

**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 REPLY BRIEF

**TO: Lester A. Heltzer, Executive Secretary
Office of the Executive Secretary**

David T. Garza
Counsel for the Acting General Counsel
National Labor Relations Board, Region 28
421 Gold Avenue, SW, Suite 310
Albuquerque, NM 87103-0567
Telephone: (505) 248-5130
Facsimile: (505) 248-5134
E-mail: David.Garza@nlrb.gov

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Pursuant to Section 102.46(h) of the Board's Rules and Regulations, Counsel for the Acting General Counsel (General Counsel) files this Reply Brief to Respondent's Answering Brief to General Counsel's Exceptions to the Decision (ALJD) of Administrative Law Judge William L. Schmidt (ALJ) in the captioned case.

I. Introduction

In its Answering Brief, Respondent makes numerous disingenuous assertions about the General Counsel's representations contained in its Brief-in-Support of Exceptions.¹ Contrary to Respondent's assertions, the facts and arguments set forth in the General Counsel's Brief are supported by the record.

II. Argument

**A. Respondent's Assertion that the General Counsel
Mischaracterizes the ALJ's Decision regarding Removal of
Union Forms is Incorrect**

In its Answering Brief, Respondent takes issue with the General Counsel's argument regarding the ALJ improperly concluding he personally would not find Smyth's conduct

¹ RAB ___ refers to Respondent's Answering Brief to General Counsel's Exceptions followed by the page number. JX___" refers to Joint Exhibits presented in evidence by General Counsel, Respondent, and the Charging Party Union. Transcript references are (Tr.__:__) showing the transcript page and line, if applicable. ALJD___ refers to JD-(SF)-08-12 issued by the ALJ on February 14, 2012, followed by the page number.

coercive. (RAB at 1) Respondent erroneously argues this is a mischaracterization of the ALJ's decision. (RAB at 1) General Counsel argues in brief that the ALJ misapplied the standard for finding a violation by focusing his assessment on Respondent's past conduct and whether Respondent had any intentions to engage in coercive action rather than assessing the inherently coercive effect Respondent's conduct would have on employees. General Counsel's reference to record evidence that Respondent allowed non-union materials to be posted at the time it removed the Union document in the presence of employees supports the argument and a finding that the conduct was inherently coercive and a violation of Section 8(a)(1). See, e.g., *Cast-Matic Corporation*, 350 NLRB No. 94 (2007). Respondent's argument that General Counsel failed to establish disparate enforcement regarding posting is not dispositive as to whether Respondent's conduct was coercive.

B. Respondent Mischaracterizes General Counsel's Arguments Regarding the Removal and Investigation of Cox

In his decision, the ALJ applied the factors in *Atlantic Steel*, 245 NLRB 814, 816 (1979), to Cox' conduct during the meeting. (ALJD at 9-11) Contrary to Respondent's assertions, General Counsel does not concede these factors apply to Cox' situation but instead argued in its exceptions brief that the ALJ incorrectly found these factors were established. Respondent also incorrectly asserts General Counsel failed to explain how the nature of Cox' conduct weighs in favor of finding protection. (RAB at 4) General Counsel cites facts in its exceptions brief showing that Cox was engaged in Union steward activity that involved his questioning Respondent about directly dealing with employees about the new Telestaff system and soliciting feedback from them regarding it. (Tr. 812-813)

General Counsel is quite clear that Cox' activity, while persistent and, at most annoying, was not in line with the kind of conduct to warrant losing the protection of the Act.

Rather, this is exactly the type of conduct that the Act is intended to protect. In this regard, General Counsel maintains the record supports a finding that removing Cox from the meeting and subjecting him to a disciplinary investigation because he was engaged in representational activities violated Section 8(a)(3) of the Act. *Wright Line*, 251 NLRB 1083, 1089 (1980). Respondent also argues General Counsel did not cite any cases showing the type of activity engaged in by Cox was protected. General Counsel did not cite any such cases because it takes a significantly different position with Respondent as to how Cox' conduct at the Telestaff meeting should be characterized

Respondent also argues that General Counsel failed to explain how Cox' interruptions regarding bargaining issues constituted feedback given the limited purpose of the session. (RAB at 3) Respondent mischaracterizes General Counsel's arguments regarding "feedback" in that the argument is raised not in the context of Cox' wanting answers to his question but in Respondent trying to get feedback from employees regarding the system and not allowing Cox to question Respondent about it. Respondent's arguments that General Counsel failed to argue Respondent had unilaterally implemented the Telestaff system is likewise a red herring. (RAB at 4) What is controlling is whether Respondent solicited feedback from employees and whether Cox' activity in addressing this was protected.

C. Respondent's Assertion General Counsel Mischaracterizes Respondent's Obligations to Provide Information that Does Not Exist is Incorrect

Respondent argues that with regard to information requests for bucket test results, lineman equipment, compliance Respondent's clean shaven policy, the General Counsel failed to cite cases in his exceptions brief establishing Respondent was obligated to inform the Union that requested information did not exist. (RAB at 6, 10, and 11) Respondent cites *Raley's Supermarkets* in support of its argument it was not obligated to do so. 349 NLRB 26, 28

(2007). In *Raley's*, the Board found that the employer had responded to the union's request. 349 NLRB at 28. Here, Respondent provided no responses to the Union's requests.

An employer cannot simply ignore a union's information request. See *Daimler Chrysler Corp.*, 331 NLRB 1324, 1329 (2000); *Interstate Food Processing*, 283 NLRB 303, 304 at fn. 9 (1987). "[A]n employer must respond to a union's requests for relevant information within a reasonable time, either by complying with it or by stating its reason for noncompliance within a reasonable period of time. Failure to make either response in a reasonable time is, by itself, a violation of Section 8(a)(5) and (1) of the Act. Some kind of response or reaction is mandatory." *Columbia University*, 298 NLRB 941, 945 (1990), citing *Ellsworth Sheet Metal*, 232 NLRB 109 (1977). Hence, contrary to Respondent's assertions, Respondent was obligated to timely respond to the Union's request and failed to do so.

D. Respondent Incorrectly Asserts General Counsel Asks the Board to Reverse the ALJ's Credibility Determination

Respondent asserts that General Counsel seeks to have the Board reverse the ALJ's credibility determination as between Tafoya and Belt regarding the parties' understanding of the request for information pertaining to the duties of Martinez and Hall. (RAB at 8) Respondent makes an incorrect assertion. As noted in General Counsel's exceptions brief, the ALJ did not discredit testimony from Tafoya regarding testimony that he orally asked for the Martinez and Hall duties information (Tr. 557). General Counsel argues that the ALJ failed to factor and/or consider this evidence in making his determination that the Union's request, pursuant to later written exchanges, was ambiguous. Credibility determinations were never made issue by General Counsel as asserted by Respondent.

E. Respondent's Assertion General Counsel Failed to Address June 15, 2009 Request for Meter Reader and Collector information is Incorrect

Respondent argues that General Counsel concedes Respondent provided a full response to the Union's June 15, 2009 request for meter reader and collector information, while trying to argue that there was a follow up request that was not satisfied. (RAB at 9) General Counsel does not deny that an original request was made on June 15, 2009, but contends this request was not fully satisfied as reflected by the December 30, 2009 follow up request made by the Union. (JX 93) Lost in Respondent's accusations is that Respondent is trying to argue that separate requests that are related to each other are somehow mutually exclusive to one another as a means to distract attention from the fact Respondent failed to fully comply with the original information request. (JX 94, Tr. 561) As such, contrary to Respondent's assertions, the record evidence is sufficient to establish that Respondent failed to fully comply with this request for relevant information.

F. Respondent's Assertion that General Counsel Fails to Address Potential Consequences for an Employee Failing a Fit Test is Not Correct.

Respondent argues that the ALJ properly found that Respondent was not required to engage in endless speculation regarding the possible consequences of future hypothetical failures of a fit test and that General Counsel failed to address this in his exceptions brief. (RAB at 10-11) Respondent is mistaken. In follow up e-mails to Respondent, the Union provided examples of two employees (Mike Patschek and Randy Shull) who were directed by their supervisor (Willie Burgeon) to be clean shaven before being able to be fit tested as a requirement for a job assignment. (JX 38, Tr. 1073-1074) As such, contrary to Respondent's assertions, the record supports a finding that the information requested is tied to represented employees' terms and conditions of employment, and thus is presumptively relevant.

Minnesota Mining & Mfg Co., 261 NLRB 27, 29 (1982) Respondent also argues General

Counsel fails to present any evidence Respondent ever threatened discipline for an employee's failure to be clean-shaven. (RAB at 10-11) Respondent is simply mistaken. Record evidence establishes that Respondent represented to the Union that it intended to enforce its respiratory protection policy with discipline. (JX 36) This statement is clearly a threat to do so and not just supposition or speculation.

G. Respondent's Assertion that General Counsel Failed to Cite Evidence Regarding Disciplinary Investigations were not Conducted in Anticipation of Litigation is Incorrect.

Respondent contends General Counsel failed to show that disciplinary meetings were conducted and interview notes were created in the "ordinary course of business". (RAB at 13, 14-15) General Counsel submits that the evidence establishes that Respondent conducts disciplinary investigations as a matter of course in conducting its business. (Tr. 397-398, 987) The record evidence includes three examples of such meetings taking place for employees Silas, Claw, and Cox. General Counsel submits Respondent is trying to play the chicken or the egg game and has itself failed to present evidence that would show it did not conduct these disciplinary meetings in the ordinary course of business.

Respondent further contends General Counsel was incorrect in arguing that the fact Lynch and Zersen consulted with Respondent attorneys after the Silas and Claw interviews was evidence they had been directed by counsel to take notes during the respective meetings in reasonable anticipation of litigation. (RAB at 12-13) Respondent asks that a cavernous jump be made from the record evidence for this proposition. Respondent presented no witness testimony or other evidence that Lynch acted under the direction of Respondent's attorneys in conducting her disciplinary interviews or that she consulted with these attorneys prior to conducting the interviews. Lynch provided no such supporting testimony. More importantly, the record evidence establishes that the meetings conducted for Silas, Claw, and Cox were not

handled or conducted in a way as to make them different from any of the other disciplinary meetings Respondent holds with employees. (Tr. 397-398, 987)

H. Respondent's New Defenses in its Exceptions Brief are Untimely

In its exceptions brief, Respondent raised a defense for the first time that it did not have to provide the Union with requested interview notes for the disciplinary meetings held with employees Silas and Claw because the notes were subject to the work product privilege. Regarding information requested for the Cox investigation, Respondent argued in its answering brief for the first time that the Union's request was akin to discovery and further argued that the information requested regarding notes and witness names was subject to work product and confidentiality defenses. (RAB at 14-15) Respondent also argued in its answering brief that deferral should be an option for the Board to consider regarding the implementation of the tailboard form allegation. (RAB at 16-17)

Respondent's assertion of these defenses is untimely because none is alleged in its answer and cannot be raised for the first time in a post-trial brief. *SEIU United Healthcare Workers-West*, 350 NLRB 284 fn.1 (2007); *Master Mechanical Insulation*, 320 NLRB 1134 (1996); *MacDonald Engineering*, 202 NLRB 748 (1973). Respondent distinguishes the case cited by the General Counsel in its exceptions brief, *Ang Newspapers*, 350 NLRB 1175 (2007), as holding defense waivers only applied to situations involving Section 10(b) defenses. Respondent is mistaken. It is well established that the failure to raise a defense in pleadings or to litigate them at the hearing before the judge operates as a waiver of that argument. *Caribbean International News Corporation*, 357 NLRB No. 133 (2011); *Master Mechanical Insulation*, 320 NLRB at 1134; *MacDonald Engineering*, 202 NLRB at 748. Respondent should not be allowed to circumvent this well established Board law.

I. Respondent's Assertion General Counsel Failed to Cite Evidence Regarding Employees Being Threatened for Not Following a New Cell Phone Policy is Incorrect

Respondent erroneously contends that General Counsel failed to cite evidence that employees had been threatened with discipline if they failed to follow the new policy. (RAB at 19) Employee Chappelle attested at hearing that Respondent implemented a new policy in October 2009, requiring all employees, not just those on call, to carry company issued cell phones with them at all times. (Tr. 887-893) Chappelle testified he “would be expected to comply with this policy,” and if he lost a phone that he was not previously required to carry, “it could lead to some sort of discipline”. (Tr. 893-894) Respondent tries to argue that “might be disciplined” does not rise to a threat. (RAB at 19) This is simply not true. Although not as strong as “will be disciplined,” the underpinnings of possible discipline, in conjunction with a new directive, is a material change to working conditions that cannot be unilaterally implemented by Respondent without first bargaining with the Union to agreement. *Flambeau Airmold Corp.*, 334 NLRB 165, 166 (2001). General Counsel maintains that the record evidence supports such a finding.

J. Respondent's Assertion General Counsel Failed to Address Relevant Case Law Regarding the Inclusion of the Operation Representatives in the Bargaining Unit is Incorrect.

Respondent argues that General Counsel failed to distinguish the ALJ's finding that it would be inappropriate to apply the doctrine articulated in *Caesar's Tahoe*, 337 NLRB 1096 (2002), and failed to address the arguable basis doctrine as found by the ALJ. (RAB at 20-22) To the contrary, General Counsel referenced in his exception brief a chain of instances where Respondent was playing the shell game regarding the placement of Martinez and other Operations Representatives. This is reflected in how it has responded to the Union in the underlying representation case matters and its refusal to process the grievances that address

work duty and contractual issues involving these employees. (JX 20, JX 30, JX 32, Tr. 286-287) To this end, contrary to Respondent’s assertions, the record evidence establishes that the analysis articulated in *Caesar’s Tahoe* and *Public Service Company of New Mexico*, 337 NLRB 193 (2001), are applicable to these facts rather than the “sound arguable basis” doctrine by Respondent and the ALJ. Where an employer, as here, takes a position that employees are not in the bargaining unit solely because of their misclassification, and then refuses to process and arbitrate grievances protesting the misclassifications, the employer is unilaterally modifying the certified unit and the collective-bargaining agreement. (JX 30, JX 32, Tr. 286-287) The contract is silent on the inclusion of Operation Representatives. What is clear from the record is that Martinez and other Operations Representatives perform a significant amount of bargaining unit work. (Tr. 350, 365) Accordingly, Respondent has no basis to exclude Martinez and other Operation Representatives from the unit and contract coverage and has violated the Act

III. Conclusion

Respondent’s Answering Brief to General Counsel’s Exceptions lacks merit and is not supported by the record. It is respectfully requested that the Board grant the General Counsel’s exceptions and otherwise affirm the decision of the ALJ.

Dated Albuquerque, New Mexico, this 27th day of April 2012.

Respectfully submitted,

/s/ **David T. Garza**

David T. Garza
Counsel for the Acting General Counsel
National Labor Relations Board, Region 28
421 Gold Avenue, SW, Suite 310
Albuquerque, NM 87103-0567
Telephone: (505) 248-5130
E-mail: David.Garza@nlrb.gov

CERTIFICATE OF SERVICE

I hereby certify that a copy of ACTING GENERAL COUNSEL'S REPLY BRIEF 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, E-Mail, and regular mail on this 27th day of April 2012, on the following:

Via E-Gov, E-Filing:

Lester A. Heltzer, Executive Secretary
Office of the Executive Secretary
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570

Via E-Mail:

Thomas L. Stahl, Attorney at Law
Jeff Lowry, Attorney at Law
Rodey, Dickason, Sloan, Akin & Robb, PA
P.O. Box 1888
Albuquerque, NM 87103
E-Mail: tstahl@rodey.com
E-Mail: jlowry@rodey.com
Attorneys for Public Service Company of New Mexico

John L. Hollis, Attorney at Law
Law Offices of John L. Hollis
6020 Constitution NE, Suite 4
Albuquerque, NM 87110
E-Mail: jhollis0@mindspring.com

Via Regular Mail:

Public Service Company of New Mexico
Avarado Square, MS 2130
Albuquerque, NM 87158

/s/ David T. Garza

David T. Garza
Counsel for the Acting General Counsel
National Labor Relations Board, Region 28
Albuquerque Resident Office
421 Gold Avenue SW, Suite 310
Albuquerque, New Mexico 87103-0567
Telephone: (505) 248-5130