

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

PUBLIC SERVICE COMPANY OF NEW MEXICO

and

**Cases 28-CA-22655
28-CA-22759
28-CA-22997
28-CA-23046**

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

**CHARGING PARTY'S ANSWER BRIEF TO RESPONDENT
PUBLIC SERVICE COMPANY OF NEW MEXICO'S
EXCEPTIONS TO ADMINISTRATIVE
LAW JUDGE'S DECISION**

Charging Party International Brotherhood of Electrical Workers, Local Union No. 611, AFL-CIO ("Union" or "Local 611"), pursuant to Section 102.46 of the Board's Rules and Regulations, submits this Answer Brief in answer to Respondent's exceptions to Administrative Law Judge ("ALJ") William L. Schmidt's February 17, 2012 Decision ("Decision") in the above-captioned case. The Union will address Respondent's exceptions as Respondent has listed them.

A. Request for Information: Asbestos Investigations (¶¶ 6(a)-(c) of Amended Consolidated Complaint, Case Nos. 28-CA-22655 & 28-CA-22759

The requests for information at issue here (J. Exhs. 1 & 3) relate to a grievance (J. Exh. 77) filed in behalf of employee Michael Patscheck. Public Service Company of New Mexico (herein "PNM") argues in its Brief in support of its exceptions that the grievance was untimely and that the applicable collective-bargaining agreement ("CBA") did not "address asbestos, occupational safety and health or compliance with OSHA

regulations” (Brief at 2). Regarding timeliness, PNM did not raise this issue in response to the requests for information until the hearing. When corporate counsel Carol Shay claimed that the grievance was improper in her July 30, 2009, letter (Jt. Exh. 5), she specified that “...the grievance is improper because it does not concern ‘the interpretation or application of the provisions of [the parties’ collective bargaining agreement] or [] the application of a specific policy to a specific policy to a specific employee.’ (See agreement, Article 10A.)” In her later letter (Jt. Exh. 7) of August 4, 2009, she still did not refer in any way to timeliness. When this was pointed out to Shay at trial, she claimed she did indicate a timeliness issue by the Union not explaining the relevance of asbestos exposures in 2007 (TR 312-3). She also claimed that HR Supervisor Ginger Lynch had noted in her original response (Jt. Exh. 2) that the scope and nature of the grievance (Jt. Exh. 77) was “beyond the time limits” (TR 312). Lynch’s response (Jt. Exh. 2), however, says nothing about the timeliness of the grievance. As explained by Fitzgerald at trial (TR 1054-5), the event giving rise to the grievance was not the asbestos exposure in the fall of 2008, but rather PNM’s later response to that exposure.

In its Brief at 2, PNM claims that the CBA does “not address asbestos, occupational safety and health or compliance with OSHA regulations.” This is the same argument that Shay made in her letter of July 30, 2009, to Fitzgerald (Jt. Exh. 5). PNM continues to ignore the responses (Jt. Exh. 6) of Fitzgerald to both Lynch and Shay wherein he specifically references the Safety Manual being part of the CBA and that Article 8 C of the CBA [both the then current (GC Exh. 5 at 10) and preceding (GC Exh. 6 at 16)] states: “The Company is subject by law to regulation by the New Mexico Public Utility Commission and other governmental agencies. Both parties shall respect

and comply with such regulation". Concerning remedy, the Patscheck grievance not only demanded that PNM "[b]ecome compliant with OSHA" but also that PNM "[m]ake affected employees whole" (Jt. Exh. 77). Similarly, Fitzgerald did not admit that "only OSHA could determine whether PNM was in compliance with OSHA. (TR 1053)" (Brief at 2) What he admitted was that if OSHA said that PNM was compliant, he would have to rely on that determination, and that "[t]hey're the ones that are the law, the way I see it." (TR 1052-3.) This does not exclude an arbitrator from also determining that PNM did not comply with OSHA in violation of the CBA, and that PNM had a pattern of inadequately responding to asbestos exposures. An arbitrator could then craft an appropriate remedy for the contract violations.

Because the arbitrator would determine timeliness if a proper defense were to be raised in arbitration, the Patscheck grievance is at least a "potentially valid grievance" (Brief at 6). Moreover, because the event giving rise to the grievance was not the actual exposure itself, but rather PNM's inadequate response to that exposure, the grievance may or may not be time-barred depending upon facts to be determined at arbitration if the arbitrator even allows such a defense to go forward since it was not raised by PNM until the unfair labor practice hearing.

The grievance (Jt. Exh. 77) expressly states: "Numerous fiber release episodes, resulting in employee exposures above permissible limits, have received an improper response by the Company." As ALJ Schmidt correctly concluded: "Hence, the presence of other related incidents has obvious relevance to the claims made in the Patscheck grievance and would potentially bear on the success of that grievance" (Decision at 13: 47-49).

Notwithstanding the grievance, the applicable provisions of the CBA, and the explanations given by Fitzgerald, PNM dismisses (Brief at 6-7) the Union's requests for information as being related "solely to an action outside the collective-bargaining context," citing *Southern California Gas*, 342 NLRB 613, 615 (2004). The short answer is that filing the grievance and filing a complaint with NMOSHB are not mutually exclusive. Here, unlike *Southern California Gas*, an active grievance was and is pending, and the requested information is relevant to that grievance. As ALJ Schmidt determined, therefore, that case is factually distinguishable. (Decision at 13: 52-14:14.)

B. Request for Information: Contract Employee Archuleta (¶¶ 6(j)-(l) of Amended Consolidated Complaint, Case Nos. 28-CA-22655 & 28-CA-22759

PNM argues (Brief at 10) that "[t]he ALJ erred in concluding that items 4, 5 and 7 of the Archuleta RFI were relevant to the pending grievance." Item 4 of the original RFI (Jt. Exh. 13) requested: "A list of all safety instruction that PNM has given this worker." When HR Consultant Sonia Otero requested how this was relevant to this grievance in her June 29, 2009, letter to Fitzgerald (Jt. Exh. 89, page 1), Fitzgerald responded (*id.*, page 2):

We have reason to believe that a PNM unit employee was used to train this contract employee as well as provide safety instruction to him. This employee was not properly paid for this work and if the Company admits that this training took place we can then establish that fact.

This fits with the grievance claiming that the "Company is not paying the upgrade to employees supervising supplemental employees" (Jt. Exhs. 88 and 65, steps 1 and 2). Moreover, logically if PNM were training the outside employee and giving him safety instructions, this would indicate that the outside employee was a supplemental worker and not an outside contractor worker. Article 41 of the CBA (GC Exh. 5 at 56) also

provides: “Supplemental workers shall be required to adhere to the same safety guidelines as regular employees.” Fitzgerald adequately satisfied the relevance burden. *Disneyland Park*, 350 NLRB 1256 (2007) and *Postal Service*, 310 NLRB 391 (1993).

Item 7 of the original RFI (Jt. Exh. 13) requested: “Amount per hour to include any fringe or roll up costs for this employee.” ALJ Schmidt answered PNM’s relevancy arguments in footnote 14 at page 19 of his Decision. Article 41 of the CBA (GC Exh. 5 at 56) in paragraph 1 under **COMPENSATION** states:

Skilled workers shall not be subject to the provisions of this Agreement except as to hours of work and rates of pay, as provided in the appendix of this Agreement.

ALJ Schmidt determined that as a dozer operator, Archuleta was a skilled worker and therefore subject to the exception clause above, and required to be paid as per the CBA. Accordingly, the Union was “unquestionably ...entitled to his compensation information as a part of its legal duty as the exclusive bargaining representative to properly police the employer’s application of the bargaining agreement.” (Decision at 19: 50-53.) Thus a showing of relevancy was, and is, not even required.

Item 5 requested a copy of the contract between PNM and EESI, Archuleta’s employer. PNM appears to concede (Brief at 11) that the “genuine issue” of the grievance was whether Archuleta was a contractor employee or a supplemental employee. The actual contract between PNM and EESI would appear to be obviously relevant to that issue. In his June 30, 2009, letter (Jt. Exh. 89, p. 2) to Sonia Otero, Fitzgerald explained the relevance as:

The Contract in question could lead to discovery of evidence relevant and necessary to show several facts including but not limited to the Companies [*sic*] intent as to who would coordinate his work, supervise this worker and insure that his safety was considered as well as requirements for

training. We are unsure as to the contents as we have yet to see the document.

PNM argues (Brief at 12) that Fitzgerald’s “theory about what the contracts might show was speculation.” Fitzgerald testified (TR 1064: 3-7):

Didn’t know the contents of the contract. I’ve never seen it. However, I did assume that the company, when they contract, would – if our people were to direct that person, that would be laid out in the contract. If they were going to have a foreman there, that would be laid out in the contract, who this employee was to report to, those type things.

Fitzgerald’s assumptions and speculation about what to expect the contract to contain were reasonable. At a minimum, his explanations to PNM established “a logical foundation and a factual basis for its information request.” *Postal Service*, 310 NLRB 391 (1993). Moreover, where the parties are disputing the status of third-party employees as either supplemental or outside contractor workers, as here, the actual contract between the employer and the third party is obviously relevant. The Board’s recent observation in *Piggly Wiggly Midwest, LLC*, 357 NLRB No. 191 (2012) applies: “Where the factual basis of a request for nonunit information is obvious from all the surrounding circumstances, the union’s failure to spell it out will not absolve the employer of its obligations under the Act.”

Fitzgerald’s original information request (Jt. Exh. 13) is not dated, but Sonia Otero’s response (Jt. Exh. 14, p.2) states that it is dated “5/1/08.” For over a year, PNM did not respond to this information request. When Otero did respond, she claimed that items 4 and 7 do “not appear relevant to the grievance” and that item 5 was not “directly relevant.” (*Id.*) She does not claim that any other items are not relevant. In his response (Jt. Exh. 15), Fitzgerald strenuously objects to Otero’s belated relevancy objections. He specifically mentions the EESI contract: “The contract that the Company possesses

should show who Tom [Archuleta] would report to and how his job was laid out and for what work.” He thus did indicate that the Union still sought answers to items 4, 5, and 7, and did not intend to withdraw those requests for information.

C. **Request for Information: Silas/Claw Terminations (¶¶ 6(aa)-(cc) of Amended Consolidated Complaint, Case Nos. 28-CA-22655 & 28-CA-22759**

PNM claims (Brief at 14) that “the approval of Human Resources was not required to carry out the terminations” and cites page 992 of the transcript of the hearing. When asked “if human resources did not approve of your recommendation to fire someone, including Silas and Claw, those employees would not be fired,” Maintenance Manager Mathew Zersen answered: “I don’t believe that is correct.” (TR 992: 3-6.) When asked the follow-up question of whether he thought the approval of human resources was required, Zersen answered: “I think that human resources works for us and will do as we recommend” (*id.* lines 7-12). When confronted with the two memos recommending termination of the two employees and addressed to Anna Ortiz, HR Director, Zersen had to admit that both memos (CP Exhs. 12 and 13) state: “Review by upper management and legal will be obtained before taking personnel action” (TR 997). He further admitted that personnel action forms have to be approved by different levels of management (TR 999). Lynch’s memos themselves (CP Exhs. 12 and 13) are entitled: “Termination Recommendation.” Zersen did not know whether management above him and human relations reviewed Lynch’s memos before approving the termination recommendations (TR 999). The significance is that Zersen was not the sole decision maker and that those approving of the termination recommendations reviewed them before approving, as was clearly intended. Therefore, the unredacted memos were

clearly within the purview of Fitzgerald’s request for “any and all documentation that was used or considered that we have not been supplied.” (Jt. Exh. 19.)

PNM also argues (Brief at 15) that ALJ Schmidt “erred in failing to find that Lynch’s memos were privileged work product after finding that her underlying notes were work product.” Note that PNM does not even claim that it argued this in its post-hearing brief or that it argued this to the ALJ (see Brief at 14). Moreover, Counsel for the Acting General Counsel has excepted to the ALJ’s finding that the underlying notes were work product (Exception 12). Counsel for the Acting General Counsel argues in his brief in support of exceptions (at 20) that PNM waived this defense to producing the notes by not raising the issue in a timely fashion and cites, e.g., *Ang Newspapers*, 350 NLRB 1175, 1181 (2007). The same argument applies to PNM’s belated claim that the Lynch memos were privileged work product. By not raising the defense during the trial, PNM denied the other parties the opportunity to demand, and the ALJ to require, an *in camera* inspection of the disputed documents to determine if the memos contained any privileged work product. The defense was not timely raised and the parties had no opportunity to litigate the issue. As it stands, no evidence was presented that either the Lynch memos or the notes contain any mental impressions of Lynch or that they were discussed with PNM’s legal department. Moreover, evidence to establish the necessary factual predicates for finding the memos and notes to be privileged work product are absent. Thus the investigation of Silas and Claw was routine and done in the ordinary course of business, and was not done at the direction of any PNM attorneys. In *Sprint Communs. d/b/a Central Telephone Co.*, 343 NLRB 987 (2004), the Board majority determined that the notes of human resource specialist Hindman were protected work product. She was

directed to perform her investigation of the misconduct of four union officials by in-house counsel, and not her own manager; she discussed possible terminations with in-house counsel which was not routine for her. As noted in the majority opinion: “We do not dispute our dissenting colleague’s contention that notes taken in the ordinary course of business do not fall within the ambit of work product protection.” The present case is distinguishable because there is no showing that Lynch prepared her notes or her memos at the direction of any counsel, or that she discussed them with counsel in any manner other than routine. In short, so far as appears from the record, the notes and memos were done in the ordinary course of business for PNM, and therefore are not protected work product.

D. Request for Information: “Other Duties” (¶¶ 6(a), (d) & (e) of Amended Complaint, Case No. 28-CA-22997

By letter (Jt. Exh. 93) dated December 30, 2009, Assistant Business Manager Ed Tafoya requested that PNM provide the information in dispute starting with “[t]he names and classifications of all PNM employees that read electric and gas or electric only meters who are not currently in our bargaining unit.” As PNM recognizes (Brief at 16): “This request related to the Union’s ongoing contention that employees with the job title Coordinator performed the work of a Senior Meter Reader or Collector and should be classified as such within the bargaining unit.” Labor Relations Manager Ray Mathes responded by his letter of January 22, 2010 (Jt. Exh. 48). Mathes argued against the inclusion of the disputed employees in the unit (*id.* at 1-2). His response, however, indicated that the disputed employees perform meter-reading and collection duties a substantial amount of their working time. In answer to requests numbered 2 and 5, Mathes stated that the employees were performing the listed duties “among their other

duties” (*id.* at 3-4). The Union then filed a grievance at Step 1 on February 15, 2010, alleging that the disputed employees were misclassified and should be classified as either Senior Meter Readers or Collectors and included in the bargaining unit (Jt. Exh. 49). Step 2 was filed on March 2, 2010, when Cindy Castro received it for PNM (Jt. Exh. 50). By letter of March 26, 2010, Tafoya requested that PNM list the “other duties” of the employees previously referenced by Mathes (Jt. Exh. 51). Mathes responded to this request by his letter of April 2, 2010 (Jt. Exh. 53). Regarding the “other duties,” Mathes demanded an explanation of relevancy. Tafoya answered Mathes by letter of April 7, 2010 (Jt. Exh. 56). Tafoya gave three reasons for the relevancy. The first was to determine if those other duties “also fall under the MRC Job Descriptions.” The second was because Mathes had claimed in a telephone conversation with Tafoya that a collector in Santa Fe doing the work of his coordinator was doing work within the collector’s job duties. The third was because on March 25, 2010, at a Step 2 grievance hearing, Cindy Castro argued that the coordinators were not doing the work of the MRC’s 100% of the time and Steve Kniffin had made arguments vaguely referring to other duties. Tafoya accused Mathes of making “specious” claims of irrelevance.

Contrary to PNM’s claim (Brief at 18), ALJ Schmidt did not recognize “that the Union ‘failed to articulate the relevance of its request’”. Instead, the ALJ rejected PNM’s argument that the Union had failed to demonstrate that the information as to the other duties was relevant (Decision at 32:16-20). At most, the ALJ states that “even though the Union may have failed to articulate the relevance of its request for information about the ‘other duties’ of the coordinators (and the other two, Martinez and Medina) in its correspondence with the Company...” (Decision at 32: 26-28) (Emphasis added). More

importantly, the ALJ concluded (Decision at 32: 20-22): “Mathes’ initial response on this subject identifying certain individuals who perform meter reading and collection work together with the subsequent grievances filed by the Union plainly establish the relevance of the ‘other duties’ information.” In other words if parties are disputing whether certain employees should be included in a bargaining unit, as here, all of the employees’ duties and responsibilities are plainly relevant. ALJ Schmidt did not need to decide if the Union had sufficiently articulated why the “other duties” information was relevant because it was “plainly” or “obviously” relevant. Hence, his citation to *Piggly Wiggly Midwest, LLC*, 357 NLRB No. 191 (2012) was, and is, appropriate. Just as Tafoya accused Mathes in Tafoya’s letter of April 7, 2010 (Jt. Exh. 51), Mathes’ claims of irrelevancy were “specious.” PNM is now continuing to make those specious claims.

E. Tafoya’s Access to Electric Services Center (¶¶ 7(c), (g) & (h) of Amended Consolidated Complaint, Case Nos. 28-CA-22655 & 28-CA-22759

ALJ Schmidt found (Decision at 40: 39-41, 41: 1): “However, there is ample evidence of a 30-year accommodation between the parties that permitted Local 611 representatives access to the ESC for the purpose of meeting with employees during nonwork times, attending grievance and bargaining sessions, and speaking with supervisors and managers when needed.” PNM does not challenge this finding of fact. The record supports it. Line Department Manager Jeff Nawman (TR 468) and Tafoya (TR 624, 633-5) both testified that Union agents had free and unfettered access to the ESC for years before Nawman and Tafoya agreed upon Tafoya having a Level 2 Contractors’ badge. Chris Frentzel, a retired PNM employee, and former Assistant Business Agent, also confirmed his free and unfettered access to the ESC as a Union agent starting in 1987 (GC Exh. 23; TR 771-6).

Moreover, the ALJ found (Decision at 41: 22-24):

The draft of the access policy (Jt. Exh. 24) submitted to Tafoya provided that contractor badges would be effective for 6-month periods but Nawman never discussed this limitation with Tafoya when arranging for the issuance of his badge.

PNM does not challenge this finding. Instead, PNM argues that the new unilateral restrictions on Tafoya's access to the ESC were not significant, substantial and material. PNM relies upon *Peerless Food Products, Inc.*, 236 NLRB 161 (1978). PNM overstates (Brief at 23-4) the restriction imposed upon the union's agent's access in *Peerless*, claiming that the union agent's "access was summarily restricted to meeting with unit employees only in the lunchroom during break periods..." (emphasis in original). The employer in *Peerless* basically back-pedaled from its restriction on the union agent's access until by the time it reached the Board, the Board stated, 236 NLRB at 164:

From the record, including Respondent's representations on the brief, n4 [*sic—note 1?*] the net effect of the change in policy is to remove Jacka's former "right" to engage unit employees in conversations on the production floor when those conversations are unrelated to contract matters. While we do not minimize the value of employee access to union business representatives, the change effected here (which does not apply to the job steward) does not materially, substantially, or significantly reduce that value.

(Emphasis added.) The narrow limit of the *Peerless* case is illustrated in *Unbelievable, Inc. d/b/a Frontier Hotel & Casino*, 323 NLRB 815 (1997), enfd. in relevant part sub nom. *Unbelievable, Inc. v. NLRB*, 118 F.3d 795, 326 U.S. App. D.C. 194 (D.C. Cir. 1997), also a Region 28 case, in which the Board refused to adopt the recommended Order of ALJ Gerald A. Wacknow that the employer did not violate Section 8(a)(5) by one instance of denying access to union agents because they refused to sign an

acknowledgement of conditions to enter the employer's premises. The Board distinguished *Peerless* and ruled, 323 NLRB at 818:

In dismissing the access restriction allegation on the basis of his finding that asking Hughes and Kelly to sign an acknowledgment of existing conditions on entry was "a non-burdensome request," the judge appears to have accepted the Respondent's argument in its brief to the judge that, under the reasoning of *Peerless Food Products*, 236 NLRB 161 (1978), the restriction was not "a material, substantial, and ... significant" change in terms and conditions of employment, and therefore did not rise to any bargaining obligation. *Id.*, quoting *Rust Craft Broadcasting*, 225 NLRB 225 NLRB 327 (1976). We disagree. Any change that actually interferes with contractually agreed employee access to the unit collective-bargaining representatives for representational purposes is a material change. *Ernst Home Centers*, 308 NLRB 848, 849 (1992). In *Peerless Food Products* the alleged change was to noncontractual past practice regarding union access. The employer had implemented a general rule as to access by any non-employee to the plant floor during working time, and the Board found no violation because it found no evidence that the employer actually had applied, or intended to apply, the rule so as to reduce the access of union representatives to employees for any representational purpose. In the present case, however, the Respondent's new restriction was specifically aimed at union representatives and it actually resulted in denying employee access to the representatives on the day the restriction was imposed. [Footnote13 omitted.]

(Emphasis added.) Here, there is evidence that PNM both had applied and intended to apply the new restrictions on access in order to reduce the access of union representatives to the unit employees at the ESC for representational purposes. The intent is shown in the letter of Labor Relations Manager Ray Mathes dated May 25, 2010 (CP Exh. 16), reading:

This letter further defines the Company's position regarding access procedures for nonemployees at our Company locations. As you know, we have addressed with the Union on multiple occasions regarding access to our locations by non-employee IBEW Business Agents.

Our labor agreement provides for representation of members by **Union Stewards**. (See Article 9, emphasis added.) The Union has agreed that its stewards "shall perform their duties promptly and efficiently with a minimum of interference with the Company's operations." (*id.*)

Moreover, we have defined the grievance process as the “exclusive means” to resolve disputes about the labor agreement. (*See* Article 10.) The grievance process only contemplates involvement by a Business Agent (i.e., a non-employee) at Step Two of the proceedings. (*See* Article 10(C).) Thus, nothing in our labor agreement provides for the involvement of non-employee Business Agents in Company meetings on Company property outside of the Step Two grievance proceedings.

Furthermore, we do not have a “past practice” of allowing Business Agents unfettered access to Company property and attendance at Company meetings. We have repeatedly given you, the Union, and the Business Agents notice that certain procedures must be followed for non-employees to gain access to the Company’s property. Moreover, to the extent a Business Agent or other non-employee is physically on the Company’s property pursuant to the appropriate procedures, such person is not entitled to attend Company meetings without management’s prior authorization.

The Company’s property rights are protected by state and federal law in this matter, and the Union’s claim for property access and/or attendance at meetings is neither guaranteed nor unlimited. As stated above, the parties have explicitly agreed that representation through employees designated as Union Stewards is sufficient. Your Union Stewards have shown that they are not shy or intimidated about voicing concerns on behalf of members and the labor agreement. Therefore, the Company’s application to Union Business Agents of its access procedures is consistent with the NLRB’s holdings that support if a union can effectively represent employees through some alternative means other than by entering on the employer’s premises, the employer’s property rights will predominate, and the union may properly be denied access.

Moreover, in situations unlike ours, even where a union can represent effectively only by access to an employer’s premises, the access is limited to reasonable periods that prevent unwarranted interruption of the employer’s operations.

The above is a declaration that PNM can and will deny access to Union business agents for all except Step 2 grievance hearings. Management approval is now injected into the access control policy. The 30-year history of unfettered union access is to be replaced with PNM’s property rights, according to Mathes.

The front desk in the administration building of the ESC is open from 8:00 a.m. until 5:00 p.m. (TR 503). PNM claims that security guards are on duty around the clock (Brief at 21). They may be on duty, but they are not always available to sign in union agents like Tafoya. Thus OSHA scheduled a site visit at the ESC for 7:00 a.m. Tafoya tried to change it to 9:00 a.m., but the OSHA agent refused. (TR 650-1.) According to Tafoya (TR 651), the following occurred:

I arrived at the service center about 6:45, and I could not access the building where the meeting was being held. I attempted to call my steward. His cell phone was off. I could not reach him. I could not access any doors to get to the security guard. The security guard was not in the office that he would be in, and even then, there's no guarantee that he's going to see you and come and allow you access.

I was approximately 45 minutes late for that meeting, because I could not gain access. When I arrived, they were almost done with the meeting, and I had to go back and make them retrace a lot of the meeting that they had already conducted. OSHA allows for union representation at these sites, and I had to insist that I be given the same treatment as I would be allowed, and I insisted, because I believed I was denied ability to be at that meeting because of PNM's new policy.

Tafoya testified to another instance when no security guard was available. This was after hours when Tafoya was trying to gain access to assist a union steward. Cindy Castro with PNM's labor relations was interrupting the steward and trying to limit the time that the steward could discuss the problem with the employee. When Tafoya tried to gain access to the ESC, the security guard was not there, and even after banging on the door, no one responded. Only by entering without authorization, by lifting a latch that the guard failed to secure, was Tafoya able to enter and attend the meeting to assist the steward. (TR 652-4.) According to Tafoya, he no longer is able to go into the ESC before work for the unit employees and converse with them regarding potential problems (TR 654). The above shows that PNM's new restrictions on Tafoya's access to the ESC

have substantially and materially interfered with his access to the unit employees for representational purposes.

CONCLUSION

WHEREFORE, and upon the record as a whole, the Charging Party respectfully requests that the Board adopt the Decision and recommended Order of Administrative Law Judge William L. Schmidt with respect to the findings and conclusions to which Respondent Public Service Company of New Mexico has taken exception.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of April, 2012, I e-filed the above with the NLRB, Office of the Executive Secretary and caused a true and correct copy of the foregoing to be served upon the following by email as indicated:

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