

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

**PUBLIC SERVICE COMPANY OF NEW MEXICO**

**and**

**Cases 28-CA-022655  
28-CA-022759  
28-CA-022997  
28-CA-023046**

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

**ACTING GENERAL COUNSEL'S ANSWERING BRIEF**

**I. INTRODUCTION**

Counsel for the Acting General Counsel (General Counsel) files this Answering Brief in response to Respondent's exceptions to the decision of Administrative Law Judge William L. Schmidt (the ALJ) in JD (SF)-08-12 dated February 14, 2012 (ALJD).<sup>1</sup> The ALJ found, and the record supports, that Public Service Company of New Mexico (Respondent) violated Section 8(a)(5) of the Act by failing and refusing to provide relevant requested information to International Brotherhood of Electrical Workers, Local Union No. 611, AFL-CIO (Union) regarding requests made by the Union for: a) requested information pertaining to asbestos accident investigations; b) requested information pertaining to supplemental workers used by Respondent at the San Juan Generating Station; c) requested unredacted copies of a manager's termination recommendations for employees Everand Silas and Guy Claw; and, d) requested

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<sup>1</sup> All dates herein are 2009, unless otherwise noted. Public Service Company of New Mexico will be referred to as "Respondent." References to the official transcript will be designated as (Tr.), with appropriate page citations. References to the Acting General Counsel's Exhibits will be referred to as (GCX.) with the appropriate exhibit number. References to Respondent's Brief in Support of Exceptions will be referred to as (RB) followed by the page.

information regarding the “other” duties performed by coordinator employees. In addition, the ALJ properly found that Respondent violated Section 8(a)(5) of the Act by unilaterally implementing a new policy limiting access to Union agents at its Edith Service Center premises in Albuquerque, New Mexico.

The defenses raised by Respondent have no merit to sufficiently overcome its obligation to provide the Union with relevant requested information noted above or the evidence that establishes it unilaterally altered the access rights of a union representative in violation of the Act. Respondent’s exceptions provide no basis for the Board to overrule the ALJ’s findings. The Acting General Counsel urges the Board to reject Respondent’s invitation to ignore Board law and adopt the ALJ’s findings that Respondent violated the Act as alleged, except as argued in the General Counsel’s Exceptions. For these reasons, the Board should affirm the unfair labor practice findings made by the ALJ.

## **II. RESPONDENT’S EXCEPTIONS ARE WITHOUT MERIT**

### **A. The ALJ correctly found that Respondent failed and refused to provide the Union with relevant requested information regarding asbestos investigations.**

Respondent contends in its Exception A that the ALJ erred by finding that Respondent violated Section 8(a)(5) of the Act by failing to provide the Union with information it requested from Respondent regarding asbestos investigations that involved bargaining unit employees. Specifically, Respondent argues that the ALJ erred in finding that finding that the Union’s request for asbestos information related to matters in the collective-bargaining context and further erred in finding that the information requested dating back to 2007 was relevant to the Union’s March 2009 asbestos incident grievance. (RB at 4) With its exceptions Respondent makes red herring attempts to divert the Board’s attention from the

seminal issue underlying the request, namely whether the information requested by the Union is relevant. As the evidence clearly shows that it is, Respondent's exceptions have no merit.

An employer must provide information requested by the union for the purposes of handling grievances. *TRW, Inc.*, 202 NLRB 729 (1973). The Board considers a refusal to provide information relevant to a union's processing of an employee's grievance to violate Section 8(a)(5) of the Act. *Postal Service*, 337 NLRB 820, 822 (2002), citing *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). Here, as correctly found by the ALJ, the requested information was related to an asbestos exposure grievance the Union filed regarding incidents that involved unit employees. (ALJD 13-14) Respondent does not deny this critical fact nor does it deny that it has not provided the Union with the requested information. (Tr. 314, 330) Under these circumstances, Respondent has undeniably violated Section 8(a)(5) of the Act by failing to provide the Union the relevant information it requested. *Postal Service*, 337 NLRB at 822.

In its exceptions, Respondent contends that the Union's asbestos exposure grievance was untimely filed and that this had the effect of making the request for asbestos test results and lab reports untimely. (RB at 2) Interestingly, Respondent makes this contention even though it does not deny that it is still processing the grievance. (Tr. 312) Even if the asbestos grievance were somehow improper, an actual grievance need not be pending nor must the requested information clearly dispose of the grievance as it is sufficient if the requested information is potentially relevant to a determination as to the merits of a grievance or an evaluation as to whether a grievance should be pursued. *United Technologies Corp.*, 274 NLRB 504 (1985); *TRW, Inc.*, 202 NLRB 729, 731 (1973). As such, Respondent's timeliness

argument regarding the grievance is not dispositive to its obligations to provide the Union with relevant requested information and as such, its exceptions have no merit.

Lost in Respondent's argument is that the information sought is related to the terms and conditions of employment of bargaining unit employees represented by the Union and specifically how Respondent handled unit employee exposure to asbestos in the workplace. The Union's request for asbestos records, lab reports and investigation reports as it pertains to unit employees is directly tied to safety issues associated with their working conditions. Such information is presumptively relevant information and clearly within the collective-bargaining context. *Minnesota Mining & Mfg Co.*, 261 NLRB 27, 29 (1982). Accordingly, Respondent has violated Section 8(a)(5) of the Act by failing and refusing to provide the Union with the requested asbestos exposure information. *Id.* at 29.

Respondent also takes issue with the Union seeking asbestos incident information dating back to 2007. Respondent relies on the Union acknowledging that it was only aware of an exposure event that involved an employee in September 2008. (RB at 4) Respondent argues it was not obligated to provide information about incident that occurred before the fall of 2008. (RB at 4) Respondent makes a nonsensical argument and submits the ALJ was correct in finding this requested incident information to be relevant. (ALJD at 13) The Union can only address the incident for which it was aware. It did so here and asked for information for a reasonable time period to assess if there were other incidents that may have involved unit employees. Again, the requested information relates to safety issues associated with the working conditions of unit employees and Respondent violated Section 8(a)(5) of the Act by failing to provide it.

Respondent also argues it was improper for the Union to seek discovery of information in a matter that was concurrently a regulatory matter involving OSHA, particularly since the Union was the party who filed the complaint and that on this basis, the information requested related solely to an action outside the collective-bargaining context. (RB at 4) Respondent also finds it important to point out that an information request that issued from OSHA was very similar to the one the Union submitted. (RB at 4)

Respondent's exception simply has no merit. "It is well established that, where a union's request for information is for a proper and legitimate purpose, it cannot make any difference that there may be other reasons for the request or that the data may be put to other uses." *Associated General Contractors of California*, 242 NLRB 891, 894 (1979). When the information requested is presumptively relevant, "it is well settled that the presumption of relevance is not rebutted by a showing that the union also seeks the information for a purpose unrelated to its representative function." *Coca-Cola Bottling*, 311 NLRB 424, 425 (1993). Moreover, there is no allegation or basis to conclude that the Union is seeking the information to avoid the Board's no-discovery rules. See *Saginaw Control & Engineering, Inc.*, 339 NLRB 541, 543-544 (2003); *Pepsi-Cola*, 315 NLRB 882 (1994) (if the request's timing and the information's relationship to the charges show the union sought the information in order to bolster its charges, the Board will not find a refusal to provide the information unlawful).

The health and safety of employees are terms and conditions of employment and thus information concerning these matters is presumptively relevant and clearly enveloped within the auspices of collective-bargaining. *Minnesota Mining & Mfg Co.*, 261 NLRB at 29. Even if there is some overlap in what was requested with what was at issue in the New Mexico OSHA complaint, the Union is entitled to presumptively relevant information regarding

employee asbestos exposure in the workplace. Respondent simply ignores this critical point and the General Counsel submits Respondent does so to its detriment. Based on the foregoing, the General Counsel submits that Respondent's exceptions have no merit and the ALJ correctly found that Respondent violated Section 8(a)(5) of the Act by failing and refusing to provide the Union with the requested asbestos information as alleged.

**B. The ALJ correctly found that Respondent failed and refused to provide the Union with relevant requested information regarding contract employee Tom Archuleta.**

The record establishes that, on May 1, 2008, the Union requested nine items of information from Respondent regarding work performed by a supplemental employee (Tom Archuleta) employed by a contractor named EESI. (JX 13) Respondent asserts in its Exception B that the ALJ erred in finding that Respondent violated Section 8(a)(5) of the Act by failing to provide the Union with information responsive to Items 4, 5, and 7 of that request. Respondent's exceptions are without merit.

Item 4 requests a list of all safety instruction that Respondent has given to Archuleta. (JX 13) Item 5 requests a copy of the contract between Respondent and ESSI, the employer who employs Archuleta. (JX 13) Item 7 requests the amount per hour, including any fringe or roll up costs, paid to Archuleta. (JX 13) Respondent argues that the ALJ erred in finding that the information requested in Items 4, 5, and 7 were relevant to the grievance. Respondent is mistaken. The relevance of the information requested in Items (4), (5), and (7) is established by virtue of Article 41 of the collective bargaining agreement, which is specifically cited in the supplemental employee grievance. (GCX 5 at 56) This article dictates what hours of work and rates of pay supplemental employees are subjected to under the collective bargaining agreement. (GCX 5 at 56)

Respondent does not dispute there are nuances associated with who is deemed a supplemental employee and who is deemed a contractor employee that have ramifications on how those employees are treated and viewed under the contract. (Tr. 937) Equally important, Respondent does not deny the Union has filed a grievance protesting how employee Archuleta is classified and how his classification affected the bargaining unit. (JX 65, 88) Information requested to assist the Union in processing that grievance is arguably relevant and should be produced by Respondent. *Bickerstaff Clay Products*, 266 NLRB 983 (1983).

The Union is entitled to information that pertains to whether or not supplemental employee Archuleta is correctly classified under the contract. When there has been a showing of relevance, the Board has consistently found a duty to provide information such as competitor data, labor costs, production costs, restructuring studies, income statements, and wage rates for non-unit employees. *E.I. du Pont & Co.*, 276 NLRB 335 (1985); *Litton Systems*, 283 NLRB 973, 974-975 (1987). Respondent's obligation to provide information extends to information in furtherance of, or which would permit the Union to determine whether to process a grievance. *Bickerstaff Clay Products*, 266 NLRB at 983. The information requested regarding this employee, including the contract that defines his terms and conditions of employment, is clearly relevant to the grievance. Accordingly, the ALJ correctly found that Respondent violated Section 8(a)(5) of the Act by failing and refusing to provide the Union with the EESI supplemental employee information requested in Items (4), (5), and (7) of the request.

Respondent argues the Union has not articulated a logical or factually supported basis for the production of the ESSI contract (Item 5). (RB at 12) In *Disneyland Park*, the Board held the union must present either evidence (a) demonstrating the relevance of non-unit

information or (b) that the relevance of the information should have been apparent to the employer under the circumstances. 350 NLRB 1256, 1258 (2007). The union's explanation of relevance “must be made with some precision; and a generalization, conclusory explanation is insufficient to trigger an obligation to supply information.” *Disneyland Park*, 350 NLRB at 1258 fn.5., citing *Knappton Maritime Corp.*, 292 NLRB 236 (1996) (a union must demonstrate a reasonable belief supported by objective evidence for request); *Southern California Gas Co.*, 344 NLRB 231 (2005) (a union’s information request for non-unit information must be supported by “logical foundation” and “factual basis”).

When posed with relevancy questions by Respondent, the Union responded with explanations as to why it wanted the information and why it was related to the grievance. (JX 89) The Union informed Respondent that it requested the ESSI contract because it would address “who would coordinate his work, supervise this worker and insure that his safety was considered as well as requirements for training.” (JX 89) The Union is pursuing a grievance regarding a potential misclassification of an employee working for Respondent and the implications associated with the classification of that employee on the bargaining unit and the work performed by the bargaining unit. Under such conditions, the Union is entitled to requested information to help assess and/or confirm this employee’s status through grievance processing. *Bickerstaff Clay Products*, 266 NLRB at 983.

Lastly, Respondent argues that the Union effectively withdrew its request for Items 4 and 7 as a result of correspondence it sent to Respondent after the initial information request. (RB 12-13) Respondent’s argument holds no water. First, there is no evidence, and Respondent points to none in its exceptions, that the Union ever expressly withdrew its request for Items 4 and 7. The only thing Respondent offers is supposition as to what it

believed to be the Union's intentions based on how it read later correspondence from the Union and the Union's focus on other requested items.

Second, as noted, the Employer offered nothing in response to the Union's information request other than general denials of relevance and a blanket assertion of confidentiality. The Union sufficiently responded to these denials and is not obligated to continue responding to them in perpetuity every time Respondent repeats the same denials. (JX 89) The ALJ correctly found that Respondent failed to explain what information in the request was proprietary and confidential and failed to make any accommodation offers and in doing so failed to sustain its confidentiality defense. (ALJD 19-20) A bare assertion of confidentiality, without more, will not suffice to justify nondisclosure. In this connection, when a claim of confidentiality is asserted, the party making the claim bears the burden of establishing that it has a substantial and legitimate confidentiality interest in the requested information. *Jacksonville Area Association for Retarded Citizens*, 316 NLRB 338 (1995). Here, Respondent provided nothing to the Union regarding its confidentiality concerns and failed to provide any accommodation to address them. As such any confidentiality defense it raises fails. *Detroit Edison v. NLRB*, 440 U.S. 301 (1979). Based on the foregoing, the General Counsel submits that Respondent's exceptions have no merit and the ALJ correctly found that Respondent violated Section 8(a)(5) of the Act by failing and refusing to provide the Union with the requested asbestos information as alleged.

**C. The ALJ correctly found that Respondent failed and refused to provide the Union with memos prepared by Manager Ginger Lynch regarding recommendations for the termination of employees Everand Silas and Guy Claw.**

Respondent asserts in its Exception C that the ALJ erred in finding that Respondent violated Section 8(a)(5) of the Act by failing to provide the Union with memos that were

prepared by Respondent in conjunction with the terminations of employees Everand Silas and Guy Claw. General Counsel submits that contrary to Respondent's contentions, the ALJ correctly found that evidence establishes that since October 1, 2009, Respondent has failed to provide, among other things, unredacted termination recommendation memos pertaining to the discharge of represented employees Silas and Claw. (ALJD at 30, JX 19, Tr. 958)

Respondent argues that the decision maker, Maintenance Manager Mathew Zersen, did not rely on these memos when making his decision to discharge the two employees. (RB at 14) This fact, even if true, is not dispositive of the issue as to whether the information requested by the Union is relevant. An employer has an obligation to provide information to a bargaining representative necessary for the performance of its duties, including information necessary to evaluate a grievance. A broad discovery-type standard is used in determining relevancy. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435-436 (1967). There must be a probability that the information sought is relevant and would be of use to the Union. *Dodge Theatricals Holdings*, 347 NLRB 953, 970 (2006).

The memos at issue here directly relate to the terminations of two represented employees and the grievances being pursued by the Union protesting their discharges by Respondent. Respondent asserts that Zersen "did not remember" reading the termination memos prepared by Manager Ginger Lynch but cannot claim that he did not do so. (RB at 14; Tr. 995) Even if the memos were not relied upon by Zersen, the memos remain in the personnel files of these employees. The facts and information included and/or revealed in the memos include a discussion of what took place during the disciplinary meetings for both employees and what factors were considered by Zersen in his decision. All of this could affect how the Union proceeds with the grievances. As such, the memos are arguably

necessary, essential, and certainly relevant to an intelligent evaluation by the Union of the validity of the charges against employees Silas and Claw so as to enable the Union to decide whether to process the grievances to an arbitration hearing. *New Jersey Bell Telephone Co.*, 300 NLRB 42 (1990); *Square D Elec. Co.*, supra, citing *Detroit Edison Co. v. NLRB*, 440 U.S. 106, 301 (1979).

Respondent also contends the ALJ erred in failing to find the memos were privileged work product and thus not subject to being produced to the Union. (RB at 15-16) Respondent's defense is without merit. First and foremost, Respondent raises the work product defense for the first time in its exceptions. Respondent did not advance a claim of work product privilege at the hearing or in its brief with respect to the termination memos. This very point was acknowledged by the ALJ in his decision. (ALJD at 30) It is well established that the failure to raise an issue in a timely fashion before the judge operates as a waiver of that argument. See, e.g., *Ang Newspapers*, 350 NLRB 1175, 1181 (2007). Respondent failed to raise this defense with regard to the termination memos with the ALJ and should not be able to do so now through its exceptions. The Acting General Counsel would clearly be prejudiced by allowing Respondent to do so and would not be able to present evidence for the record to rebut this newly-raised defense.

Even if the work product defense were appropriately entertained for the termination memos, Respondent failed to present evidence the memos were prepared in anticipation of litigation and could warrant application of any privilege. To the contrary, it appears that disciplinary investigations and the termination memos that result from them are conducted in the ordinary course of business by Respondent, before counsel ever reviewed the documents. The memos were prepared by Manager Ginger Lynch at the direction of Maintenance

Manager Zersen, not legal counsel. Further, the memos and their contents were not discussed with legal counsel until after they were already prepared. As such, the work product defense has not been established with regard to these memos. Hence, the evidence reflects that the termination memos were not made in defense of litigation, and therefore, were not privileged. *U.S. Postal Service*, 332 NLRB at 644. Accordingly, the General Counsel submit the ALJ correctly found that Respondent violated Section 8(a)(5) of the Act by failing and refusing to provide the Union with requested unredacted termination memos reports for employees Everand Silas and Guy Claw.

**D. The ALJ correctly found that Respondent failed and refused to provide the Union with relevant requested information regarding “other duties” performed by certain Coordinators.**

Respondent asserts in its Exception D that the ALJ erred in finding that Respondent violated Section 8(a)(5) of the Act by failing to provide the Union with requested information regarding “other duties” performed by certain Service Coordinator employees. The evidence establishes that in the exchange of requests for meter reader and collector (MRC) unit information and the responses to those requests, Respondent provided the Union with the names of six coordinators, employees not in the bargaining unit, who were performing MRC unit work. (JX 94) In response, the Union filed a grievance protesting these coordinators performing this unit work. (JX 49) In a response to the Union’s request for information pertaining to the job descriptions for these employees, Respondent made reference to “other duties” that they performed. On March 26, 2010, the Union asked for a list of these “other duties” which to date Respondent has failed to provide. (JX 51, Tr. 561, 676)

The ALJ correctly found that the requested “other duties” information was relevant and that the Union’s request to include duties other than the duties that the Union specifically claimed constituted “unit work”. (ALJD at 32) The Board has held that a union is entitled to

information requested which bears upon the union's determination to file a grievance or is helpful in evaluating the propriety of going to arbitration. *Brooklyn Union Gas Company*, 220 NLRB 189 (1975); *Vertol Division, Boeing Company*, 182 NLRB 421 (1970). Here, the Union has a grievance with Respondent protesting non-unit employees Respondent admits are performing bargaining unit work. The Union has requested all information pertaining to the job duties performed by these employees. (JX 49) Respondent refused to provide a list of the “other duties” it referenced these employees performing. (Tr. 676) Although Respondent assessed the Union only wanted the other duties described that constituted “unit work,” Respondent is not entitled to make this assumption. The Union, in its investigation of its grievance, is entitled to make its own assessment as to whether the “other duties” constitute unit work or not or whether the information supports or undercuts its grievance.

Allowing Respondent to make the assessment as to what information it believes should be provided, rather than providing all of the information that is responsive to what was requested, allows Respondent to step into the realm of making assessments about whether or not the Union is pursuing a meritorious grievance. Such assessments by Respondent are not the standard in determining whether requested information is relevant and such assessments should not serve as a basis or means to allow Respondent to obviate its obligations under Section 8(a)(5) of the Act to provide the Union with relevant, requested information.

Respondent makes the argument that the ALJ “excused” the Union from its burden of showing relevance because he found that the factual basis for the Union’s request was “obvious from all surrounding circumstances.” (RB at Respondent adds that the ALJ erred in requiring Respondent to guess as to what was in the Union’s mind regarding its request. Although General Counsel agrees with the ALJ’s assessment that the grievance issue

regarding whether non-unit employees were performing bargaining unit work, this does not undercut that the information requested was relevant to the grievance matter filed by the Union and the Union's ability to assess the "other duties" being performed by non-unit employees who had already been alleged to have been performing some unit work. The requested information clearly bears upon the union's determination to pursue or not pursue its grievance. *Brooklyn Union Gas Company*, 220 NLRB at 189; *Vertol Division, Boeing Company*, 182 NLRB at 421. Accordingly, General Counsel submits the ALJ correctly found that Respondent has violated Section 8(a)(5) of the Act by failing to provide the Union with this relevant information. *Bickerstaff Clay Products*, 266 NLRB 983 (1983).

**E. The ALJ correctly found that Respondent unilaterally altered Union Assistant Business Manager Ed Tafoya's access to the Electric Service Center.**

Respondent asserts in its Exception E that the ALJ erred in finding that Respondent violated Section 8(a)(5) of the Act by altering the access of Union Assistant Business Manager Ed Tafoya to Respondent's Electric Service Center (ESC) in Albuquerque, New Mexico. Respondent argues that there is no evidence that the changes relied upon by the ALJ's were a material and significant restriction and change to Tafoya's access to unit employees. General Counsel submits that Respondent seriously undercuts the nature of the changes that were made to Tafoya's access to the ESC facility and further submits that the ALJ correctly found that these changes were material and significant and unilaterally made by Respondent in violation of Section 8(a)(5) of the Act. (ALJD at 42)

The evidence reflects that, in December 2008, Respondent negotiated with Tafoya for a second level access badge in conjunction with new security measures Respondent was implementing at the time. (Tr. 184) Respondent failed to renew Tafoya's badge when it expired in August 2009; instead, Tafoya was given a visitor badge. (Tr.474, JX 25)

Respondent argues that Tafoya not having a contractor badge does not preclude him from having access to the property and to represented employees and that his new visitor status access only means he will be treated like other non-employees. Respondent admits, however, that with this new visitor status, Tafoya is subject to restrictions he did not have before the security measures were implemented and before his level two badge expired. (Tr. 505) Respondent further admits that Tafoya essentially had the same level of access with a level two badge that he had prior to the new security measures being implemented. (Tr. 498) Consistent with both his status before the changes and with his level two badge, Tafoya did not have to sign in, wear a sticker or be escorted on company premises when he met with employees regarding grievance and/or work-related business.

A unilateral change in the past practice of permitting union access is a material change about which the Respondent is obligated to bargain. *Ernst Home Centers*, 308 NLRB 848, 849 (1992). Here, the Union's long-standing past practice had been to enter the premises and talk, at will, with the employees before and after they were working. With its actions in refusing to renew his level two badge in August 2009 giving him this access, Respondent restricted Tafoya's ability to visit with represented employees. The new procedure that resulted is a significant change from the prior practice and Respondent's refusal to bargain over it violates Section 8(a)(5) of the Act. *McGraw Hill Broadcasting Company, Inc.*, 355 NLRB No. 213, slip op. (2010).

Respondent argues the changes made to Tafoya's access were not material or substantial. (RB at 24) Respondent asserts that the changes were nothing more than trivial administrative requirements. In support of its argument, Respondent relies on *Peerless Food Products, Inc.*, 236 NLRB 161 (1978). Respondent's reliance on this case is misplaced. In

*Peerless*, the Board did not find the Employer's removal of access rights to Union representatives to have access to employees on the production floor to engage in conversation that were unrelated to contract matters to be material, substantial or significant because it did not materially effect employee access to union representatives for representation purposes. *Id.* These facts are not similar to the ones in this matter.

As a result of the change in Tafoya's access level, the Employer requires him to sign in, wear a sticker badge, and be escorted by an employee, usually a member of management, for his entire visit. (Tr. 641) The escort was required to remain with Tafoya when he is conferring with Union stewards or employees. (Tr. 641) Tafoya has experienced difficulties with the "visitor" access level access. Approximately ninety percent of represented employees begin work at 7:00 a.m. at the ESC. (Tr. 654) On one occasion in August 2009, there was an OSHA site visit scheduled to begin at 7:00 a.m. (Tr. 651-652) When Tafoya tried to access the facility there was no one at the front desk and as a result, he was forty-five minutes late to an OSHA inspection he was entitled to be present as employee representative. (Tr. 651) Thus, the access restrictions levied on Tafoya beginning in August 2009 by Respondent are clearly far from trivial and clearly inhibit his access to employees for the purpose of addressing contractual matters with them.

Rather the changes involved with this matter are more akin to the changes addressed in *Granite City Steel Company*, 167 NLRB 310 (1967) and *Ernst Home Centers, Inc.*, 308 NLRB 848 (1992). In *Granite City Steel Company*, union agents had unlimited access to all areas of plant until the employer restricted agent access to weekdays only thereby cutting these agents off from being able to communicate with night shift employee who constituted over half of the unit. *Granite City Steel Company*, 167 NLRB at 310. The Board found this

change to be an unlawful unilateral change even though the access rights were not specifically incorporated in the collective-bargaining agreement. *Id.* Here, Respondent's actions resulted in Tafoya having access difficulties to ninety percent of the unit employees during times they were reporting to work. (Tr. 654) Tafoya previously had unfettered access to the ESC since 2002 before these changes occurred even though these rights were not defined in the contract. Hence, General Counsel submits the ALJ correctly relied on *Granite City Steel Company* in assessing the facts in this case and finding Respondent's actions to constitute an unlawful unilateral change. (ALJD 42)

General Counsel submits the ALJ also correctly applied the *Ernst Home Centers* case to the facts present in this matter. (ALJD at 42) In *Ernst Home Centers*, the union had a practice of visiting the employer's stores and speaking with employees on the sales floor, in break areas, and in the lunch room. 308 NLRB at 848. The employer sought to restrict the union's access to break areas and lunch rooms. *Id.* The ALJ found the employer violated Section 8(a)(5) by unilaterally prohibiting union agents from speaking with employees in all areas except the break area or lunch room. *Id.* The Board found the employer's unilateral change in the union's practice of visiting employees in all areas was a material change which the employer was obligated to bargain. *Id.*

Tafoya, similar to the representatives in *Ernst Home Centers*, had an established practice of meeting with employees inside Respondent's ESC facilities for a number of years prior to the changes. Tafoya maintained the same practice of meeting with employees, investigating grievances, filing grievances, meeting with supervisors, and conducting other union business inside Respondent's facility since 2002. Respondent, like the employers in *Granite City Steel Company* and *Ernst Home Centers*, changed Tafoya's ability to meet with

employees and carry out his duties as their representative by restricting his ability to meet with them inside the ESC. Respondent, at no point during the hearing, offered any testimony to demonstrate it provided any meaningful notice to the Union of its intention to modify the long established practice of the Assistant Business Manager's ability to access its facilities or an opportunity to bargain over any changes to that access. Accordingly, the credible record evidence supports the ALJ's findings, and the Board should affirm his conclusions that Respondent's actions violated Section 8(a)(5). *Granite City Steel Company*, 167 NLRB at 310; *Ernst Home Centers*, 308 NLRB at 849; *Sierra Publishing Company d/b/a The Sacramento Union*, 291 NLRB 540 (1988).

### III. CONCLUSION

Based upon the foregoing, the Acting General Counsel submits that the ALJ correctly found that Respondent violated Section 8(a)(5) of the Act as set forth above. Accordingly, the Acting General Counsel respectfully urges the Board to reject Respondent's Exceptions and to adopt the ALJ's findings and recommended order, consistent with Acting General Counsel's Exceptions.

Dated at Albuquerque, New Mexico, this 13<sup>th</sup> day of April 2012.

Respectfully submitted,

/s/ David T. Garza\_\_\_\_\_

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CERTIFICATE OF SERVICE

I hereby certify that a copy of ACTING GENERAL COUNSEL'S BRIEF IN ANSWER TO RESPONDENT'S EXCEPTIONS in PUBLIC SERVICE COMPANY OF NEW MEXICO, Cases 28-CA-022655, 28-CA-022759, 28-CA-022997, and 28-CA-023046, was served by E-Gov, E-Filing, and E-Mail, on this 13<sup>th</sup> day of April 2012, on the following:

***Via E-Gov, E-Filing:***

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