Public Service Company of New Mexico *and* International Brotherhood of Electrical Workers, Local No. 611, AFL–CIO. Case 28–CA–23148

May 24, 2011

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS PEARCE AND HAYES

On March 2, 2011, Administrative Law Judge Burton Litvack issued the attached decision. The Respondent filed exceptions and supplemental exceptions and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.[1]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Public Service Company of New Mexico, Albuquerque, New Mexico, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. May 24, 2011

Wilma B. Liebman,	Chairman
Mark Gaston Pearce,	Member
Brian E. Hayes,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[1] The administrative law judge erroneously included broad remedial language in his attached notice. We shall substitute a new notice to conform to the violations found and to the Board's standard remedial language.

For the reasons stated in his dissenting opinion in *J. Picini Flooring*, 356 NLRB No. 9 (2010), Member Hayes would not require electronic distribution of the notice.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT do anything that interferes with these rights. More specifically,

WE WILL NOT unreasonably delay in complying with the requests of the International Brotherhood of Electrical Workers, Local Union No. 611, AFL–CIO (the Union) for information pertaining to the discipline (if any) issued to our managers for their violation of PRC and New Mexico regulations and statutes regarding the gas leak at the intersection of Montgomery and Carlisle in Albuquerque and the violation of our Do the Right Thing policy and for all documentation of discipline issued to any of our employees for violations of PRC and New Mexico regulations and statutes since January 2008.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

PUBLIC SERVICE COMPANY OF NEW MEXICO

Lisa Walker-McBride, Esq., for the Acting General Counsel.
Carol Dominguez Shay, Esq. (Conklin, Woodcock & Ziegler), of Albuquerque, New Mexico, for the Respondent.
John L. Hollis, Esq., of Albuquerque, New Mexico, for the Charging Party.

DECISION

STATEMENT OF THE CASE

BURTON LITVACK, Administrative Law Judge. The unfair labor practice charge in the above-captioned matter was filed by International Brotherhood of Electrical Workers, Local Union No. 611, AFL–CIO, herein called the Union, on August 19, 2010.[1] After an investigation, on October 28, the Acting Re-

[1] Unless otherwise stated, all events herein occurred during the year 2010.

gional Director for Region 28 of the National Labor Relations Board, herein called the Board, issued a complaint, alleging that Public Service Company of New Mexico, herein called Respondent, had engaged in, and continues to engage in, unfair labor practices within the meaning of Section 8(1) and (5) of the National Labor Relations Act, herein called the Act.[2] Respondent timely filed an answer to the complaint, denying the commission of the alleged unfair labor practices and alleging certain affirmative defenses, and, during the hearing, also denied the amended unfair labor practice allegations. Pursuant to the notice of hearing, the above-captioned matter came to trial before the above-named administrative law judge on December 14 in Albuquerque, New Mexico. During the hearing, all parties were afforded the rights to present their cases-in-chief, to examine and to cross-examine all witnesses, to offer into the record all relevant documentary evidence, to argue their legal positions orally, and to file post-hearing briefs. Such briefs were filed by all parties and have been carefully considered. Accordingly, based upon the record as a whole, including the post-hearing briefs and my observation of the credibility, while testifying, of the only witness, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all times material herein, Respondent, a State of New Mexico corporation with a principal office and place of business in Albuquerque, New Mexico, has been engaged in the purchase, production, transmission, and retail sale of electricity to customers in the State of New Mexico. During the 12-month period ending August 19, 2010, in conducting its aforementioned business operations, Respondent purchased and received, at its facilities throughout the State of New Mexico, goods, valued in excess of $50,000, directly from suppliers located outside the State of New Mexico. At all times material herein, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

Art all times material herein, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

A. The Issues

The complaint, as amended, alleges that, by letters dated June 28 and July 30, the Union requested that Respondent furnish it with the information documenting (1) the discipline (if any) issued to Dave Delorenzo and Kelly Bouska for their violations of PRC and State of New Mexico regulations and statutes regarding a gas leak at the intersection of Montgomery and Carlisle in Albuquerque, New Mexico and their violation of Respondent's *Do The Right Thing* policy and (2) discipline issued to any of Respondent's employees for violations of PRC and State of New Mexico regulations and statutes since January 2008 and that said information was necessary and relevant to the Union's performance of its duties as the exclusive collective-bargaining representative of certain of Respondent's employees. The complaint, as amended, further alleges that Respondent engaged in acts and conduct, violative of Section 8(a)(1) and (5) of the Act, by delaying in furnishing the above-described information to the Union from June 28 until on or about December 13. Respondent denies the commission of the alleged unfair labor practices and affirmatively asserts that none of the requested information was necessary and relevant to the underlying grievance from which the information request arose; that the information request was made in bad faith and meant to harass Respondent; that the requested information concerns individuals who were and are not similarly situated to the employee, who is represented by the Union in the underlying grievance; and that, in any event, Respondent had produced and the Union already possessed all of the requested information.

B. The Alleged Unfair Labor Practices

1. The facts

As stated above, Respondent is in the business of purchasing, producing, transmitting and selling, at retail, electricity to commercial and residential customers located throughout the State of New Mexico. As embodied in successive collective-bargaining agreements, the most recent of which is effective, by its terms, from May 1, 2009 through April 30, 2012, Respondent has recognized the Union as the collective-bargaining representative of an overall unit of employees actually encompassing three separate bargaining units—its electric service bargaining unit covering transmission and distribution employees in its line, substation, meter, communication, and relay departments; its MRC bargaining unit covering meter readers and collectors; and its PPU or power production employees bargaining unit.[3] Cindy Castro is a labor relations consultant for Respondent, and Edward J. Tafoya, an assistant business manager for the Union, is primarily responsible for representing bargaining unit employees in the electrical service and MRC bargaining units. A significant function of Tafoya's duties concerns filing and processing grievances on behalf of the electric service and MRC bargaining unit employees.

The record discloses that, by letter dated February 26, Respondent terminated Robert Madrid, who was employed by it as a collector, for allegedly ". . . violating our Personal Conduct Policy on tampering with meter or service lines, violating *Do the Right Thing*, which requires ethical treatment of our customers, and violating the Harassment and Retaliation Policy

[2] During the hearing, counsel for the Acting General Counsel moved to amend the complaint, altering the alleged unfair labor practices. Over the objection of counsel for Respondent, I granted the proposed amendment.

[3] Specifically, according to the collective-bargaining agreement, Respondent recognizes the Union and the exclusive representative of "all employees of the Company's electric, water, transmission, distribution, production, meter reader, and collector departments . . . ." Prior to the current collective-bargaining agreement, Respondent's meter readers and collectors were not covered by the contractual bargaining unit. However, after a *Globe* election, pursuant to which the said employees selected the Union as their representative for purposes of collective-bargaining, the parties agreed to include them in the contractual bargaining unit.

. . . . Your admitted actions of disconnecting a customer's gas meter in retaliation for the customer's complaints also violated laws and administrative regulations."[4] On March 10, pursuant to Article 10 of the collective-bargaining agreement, on Madrid's behalf, Tafoya filed a second step grievance, asserting that the employee had been terminated without cause[5] and demanding that Madrid be returned to work and be made whole, including full back pay.[6] According to Tafoya, whose entire testimony was uncontroverted, he filed the grievance in the second step as such ". . . is the practice that the parties have agreed upon in terminations. We understand that the first step [involves] . . . the first line supervisors, and [they are] not empowered to remedy the situation. . . ."

By a letter dated April 2, to assist the Union in performing its representational duties with regard to Madrid, on behalf of the Union, Tafoya submitted a lengthy information demand to Respondent for nine separate categories of information. Eight days later, in a letter dated April 10, Cindy Castro[7] replied to Tafoya, supplying some of the requested information but, according to the latter, failing to provide any information pertaining to four of Tafoya's information categories. Thereafter, on June 28, having analyzed the information previously provided by Castro and "developed" new ideas as to possible areas of vulnerability in Respondent's rationale for discharging employee Madrid and ". . . in order to investigate a possible grievance. . . . ," Tafoya submitted a second information request letter to Respondent for five categories of information. Two of said demands were for information previously sought and three were new. Among the latter were requests for "the discipline (if any) issued to Dave Delorenzo and Kelly Bouska for their violation of PRC and New Mexico regulations and statutes regarding the gas leak at Montgomery and Carlisle and the violation of [Respondent's] Do the Right Thing Policy"[8] and for "any and all documentation of discipline issued to any [Respondent] employees for violation of PRC and New Mexico regulations and statutes since January of 2008." On July 12, by letter, Castro responded to Tafoya. After complaining that Tafoya had not responded to her demands that he provide her dates for a Step 2 meeting on the Madrid grievance and stating her objection to the "lengthy delays" in proceeding with a Step 2 meeting, Castro discussed each of Tafoya's June 28 information demands. While providing information as to some of the latter's requests, as to Tafoya's request, regarding Delorenzo and Bouska, Castro stated only that ". . . neither Dave Delorenzo nor Kelly Bouska were bargaining unit employees during the incident in question. Thus, they were not similarly situated to Mr. Madrid and any discipline administrated to them or other managers or non-bargaining unit employees is not applicable. Moreover . . . neither Delorenzo nor . . . Bouska are employees of [Respondent] and the company has no control over or access to personnel actions taken with regard to them by their current employer." As to Tafoya's request for documentation of discipline issued to any [Respondent] employee for violating PRC or New Mexico regulations and statutes since January 2008, Castro responded only that "union employee Jason Keyes was terminated for violating state laws as well as Company policies since 2008." Regarding Castro's latter response, Tafoya testified that "all she had provided was a bargaining unit employee. I was wanting all employees," presumably including nonbargaining unit employees.

Inasmuch as Castro had asserted that any information regarding the discipline (if any) issued to Dave Delorenzo and Kelly Bouska or to other managers or non-bargaining unit employees was "not applicable" and as he thought it necessary to explain the relevancy of the requested information "chiefly" pertaining to Delorenzo and Bouska, Tafoya sent a letter, dated July 30, to Castro.[9] Therein, he noted that, while neither Delorenzo nor Bouska are current employees of Respondent, each was employed by Respondent at the time of the gas leak incident at the intersection of Montgomery and Carlisle and Respondent was aware of their misconduct and had ample time to investigate and administer discipline if required.[10] Next, he wrote that,

[4] Apparently the *Do the Right Thing* and harassment and retaliation policies are internal Respondent polices for its employees.

[5] Pursuant to the parties' collective-bargaining agreement, the definition of a grievance is limited to ". . . a dispute between the parties . . . with respect to the interpretation or application of the provisions of this Agreement or to the application of a specific policy to a specific employee."

[6] Tafoya testified that he has been involved in discharge arbitrations in which the Union has sought similar remedies, including reinstatement and make whole, and that Respondent has never questioned the propriety of such a remedy.

[7] Respondent denied that Castro is a supervisor within the meaning of Section 2(11) of the Act or an agent within the meaning of Section 2(13) of the Act. Tafoya testified that Castro is "one" of the labor relations persons for Respondent with whom he deals. Presumably on behalf of Respondent, Castro authored and executed each of Respondent's responses to Tafoya's information requests. Respondent does not contend that Castro was not authorized to send said responses to the Union or that, in so doing, she was not stating Respondent's positions.

[8] The New Mexico Public Regulations Commission (PRC) is charged with regulating New Mexico's public utilities.

Tafoya testified that this new information request was triggered by Castro's comment on the second page of her April 10 letter that ". . . Mr. Madrid's actions and conduct subjected the Company to liability from [the PRC for] tampering with equipment that is not [Respondent's]." According to Tafoya, "[Castro's comment] tells me that he was fired for . . . what Mr. Delorenzo and Ms. Bouska did . . . in 2008."

[9] During cross-examination, asked whether his July 30 letter was the Union's attempt to establish the relevancy of its information requests, Tafoya replied, "This was my response to Cindy's question of relevance, yes."

[10] Apparently, in 2008, besides electricity, Respondent provided natural gas to customers in New Mexico, and the Union represented a bargaining unit of Respondent's employees involved in said operation. According to Tafoya, in May 2008, a gas leak occurred at the intersection of Montgomery and Carlisle in Albuquerque, and Respondent's bargaining unit employees discovered the leak and monitored it to alleviate safety concerns. Delorenzo and Bouska were Respondent's supervisors over the operations and engineering areas involved in the leak. As he believed Respondent's response to the leak was inadequate and as he believed Delorenzo's and Bouska's actions, as well as those of other managers, were violative of New Mexico's laws or regulations, Tafoya reported his concerns to the New Mexico Pipeline Safety Bureau (PSB), whose inspectors investigated and found several safety violations. Thereafter, the PSB decided to levy a fine against Respondent, and, the Union filed a motion to intervene. In May 2010, the PRC

while neither Delorenzo nor Bouska was an employee included in the contractual bargaining unit, they were "similarly situated" to Madrid as all of Respondent's employees are subject to the same company policies, including the Do the Right Thing code of conduct, and New Mexico laws and regulatory requirements. Further, Tafoya challenged Castro that she could not be contending, due to Madrid's membership in the bargaining unit, Respondent ". . . can treat him differently than any other employee who violates these policies or regulatory requirements" and emphasized that ". . . the company has the obligation to apply its rules, order, and penalties evenhandedly and without discrimination to all workers." Upon completing his explanation of the relevancy of the material pertaining to Delorenzo and Bouska, Tafoya reiterated his requests for information concerning "the discipline (if any) issued to [them] for their violation of PRC and New Mexico regulations and statutes regarding the gas leak at Montgomery and Carlisle and the violation of [Respondent's] Do the Right Thing Policy" and concerning "any and all documentation of discipline issued to any [Respondent] employees for violation of PRC and New Mexico regulations and statutes since January 2008."[11] By a letter, dated August 18, Castro responded to Tafoya. In said document, while failing to rebut Tafoya's contention that Respondent's internal policies, including its Do the Right Thing policy, and New Mexico regulations and statutes apply equally to bargaining unit and nonbargaining unit employees, she asserted that the information, pertaining to any disciplinary measures taken against Delorenzo and Bouska, had been included in a brief, filed by the New Mexico Gas Company and served upon the Union's attorney during the 2008 PSB hearing,[12] and stated that she was unaware of any "bargaining unit employees," other than Keyes and Madrid, who had been disciplined since January 2008 for violating PRC or New Mexico regulations and statutes. Two days later, on August 20, Tafoya wrote to Castro that the Union intended to file an unfair labor practice charge concerning Respondent's failure to provide the requested information and would not schedule a second step grievance meeting without said information.

Approximately four months later on December 13, the day before the scheduled commencement of the unfair labor practice hearing, Respondent's attorney sent an e-mail, with attachments, to the Union's attorney and a copy to Tafoya; there is no dispute that said document, including the attachments, was responsive to and satisfied the Union's information request.[13] With regard to Delorenzo and Bouska, in her e-mail, Respondent's attorney stated that Respondent ". . . did not discipline Mr. Delorenzo or Ms. Bouska regarding the gas leak at Montgomery and Carlisle because they were not [Respondent's] employees at the time the Montgomery and Carlisle investigation was concluded." While conceding that the Union intervened in the July 2008 PSB hearing based on its belief that Respondent had failed to discipline any management employees, including Delorenzo and Bouska, over the gas leak incident and that he was present during the May 2010 hearing before the PRC concerning increasing the penalty against Respondent, Tafoya denied that, during the 2010 hearing, he became aware Respondent had not disciplined either Delorenzo or Bouska over the 2008 gas leak and was uncontroverted that the statement in the attorney's e-mail ". . . was the first time I had seen that." In this regard, I note that no such statement appears in any of the attached documents.[14] As to Respondent's employees who, since January 2008, had been disciplined for violations of PRC or New Mexico regulations or statutes, Respondent's attorney attached a document, which appears to be a matrix of all of its employees, who were disciplined since January 2008 and whose discipline mentioned PRC or New Mexico regulations or statutes. Finally, there is no record evidence that Respondent offered any explanation to the Union as to why it delayed for over five months in informing the Union that it had never disciplined Delorenzo and Bouska or in giving the Union a complete list of other employees, who, since January 2008, had been disciplined for violating PRC or New Mexico statutes or regulations.

2. Legal analysis

As stated above, the Acting General Counsel contends that Respondent violated Section 8(1) and (5) of the Act by unreasonably delaying in furnishing necessary and relevant information, pertaining to Delorenzo and Bouska and concerning any employees who, since January 1008, had been disciplined for violating PRC and New Mexico regulations and statutes, to the Union from June 28 until December 13—a period encompassing approximately five and a half months. In this regard, the only witness, Edward Tafoya, was uncontroverted; there is no

held a hearing on whether the penalty against Respondent should be increased.

In 2009, Respondent sold its natural gas operations to another entity, New Mexico Gas Company. Many of Respondent's employees, who worked on its gas operations, including Delorenzo and Bouska, were hired by New Mexico Gas Company.

[11] As to the latter request, Tafoya asked Castro whether the previously provided information, regarding employee Jason Keyes, completely satisfied his information demand.

[12] Castro asserted that, by demanding information pertaining to Delorenzo and Bouska, the Union was engaging in harassment as the Union's attorney already had the information.

[13] Asked, during cross-examination, whether the information, which he received on December 13 was fully responsive to his information requests, Tafoya replied, "yes."

The attachments include several documents related to the May 2010 hearing before the New Mexico PRC as to whether the fine against Respondent for the 2008 gas leak should have been increased. Said documents include portions of the hearing transcript and pages from Respondent's and the Union's post-hearing briefs.

[14] While arguing that the Union should have known that Respondent failed to discipline either Delorenzo or Bouska as a result of the 2008 gas leak, Respondent's attorney conceded, during the hearing, that nothing in any of the attachments is phrased in such a manner. In this regard, perusal of Respondent's brief-in-chief to the PRC reveals that its lawyers only wrote that Respondent ". . . disciplined one employee who remained with [it] following the gas asset sale." Further, analysis of the Union's brief discloses the following—" . . . the Union states that with perhaps one exception the discipline that was imposed by the companies on the employees involved was relatively minor." Neither document specifically mentions either Delorenzo or Bouska.

dispute as to the facts; and there does not appear to be any dispute as to the applicable Court and Board law. Thus, it has long been established that, generally, an employer is under a statutory obligation to provide information, upon request, to a labor organization, which is the collective-bargaining representative of its employees, if there is a probability that the information is necessary and relevant for the proper performance of the labor organization's duties in representing the bargaining unit employees. *Detroit Edison Co. v. NLRB,* 440 U.S. 301 (1979); *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435–436 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152 (1956); *Disneyland Park*, 350 NLRB 1256, 1257 (2007); *Sands Hotel & Casino*, 324 NLRB 1101, 1109 (1997). This duty to provide information encompasses not only material necessary and relevant for the purpose of contract negotiations but also information necessary for effects bargaining and for the administration of a collective-bargaining agreement, including information required by the labor organization to process a grievance through arbitration. *Acme Industrial*, supra; *Disneyland* Park, supra; *Postal Service*, 337 NLRB 820, 822 (2002); *Beth Abraham Health Services*, 332 NLRB 1234 (2000); *Sands Hotel*, supra. The standard for relevance is a "liberal discovery-type standard," and the sought-after information need not be necessarily dispositive of the issues between the parties but, rather, only of some bearing upon the said issues and of "potential or probable" use to the labor organization in carrying out its statutory responsibilities. *Disneyland Park*, supra at 1258; *Postal Service*, supra. In this regard, in the case of possible relevance, the Board does not pass upon the merits, and the labor organization is not required to demonstrate that the information is accurate, not hearsay, or even, ultimately reliable. *Postal Service*, supra. "The [labor organization] is entitled to the information in order to determine whether it should exercise its representative function in the pending matter, that is, whether the information will warrant further processing of the grievance or bargaining about the disputed matter." *Ohio Power Co.*, 216 NLRB 987, 991 (1975), enfd. 531 F.2d 1381 (6th Cir. 1976). Further, necessity is not a guideline itself but, rather, is directly related to relevancy, and only the probability that the requested information will be of use to the labor organization need be *established*. *Bacardi Corp.*, 296 NLRB 1220 (1989). Moreover, information, which concerns the employees in the bargaining unit and their terms and conditions of employment, is deemed "so intrinsic to the core of the employer-employee relationship" so as to be presumptively relevant, and an employer must provide the information to a labor organization, which has requested it. *Disneyland Park*, supra, at 1257; *Sands Hotel*, supra. However, when the requested information does not concern subjects directly pertaining to the bargaining unit, such material is not presumptively relevant, and the burden is upon the labor organization to demonstrate the relevance of the material sought. *Disneyland Park*, supra at 1257; *Richmond Health Care*, 332 NLRB 1304, 1305 fn. 1 (2000). Finally, with regard to Respondent's alleged unlawful delay in providing the Union with the information pertaining to Delorenzo and Bouska and to the disciplining of any of its employees for violating PRC or New Mexico regulations or statutes since 2008, the Board holds that "when a union makes a request for relevant information, the employer has a duty to supply the information in a timely fashion or to adequately explain why the information will not be furnished." *Regency Service Carts*, 345 NLRB 671, 673 (2005); *Beverly California Corp.*, 326 NLRB 153, 157 (1998). As to whether the requested information has been furnished in a timely manner, the Board considers the totality of the circumstances and requires that an employer make a "'. . . reasonable good faith effort to respond to the request as promptly as circumstances allow.'" *West Penn Power Co.*, 339 NLRB 585, 587 (2003); *Good Life Beverage Co.*, 312 NLRB 1060, 1062 fn. 9 (1993).

Initially, there can be no doubt that counsel for the Acting General Counsel has established that the information requested by Tafoya on behalf of the Union, pertaining to the discipline (if any) levied against Delorenzo and Bouska over the gas leak at the intersection of Montgomery and Carlisle and to Respondent's disciplining, since January 2008, of any of its employees for violations of PRC and New Mexico statutes and regulations, was generally relevant to its representative function. Thus, in his June 28 letter, Tafoya explained that the requested information was required by the Union to aid it in processing the Madrid grievance, and, in his July 30 letter, Tafoya explained that the Union believed Respondent had treated employee Madrid, who was terminated for violating company policies and State of New Mexico statutes and administrative regulations, disparately as other individuals, employed by Respondent, may have been subjected to discipline short of discharge or no discipline at all for similar acts of misconduct or malfeasance. Moreover, insofar as the Union's request for documentation, concerning Respondent's disciplining of any employees who violated PRC and New Mexico regulations or statutes since January 2008, encompassed bargaining unit employees, such was presumptively relevant.. *Booth Newspapers, Inc.*, 331 NLRB 296, 300 (2000); *Leland Stanford Junior University*, 307 NLRB 75, 80 (1992). However, with regard to Delorenzo and Bouska, the issue is that both individuals were supervisors for Respondent at the time of the 2008 gas leak, and the issue, with regard to the Union's other demand for information, which pertains to Respondent's disciplining of "any" of its employees, is that Tafoya's request obviously also encompassed nonbargaining unit employees.

In the above circumstances, to the extent that the Union sought nonbargaining unit information, it was incumbent for the Union to have established the relevancy of such material. In this regard, "to demonstrate relevance, the {Acting General Counsel] must present evidence either (1) that the union demonstrated relevance of the nonunit information, or (2) that the relevance of the information should have been apparent to the Respondent under the circumstances." *Disneyland Park*, supra, at 1258. In his July 30 letter to Respondent, which mainly concerned the information request pertaining to Delorenzo and Bouska but clearly was also applicable to both requests, Tafoya, writing on behalf of the Union, explained his information requests, contending that Respondent's supervisors, Delorenzo and Bouska, and all of its other employees were "similarly situated" to the grievant Madrid insofar as all of the company's internal policies, including its Do the Right Thing policy, and all New Mexico statutes and administrative regulations are

equally applicable to each of Respondent's bargaining unit and nonbargaining unit employees. Therefore, he argued, in disciplining employees, Respondent was obligated to treat bargaining unit and nonbargaining unit employees "evenhandedly." While offering no evidence during the hearing contraverting Tafoya's point that all of her client's internal policies and New Mexico laws and administrative regulations are equally applicable to all of its employees, in her post-hearing brief, counsel for Respondent asserts that, in reality, in the Madrid grievance, the Union is contending that Respondent "engaged in disparate treatment based on anti-union animus" in discharging Madrid, that anti-union animus could not be the subject of a grievance or arbitration under the parties' existing collective-bargaining agreement, and that such should have been the subject of an unfair labor practice charge before the Board. This assertion seems to have been conjured out of thin air. Thus, contrary to counsel, close scrutiny of the Madrid grievance and of Tafoya's July 30 letter fails to disclose any assertion by the latter that Respondent was motivated by anti-union animus in discharging Madrid.[15] Rather, Tafoya indicated to Castro that he intended to argue nothing more than Respondent had engaged in disparate treatment and that he required the requested information in order to establish the Union's contention. Therefore, I reject counsel's contention, and, in my view, based upon the record as a whole, by Tafoya's letter, the Union demonstrated the relevance of both requests insofar as they concerned information regarding nonbargaining unit employees, including supervisors. *Postal Service*, 310 NLRB 391, 392 (1993); *Postal Service*, 301 NLRB 709, 711–712 (1991).

Turning to the instant unfair labor practice allegation that Respondent unlawfully delayed from June 28 until December 14 in furnishing the requested information to the Union, I reiterate my conclusions as to the relevancy of the entirety of the information, which was sought by the Union. Inasmuch as there is no evidence or, indeed, any assertion that any of it was unavailable, difficult to retrieve, voluminous, or time consuming to produce, furnishing the information to the Union in a timely manner would not have been burdensome upon Respondent. Rather, Respondent's main defense is that the Union "already possessed the information," regarding Delorenzo and Bouska, and its attorney points to statements in the parties' briefs after the May 2010 hearing before the PRC, which were attached to Respondent's counsel's December 13 e-mail. However, I can find no mention of either individual in any of the briefs; Tafoya was uncontroverted that, during the PRC hearing, he never became aware Respondent had failed to discipline either Delorenzo or Bouska for the 2008 gas leak incident; and, during the instant hearing, counsel herself conceded that nothing in the briefs is phrased as directly as her e-mail statement. Moreover, notwithstanding whether one may divine, from the attachments to the e-mail, that Respondent had not disciplined either Delorenzo or Bouska for the 2008 gas leak, Board law is clear that Respondent's obligation to provide the requested information is not excused because the Union may have had alternative sources for the information. *Detroit Newspaper Agency*, 317 NLRB 1071, 1072 (1995); *New York Times Co.*, 265 NLRB 353 (1982).[16] Accordingly, based upon the foregoing and the record as a whole, I find that Respondent's five and a half month delay in furnishing the Union with the requested information, pertaining to Delorenzo and Bouska and to the disciplining of any employees since January 2008 for violating PRC and New Mexico regulations and statutes, was unreasonable and, therefore, violative of Section 8(1) and (5) of the Act. *Pan American Grain Co.*, 343 NLRB 318, 343 (2004).

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. All employees of Respondent's electric, water, transmission, distribution, production, meter reader and collection departments in the divisions and jobs referenced in Respondent's collective-bargaining agreement with the Union, effective, by its terms, from May 1, 2009 through April 30, 2012, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.
4. From June 28 to December 13, 2010, by unreasonably delaying in complying with the Union's requests for information pertaining to the discipline (if any) issued to Dave Delorenzo and Kelly Bouska for their violation of PRC and New Mexico regulations and statutes regarding the gas leak at the intersection of Montgomery and Carlisle in Albuquerque and their violation of its Do the Right Thing policy and for all documentation of discipline issued to any of its employees for violation of PRC and New Mexico regulations and statutes since January 2008, which material is necessary and relevant for the Union's processing of a grievance, Respondent engaged in acts and conduct violative of Section 8(1) and (5) of the Act.
5. The above-described unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

I have concluded that Respondent engaged in serious unfair labor practices. Therefore, I shall recommend that it be ordered to cease and desist from engaging in said acts and conduct and to take certain affirmative actions designed to effectuate the purposes and policies of the Act. Specifically, I shall require Respondent to post a notice, physically and by electronic for-

[15] While it is true that Tafoya stated that Respondent was obligated to apply its rules "without discrimination," he does not mention anti-union animus, which is unlawful under the Act. Clearly, the tenor of his letter suggests that, by discrimination, Tafoya meant disparate treatment and nothing more.

[16] While, in its answer to the complaint, Respondent raised as affirmative defenses that the Union's information requests were made in bad faith and were designed to harass, it failed to present any supporting evidence during the hearing. Rather, in her post-hearing brief, Respondent's attorney states that the evidence is that "the Union possessed the information sought . . . before it made the request." However, Tafoya denied the assertion. He was uncontroverted, and, based upon the briefs attached to counsel's December 13 e-mail, any effort to contradict him would be to engage in mere speculation. Accordingly, Respondent's affirmative defenses are rejected.

mat, to all employees, setting forth its obligations required to remedy its unfair labor practices.[17]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[18]

ORDER

The Respondent, Public Service Company of New Mexico, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unreasonably delaying in complying with the Union's requests for information pertaining to the discipline (if any) issued to Dave Delorenzo and Kelly Bouska for their violation of PRC and New Mexico regulations and statutes regarding the as leak at the intersection of Montgomery and Carlisle in Albuquerque and their violation of its Do the Right Thing policy and for all documentation of discipline issued to any of its employees for violation of PRC and New Mexico regulations and statutes since January 2008, which material is necessary and relevant for the Union's processing of a grievance

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its place of business in Albuquerque, New Mexico copies of the attached notice marked "Appendix."[19] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by e-mail, posting on an intranet or an internet site, and/or by other electronic means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 28, 2010.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. March 2, 2011

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT do anything that interferes with these rights. More specifically,

WE WILL NOT unreasonably delay in complying with the requests of the International Brotherhood of Electrical Workers, Local Union No. 611, AFL–CIO, herein called the Union, for information pertaining to the discipline (if any) issued to our managers for their violation of PRC and New Mexico regulations and statutes regarding the gas leak at the intersection of Montgomery and Carlisle in Albuquerque and the violation of our Do the Right Thing policy and for all documentation of discipline issued to any of our employees for violations of PRC and New Mexico regulations and statutes since January 2008.

WE WILL NOT, in any other manner, interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

PUBLIC SERVICE COMPANY OF NEW MEXICO

[17] Electronic posting of the notice is appropriate as the record evidence is that Respondent regularly communicates with its employees by e-mail. *J. Picini Flooring*, 356 NLRB No. 9 (2010).

Inasmuch as Tafoya admitted that Respondent's December 13 transmission of information was fully responsive to the Union's information requests, I shall not affirmatively require Respondent, to the extent it has not already done so, to immediately provide information to the Union.

[18] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[19] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."