

**BEFORE THE
NATIONAL LABOR RELATIONS BOARD**

In the Matter of:)	
)	
NV ENERGY, INC.,)	
)	
Employer,)	
)	
and)	CASE NO. 28-UC-243
)	
)	
INTERNATIONAL BROTHERHOOD OF)	
ELECTRICAL WORKERS, LOCAL 396)	
)	
Petitioner.)	
)	

**THE COMPANY’S RESPONSE
IN OPPOSITION TO THE UNION’S REQUEST FOR REVIEW**

COMES NOW, NV Energy, Inc. (“NVE” or “the Company”), pursuant to Section 102.67(e) of the Rules and Regulations (“R&R”) set forth by the National Labor Relations Board (“NLRB” or “the Board”), and files its Response in Opposition to the Request for Review filed by the International Brotherhood of Electrical Workers, Local 396 (“the Union”). In support thereof, the Company would show as follows:

**I.
BRIEF PROCEDURAL HISTORY**

On March 12, 2009, Regional Director Cornele A. Overstreet (“the Regional Director”) signed an Order (“the Order”), granting the Union’s unit clarification (“UC”) Petition, and accreting the Maintenance and Operations classifications of the Company’s Higgins employees into the Union’s existing bargaining unit. The Regional Director’s Order specifically excluded from the accretion the “material/warehouse” classification, as well as the contract employee

currently performing some of what the Union characterizes as “warehouse” functions, Daniel Torres (“Torres”). Specifically, the Regional Director held that there was, “scant record testimony concerning Torres’ duties at the Higgins Plant ... little testimony concerning who supervises Torres at the Higgins Plant, and [little testimony regarding] the interaction between the Employer and its contractor with respect to Torres.” *See* Order at 11. On March 25, 2009, the Union filed a Request for Review, seeking to overturn this portion of the Regional Director’s Order, and asking the Board to add the Higgins facility’s (non-existent) “warehouseman” classification to the accretion.¹

II. **LEGAL STANDARD**

Pursuant to the Board’s Rules & Regulations, the Board may only grant a party’s request for review if: (1) a substantial question of law or policy is raised because of (i) the absence of, or (ii) a departure from officially reported Board precedent; (2) the decision on a substantial factual issue is **clearly erroneous on the record**, and such error prejudicially affected the party’s rights; (3) the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error; and/or (4) there are compelling reasons for reconsideration of an important Board rule or policy. *See* NLRB R&R 102.67(c)(1),(2) & (4) (emphasis added).

III. **ARGUMENTS & AUTHORITIES**

It appears that the only grounds upon which the Union seeks review of the Regional Director’s Order are the first and second grounds, *i.e.* that the Regional Director’s order was a departure from Board “policy” (not, it should be noted, a departure from “officially reported

¹ On March 26, 2009, the Company timely filed its own Request for Review, seeking a reversal of the Regional Director’s Order with regard to the accretion of the Operations and Maintenance classifications to the existing unit.

Board precedent,” as required by the Rules & Regulations), and/or that the Order was clearly erroneous on the record. *See* Union Request for Review at 3. However, as set forth below, it is clear that, with regard to Torres and the warehouse classification, the Regional Director’s Order was supported by the evidence and testimony (or the lack thereof) that was presented at the formal hearing on this matter. Alternatively, even assuming solely for purposes of this Brief that there is some question about the weight of the evidence regarding warehouseman classification, the Regional Director’s findings cannot reasonably be viewed as “clearly erroneous” on the record.

A. ACCRETION OF TORRES—WHO THE UNION ALLEGES IS CURRENTLY PERFORMING WHAT THE UNION CALLS “WAREHOUSE” FUNCTIONS AT THE HIGGINS FACILITY—WOULD NOT, EVEN IF TRUE, BE APPROPRIATE BECAUSE TORRES IS NOT A COMPANY EMPLOYEE.

In the Union’s Request for Review, the Union characterizes Torres as an individual that the Company “hired” through an employment agency. *See* Union’s RFR at 2. This is a misstatement of the evidence. Contrary to the Union’s assertion, the undisputed evidence at the hearing established that Torres is a contract (or a “contingent”) employee, who was temporarily hired to assist with the transition of the plant’s ownership. *See* Ex. P.14(e); TR 772:21-773:12; TR 815:13-816:15. The Company had no (and currently has no) intention of making this a permanent position. *See* TR 774:19-23.

Obviously, the Company would be placed in a difficult position if it were required (by accretion) to negotiate and bargain in good faith with another company’s employee over whom NVE, realistically, has no control. Accordingly, as the Regional Director correctly held, accretion of Torres, or the “warehouseman” classification, into the existing unit would be inappropriate, and unsupported by the record evidence in this case.

B. THERE IS NO EVIDENCE THAT THE COMPANY HAS DETERMINED WHETHER IT WILL HIRE ANYONE TO PERFORM ANY “WAREHOUSE-TYPE” FUNCTIONS AT THE HIGGINS FACILITY, OR, IF SO, WHAT THOSE FUNCTIONS WOULD BE.

The evidence at the hearing established that, historically, the traditional “warehouse-type” functions do not exist at the Higgins facility. To the extent that they do exist, those functions have always been shared functions that were handled by the plant’s Operators and Maintenance Specialists:

Tom Price (Complex Director for Silverhawk, Lenzie, and Harry Allan)

- Q. Do you know who performed the warehouse function at the Bighorn [Higgins] Plant before NVEnergy acquired the plant?
- A. **Yeah, I think it was kind of a group effort. An employee by the name of Toni Lubbe had the responsibilities of the paperwork side of it. I think the inventory was controlled by Pat Comella. But I think everybody kind of received the goods. As far as I know, they didn’t have a warehouseman.**

TR 774:2-9.

Not only is this true for the period during which the plant was owned and operated by Reliant, but the Higgins employees’ “group effort” continues to be true today, despite the presence of contract employee Torres. *See* TR 713:11-14. Due to the shared nature of this function at the Higgins facility, the testimony at the Hearing conclusively established that the Company has not determined whether it even needs to hire an employee to tend to the Higgins warehouse, or, if so, what that employee’s duties would be. Indeed, the undisputed testimony indicated that it is not unusual to have an unmanned warehouse at an IPP-staffed plant that is the size of the Higgins facility. TR 774:19-23.

C. THERE IS NO SUPPORT IN THE RECORD FOR THE UNION’S ASSERTION THAT TORRES IS “SUPERVISED” BY BILL ROBINSON.

On numerous occasions, the Union states—both in its post-hearing brief and its Request for Review—that Torres is supervised by Bill Robinson (“Robinson”). *See* Union Brief at 28;

Union Request for Review at 3 n.1, 10. The Union, however, never supplies a shred of record support for its contentions.² *See Id.* To the contrary, the evidence that actually appears **in the record** conclusively establishes that: (a) Torres is a contract employee [*see* Ex.P14(e); *see also* section B, *supra*]; and (b) the Company does not have employees who “supervise” its contract employees. TR 815:13-816:15. Regardless of the tenuous chain-of-command that the Union attempts to build, nowhere in the record does it state that Torres is supervised by Robinson. In fact, the record evidence shows that Robinson does not appear as Torres supervisor anywhere on any of the Company’s organizational charts. *See* Ex.E5 & E6.

IV. CONCLUSION

As set forth in the Company’s Request for Review, with regard to the Operators and Maintenance classifications, the Regional Director’s Order was contrary to officially reported Board precedent and clearly erroneous on significant factual issues. Moreover, the Company argued that, with regard to the accretion of historically unrepresented employees into an existing unit, there are compelling reasons for the Board to reconsider an important rule or policy. Accordingly, the Regional Director’s Order should be overturned in its entirety. However, in the event that the Board does not grant the Company’s Request for Review and reverse the finding of the Regional Director, it is clear that the Regional Director’s determination with regard to Torres and the “warehouseman” classification was not “clearly erroneous” or contrary to the evidence in the record.

² In defense of its lack of citations to the record, the Union has argued that it did not have a copy of the transcript prior to filing its original Post-Hearing Brief. The same cannot be said with regard to the Union’s Request for Review.

WHEREFORE, for all of the foregoing reasons, the Company hereby moves the Board to deny the Union's Requests for Review, and uphold the portion of the Regional Director's Order that excludes a temporary contract employee (Torres) and the warehouseman classification from the accretion.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'D. Lonergan', written over a horizontal line.

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ATTORNEYS FOR THE COMPANY

CERTIFICATE OF SERVICE

I hereby certify that, on this 2nd day of April 2009, a true and correct copy of the foregoing was filed with the Board via the Board's e-filing system, and served upon the following individuals in compliance therewith.


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