UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28

PUBLIC SERVICE COMPANY OF NEW MEXICO

and **Case 28-CA-023391**

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 611, AFL-CIO

ACTING GENERAL COUNSEL'S OPPOSITION TO RESPONDENT'S MOTION TO DISMISS PORTIONS OF THE COMPLAINT

Counsel for the Acting General Counsel (General Counsel) opposes Respondent's Motion to Dismiss Portions of the Complaint and Notice of Hearing (Motion). On May 31, 2011, the Regional Director issued a Complaint and Notice of Hearing (Complaint) in the above-referenced matter. On October 13, 2011, Respondent filed a Motion to have certain pleadings of the Complaint dismissed. Specifically, Respondent moves that paragraphs 5(e), 5(g), 5(h), 5(i), 7(c), 7(d), 7(f), 7(h), 7(l), 7(m), 7(o), and 7(q) of the May 2011 Complaint be dismissed under *Jefferson Chemical Co.*, 200 NLRB 992 (1972).[1] Respondent contends the Regional Director acted arbitrarily and abused his discretion when he issued the Complaint and included allegations alleging Respondent (1) failed and refused to furnish International Brotherhood of Electrical Workers, Local Union No. 611 (Union) information it requested regarding the discipline of a non-bargaining unit employee,[2] (2) denied a Union Assistant Business Agent Ed Tafoya access to company premises,[3] and (3) refused to meet with employee Eric Cox regarding a complaint he filed regarding his working

[1] In its Second Amended Answer To Complaint and Defenses, filed on October 11, 2011, Respondent also raises this argument as an affirmative defense.
[2] See Complaint paragraphs 7(c) and 7(l).
[3] See Complaint paragraphs 5(g), 5(i), 7(d), 7(f), 7(h), 7(m), and 7(o).

conditions because Cox insisted his Union representative be present.[4] Respondent maintains these allegations were previously litigated and should be dismissed. General Counsel submits that Respondent's Motion has no merit and should be denied. In opposition to Respondent's Motion, General Counsel states the following:

I. Background

On March 26, 2010, the Regional Director issued an Amended Complaint and Notice of Hearing in Cases 28-CA-22655 and 28-CA-22759 (March 2010 Complaint). The March 2010 Complaint alleged, among other things, that some time in August 2009, Respondent violated Section 8(a)(1) and (5) of the Act by implementing and enforcing new policies that restricted and limited Union agent access to its facility. On July 30, 2010, the Regional Director issued a Complaint and Notice of Hearing in Case 28-CA-23046 (July 2010 Complaint). The July 2010 Complaint alleged, among other things, that on or about April 21, 2010, Respondent, in the presence of employees, violated Section 8(a)(1) and (3) of the Act by removing employee and Union Steward Eric Cox from a management-employee meeting addressing the Respondent's TeleStaff call system and subjecting Cox to a disciplinary investigation based upon his conduct at the meeting.

On August 23, 2010, the Regional Director issued an Order Consolidating Cases for Hearing and Designating Place of Hearing which consolidated Cases 28-CA-22655, 28-CA-22759, and 28-CA-23046, along with another case, for hearing. The unfair labor practice hearing involving all of the cases was held in Albuquerque, New Mexico on August 31, September 1, 2, and 3, and November 2, 3, 4, and 5, 2010 before Administrative Law Judge William L. Schmidt. The consolidated matter is still pending before ALJ Schmidt.

[4] See Complaint paragraph 5(e).

On October 28, 2010, the Acting Regional Director issued a Complaint and Notice of Hearing in Case 28-CA-23148 (October 2010 Complaint). The October 2010 Complaint alleged, among other things, Respondent violated Section 8(a)(1) and (5) of the Act by failing to furnish the Union with information documenting discipline issued to Supervisors Dave Delorenzo and Kelly Bouska, for violations of state laws and regulations related to a gas leak incident (gas leak) that occurred at the intersection of Carlisle and Montgomery in Albuquerque, New Mexico. The unfair labor practice hearing in Case 28-CA-23148 took place on December 14, 2010, before Administrative Law Judge Burton Litvack. On December 13, 2010, a day before the unfair labor practice hearing was scheduled to commence, Respondent's counsel electronically provided the Union with the information it requested regarding the discipline of Delorenzo and Bouska. The provided information, which the Union admitted was responsive to its request, showed that neither Delorenzo nor Bouska were disciplined for the gas leak. The October 2010 Complaint was then amended at the hearing to allege Respondent violated Section 8(a)(1) and (5) of the Act by its delay in furnishing the requested information to the Union.

On March 2, 2011, ALJ Litvack issued his decision and found Respondent violated Section 8(a)(1) and (5) of the Act by its unreasonable delay in complying with the Union's request for information pertaining to the discipline Respondent issued to Supervisors Delorenzo and Bouska as it pertained to their involvement in the gas leak incident. On March 30, 2011, Respondent filed exceptions to ALJ Litvack's decision. On May 24, 2011, the Board issued a Decision and Order affirming ALJ Litvack's decision. On June 22, 2011, Respondent filed a Petition for Review with the United States Court of Appeals for the Tenth

Circuit seeking a review of the Board's Decision and Order. This appeal is currently pending before the Tenth Circuit.

II. *Jefferson Chemical* Does Not Mandate Case Consolidation.

Respondent argues that under the *Jefferson Chemical* doctrine the General Counsel should be prohibited from litigating paragraphs 5(e), 5(g), 5(h), 5(i), 7(c), 7(d), 7(f), 7(h), 7(l), 7(m), 7(o), and 7(q) of the Complaint because these allegations are related to matters previously litigated in unfair labor practice hearings involving the March 2010 Complaint for Cases 28-CA-22655, 28-CA-22759, and 28-CA-23046 and the October 2010 Complaint for Case 28-CA-23148. Respondent's arguments are without merit.

The Board will generally not permit the General Counsel to relitigate the lawfulness of the same act or conduct as a violation of different sections of the Act or to relitigate the same charges in different cases. *Jefferson Chemical*, supra; *Peyton Packaging Co.*, 129 NLRB 1358 (1961). The Board, however, has recognized that a blanket rule in favor of consolidating cases would improperly interfere with the General Counsel's discretion and, in some cases, could unduly delay the disposition of pending cases. *Service Employees Union, Local 87 (Cresleigh Management)*, 324 NLRB 774 (1997). Based on this recognition, the Board limited *Jefferson Chemical* to the specific facts presented in that case. See *Cresleigh Management*, supra; *Unbelievable, Inc. d/b/a Frontier Hotel and Casino*, 324 NLRB 1225-1226 (1997). Further, in *Harrison Steel Castings Co.*, 255 NLRB 1426, 1427 (1981), the Board rejected the respondent's contention that *Peyton Packing* required dismissal of a complaint that was based on a charge filed while a hearing on a prior complaint was in progress. The Board stated that:

> [t]o accept the Respondent's argument that the General Counsel be compelled to litigate all unfair labor practices occurring during the pendency of litigation of other

> unfair labor practice charges against the same respondent would not only severely restrict the General Counsel's discretion, but also allow a respondent to delay indefinitely the ultimate litigation of any charges by simply engaging in further unlawful conduct. Such a result is completely at odds with the purposes and policies of the Act.

The same concerns present in the cited cases are present in this matter. The first charge in the October 2010 Complaint was filed over two years ago and the subsequent charges involved with that litigation were filed approximately a year later. In this regard, the Regional Director acted within his discretion to issue complaint and litigate these cases within the timeframe they were presented to the Region.

Although the allegations in the Complaint cited by Respondent in its Motion raise some similar concepts and topics that were present in the prior litigated cases, they are based on different facts and legal theories. If Respondent's suggestions that all future charges involving allegations that addressed similar concepts or topics were subject to the dictates of *Jefferson Chemical* based solely on their addressing similar concepts or topics Respondent would be allowed under such a theory to engage in any conduct it wished in violation of the Act because similar concepts and topics had been addressed in prior litigation.

This is not what *Jefferson Chemical* envisioned. Rather the dictates of that case prohibit the litigating of different violations arising from the same operative facts in separate proceedings. Such circumstances are not present here. Rather, the allegations cited by Respondent in its Motion involve different facts and/or different legal theories tied to different allegations. Such allegations are not encompassed and were not intended to be encompassed within the dictates of *Jefferson Chemical*. Additionally, the General Counsel has acted within the discretion afforded under Section 102.33 to avoid unnecessary delay by not waiting on each pending charge, as suggested by Respondent in its Motion, and charges that may or may

not be filed in the future as means to not litigate pending complaints. As such, Respondent's reliance on *Jefferson Chemical* as a basis to argue that separate, distinct allegations not arising from the same facts should be dismissed solely because they raise similar concepts or topics that have been previously litigated is without merit and Respondent's Motion based on such argument should be denied.

III. Complaint Alleges Failure to Produce Information—Not Delay.

Respondent asserts in its Motion that the matter surrounding the Union's request for information regarding the discipline issued non-bargaining unit employees for the gas leak incident has been fully litigated and that the Complaint allegations in paragraphs 7(c) and 7(l) should be dismissed on that basis. Respondent is incorrect in its overly-broad contention. The Union's request for information in the October 2010 Complaint specifically related to discipline issued to Supervisors Delorenzo and Bouska for violating state laws and regulations pertaining to the gas leak. The October 2010 Complaint alleged Respondent failed and refused to provide requested disciplinary information pertaining to these two specifically identified persons. Respondent provided the information requested by the Union the day before the unfair labor practice hearing, which lead to the amendment of the complaint to allege Respondent delayed in furnishing said information. ALJ Litvack's decision, with Board approval, determined the request for information pertaining to Delorenzo and Bouska was relevant to the Union's role as the exclusive bargaining representative.

The October 2011 Complaint did not address requests for disciplinary information for all possible non-bargaining unit employees. Rather it was limited to two specific supervisory personnel. Respondent's attempts to extend the situation addressed for those two specifically named employees as extending to another employee solely because they share similar

employment status as supervisory personnel is without merit. The Union is not precluded from seeking distinct relevant requested information and acting on its rights under the Act to obtain that information when the Employer fails to provide it.

Even more so, Respondent's arguments in support of its Motion and the actions it has taken prior to the filing of the Motion are asymmetrical. It provided the Union with information it requested, although in an untimely manner, as it pertained to Delorenzo and Bouska, who are both non-bargaining unit members. This requested information was found by the Board to be relevant to the Union's exclusive role as employees' bargaining representative. Yet, regarding paragraphs 7(c) and 7(l) in the Complaint in the instant matter, Respondent denies the information related to Supervisor Foss, also a non-bargaining unit member, is relevant to the Union's performance of the same duties as its employees' exclusive bargaining representative while simultaneously declaring this issue has been resolved in a previously litigated case. Respondent's argument that the access to information regarding the discipline of non-bargaining unit employees has been fully litigated in a prior unfair labor practice hearing, in which the relevancy of the information was established by the Board, must fail in the face of its non-compliance and continuing refusal to provide similar relevant information later requested by the Union.

Respondent's Motion further suggests the Regional Director had three (3) months to amend the October 2010 complaint before ALJ Litvack to include the request for information allegation related to Foss. ALJ Litvack issued his decision on March 2, 2011. A review of the Complaint in the instant matter establishes the underlying unfair labor practice charge related to Foss was filed on March 4, 2011.[5] ALJ Litvack's decision issued two (2) days

[5] See paragraph 1 of the Complaint, which is an allegation Respondent admitted in its answer.

before the Union filed the unfair labor practice charge underlying the Complaint. Contrary to Respondent's calculations, the Regional Director did not have three (3) months to file a motion requesting ALJ Litvack to keep the record open in the unfair labor practice hearing on the October 2010 Complaint allegations because of the pending investigation of the information request related to Foss. These facts clearly establish the Regional Director did not have knowledge of the Union's information request at the time the October 2010 Complaint was issued or when Judge Litvack issued his March 2, 2011 decision two days prior to the charge filing. Thus, Respondent's assertion that the Regional Director acted arbitrarily and abused his discretion or abused his discretion when issuing the Complaint alleging in paragraph 7(c) that Respondent failed and refused to furnish the Union with requested information relating to discipline issued to Foss lacks merit.

For the reasons discussed above, Respondent's Motion as it pertains to the dismissal of paragraphs 7(c) and 7(l) of the Complaint should be denied.

IV. The Denial of Access Versus the Restriction and Limitation of Access.

Respondent asserts paragraphs 5(g), 5(h), 5(i), 7(d), 7(f), 7(o), and 7(q) in the Complaint pertaining to Respondent prohibiting Union agents on company property was the subject of the unfair labor practice hearing before ALJ Schmidt in August, September, and November of 2010. The access issue addressed in both matters might appear at first glance to be similar in a general sense, but a close review of the earlier complaint allegations and the transcript associated with them demonstrate the obvious differences with those allegations and the ones cited by Respondent in its Motion.

The March 2010 Complaint allegation that Respondent maintains was fully litigated before ALJ Schmidt, as cited in its motion, states:

> *In or about August 2009*, a more precise date being unknown to the General Counsel, the Respondent implemented and enforced new policies concerning Union agents' and representatives' access to the Respondent's facility, thereby *restricting and limiting* Union agents' and representatives' access to the Respondent's facility. (emphasis added)

The transcript from the unfair labor practice hearing before ALJ Schmidt related to this allegation demonstrates the issue involved Respondent's implementation of a new policy in August 2009, requiring Union agents to use a swipe card, sign in, and be escorted in order to gain access to Respondent's facility.[6] The transcript clearly reflects this policy was not in place prior to August 2009. This testimony in the transcript is consistent with the allegation, which is that the Respondent's new policy *restricted and limited* Union agents' access to Respondent's facility.

Contrary to Respondent's assertion, the Complaint in the instant matter advances different allegations than those litigated in the March 2010 Complaint described above. The allegations in the Complaint are as follows:

> 5(g) - *On or about January 20, 2011*, the Respondent, by Gary Cash, herein called Cash, at the Respondent's Edith facility, threatened employees by informing them that Union Assistant Business Manager Ed Tafoya, herein called Tafoya, *was not allowed on the property* to represent them. (emphasis added)
>
> 5(h) - *On or about January 24, 2011*, the Respondent, by a security guard, whose precise identity is unknown to the Acting General Counsel, and speaking at the direction of Jeff Nawman, herein called Nawman, at the Respondent's Edith facility, threatened employees by informing them that Tafoya *was not allowed on company property*. (emphasis added)
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> 5(i) - *On or about January 25, 2011*, the Respondent, by Nawman, at the Respondent's Edith facility, threatened employees by informing them that Tafoya *was not allowed on the Respondent's property*. (emphasis added)

[6] See attachment Exh. D, Transcript, pp. 625-634 to Respondent's Motion to Dismiss.

7(d) Since *on or about February 3, 2011*, the Union, by written request, has requested that the Respondent furnish the Union with the following information:

- Who from management met with employees to discuss the reasons for the changes?
- Who were the employees management met with?
- When and where did these meetings take place?
- What were the reasons for changes that management gave to the employees that they met with?

7(f) Since *on or about January 11 and February 9 and 11, 2011*, the Union, by oral and written request, respectively, has requested that the Respondent furnish the Union with the following information:

> The Union requests the policy that requires employees to get management's permission to escort visitors into the service center.

7(h) Since *on or about March 28, 2011*, the Union, by written request, has requested that the Respondent furnish the Union with the following information:

> * * *
>
> 3. The names of the Company management that made the decision to deny me access to the service center before normal working hours.
> 4. Any and all documentation the Company relied upon in making the decision to deny my request for access to the service center before normal working hours

7(m) Since *on or about February 3, 2011*, the Respondent has failed and refused to furnish the Union with the information described above in paragraph 7(d).

7(o) Since *on or about January 11, 2011*, the Respondent has failed and refused to furnish the Union with the information described above in paragraph 7(f).

7(q) Since *on or about March 28, 2011*, the Respondent has failed and refused to furnish the Union with the information described above in paragraph 7(h).

The Complaint covers a time period from January 2011 to March 2011; not August 2009. More importantly, the Complaint alleges Tafoya was *not allowed* on Respondent's property, while the allegations in the March 2010 Complaint and the testimony presented at the unfair labor practice hearing regarding those allegations are that Respondent implemented a new system that *restricted and limited* the access of Union agents and representatives to its facility. Neither the March 2010 Complaint nor testimony proffered at the unfair labor practice hearing alleges Union agents *were not allowed* on Respondent's property. The Complaint in the instant matter clearly alleges Tafoya's access was not simply restricted or limited by Respondent, but rather that he was outright prohibited from gaining any access to Respondent's facility. Even more so, this denial of access alleged in the Complaint is alleged to have started beginning in January 2011, not at the time the restricted and limited access was alleged and litigated in the March 2010 Complaint.

As such, Respondent's argument that the access issue has been previously litigated is without merit. If anything, the March 2010 Complaint allegations and witness testimony, which are both cited as exhibits in Respondent's Motion, establish the allegation are distinctly different from the Complaint that alleges the denial of access to a specifically identified Union representative. Accordingly, Respondent's Motion seeking to dismiss paragraphs 5(g), 5(h), 5(i), 7(d), 7(f), , 7(m), 7(o), and 7(q) of the Complaint should be denied.

V. Previously Litigated Cases Are Unrelated to Paragraph 5(e) of the May 2011 Complaint.

Respondent asserts in its Motion that the General Counsel and the Union are attempting to relitigate the claim that employee and Union Steward Eric Cox was denied union representation during an investigation into a claim he suffered racial discrimination arising from a discussion on implementing a new policy. Respondent, in its belief that this

matter has been previously litigated, argues paragraph 5(e) of the Complaint should be dismissed.

Paragraph 5(e) of the Complaint states as follows:

> Since about *October 7, 2010*, the Respondent has refused to meet with the Union and its employee Eric Cox . . . regarding a complaint Cox filed regarding his working conditions because Cox has insisted that his Union representative be present during any such meetings.

Respondent incorrectly assumes this pleading (and the facts that will be presented at the November 15, 2011 hearing) is related to any allegations in the March 2010 Complaint or covered by subsequent testimony in the August, September, and November 2010 unfair labor practice hearing before ALJ Schmidt. The Regional Director's Complaint in the instant matter alleges the unlawful conduct occurred about October 7, 2010, not on May 5, 2010 or in the meeting referenced in the Respondent's motion.[7] Respondent also incorrectly assumes the allegation in the July 2010 Complaint which involves conduct that occurred in April 2010 is linked to the current allegation in the Complaint without knowing the underlying facts in support of the allegation, which the General Counsel will put forth through witnesses at the November 15, 2011 unfair labor practice hearing.[8] In its Motion, Respondent inaccurately reads facts into paragraph 5(e) of the Complaint that do not exist or have yet to be presented.

The events and testimony referenced in Respondent's Motion are noticeably unrelated to the allegation in paragraph 5(e) of the Complaint particularly since the allegation involves different facts and legal theories. Thus, Respondent's Motion to dismiss paragraph 5(e) of the Complaint should be denied.

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[7] See p. 9 of Respondent's motion, citing Exh. D, Transcript p. 582, lines 10-20 attached to its motion.

[8] Paragraph 6(a) in the Complaint issued in July 2010 reads: On or about April 21, 2010, the Respondent, by Jeff Nawman and Smyth, in the presence of employees, removed its employee and Union steward Eric Cox, herein called Cox, from a management-employee meeting addressing the Respondent's TeleStaff call system.

VI. Conclusion

The facts underlying the allegations in paragraphs 5(e), 5(g), 5(h), 5(i), 7(c), 7(d), 7(f), 7(h), 7(l), 7(m), 7(o), and 7(q) of the Complaint are unrelated to facts in previously litigated cases referenced by Respondent in its Motion. Although the allegations may address similar subjects as those referenced by Respondent from the prior litigation, the allegations in the Complaint in the paragraphs Respondent named in its Motion pertain to different facts matters and/or raise different legal theories. As the allegations are unrelated to ones addressed in the previously litigated cases, the Regional Director acted reasonably in not consolidating the allegations in the Complaint, some of which were unknown at the time the Complaint was issued, with past cases filed as far back as two years ago in which Respondent and the Union were parties. The Regional Director appropriately included the named allegations in the Complaint and the hearing set for November 15, 2011 will reveal the facts and evidence related to these allegations are distinct and separate from those associated with the previously-litigated cases referenced in Respondent's Motion.

Based on the foregoing, General Counsel respectfully requests that Respondent's Motion be denied in its entirety.

DATED at Indianapolis, Indiana, this 19th day of October 2011.

Respectfully submitted,

/s/ Fredric D. Roberson

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CERTIFICATE OF SERVICE

I hereby certify that a copy of ACTING GENERAL COUNSEL'S OPPOSITION TO RESPONDENT'S MOTION TO DISMISS PORTIONS OF THE COMPLAINT in PUBLIC SERVICE COMPANY OF NEW MEXICO, Case 28-CA-023391, was served by E-Gov, E-Filing, E-Mail and Overnight Delivery via United Parcel Service, on this 20th day of October 2011, on the following:

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