

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

PUBLIC SERVICE COMPANY OF
NEW MEXICO

and

Cases 28-CA-23391
28-CA-66164

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

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

Frederic D. Roberson, Esq. for the Acting General Counsel.
Paula G. Maynes, Esq. and K. Janelle Haught, Esq.
for the Respondent.
John L. Hollis, Esq. for the Charging Party.

DECISION

Statement of the Case

Eleanor Laws, Administrative Law Judge. This case was tried in Albuquerque, New Mexico on November 15–18, 2011 and January 18–19, 2012. The International Brotherhood of Electrical Workers, Local Union No. 611, AFL-CIO (IBEW, Local 611, or Union) filed the charge in Case 28-CA-23391 on March 4, 2011 and the Acting General Counsel issued the complaint on May 31. Public Service Company of New Mexico (PNM, Respondent, or Company) filed a timely answer¹ on June 21 denying all material complaint allegations and setting forth its defenses. Respondent filed an amended answer on June 29, clarifying the job titles of various individuals connected to the complaint allegations. On October 11, Respondent filed a second amended and a motion to dismiss portions of the complaint, arguing that certain issues had been previously litigated. The Board issued an Order denying the motion on November 10. Respondent renewed the motion at the hearing, and I denied it pursuant to the Board's order.

The Union filed the charge in Case 28-CA-66164 on October 5, 2011. The Acting General Counsel consolidated the cases and issued a consolidated complaint on October 31.

¹ Respondent requested, and was granted, an extension of time to file the answer.

Respondent filed a timely answer on November 14, denying all material allegations and setting forth its defenses.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the PNM and the Acting General Counsel,² I make the following.

Findings of Fact

I. Jurisdiction

Respondent, a New Mexico corporation, with its principal office and place of business in Albuquerque, New Mexico, purchases, produces, transmits and sells electricity. During the past twelve months and at all material times it derived gross revenues in excess of \$500,000 and purchased and received goods valued in excess of \$50,000 directly from points outside the state of New Mexico. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. Complaint Allegations

All of the complaints allege that Local 611 is the exclusive bargaining representative of the employees in the following unit (Unit):

All employees of the Respondent's Electric, Water, Transmission, Distribution, Production, Meter Reader, and Collector departments in the divisions and jobs referenced in Respondent's collective-bargaining agreement with the Union effective by its terms from May 1, 2009, through April 30, 2012.

PNM admits Local 611 is a Section 2(5) labor organization that it has recognized as the exclusive representative certain employees covered by a series of bargaining agreements, including the agreement effective from May 2009 through April 30, 2012.

The consolidated complaints allege that Respondent violated Section 8(a)(1) of the Act by threatening employees in various ways, denying Union representation to employees, conducting interviews after denying Union representation, refusing to meet with an employee because of his insistence on Union representation, denying an employee the Union representative of his choice, misrepresenting *Weingarten* rights, and interrogating employees about their Union activity. The complaints further alleges that Respondent violated Section 8(a)(1) and (3) by imposing more onerous working conditions on an employee. Finally, the complaints allege that Respondent violated Section 8(a)(1) and (5) by failing to provide the Union with various requested information, implementing new policies regarding Union business agents' access to

² The Union did not file a brief.

Company property, requiring meter readers to work on Saturdays, and implementing changes to the grievance process.

B. Summary of Previous Decisions

5

This decision culminates, for the time being anyway, the third recent go-round for these parties over some similar disputes.³ Because the previous decisions address some related and analogous complaints, I will briefly summarize them here.

10

On March 2, 2011, Administrative Law Judge (ALJ) Burton Litvack issued a decision in Case 28-CA-23148. He found that PNM violated the Act by its delay in responding to the following information requests:

15

(1) the discipline (if any) issued to Dave Delorenzo and Kelly Bouska for their violations of [Public Regulations Commission] PRC and State of New Mexico regulations and statutes regarding a gas leak at the intersection of Montgomery and Carlisle in Albuquerque, New Mexico and their violation of Respondent's Do The Right Thing policy, and

20

(2) discipline issued to any of Respondent's employees for violations of PRC and State of New Mexico regulations and statutes since January 2008

25

He found the information requested was relevant to the Union's representative function, and that Respondent's five-and-a-half month delay in responding to it was unreasonable. The Board affirmed Judge Litvack's decision on May 24, 2011. 356 NLRB No. 60 (2011).

30

On February 12, 2012, ALJ Schmidt issued a decision in Case 28-CA-022655. He found that PNM violated the Act by failing to provide certain requested information, and by unilaterally restricting Union Assistant Business Manager Ed Tafoya's access to one of its facilities. Judge Schmidt found that PNM had not violated the Act with regard to certain other information requests, removing and throwing away a Union posting from a bulletin board, removing Union steward Eric Cox from a meeting and subjecting him to a disciplinary investigation, and unilaterally implementing certain policies. Both parties filed exceptions and, at the time of this decision, the matter was pending before the Board.

35

C. Background and Respondent's Operations

1. Facilities

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³ There was also a previous case from 2001, where the Board upheld the ALJ's finding that Respondent violated the Act by failing to bargain over certain decisions and their effects, requiring employees to wear uniforms, and eliminating the meter service technician position. *Pub. Serv. Co. of N.M.*, 337 NLRB 193 (2001).

50

PNM’s primary place of business is Albuquerque, but it operates a number of facilities throughout New Mexico. Relevant to this decision are the Edith Service Center (ESC) in Albuquerque, the San Juan Generating Station in Farmington, and the Belen Office.

5 A variety of employees work out of the ESC, which encompasses roughly 12 acres and contains multiple buildings, including the Administration building, Line Department building, Meter Department building and a warehouse. (Tr. 749–50).⁴ The employees who work at the ESC include: Linemen who maintain overhead and underground lines; Substation Electricians who maintain large power equipment; Communications Technicians who maintain radio
10 communications; Relay Journeymen who maintain PNM’s protective relaying schemes; and Meter Journeymen who install metering equipment. (Tr. 746–47). The ESC also stores a large volume of materials and equipment. (Tr. 751–52).

15 The San Juan Generating Station in Farmington is a coal-fired power plant that covers roughly 30–35 acres. The Administration building sits in the parking lot outside of a fence that encompasses the plant. Inside the fence are generation assets, auxiliary assets, shops, and offices. (Tr. 366). The control rooms and distributive control system shop have been secure sites under North American Electric Reliability Corporation (NERC) regulations since January 2011. (Tr. 374, 464). Employees required to access the controlled sites must pass a criminal background
20 check and received swipe cards permitting them to enter through a turnstile. (Tr. 464).

2. Company and Union Personnel

25 PNM has roughly 1,800 employees, 635 of whom belong to the IBEW. (Tr. 605). Some Company policies apply to all employees, regardless of Union status, while others do not. For example, a different discipline policy applies to Union versus non-Union employees. Employees covered by the collective bargaining agreement (CBA) may only be terminated for just cause, whereas non-Union employees may be terminated for any reason. There are also differences in
30 other terms and conditions of employment, such as entitlement to bypass overtime, required training, and compensation. (Tr. 600–03). On the other hand, certain policies apply to all employees alike, regardless of Union membership. (Tr. 631; CP 2).

Laurie Monfiletto is the Director of Human Resources for the utility portion of PNM. (Tr. 581). In that capacity, she oversees employee relations, labor relations, staffing, and
35 learning/development issues. She supervises six employees: four business partners who are assigned to PNM’s business units, a Labor Relations Representative, and a Disability Specialist. (Tr. 582). The business representatives are: JoAnn Garcia for the Marketing Customer Service Group; Sonia Otero for the Electric Service Business Unit (EBSU); and Tim Padilla and Eleanor (Ellie) McIntyre for the generation part of the business. McIntyre has been the Human Resources
40 Supervisor at the San Juan Generating Station since February 2010. She supervises Padilla, who holds the title of Senior Human Resources Consultant. (Tr. 582–83, 901, 929, 1007).

4 Abbreviations used in this decision are as follows: “Tr.” for transcript; “R” for Respondent’s exhibit; “GC” for Acting General Counsel’s exhibit; “CP” for charging party’s exhibit; “JT” for joint exhibit; “AGC Br.” for the Acting General Counsel’s brief; and “R Br.” for Respondent’s brief.

Ray Mathes is PNM’s Labor Relations Manager. He supervised Cindy Castro, who worked for PNM as a Labor Relations Consultant from November 2009 to April 2011. (Tr. 528). Castro’s work included tracking grievances and responding to requests for information from the Union. She was responsible for labor relations of the meter readers, collectors and the ESBU. (Tr. 528). Mick Oldham, Senior Labor Relations Representative, also reports to Mathes. (Tr. 901, 904).

Jeff Nawman has been PNM’s Manager of the Substation Communications and Relay Departments since February 2011. (Tr. 743). He was previously the Manager of the Line Department and Distribution Operations, a position Tom Mitchell assumed in April 2011.⁵ (Tr. 832, 861). Dale Smyth was a Supervisor of the Line Department until his retirement in December 2011. (Tr. 805). Ralph Pesce is a Supervisor in the Construction and Maintenance Department. (Tr. 806). Ernie Rodarte is the Compliance Manager at the San Juan facility. (Tr. 943).

Ed Tafoya works for the Union as an Assistant Business Agent, servicing the state of New Mexico. He has held this position since October 2002. In this capacity, he negotiates contracts, represents members in the grievance and arbitration processes, and deals with management on various other issues that arise. He also represents members in meetings from which the employee reasonably perceives discipline may ensue. (Tr. 31–32). Tafoya primarily services employees working in the EBSU at PNM’s Albuquerque and Belen offices, and oversees approximately 20 Union stewards. (Tr. 37). Shannon Fitzgerald is also an Assistant Business Manager with the IBEW, servicing members in the power production units at PNM’s San Juan, Afton and Reeves Generating Stations, and overseeing approximately 20 Union stewards. (Tr. 350). Prior to assuming this position, he had been a Journeyman Mechanic, and had served as a Union steward since late 1984 or early 1985. (Tr. 352).

Finally, many of the allegations concern Eric Cox, who worked for PNM as a Journeyman Lineman until early 2009, when he moved from the Line Department to the Maintenance Department. (Tr. 221, 855). Cox has been a Union steward since 2006. (Tr. 221).

III. Factual Findings and Decision

Because of the numerous allegations, I have broken down my factual findings and conclusions, including credibility determinations, into separate sections below. In preface, I will state that in reaching my conclusions, I often had the impression that both parties were blindly and stubbornly digging in their heels, caring more about who could exert the most power and be technically “right” rather than trying to come to a workable solution. In my view, a change in this dynamic is long overdue.

A. Alleged Changes to Informal Step of the Collective Bargaining Agreement

⁵ Dale Smyth served as interim manager after Nawman left the position and before Mitchell assumed it on a permanent basis.

Complaint allegation 9(d) alleges that since on or about July 7, 2011, a more precise date being unknown to the Acting General Counsel, the Respondent has unilaterally implemented the following changes to the Informal Step of the contractual grievance and arbitration procedures:

- 5 (1) requiring stewards at the initial stage of the Informal Step to explain in detail which articles of the contract are alleged to be violated and how these articles have been violated;
- 10 (2) refusing to sign in receipt of grievances that have been put to writing after oral grievances have been presented;
- (3) refusing to talk about grievances with Union representatives on company time; and
- 15 (4) requiring more than one supervisor be present during Informal Step grievance meetings.

1. Facts

20 PNM and the IBEW have a long history together. They have been parties to successive collective bargaining agreements since the 1970s. The current CBA runs from May 1, 2009 through April 30, 2012. (JT 1).

25 The Grievance process is set forth in the CBA at Article 10. It is a three-step process, with each step requiring a higher level of approval for resolution. The first step, referred to as the informal step in the CBA, is at issue here. The relevant section of Article 10 is Part B, which states in full:

30 **B. Informal Step.** Any employee, or designated member of a group of employees, having a grievance, as defined herein, shall first take up the grievance orally with the immediate supervisor of the grievant, who will attempt to adjust the grievance informally.

35 In this Informal Step, prior to the grievance being reduced to writing, grievance settlements will be considered as non-binding precedent setting unless otherwise mutually agreed.

Any employee may request the presence of a Union steward to represent the employee in the grievance.

40 If the grievance is not adjusted to the satisfaction of the grievant at this informal step, it shall be reduced to writing, on the appropriate forms and presented to the supervisor no later than fifteen (15) days after the occurrence of the event giving rise to the grievance.

Any grievance which is reduced to writing shall include the following matters:

- 45 1. A statement of the grievance and all facts or events upon which it is based, as well as the date of occurrence of the alleged event on which it is based;

2. The specific provision of the Agreement which is alleged to be at issue;
3. The remedy sought by the grievant for resolution of the grievance;
- 5 4. The names of all employees involved in the grievance
5. The signature of the grievant, or steward, along with the date the grievance was presented to the supervisor.

10 The supervisor shall respond, in writing, no later than fifteen (15) days after being presented with the grievance. If there is no response from the supervisor, the grievance shall proceed to Step Two.

15 If the grievance is not satisfactorily adjusted at the informal step it shall be referred to Step Two.

(JT 1). The informal step, also referred to as Step 1, generally takes place in the supervisor’s office or in the area where the employee works. (Tr. 34). The time limits can be extended upon the parties’ mutual agreement. (Tr. 161).

20 Monfiletto testified as to her understanding of the informal step. She stated that the supervisor, Union steward and employee talk through the issue. If they can come to a remedy, the grievance goes away. If the supervisor says he or she cannot remedy the situation, the grievance is reduced to writing. A supervisor who does not know whether or not he or she can meet the remedy asks for more time to get the information they need before moving to the written part of Step 1. If the supervisor cannot get an answer in time to avoid threatening the 15-day time limit, the supervisor will grant an extension. (Tr. 595–96). Oldham, McIntyre, and Padilla share this view. (Tr. 926–29, 957, 1035, 1058).

30 Business agents Tafoya and Fitzgerald, as well as Union stewards Eric Cox, Clay Cash, Mike Patscheck, and Allen Barnard all testified regarding their understanding of and experience with the informal step. Though not using precisely the same words, they all recounted that prior to the alleged changes, the informal step involved the supervisor and Union steward sitting down to talk about the alleged violation to see if they could settle it. If they could not resolve it easily
 35 then and there, it was reduced to writing, and the supervisor signed that he had received the grievance. Stewards commonly had the written part of the informal step filled out when they went into the initial meeting with the supervisor. Once the supervisor signed in receipt of the grievance, he or she had 15 days to respond. The steward then signed in receipt of the response, and if the grievance was not resolved, it proceeded to Step 2. (Tr. 34–48, 117, 220–24, 266, 273–
 40 74, 351–52, 405, 407, 412, 422–23; 1079–80; JT 1).

The Step 1 form has two separate lines for the supervisor to sign and date; one indicating the date of receipt and another indicating the date of the response. (Tr. 318; GC 7). Because the supervisors must sign in receipt within 15 days of the alleged violation, the Union had concerns
 45 that if they would not sign until 15 days from the oral part of Step 1, the grievances would be

untimely.⁶ (Tr. 163, 413). Tafoya testified that, from the Union’s perspective, the decision of whether or not to agree to an extension is at the steward’s discretion, and depends upon the steward’s impression of whether the request is made in good faith.⁷ (Tr. 163). After signing in receipt, the supervisor could let the employee know at a later time whether he/she could remedy the grievance. According to Tafoya, this was how Respondent processed the informal grievance from 1977 until mid-2011. (Tr. 34–38).

During the summer of 2011, there were many new supervisors at PNM. Because of this, starting in May, Monfiletto began a series of supervisor trainings by the Management Associated Results Company (MARC). (Tr. 592, 611, 971). The MARC training gives a history of labor relations, and provides guidance on handling difficult conversations. (Tr. 624). PNM’s Human Resources Department also distributed to its supervisors a document dated October 25, 2011, called “Informal Grievance Guidelines for Supervisors.”⁸ (Tr. 362; GC 3; R A). The document gives guidelines for supervisors involved to handle Step 1 grievances. The bullet point items the Union most contests are:

- You are not obligated to hear a grievance on a walk-in basis. Schedule a time for the informal meeting with the employee and the union steward that is convenient for you. Ensure second supervisor is available and/or attends the meeting, if you feel is needed.
- Document the meeting as thoroughly as possible. Be sure to follow MARC documentation process on page 52 under Chronological-Time-Sequence Note Taking in your MARC manual.
- Do not accept a written grievance until the informal process has occurred.
- Have the employee/union steward identify the section(s) of Articles allegedly being violated, and ask them to explain how they were violated. If the employee/union steward cannot provide this information, document what they said.
- Do not state that you cannot meet the remedy at this time, but instead ask for time to further research and/or obtain approval or communicate up (Management chain/HRBP).
- If at any time before the informal process has been completed a union steward presents a step 1 written grievance and requests you to sign it, you should indicate the informal Step has not been completed, that you are attempting to follow the contract grievance procedure, and that you will sign the Step 1 grievance if the matter is not resolved in the Informal Step.
- If you have had the informal meeting but have not yet provided the employee or union steward with the Company response, and the union steward presents a written

⁶ Although Respondent contends that the Union controls when the grievance is brought, this is not always the case, as there was testimony that sometimes the employee does not raise the grievance with the Union until the end of the time period due to leave, schedules, or other reasons.

⁷ For example, Barnard said he would give extensions to supervisors if he felt it would be worthwhile for them to go talk to someone else. (Tr. 431).

⁸ GC 3 is a previous version dated October 6. Padilla testified that he and Otero co-authored the document. (Tr. 973).

grievance, you must state that you have not denied the remedy at this point and still consider this grievance at the Informal Step, and are attempting to follow the contract that you will sign Step 1 grievance if it is not resolved at the Informal Step.

- If a union steward asks if you are refusing to sign for the written grievance, restate that you are attempting to follow the contract, have not denied the remedy, and will attempt to settle at the Informal Step, but you will sign Step 1 grievance if the matter is not resolved at the Informal Step.
- If the union steward gives you a written grievance with “refused to sign” noted on it, continue to work at addressing the grievance at the Informal Step.

(GC 3; R A; emphasis in original). The guidelines were distributed to all supervisors with Unit employees.⁹ (Tr. 593, 611). Content in the guidelines had been discussed with individual supervisors previously on a piecemeal basis. (Tr. 616).

Before the MARC training, McIntyre believed the Union and the Company were not doing a good job implementing the informal process and getting grievances settled at the lowest possible level. (Tr. 1035). She perceived the training as providing supervisors with a better understanding of how to follow the CBA. (Tr. 1034–35). Padilla perceived the MARC training and the guidelines as consistent with the CBA, but not consistent with how grievances were actually being processed. (Tr. 974).

Jamie Shockey was a member of the Union for five years until he became a supervisor in late May or June 2011. He served as a Union steward and was trained by Fitzgerald and others on handling grievances. (Tr. 1078). In his experience as a steward, supervisors generally did not ask for more time when he would present the oral grievance at the Step 1 meeting. (Tr. 1080). On one occasion involving an intoxicated employee the supervisor asked for, and was granted, additional time. (Tr. 1082). Shockey took the MARC training after he became supervisor in or around early June 2011. He did not view it as a departure from the contract, and opined it was intended to get supervisors to follow the contract. (Tr. 1083). He did see it as a departure from how the informal step had previously been handled. (Tr. 1109–10).

According to Tafoya, PNM also trained employees on the MARC principles 12 years ago. The Union did not agree to abide by the MARC principles then or now. (Tr. 49–50). Tafoya’s objection to the MARC principles is based on his perception that they formalize the intended informal nature of the first step. He elaborated that the MARC principles advise supervisors to bring in a witness, schedule grievance meetings, and “go up the ladder” before answering grievances. (Tr. 107).

Mike Patscheck works as an instrument control electrician (ICE) journeyman in the maintenance department at PNM’s San Juan facility. He has served as a Union steward for approximately two years. (Tr. 410). On July 7, 2011 Patscheck met with acting supervisor Dennis Mitchell to process a grievance for employee Perry Woolsey. After the verbal discussion, Mitchell said he could not meet the remedy, but would not sign in receipt of the Step 1

⁹ McIntyre did not provide Fitzgerald with the materials from the MARC training. (Tr. 1037).

grievance. (Tr. 411). Fitzgerald advised Patscheck to file the grievance the following day with Woolsey’s regular supervisor, Shockey. (Tr. 353–54). On July 8, Shockey, Mitchell, Patscheck and Woolsey met. (Tr. 1084). Woolsey’s grievance involved an alleged change to his job description, and he sought a severance package of roughly 9–10 months’ pay as a remedy. (Tr. 5 1086). Shockey stated this would probably go beyond his or anyone at the plant’s ability to remedy, but stated he would find out what human resources had to say about it. (Tr. 1087). Though he did not feel he could meet the remedy, Shockey wanted to know where the company stood in a pending reorganization process before he responded, so he did not sign in receipt of the grievance. (Tr. 1088–89). Patscheck testified this was a change from how Respondent 10 processed the roughly 50 grievances he had previously filed. (Tr. 410, 412).

In early September 2011, Tafoya began receiving complaints from other stewards who reported to him that supervisors were not “signing in receipt” of grievances at the informal step. Instead, the supervisors were requiring employees to go through the CBA and explain which 15 articles were allegedly violated and why, and they would not sign in receipt of grievances. (Tr. 36–38).

In late September, Glenn Miller, an employee in the meter reader department, notified Tafoya that supervisor Steve Kniffen would not sign in receipt of a grievance. Tafoya came to Respondent’s headquarters and spoke with Kniffen. He explained to Kniffen how he thought the 20 CBA had been violated, and asked if Kniffen could meet the remedy. In response, Kniffen contacted his supervisor, Eric Morgan. Morgan joined the meeting, and asked Tafoya what he was doing on Respondent’s property. When Tafoya explained that he was there as a representative, Morgan told him he was not allowed on Respondent’s property. Neither Morgan 25 nor Kniffen signed in receipt of the grievance. Instead, Morgan asked Tafoya to schedule a time to sit down and discuss the matter. Tafoya responded that they could arrange a meeting at a later time, but he believed that was beyond what was required at the informal step. (Tr. 39–44).

Since Kniffen would not sign in receipt of the grievance, Tafoya decided to send it to the 30 second step. He reduced the grievance to writing on the second step form and called Mick Oldham to meet. On September 30, 2011, Tafoya and Oldham met in the lobby of Respondent’s headquarters building. (Tr. 45–47, 908–09). Tafoya explained that he had a couple of grievances where the supervisor would not sign in receipt, and he wanted to process them up to the second step. Oldham responded that these grievances had not been through the first step, and he would 35 not sign them.¹⁰ (Tr. 45–47, 910–11).

Cox noticed that since the Fall of 2011, the Union meets with two supervisors, they require a scheduled meeting, and they will not answer whether or not they can remedy the grievance. In addition, Cox testified that Supervisors Smyth, Mary Ann Brandon and Ralph 40 Pesce would not process grievances unless he explained the violation “line by line, article by article.” (Tr. 220–24, 266, 280).

Clay Cash works as an ICE journeyman, instrument control electrician at PNM’s San 45 Juan facility. He has served as a Union steward for roughly 7 years. (Tr. 402). He observed that

¹⁰ He did sign grievances that the supervisor had signed on the Step 1 form.

in the fall of 2011 supervisors were making the stewards go through grievances “article by article” at the informal step and they were not signing in receipt of the grievances. (Tr. 403). On August 23, after Cash finished the oral part of the informal step, Bob Vozza would not sign a grievance Cash filed on behalf of Fitzgerald. (Tr. 403–05). Vozza told Cash he had 15 days to sign the grievance. (Tr. 404). Cash’s understanding was that the Union has 15 days to file the grievance. At that point, after the supervisor signs stating that he has received the grievance, he or she has 15 days to come back with an answer. (Tr. 405). Cash tried to show Vozza this in the CBA, but Vozza did not change his position. (Tr. 405).

Allen Barnard, who has worked with PNM for 29 years, is an environmental process operator at PNM’s San Juan facility. At the time of the hearing, he had been a Union steward for about 10 months. (Tr. 421). On October 8, 2011, Barnard had some grievances involving employees Brian Donisthrope and Mike Pronio. Barnard asked to meet with supervisor Troy Bateman, and Bateman responded that he was too busy and would need to get with his team manager.¹¹ (Tr. 424, 430). The next day, Barnard met with Batemen and the team manager Joel Roundy. Bateman asked for more time before he signed in receipt of the grievance, but Barnard would not grant it. (Tr. 378). Barnard wrote on the form that the supervisor would not sign, and gave him a copy. After the 15 days passed for the supervisor to respond, Fitzgerald presented Padilla with the Step 2 forms. Padilla would not receive the unsigned Step 2 grievances, and suggested that the Union re-file the Step 1 grievance. (Tr. 355–56).

On October 18, 2011, Barnard processed a grievance for employee Bret Cartwright. He met with supervisor Jeff Cuffee and they could not settle the matter. Barnard signed the written grievance and gave it to Cuffee to sign that he had received it. Cuffee did not sign in receipt of the grievance and left it on the table. (Tr. 427–28).

2. Decision and Analysis

Well-settled law provides that an employer may not change the terms and conditions of employment of represented employees without providing their representative with prior notice and an opportunity to bargain over such changes. *See NLRB v. Katz*, 369 U.S. 736, 747 (1962). A grievance procedure is a mandatory subject of bargaining and, hence, a unilateral change therein likewise constitutes a refusal to bargain. As the Board stated in *Bethlehem Steel Co.*, 136 NLRB 1500, 1502 (1962):

A method for presenting and adjusting grievances which deal with “wages, hours, and other terms and conditions of employment” is manifestly related to those matters. In accord with Board and court decisions, we find that . . . a grievance procedure [is a matter] related to “wages, hours, and other terms and conditions of employment” within the meaning of Section 8(d) of the Act and, therefore, [is a] mandatory subject for collective bargaining.

See also *Westinghouse Electric Corp.*, 141 NLRB 733, 735–736 (1963), reversed on other grounds 325 F.2d 126 (7th Cir. 1963). Accordingly, unilateral action by an employer that

¹¹ The team manager is above the supervisor in the chain-of-command. (Tr. 424-45).

substantially changes a contractual grievance procedure violates Section 8(a)(5) and (1) of the Act. *Motoresearch Co.*, 138 NLRB 1490, 1492 (1962); *Athey Prods. Corp.*, 282 NLRB 203, 207 (1986).

5 The fact that a particular working condition or benefit is not expressly embodied in the governing collective agreement is immaterial where satisfactorily established by practice or custom. See *Citizens Hotel Co.*, 138 NLRB 706, 712-713 (1962), *enforced*, 326 F.2d 501 (5th Cir. 1962); *Frontier Homes Corporation*, 153 NLRB 1070, 1072-73; *Cent. Ill. Pub. Serv. Co.*, 139 NLRB 1407, 1415 (1963), *enforced*, 324 F.2d 916 (7th Cir. 1963). Regular and longstanding
10 practices that are neither random nor intermittent become terms and conditions of employment even if not addressed in a collective bargaining agreement. As such, these past practices cannot be changed without offering the unit employees’ collective bargaining representative notice and an opportunity to bargain, absent clear and unequivocal waiver of this right. *Sunoco, Inc.*, 349
15 NLRB 240, 244 (2007), citing *Granite City Steel Co.*, 167 NLRB 310, 315 (1967); *Queen Mary Rest. Corp. v. NLRB*, 560 F.2d 403, 408 (9th Cir. 1977); *Exxon Shipping Co.*, 291 NLRB 489, 493 (1988); *DMI Distrib. of Del.*, 334 NLRB 409, 411 (2001). This is no less true where the practice is denominated a “privilege,” voluntarily instituted or bestowed by the employer. *Cent. Ill. Pub. Serv. Co.*, 139 NLRB at 1415. A past practice must occur with such regularity and
20 frequency that employees could reasonably expect the “practice” to continue or reoccur on a regular and consistent basis. *Phila. Coca-Cola Bottling Co.*, 340 NLRB 349, 353–354 (2003); *Eugene Iovine, Inc.*, 328 NLRB 294, 297 (1999).

As cited above, Respondent’s witnesses admit, and I find, that there was a longstanding practice of handling the informal step of the grievance process as the Union witnesses described
25 it. I further find that this practice changed during the summer of 2011.¹² In response, Respondent asserts rather that the guidelines it distributed were suggestions rather than requirements on how supervisors handle grievances. It also contends that the supervisors’ subsequent adherence to the guidelines was simply an attempt to bring the informal step in line with the CBA.

30 I will first briefly address the argument that the guidelines were merely optional. It is clear from the testimony of several Union stewards and Tafoya, detailed above, that supervisors abided by them regularly. The MARC training principles and/or the guidelines for supervisors therefore may have been optional in theory, but evidence shows they were implemented in
35 practice most of the time. In other words, there was a change.

Next, Respondent argues that any changes attendant to the MARC training and supervisor guidelines merely were attempts to enforce the contract as written. It is well settled
40 that the Board has the authority to interpret the terms of a collective-bargaining agreement to determine whether an unfair labor practice has been committed. *NLRB v. C & C Plywood Corp.*

45 ¹² While there was testimony regarding occasional deviations from the general practice, such as occasional extensions of time and the occasional presence of more than one supervisor, the evidence shows the informal step was generally handled in the same manner prior to the changes. Likewise, after the summer of 2011, the informal step was sometimes handled the way it was before, but the evidence shows it generally was handled in conformity with the guidelines.

385 U.S. 421, 428 (1967); *Resco Prods., Inc.*, 331 NLRB 1546 (2000). In *Resco*, the Board described its method of interpreting collective-bargaining agreements as follows:

5 In interpreting a contract, the parties' intent underlying the contract language is paramount and is given controlling weight. To determine the parties' intent, the Board looks to both the contract language and to the relevant extrinsic evidence, such as the parties' bargaining history and past practice. When there is no extrinsic evidence, the Board looks to the ordinary meaning of relevant contract terms as applied to the facts of the case.

10 331 NLRB at 1548.

The parties interpret the requirements of the informal step somewhat differently. The language of the contract is not precise enough to fit either specific approach to a T. Respondent contends that its interpretation is correct, citing to the contractual language and testimony of human resource officials and a supervisor for support. As an example, Respondent claims the Union stewards' practice of coming to the oral part of the step with the written grievance already prepared is noncompliance with the CBA. The Union claims that this practice is consistent with the contract, because the stewards do not present the written grievance to the supervisor until they have discussed the matter and the supervisor is unable to meet the remedy. The Union, of course, disputes much of Respondent's interpretation, and points to the contract language as well as past practice. For example, the Union deems the practice of having the supervisor "communicate up (Management chain/HRBP)" if he or she cannot independently meet the remedy as inconsistent with the informal step and consistent with Step 2. Respondent sees it as consistent with the informal step.¹³ As with the numerous other points of disagreement, I find that both Respondent's interpretations and the Union's interpretations, as advanced by the Acting General Counsel, are generally plausible.¹⁴

30 To borrow from ALJ Wilks' decision in *Dearborn Country Club*, 298 NLRB 915, 920 (1990), "[d]isposition of this case does not necessitate an arbitral-like process of interpreting

35 ¹³ The language of Article 10 states that the oral meeting at the informal Step is with the "immediate supervisor" and the employee and/or steward. Respondent argues in its brief that this precludes having a Union business agent present (R. Br. 66-67), but takes the position that it does not preclude having additional supervisors or managers present.

40 ¹⁴ Oldham's testimony, cited in Respondent's brief, that "the time limit for the oral step is bundled with the '15 days' for either party, and that there is not a separate time for the oral part of Step 1 versus the written part of Step 1" is an implausible interpretation. (Tr. 920-21; R Br. 62). The language of Article 10 clearly sets forth separate time limits. (JT 1). In addition, Respondent's argument in its brief that there are informal and formal procedures in Step 1 and that Cash's interpretation of the grievance process as "informal step, second step, arbitration" is wrong is conclusory and is belied by the fact that the contract itself calls the entire first step "Informal Step" and the phrase "Step 1" appears nowhere in Article 10. The last sentence of the informal step states, "If the grievance is not satisfactorily adjusted at the informal step it shall be referred to Step Two." (JT 1; R Br. 62). However, these examples do not necessitate a finding that Respondent's interpretation is wholly implausible.

what I find to be equally plausible contract interpretations. The past practice is clear and unambiguous.” “Where past practice has established a meaning for language that is used by the parties [in their agreement], the language will be presumed to have the meaning given it by past practice.” *Pan-Adobe, Inc.*, 222 NLRB 313, 325 (1976) (quoting *Pekar v. Local 181, Brewery Workers*, 311 F.2d 628, 636 (6th Cir. 1962), cert. denied 373 U.S. 912 (1963)). There is nothing in the contract that obviates the Union’s interpretation of the informal step. On the contrary, for the reasons set forth herein at footnote 13, its interpretation seems the more plausible one. In any event, the Union’s interpretation had clearly become the past practice.¹⁵ Accordingly, Respondent’s argument that its approach is mandated by the CBA fails, and I find the Acting General Counsel has established that the manner of processing the informal step that existed prior to the changes that began during the summer of 2011 was a longstanding past practice.

Respondent further advances a business justification argument, discussing the benefits of improved adherence to the CBA. (R Br. 69–72). There are two problems with this. First, as discussed directly above, the parties have different reasonable interpretations of the relevant part of the CBA. Accordingly, Respondent has not shown that the changes would yield improved adherence. Second, the argument does not justify bypassing the Union and implementing the changes to longstanding past practices unilaterally. *McCottor Motors Co.*, 291 NLRB 764, 769 (1988).

Finding a change in the terms and conditions of employment does not end the inquiry, however because the duty to bargain only arises if the changes are “material, substantial and significant.” *Alamo Cement Co.*, 281 NLRB 737, 738 (1986); *Flambeau Airmold Corp.*, 334 NLRB 165, 171 (2001). The General Counsel bears the burden of establishing this. *N. Star Steel Co.*, 347 NLRB 1364, 1367 (2006).

Turning now to consider the specific allegations, the Acting General Counsel did not submit evidence that supervisors refused to talk about grievances with Union representatives “on company time” as alleged in the consolidated complaint. Accordingly, I recommend dismissal of the complaint allegation at paragraph 9(d)(2).

A closely related issue that was not raised in the complaint but was fully litigated, however, was that supervisors required Union representatives to schedule informal step meetings with them. I do not find this to be a “material, substantial, and significant” change. The evidence showed that this did occur, but that supervisors also would meet the steward on the fly if it was convenient. Had the supervisors been unwilling to schedule a meeting without undue delay, then the change would arguably meet the standard. The Acting General Counsel, however, did not submit evidence that supervisors were unwilling to schedule time to discuss grievance, or that any grievances were untimely as a result.

I find that the Acting General Counsel has met his burden with respect to the remainder of the allegations in paragraph 9(d), particularly when the individual allegations are considered together. Stewards Cox, Cash, Miller, Patscheck, and Barnard, and Union business agent Tafoya

¹⁵ Indeed, Respondent conducted the MARC training and distributed the guidelines based on its view that this practice was incorrect.

all testified about specific informal grievances where the immediate supervisor called in another supervisor or manager. Cox and Cash provided specific examples of meetings where the supervisor would not go forward with the discussion unless they described the grievance line by line and article by article. Cox, Cash, Miller, Patscheck, Barnard and Tafoya each provided examples of meetings where the supervisor would not sign in receipt of the written grievance after meeting with the steward and not being able to meet the requested remedy. All told, the evidence shows that what was once an informal discussion between the steward and the supervisor is now a more formal and protracted affair, involving more than just the immediate supervisor on management's behalf at the initial meeting, and potentially involving human resources and/or higher-level management down the line. This is a significant change from the past practice of handling the informal step.

Moreover, the evidence shows that the net effect of these changes resulted in failure to process some grievances. Refusal to process a grievance violates Section 8(a)(5) of the Act. *Majestic Towers, Inc.*, 353 NLRB No. 29 (2008). Specifically, the Acting General Counsel presented evidence that after the expiration of the supervisor's 15-day time to respond at the informal step, Tafoya gave Oldham and Padilla certain grievances that the respective supervisors would not sign for as received. Oldham and Padilla would not process these grievances at Step 2, even though Tafoya explained that the supervisor had failed to sign the grievance after the initial meeting with the steward. As with much of the dealings between the Union and management, this standstill represents yet another ill-advised battle of wills. Given my finding that the supervisors' refusal to sign that they received a grievance deviates from past practice grounded in a reasonable interpretation of the contract, however, Respondent loses this one. It is important to note that, at any point between the time the steward presented the written grievance to the supervisor and the expiration of the supervisor's 15-day time period to respond, the supervisor could have taken the very steps that he/she claimed justified the initial failure to sign in receipt of the grievance. In fact, prior to the changes, when the supervisor came back with a response that he/she could meet the remedy after the Union presented the written grievance to the supervisor but before expiration of the supervisor's 15-day response time, the Union would withdraw the grievance. (Tr. 472–73). The supervisors' refusal to sign in receipt of grievances, even if they thought the oral part of the informal step should be continued, does not excuse complete inaction during the 15-day response time.¹⁶ These practices amount to a refusal to process grievances in violation of Section 8(a)(5).

Based on the foregoing, I find the Acting General Counsel has met his burden to prove that Respondent violated Section 8(a)(1) and (5) by making unilateral changes to the informal step of the grievance process.

B. Alleged Changes to Union Agents' Access and Related Threats

Paragraph 9 of the complaint alleges that Respondent violated Section 8(a)(1) and (5) when:

¹⁶ GC 7 makes clear that signing in receipt does not mean that the supervisor has responded one way or the other, as there is space for the response, as well as a separate line to sign and date.

(a) In about January 2011, a more precise date being unknown to the Acting General Counsel, the Respondent implemented a new policy requiring employees to obtain permission to escort visitors on the Respondent’s Edith facility premises.

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(b) In about January 2011, a more precise date being unknown to the Acting General Counsel, the Respondent implemented a new policy requiring all Union agents obtain permission before entering the Respondent’s Edith facility premises.

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(c) Since on or about October 4, 2011, the Respondent implemented and enforced new policies concerning Union agents’ and representatives’ access to the Respondent’s San Juan Generating Station facility, thereby restricting and limiting Union agents’ and representatives’ access to the Respondent’s facility.

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The complaint, at paragraph 5, further alleges that Respondent violated Section 8(a)(1) when:

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(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.

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(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.

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(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

1. Facts Relating to Tafoya

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The progressive narrowing of Union business agent Ed Tafoya’s access to PNMs property has been the subject of previous litigation. Judge Schmidt provided a thorough summary of Tafoya’s historical access in his decision at pp. 40–42, which I will not reiterate here. In sum, PNM took steps in 2008 to address security lapses at the ESC, one of which was a new access policy for visitors. (Tr. 752–55, 777). Though Tafoya previously enjoyed unfettered access to meet with his members at the ESC, he agreed, under the policy, to have the same access as contractors. He was given a badge that permitted him access between the hours of 6:00 a.m. and 6:00 p.m. In August 2009, Tafoya’s access was changed to that of a visitor.¹⁷ Pursuant to a January 15, 2009 Security and Access Control memo from the General Services Group/Security, the policy with regard to visitors is as follows:

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¹⁷ Judge Schmidt found this unilateral change violated Section 8(a)(1) and (5).

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Visitors: All visitors will be required to sign in with Security or at the front desk of the Administration Building. Visitor's badges or stickers will be issued to visitors by Security or by an ESC employee. Employees will be required to escort visitors at all times within the ESC compound. Visitors can be pre-announced to Security by calling 241-3642 and Security will provide notification when the visitor has arrived. Employees will be required to pick up and return visitors at either the main service gate (E-4) or the front lobby of the Administration Building. Visitor badges should be returned to Security at the end of the visit.

(Tr. 99; JT 2-1; Schmidt decision at 42).

During a Monday morning safety briefing in late 2010, Supervisor Don Wilkerson informed a group of 10–15 employees, including Cox, that the Company had come up with a new policy requiring employees to get management's approval prior to letting visitors into the ESC. Cox asked for a copy of the policy but Wilkerson did not provide it. (Tr. 231–32). Union steward Bert Garcia asked Smyth for a copy of the policy but he never received it. (Tr. 341).

In early January 2011, an unidentified working foreman called Tafoya and asked him to come and review a new email policy Respondent was implementing. The working foreman stated that he had his crew with him, and they shared a concern about the policy. While on the phone, Tafoya heard the supervisor, Gary Cash, state that Tafoya was not allowed on PNM property. (Tr. 52–55). At a later point, Tafoya and Castro worked out a time with Cash to come and have Tafoya review the policy with employee Joe Montano. (Tr. 770).

On January 10, 2011, Tafoya went to the ESC to investigate a potential grievance. Union Steward Eric Cox signed Tafoya in and escorted him to the new service delivery (NSD) Crew Room to speak with an employee John Vigil. (Tr. 55–58, 171, 228–31). When Nawman saw Tafoya, he stopped and asked why he was visiting the facility. Tafoya informed Nawman he was investigating a potential grievance. Nawman told Tafoya, in the presence of employees John Vigil, Jerry Serna, and Cox, that he needed permission from management to be on the property, and asked him to leave. (Tr. 58–59, 169-71, 230–32). Tafoya told Nawman that he had followed procedures by signing in and having Cox escort him. Nawman responded that, per PNM policy, Cox was required to get permission from management to escort Tafoya onto the premises. (Tr. 58–59). Tafoya asked Nawman for a copy of this policy but he did not provide one.¹⁸ (Tr. 60; Jt. Ex. 3).

A series of written exchanges ensued. On January 11, Tafoya sent an email to Cindy Castro and Nawman, recounting his conversation with Nawman about the policy, and formally requesting a copy of it. He also asked for information regarding how the policy was communicated to supervisors and employees. Castro responded in a letter dated January 20. In pertinent part, she stated that the January 15, 2009 Security and Access Control memo from the General Services Group/Security specifies the access control, and provided him with a copy of it. (Tr. 574; JT 2; CP 5). She also sent him an email on February 2, reiterating what she said in her letter, and adding that employees must check with their supervisors when deviating from their

¹⁸ Tafoya also later asked Cindy Castro for a copy. (Tr. 60).

assigned work. Castro further informed Tafoya that the company did not have information regarding how the policy was distributed to supervisors or employees. Tafoya replied on February 7, asking Castro to clarify that there was no written policy requiring management approval to escort visitors onto PNM property. He additionally asked her to clarify how and when employees and management learned of the policy, and notified her that he was investigating a possible grievance related to the matter. Castro responded that his access to the ESC was pending a decision from an ALJ, and that PNM's position remained unchanged. Tafoya reiterated his request on February 11. Castro responded on February 16, stating simply, "The Company stands by its previous responses." (JT 2; Tr. 61). Castro testified that, by referencing to the Security and Access Control memo, she advised Tafoya there was no written policy requiring management's approval to escort visitors. (Tr. 536). She did not recall directly telling Tafoya that there was no written policy requiring employees to obtain management's permission to escort visitors onto the ESC premises. (Tr. 573). Castro did not recall seeing such a policy, and the Access Control memo does not address management's approval for visitors. (Tr. 573–74; CP 5).

On an unidentified date, Bert Garcia, who was a steward at the time, received a request from Joe Pesce, who was then a working foreman, to sign Tafoya in so he could meet with him. Pesce drove Garcia to the security gate where Tafoya was waiting, and Garcia signed him in as a visitor. As Tafoya and Garcia were walking down the hall inside the Administration building, a security guard approached and told Tafoya he had instructions from Nawman not to allow Tafoya inside the building.¹⁹ (Tr. 340–41). During the first part of April 2011, Garcia observed Nawman, in the hallway by the Line Department, tell Tafoya he was not allowed on Company property. (Tr. 339, 343).

Nawman testified that prior to January 2011, any employee at the ESC could meet Tafoya at the front desk, sign him in, and escort him, though this practice was "certainly not our expectation." (Tr. 789). Nawman learned of the changes to visitor access from Mathes and his boss, Kirk Moser, but he could not recall or even approximate when. (Tr. 800). He thinks Moser told him verbally. (Tr. 801).

From January 11 forward, Tafoya was required to have management approval for access to the ESC. (Tr. 137–38, 789). Whether management needed to actually escort him while he was on the property depended on the supervisor involved. According to Tafoya, some supervisors sent the steward to escort him while others had a supervisor escort him throughout his visit. (Tr. 137-38).

¹⁹ There was a separate incident when Nawman instructed a guard to escort Tafoya off the premises. Nawman, however, left the area and did not hear what, if anything, the guard said to Tafoya. He therefore did not know whether any employees heard the guard speak to Tafoya. (Tr. 766). Tafoya did not testify about this incident. The only specific testimony the General Counsel elicited about a guard's statement to Tafoya came from Bert Garcia, and I will therefore infer this comment is the basis for complaint allegation 5(h).

Cox observed a contractor named Bizzell enter the property without following the new protocol. He saw people from the blood drive come and go without escorts. (Tr. 301). He has also seen Ken Harger, a retired foreman, at PNM’s facilities without an escort. (Tr. 322).

5 2. Analysis and Conclusions

a. Tafoya’s Access

10 As a condition of employment, the method of access by employees to their representatives for grievance resolution is a matter related to “wages, hours, and other terms and conditions of employment” within the meaning of Section 8(d) of the Act and is a mandatory subject of bargaining. *Bethlehem Steel Co.*, 136 NLRB 1500, 1502 (1962), *enforced*, 320 F.2d 615, 620 (3d Cir. 1963). *See also Westinghouse Electric Corp.*, 141 NLRB 733, 735-736 (1963), reversed on other grounds 325 F.2d 126 (7th Cir. 1963); *Motoresearch Co.*, 138 NLRB 1490, 1492 (1962); *J & H Rainwear*, 273 NLRB 497 (1984), and *Hous. Coca-Cola Bottling Co.*, 265 NLRB 766, 778 (1982).

20 The CBA does not address the level of access Union officials, including Business Agents, may have at PNM’s facilities. Accordingly, the analysis turns to whether, by past practice, access became a term or condition of employment. The legal framework, set forth above in the discussion of changes to the informal step of the grievance process, governs this analysis. It is undisputed that traditionally the Union had virtually unencumbered access to the plant for a variety of reasons. As Judge Schmidt observed, “the evidence shows a longstanding practice of granting union agents access to PNM’s private property for the purpose of providing service to the employees the Union represents.” (Smith decision at 42). As in the prior case, Nawman, a PNM manager with a long tenure at the ESC, admitted as much. In addition, Tafoya’s testimony on his past practice of meeting with employees, investigating grievances, filing grievances, attending investigatory interviews, meeting with supervisors, and conducting other union business inside Respondent’s facility since 2002 was not contradicted.

30 By requiring management approval for employees to escort for Tafoya into the ESC or before Tafoya could enter the ESC, PNM unilaterally removed a “real and substantial benefit” the Union previously enjoyed. *Granite City Steel Co.*, 167 NLRB 310, 315 (1967). Having a manager aware each time an employee requests to talk to Tafoya and requiring him to be escorted would clearly inhibit the kind of candid exchanges possible between the represented employees and their union agents. Such a requirement is a way to make certain managers know when and with whom meetings between the Union agent and Unit employees occur. The same is true for the requirement that Tafoya contact a manager before entering the ESC.

40 Respondent asserts that requiring management permission for Tafoya to access the ESC is part and parcel of requiring employees to obtain management permission before leaving their assigned duties. (R. Br. 57). There was no evidence presented, however, that this requirement was limited to employees who were on the clock or employees who had not already received supervisory permission to address Union matters during working hours. In addition, Respondent asserts in its brief that the issue was previously litigated and decided by Judge Schmidt. The issues, however, are different, with the level of access here being even more restricted than in the previous case. Finally, Respondent alleges a business justification, citing management’s right to

prevent unwarranted interruption of PNM’s operations. This, however, does not excuse the duty to bargain. *McCottor Motors Co.*, 291 NLRB 764, 769 (1988). Accordingly, I find the unilaterally-implemented changes to Tafoya’s access to PNM’s property in January 2011 are material and significant, and therefore violate Section 8(a)(1) and (5). *Ernst Home Ctrs.*, 308 NLRB 848, 849 (1992); *see also Turtle Bay Resorts*, 355 NLRB No. 207 (2010); *Sierra Publ’g Co.*, 291 NLRB 540 (1988).

b. Alleged Threats

The Board’s longstanding test to determine if there has been a violation of Section 8(a)(1) of the Act is whether the employer engaged in conduct which might reasonably tend to interfere with the free exercise of employee rights under Section 7 of the Act. *Am. Freightways Co.*, 124 NLRB 146 (1959). Employer conduct that violates Section 8(a)(1) of the Act includes threats to exclude union agents from a jobsite. *Swardson Painting Co.*, 340 NLRB 179 (2003). In specifically assessing whether a remark constitutes a threat, the appropriate test is “whether the remark can reasonably be interpreted by the employee as a threat.” *Smithers Tire and Auto. Testing of Tex.*, 308 NLRB 72 (1992). Further, “It is well settled that the test of interference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on the employer’s motive or on whether the coercion succeeded or failed.” *Am. Tissue Corp.*, 336 NLRB 435, 441 (2001) (citing *NLRB v. Ill. Tool Works*, 153 F.2d 811, 814 (7th Cir. 1946)).

With regard to Cash’s statement, I agree with Respondent that the Acting General Counsel has not presented sufficient evidence to prove this allegation. As Respondent notes, the “working foreman” was not identified. Based on a later meeting Cash arranged with Tafoya and Montano, it most likely was Montano, but Montano did not testify about this incident. No other employee who was present testified about it either. Though Tafoya heard voices of crew members in the background, the evidence does not establish that any of them were listening to the phone conversation between Tafoya and Cash or that they were subsequently informed of it. Accordingly, I recommend dismissal of complaint allegation 5(g).

By contrast, the other statements, detailed above, occurred in the presence of Union employees. Garcia overheard the security guard’s comment that Nawman instructed him not to let Tafoya on the property. Nawman’s statements in the NSD crew room were made in the presence of other employees. Respondent asserts that the contested comments were merely enforcement of the rule requiring management’s permission for Tafoya to access PNM’s premises. Given my finding that the rule was unlawfully unilaterally promulgated, however, reliance on such cannot provide a valid reason for the statements enforcing the rule. *Villa Avila*, 253 NLRB 76, 82 (1980).

The Board ruled on a similar issue in *Frontier Hotel & Casino*, 309 NLRB 761 (1992) *enforced in relevant part*, *NLRB v. Unbelievable, Inc.*, 71 F.3d 1434, 1438 (9th Cir. 1995).²⁰ There, the Board affirmed the ALJ’s finding that ejection of union representatives from the hotel’s premises interfered with union-related communications and coerced employees in

²⁰ In *Frontier Hotel*, there was an access provision in the applicable CBA. Here, established past practice renders this a distinction without a difference.

violation of Section 8(a)(1) of the Act. *Id.* at 766; *see also ABF Freight Sys., Inc.*, 325 NLRB 546, 562 (1998). In the present case, expulsion of the union representative from the premises took on the character of a threat (and its impact on Section 7 rights was magnified) by the presence of Union employees who witnessed the denial of access to their representative.

5 Accordingly, I find that the Acting General Counsel has met his burden to prove that Respondent threatened employees' Section 7 rights by sending the message that the person charged with administering their collectively bargained rights was no longer allowed inside Respondent's facility. I therefore find that, by the conduct alleged in complaint paragraph 5(h) and (i), Respondent violated Section 8(a)(1) of the Act.

10 3. Allegations Relating to Fitzgerald

a. Facts

15 Prior to October 2011, Union Business Agent Fitzgerald went to the San Juan facility most Tuesdays. He would call Human Resources employees, drive to the plant, get a temporary placard from the security guard to put on his dashboard, and enter the plant. (Tr. 366, 932). Fitzgerald would conduct whatever business he needed to without an escort. When he was done, he would return his placard and leave. (Tr. 367). McIntyre was aware of this practice, having
20 been informed of it by her predecessor, as well as having observed it for a year. (Tr. 1069–70). Employees also knew Fitzgerald visited on Tuesdays. (Tr. 1098). Fitzgerald generally met with supervisors in their offices. (Tr. 360).

25 Employees receive two breaks and a 30-minute lunch. (Tr. 1055, 1065). Fitzgerald visited employees in the shops and in the control rooms, and conducted Union business when employees were on breaks when possible. In the shops, he would talk to employees in the break room for varying amounts of time. (Tr. 1099). Some Unit employees, such as Plant Operators in the secure control rooms, do not get formal breaks. Fitzgerald talked to employees in the control room both
30 before and after it was a NERC-secured site. He would sign in, and an employee with a swipe card would escort him. (Tr. 443–44). His visits in the control rooms were varied in time but were usually relatively brief. (Tr. 1100–01).

35 McIntyre started as Human Resources Director at San Juan in February 2010. In early 2011, she spoke with Mathes and the Plant Director, Greg Smith, about wanting to make sure employees were not coming off the job to talk to Fitzgerald. She perceived his routine access to the plant as “odd” based on her labor background. (Tr. 1042–45).

40 An internal election within the IBEW resulted in a brief and temporary changing of the guard. Between July 15 and September 9, 2011, Jim Speight, a newly-elected Business Manager, employed his own assistants and stewards to represent the Local 611's members. (Tr. 158–59). Most relevant here, Aaron King served as the Assistant Business Manager for members at the San Juan Generating Facility from July 27 to mid-September 2011. (Tr. 159; 382). During that time period, Fitzgerald returned to his position of Journeyman Mechanic.²¹ (Tr. 373). Prior to

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²¹ Fitzgerald had to undergo a seven-year criminal background check pursuant to NERC regulations when he resumed his work at PNM.

King taking over as Assistant Business Manager in the Summer of 2011, King was in McIntyre's office to get paperwork started for his leave of absence from his job with PNM. He, McIntyre and Padilla discussed access to the plant. (Tr. 383, 1023). According to King, McIntyre did not like that Fitzgerald came to PNM unannounced. (Tr. 383). King stated that when the new administration was in place, they would work to compromise on a number of things. King told McIntyre that he would call and let them know when he would be coming, and that he would conduct most Union business at the Union hall. (Tr. 383–84, 942, 1023). Padilla and McIntyre offered King space in the Administration building to meet with Unit members. (Tr. 391–92, 938, 1023). King was not in office long enough to take Padilla up on this offer, but had no problem with the plan. (Tr. 392, 968). King viewed it as a courtesy rather than a requirement. (Tr. 395). King did not perceive that he and anyone from PNM entered into any agreement over his access to PNM's property. (Tr. 386). Padilla perceived that he and King agreed about the changed access, but did not view it as binding on Fitzgerald. (Tr. 952–53, 970). McIntyre did not view King's acceptance of the offer to meet with Unit members in the Administrative building as an agreement. (Tr. 1052). During King's 6–8 weeks as Assistant Business Manager, he had about three meetings with Padilla to discuss grievances. (Tr. 391–92, 938).

On October 4, 2011, Fitzgerald returned as Assistant Business Manager. He arrived at the San Juan Generating Station, where the security guard checked his ID and directed him to the admin building. After signing in, Fitzgerald started on his way to find Padilla, at which point the guard told him he needed to have Padilla escort him onto the property. (Tr. 356–57). Fitzgerald and the guard tried to call Padilla, but neither received a response. Fitzgerald then signed out, took off his badge, and drove around to the front gate to attend to other work. The guard at the front gate said he was ordered to deny Fitzgerald access. (Tr. 357). Fitzgerald went back to the Union hall. When he got ahold of Padilla and asked what was going on, Padilla apologized for the way things had transpired, but explained that PNM was changing his access. (Tr. 358, 951). Fitzgerald made an appointment to come back at 1:00 that afternoon. He arrived, signed in, received a badge, and Padilla escorted him into the Administration building. (Tr. 359). Clay Cash was also present. Padilla informed Fitzgerald that when he needed to talk to any of the stewards or employees, the employee would be called up to meet with him in a room in the Administration building. If Fitzgerald needed to be elsewhere on the PNM property, Padilla would escort him. (Tr. 446, 454–55, 954). Under the new rule, Padilla, McIntyre, or Ernie Rodarte, the compliance manager, needed to escort him whenever he came to the facility, and they would make a meeting room available to him in the admin building. (Tr. 981). In a meeting about a week later, Padilla said that the Union had not acquiesced to the loss of any rights to access the property during King's tenure. (Tr. 458–59, 978).

Cash observed vendors and contractors walking around the plant unescorted. (Tr. 459–60). Lloyd Beebe, a business agent from the Local 611 who represents contractor MJ Electric's construction electricians, appeared on the property unescorted in or around October 2011. (Tr. 462, 503). Beebe continued, through the time of the hearing, to have the same access Fitzgerald previously had. (Tr. 509, 511, 935). Contractor Jim Washburn does not require an escort. (Tr. 963). Other vendors have varying degrees of access. Some have temporary swipe cards, others use visitors' badges. (Tr. 1063).

b. Analysis and Conclusion

Respondent admits, and I find, that Fitzgerald had a practice of visiting the San Juan facility on Tuesdays and had wide-ranging access once there. (R Br. 73; 963, 1019, 1021). The legal framework discussed above regarding Tafoya’s access applies here, and accordingly I find Fitzgerald’s access prior to the changes constitutes a past practice. Likewise, for the reasons articulated above, I find the unilateral changes Respondent implemented are material, substantial and significant. The rationale is even more compelling than in Tafoya’s situation, since here either human resources management or the compliance manager now must escort Fitzgerald to meetings. Respondent’s argument that once escorted, Fitzgerald could meet with the employee in a private room misses the point entirely, as articulated in the discussion of Tafoya’s access.

Respondent’s argument that King “constructively agreed” to restrictions on the Union’s access is wholly unavailing and baseless in light of the evidence presented. Though no law was cited to support this argument, I will address it with the brevity it is due. King was not yet acting as a Union business agent when he had the discussions with McIntyre and Padilla at issue. Respondent’s argument that because King was wearing a suit and driving a Union truck, Padilla, a seasoned Human Resources employee who knew King had yet to take office, somehow believed King could bind the Union is absurd. This is particularly true considering Padilla’s own testimony that he did not consider any arrangement he made with King as binding on Fitzgerald. In a meeting about a week later, Padilla said that the Union had not acquiesced to the loss of any rights to access the property during King’s tenure. (Tr. 458–59, 978). Likewise, McIntyre did not view King’s acceptance of the offer to see employees in the Administration building as an agreement. (Tr. 1052). Finally, King testified he did not view the discussions he had with Padilla or McIntyre about access as an agreement. (Tr. 386). Apparently, nobody perceived there was an agreement.

Respondent cites to the NERC regulations to support the changes. First, these regulations became applicable in January 2011, yet no changes took place until August. Second, the NERC regulations apply to very few of the worksites at the San Juan facility yet the changes were not limited to these sites. Finally, Fitzgerald obtained the requisite background check to access NERC-regulated sites during his brief period out of office when he returned to work as a Journeyman Mechanic. He was permitted access when he lacked the required clearance, and, as Respondent noted, he was also permitted access to the NERC-secured control room after the changes. (R. Br. 77). Respondent did not present evidence, as it argued in its brief, that Fitzgerald’s access to the NERC-controlled sites was precluded by federal law. This position would be most difficult to support in light of the evidence regarding his continued access after the law took effect.

Lastly, Respondent pointed to concerns about productivity. The evidence that Fitzgerald interfered with employee production is scant at best. On one occasion, when Padilla saw three people talking with Fitzgerald, he asked whether they had work to do. Fitzgerald replied that if they did, they were free to go. (Tr. 936). Supervisor Rick Carroll once complained that Fitzgerald was causing a disturbance down in the shop when Carroll would not receive a request for information. He did not mention anything about production. (Tr. 961). McIntyre had a few conversations with Fitzgerald about employees needing to limit their visiting time to lunch and breaks. Fitzgerald, in a manner that McIntyre characterized as respectful, agreed and told her that

his purpose was to be available during lunch and breaks. (Tr. 1020). There was no evidence that any employee suffered production deficiencies from working on Union business with Fitzgerald. Any business justification lacks merit for the same reasons articulated in Tafoya’s case. *See McCottor Motors Co.*, 291 NLRB 764, 769 (1988).

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Based on the foregoing, I find respondent violated Section 8(a)(1) and (5) of the Act when it changed Fitzgerald’s access as alleged.

C. Alleged Changes to Meter Reader Schedules

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Complaint paragraph 9(c) alleges that Respondent violated Section 8(a)(1) and (5) of the Act when:

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On or about January 3, 2011, the Respondent implemented a new requirement that meter-reading employees have to work on Saturdays.

1. Facts

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Article 15A of the collective-bargaining agreement contains a provision that defines the working hours for Meter Readers and Collectors. Under this provision, employees who work an 8-hour schedule work a 40-hour week with regular work hours on Monday through Friday. Collectors may be assigned a 10-hour per day, four-day per week schedule, with the regular work week as Monday through Thursday or Tuesday through Friday. (JT 1).

25

Meter Readers reported to Tafoya they were being required to work mandatory overtime and these hours were being scheduled on Saturday. Respondent, after imposing mandatory overtime on Saturdays, notified employees that failure to report on those days would be considered unscheduled absences. (Tr. 101).

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2. Analysis and Conclusion

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I find that the Acting General Counsel has not produced sufficient evidence to prove this allegation. The contract provision it cites to, Section 15A, sets forth the schedules for regular work hours. What is at issue, however, is the requirement to work overtime, not the regular schedule. Section 15A is silent as to overtime, but overtime work is contemplated in Article 17A, which sets forth the overtime rates for meter readers and collectors. Tafoya testified that the meter readers complained to him about being required to work overtime on Saturday in January 2011. There was simply not testimony or other evidence sufficient to prove that this requirement violated the collective bargaining agreement or that it deviated from established past practice. As the Acting General Counsel has not met his burden in this regard, I recommend dismissal of complaint paragraph 9(c).

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D. Alleged Refusal to Process Eric Cox’s Discrimination Complaint

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Complaint paragraph 5(e) alleges that Respondent violated Section 8(a)(1) of the Act as follows:

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

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1. Facts

In or around late April/early May 2010, Cox filed a complaint with PNM alleging discrimination based on his race and Union activity, i.e. his status as a Black steward. He asked Tafoya to represent him. PNM assigned Tommy Lee, Human Resources Director at PNM Resources in Las Colinas, Texas, to investigate the complaint. (Tr. 636–37). Glenn Porter, Vice President of Human Resources, chose Lee because he had no prior connections with the Union or local management. (Tr. 628). Lee attempted to meet with Cox on Wednesday June 1, in Albuquerque. He called and emailed both Cox and his supervisor, Mark Martinez, to confirm availability. Martinez, informed Lee that Cox had already take leave for Thursday and was thinking of taking Wednesday off too. Cox did take leave on Wednesday, and was therefore not at work when Lee visited.²² (Tr. 640–41). For reasons that are less than clear, Lee and Cox did not make contact with each other until Cox sent Lee an email on September 29, asking if Lee was the right person to contact about his complaint, and stating that nobody had gotten back to him.²³ (Tr. 643). The next day, Lee responded, and ultimately scheduled a meeting for October 7, 2010 at PNM Headquarters (Tr. 226, 643, 647). The parties met on October 7, but, as described in more detail below, the investigation did not move forward. This is because Cox did not agree to proceed without Tafoya as his representative. Cox wanted Sonia Otero to conduct the investigation because he believed Lee had been influenced by Ray Mathes,²⁴ and Cox wanted the investigation processed as a single allegation of discrimination based on race and union animus. (GC 2).

On October 8, 2010, Lee sent Cox an email summarizing his understanding of the meeting. He stated that PNM was ready and willing to investigate his complaint, but that Tafoya could not serve as a witness or representative during the investigation into the race discrimination complaint.²⁵ Lee further informed Cox that he could choose a PNM employee to serve as a witness for the race discrimination investigation, and that Tafoya could serve as a witness during the investigation regarding Union animus.²⁶ Lee noted that Tafoya and Cox were adamant that the race and Union animus complaints should be investigated together, and they believed Tafoya had the right to serve as Cox’s Union representative, not just as a witness. He also memorialized Cox’s request to have Sonia Otero participate in the investigation, and stated

²² Cox called Lee and left him a voicemail that he was on leave. (Tr. 643).

²³ Not surprisingly, each side lays the blame on the other. Because the complaint allegation runs from October 7 forward, however, the prior communications snafus are immaterial.

²⁴ Cox testified he thought Mathes was part of the problem underlying his complaint, and the only person he trusted at PNM was Otero. (Tr. 293, 295).

²⁵ Tafoya testified that he told Lee and Otero that he had information to offer as a witness. (Tr. 126).

²⁶ Lee clarified that Tafoya could serve as a witness to the proceeding and remain in the room with Cox. (Tr. 660).

that the Company would make her available to help with the race discrimination claim. Lee concluded that he would speak with management about next steps, and get back to Cox. (Tr. 643–51; GC 2).

5 Cox forwarded Lee’s email to Tafoya for response. On October 29, 2010, Tafoya reiterated that Cox did not want the complaint split into two separate investigations. He expressed his belief that Ray Mathes, Manager of Labor Relations, was a party to the complaint, and therefore should not have any input into the investigation. According to Tafoya and Cox, Lee had stated at the meeting that his decision to bifurcate the investigation was made in concert with Legal Counsel Janelle Haught, Porter and Mathes. (Tr. 128, 227). Lee testified that he, Mathes and Porter discussed whether to permit a Union representative, and that he discussed the decision to bifurcate the investigation with Porter and Haught. (Tr. 658–59). Tafoya stated that he would continue to act as Cox’s representative, and he asked Lee to provide him with the policy he was relying on to prohibit his involvement. He noted that any investigation may affect Cox’s terms and conditions of employment, and therefore his request for Union representation was legitimate. Tafoya further related the parties’ responsibilities to abide by Article 8 of the CBA. He concluded by requesting a meeting to address Cox’s concerns. (GC 2).

20 On November 2, 2010, Lee sent an email to Cox acknowledging receipt of Tafoya’s October 29 correspondence. He clarified that he had spoken to Mathes prior to their meeting, but he did not “follow advice” from him as Tafoya had alleged. He reiterated that he intended to bifurcate the investigation, and that Union representation for the race discrimination claim was unwarranted. He recommended that they proceed with the separate investigations rather than allow a process issue to delay the Company in its attempts to address his concerns. Lee concluded by informing Cox that he had set up a meeting for November 10 to discuss the race discrimination complaint. (GC 4). Lee met with Cox and Tafoya on November 10, offered to take Cox’s statement about the race discrimination claim with Tafoya in the next room. If it came to light that Tafoya had relevant knowledge, Lee would interview him. (Tr. 653). The parties maintained their respective positions, and the investigation did not ensue. (Tr. 68). Lee learned that Cox’s unfair labor practice charges alleging PNM failed to investigate his complaint were dropped, and asked Cox if he still wanted to pursue his race discrimination claim. Lee testified that Cox sent him a simple email back: “No.”²⁷ (Tr. 654-656).

2. Analysis and Conclusion

35 The Acting General Counsel contends that Cox’s discrimination complaint alleges a violation of the CBA. He further argues that Cox’s complaint falls within the CBA’s definition of a grievance, thereby invoking Cox’s right to representation. (ACG Br. 51–53). Respondent argues that the CBA does not address representation for the investigation of an employee’s own complaint. Respondent further contends that the investigation that Cox initiated could not

45 ²⁷ Respondent does not argue that Cox abandoned his race discrimination complaint, and, assuming Cox sent this e-mail (which was not produced at the hearing), I find his response to Lee indicates he did not want to go forward as before, *i.e.* unrepresented.

reasonably lead to his own discipline, and therefore he had no right to representation under *Weingarten*.²⁸ (R Br. 17–18).

In support of its argument, the Acting General Counsel points to Articles 8 and 10 of the CBA. Article 8, at Section A, incorporates Respondent’s requirement to abide by federal and state laws regardless of an employee’s race, religion, color, sex, age, or national origin into the contract. (JT 1). Respondent’s “Do the Right Thing” policy also contains an Equal Employment Opportunity (EEO) provision prohibiting unlawful discrimination. (CP 2). The CBA, Article 10, defines a grievance as “a dispute between the parties hereto with respect to interpretation or application of the provisions of the Agreement or to the application of a specific policy to a specific employee.” That same section permits employees to have a “Union steward” represent them in the grievance process. Finally, Article 10 provides: “The following procedure shall be the exclusive means by which either party may seek to resolve any dispute or grievance arising under the provisions of this Agreement.”(JT 1). The crux of the argument, therefore, is that PNM was required to process Cox’s complaint as a grievance and permit Tafoya to represent him. Respondent contends the CBA does not address representation for the investigation of Cox’s discrimination complaint and therefore does not confer upon him any representation rights.

Complaints regarding contract violations are generally processed as grievances. Indeed, there is a lengthy body of caselaw that discusses when deferral to the grievance and arbitration process is appropriate. See *Collyer Insulated Wire*, 192 NLRB 837 (1971), and its progeny. In most such cases, the employer requests dismissal of an unfair labor practice complaint, arguing deferral to the grievance/arbitration process. This case is somewhat upside down. Respondent never sought to process either the underlying discrimination complaint, or the complaint regarding representation in the investigation of the discrimination complaint, as grievances.²⁹ It is not clear whether Cox or Tafoya presented the discrimination complaint as a grievance, though Tafoya referenced Article 8 of the CBA in his correspondence with Lee. A threshold issue therefore arises then of whether Cox’s discrimination complaint should have been processed as a grievance.

As discussed above, it is well settled that the Board has the authority to interpret the terms of a collective-bargaining agreement to determine whether an unfair labor practice has occurred. *NLRB v. C & C Plywood Corp.* 385 U.S. 421, 428 (1967); *Resco Prods., Inc.*, 331 NLRB 1546 (2000). I find that the CBA, through Articles 8 and 10, mandated PNM to process the discrimination complaint as a grievance. Cox did not file a discrimination charge with a federal or state agency. Instead, he raised his complaint internally. Cox, as a Union steward, should have known that his complaint fell under the CBA, and asked for it to be processed as a

²⁸ *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975). As Respondent asserts, Lee testified it was “inconceivable” that Cox could face discipline for bringing his complaint. Civil Rights law does share this view. Title VII of the Civil Rights Act of 1964 (Title VII) protects employees from employer retaliation for opposing or complaining about, *inter alia*, race discrimination, and provides a comprehensive remedial scheme for any violations. See 42 U.S.C. 2000e-3.

²⁹ Respondent did not present a deferral argument or analysis.

grievance.³⁰ It is not clear to whom Cox initially presented his discrimination complaint or whether he asked that it be routed through any particular forum. The evidence shows, however, that the complaint made its way to Porter, the Vice President of Human Resources. Porter, and other individuals from Human Resources, Labor Relations and/or the Legal Department, who knew about the complaint, plainly should have known that it implicated the CBA and, in turn, the grievance process. The evidence does not indicate that Porter, or anyone else involved in the complaint, intentionally violated the CBA by the manner in which it chose to process Cox’s discrimination complaint. It is more likely that bypassing the grievance process was an oversight by all involved. Nonetheless, Respondent did not present any evidence to refute the contractual language that brings Cox’s complaint within the ambit of a grievance. Based on the foregoing, I find that Cox’s complaint was a grievance under the terms of the CBA.

Whether Cox had a right to representation in the grievance process, like the question of whether the complaint should have been processed as a grievance, is also a matter of contract interpretation. Respondent does not argue that the issue should have been deferred to the grievance process. Even if it had, the allegation that Tafoya was not permitted to represent Cox in his discrimination complaint is closely related to many other issues regarding Cox’s representational rights and Tafoya’s access, both in this complaint and the complaint Judge Schmidt adjudicated.³¹ The Board has consistently held that it will not defer one issue if it is closely related to another issue that is not deferrable. *Everlock Fastening Sys.*, 308 NLRB 1018, 1019, n. 8 (1992); *15th Ave. Iron Works*, 301 NLRB 878, 879 (1991).³² The language of the CBA authorizes representation in the grievance process by a Union steward. The legal framework for establishing a past practice is discussed earlier in this decision, and is hereby incorporated. It is abundantly clear, and I find, that Tafoya and other Union Business Agents had established a past practice of representing Unit members in the grievance process. (Tr. 31-32, 506). Accordingly, I find that Respondent violated Section 8(a)(1) by conditioning the investigation of Cox’s discrimination complaint on his being unrepresented.

Respondent raised some other points on the matter that merit discussion. Lee asserted that his practice has been to “not have a non-employee to represent or be involved in a meeting with an employee that brings an allegation forward,” (Tr. 697), Lee’s past practice at companies not party to the CBA between PNM and the Local 611 lacks relevance. Respondent also contended that PNM offered to bifurcate the proceeding to permit Tafoya to serve as witness to the union animus complaint misstates the facts. Cox alleged that he was discriminated against as a Black steward, and always wanted this to be processed as a single allegation. The “offer” to bifurcate

³⁰ Neither party submitted a written discrimination complaint, which leads me to infer Cox complained orally, at least initially.

³¹ Judge Schmidt found unlawful the restrictions placed on Tafoya’s access to PNM’s facilities in the latter part of 2009.

³² In addition, as with requests for information, the denial of representation complaint alleges interference with the grievance procedure to which the employer urges deference.

was in reality a requirement to bifurcate in a manner that Cox believed misstated his claim. (Tr. 123, GC 2)³³ Finally, in light of my ruling that the Cox’s discrimination complaint is properly processed as a grievance, which confers the right to representation aside and apart from *Weingarten*, I need not address whether or not Cox had a reasonable expectation of discipline for bringing his complaint and/or meeting with Lee.³⁴

E. Alleged Denial of Cox’s Representative of Choice by Tom Mitchell

The complaint, at paragraph 5(f), alleges that Respondent violated the section 8(a)(1) Act as follows:

On or about March 28, 2011, the Respondent, by Tom Mitchell, herein called Mitchell, at the Respondent’s facility located on Edith Boulevard in Albuquerque, New Mexico, herein called Respondent’s Edith facility, denied the request of its employee Cox to be represented by the Union during an interview, by refusing to allow Cox to be represented by the Union representative of his choice who was present and available.

1. Facts

In March 2011,³⁵ Mitchell, Cox’s supervisor, told him he was to report to Human Resources. At the time, Cox was in the NSD crew room, which was a 3–5 minute walk to the Human Resources office. On his way to the meeting, Cox called Tafoya to represent him. (Tr. 233–35). When Cox arrived, Monfiletto, Mitchell and Bert Garcia, a Union steward, were present.³⁶ Monfiletto informed Cox that Joan Schueller, the Business Partner for Shared Services, reported that he had been disruptive and rude while representing an employee on a grievance a couple weeks prior. (Tr. 236, 256, 303, 606). Cox responded that he wanted Tafoya to represent him, and that Fred Martinez would also be acceptable. Management initially responded that Garcia was present and could represent Cox. (Tr. 235–37). According to Monfiletto, when Cox insisted on a different representative, he was given a five-minute break to get either Tafoya or Martinez. (Tr. 589). Tafoya was outside the gates of the locked perimeter, and Cox went to talk to him. (Tr. 235–38). After five minutes, Cox had not returned to the

³³ Courts have recognized so-called “plus” claims, where race or any basis protected by Title VII, coupled with another characteristic, is the alleged basis discrimination. *See Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (sex plus pre-school age children); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406 (10th Cir.1987) (sex plus race); *Jefferies v. Harris Cnty. Cmty. Action Ass’n*, 615 F.2d 1025 (5th Cir.1980) (race plus gender). In a recent case, *Craig v. Yale Univ. Sch. of Med.*, No. 3:10cv1600(JBA), 2011 WL 6748515 (D. Conn. December 22, 2011), the Court found the plaintiff stated a cognizable claim of discrimination based on “race plus gender” but not based on gender alone.

³⁴ I agree with Respondent that Cox had no right to insist that certain individuals conduct the investigation. As Cox would not go forward without representation, however, this issue never became ripe, and is not part of the instant complaint.

³⁵ Cox testified it was “maybe May” but the complaint alleges it was March, and Respondent notes the date as March 28. (R Br. 18).

³⁶ Mitchell brought Garcia to the meeting. (Tr. 586).

meeting. (Tr. 590) Mitchell came out and told time it was time to go back to the meeting. Tafoya sought to attend as Cox’s representative, but Mitchell told him he was not allowed to be on PNM property and he could not represent Cox at the interview. (Tr. 71, 239, 339). Cox returned to the meeting with Garcia under protest. (Tr. 240). The CBA does not address whether the employee has the right to choose his or her Union representative. PNM’s practice was to accommodate if it would not delay the investigation. (Tr. 588, 808).

The investigation concluded with Monfiletto determining that Cox had not been disrespectful or rude, and had not violated any policy. (Tr. 592).

2. Analysis and Conclusion

“The selection of an employee’s representative belongs to the employee and the union, in the absence of extenuating circumstances...” *Barnard Coll.*, 340 NLRB 934, 935 (2003), (citing *In re Anheuser-Busch, Inc.*, 337 NLRB 3 (2001), *enforced*, 338 F.3d 267 (4th Cir. 2003), cert. denied 541 U.S. 973 (2004), and *Pac. Gas & Electric Co.*, 253 NLRB 1143 (1981). In *Consolidation Coal Co.*, 307 NLRB 976 (1992), the Board found an employer violated an employee’s *Weingarten* rights when it denied the employee his specifically requested union representative when that representative was available and ready to proceed. *See also GHR Energy Corp.*, 294 NLRB 1011, 1042 (1989). In *Anheuser-Busch*, the Board agreed with the trial judge’s finding that the employer violated the Act by refusing an employee’s request for an alternate representative because that person was on his lunch break. The evidence showed that the desired representative was due to return to work in 15 minutes and “there was nothing about the allegations . . . that demanded instant attention.” *Anheuser-Busch*, 337 NLRB at 11.

There were no extenuating circumstances present here, as Tafoya was available and ready to represent Cox. Respondent asserts that Monfiletto did not know Tafoya was available. This doesn’t matter, as Mitchell knew Tafoya was present at the facility and ready to proceed. Respondent notes that Cox was represented and no discipline was imposed. This misses the point, however. Clearly Respondent saw the interview as invoking Cox’s *Weingarten* rights, as management had secured the presence of Union steward Bert Garcia. The fact that Garcia was present and qualified does not eradicate the decision to deny Cox his available representative of choice. Accordingly, I find Respondent violated Section 8(a)(1) of the Act by denying Cox the available Union representative of his choice.

F. Alleged Conduct Related to Supervisor Dale Smyth

In complaint paragraph 5, the Acting General Counsel alleges that Respondent violated Section 8(a)(1) of the Act with regard to the following actions by Supervisor Dale Smyth:

(k) On or about June 2, 2011, the Respondent, by Dale Smyth, herein called Smyth, at the Respondent’s Edith facility:

(1) Interrogated employees regarding their Union activities by questioning them about discussions employees had with Union representatives;

(2) Threatened employees by informing them they were being taken into a management office to be questioned about their Union activities;

(3) Threatened employees by telling them it would be futile for them to go to the Board because the Respondent was not going to abide by the National Labor Relations Act;

(4) Misrepresented to employees that they had rights pursuant to Weingarten only when the Respondent was going to issue actual discipline to them; and

(5) Threatened employees with unspecified reprisals by telling them there would be consequences if they did not reveal the details of their Union activities to the Respondent.

(l) On or about June 2, 2011, the Respondent, by Smyth, at the Respondent's Edith facility, denied the request of its employee Cox to be represented by the Union during an interview.

The complaint, at paragraph 6, further alleges that Respondent violated Section 8(a)(1) and (3) when on or about June 2, 2011, Respondent imposed more onerous working conditions on Cox by requiring him to go to a management office to be questioned about his Union activities.

1. Facts

On June 2, 2011, Cox was in the NSD crew room speaking to a few Maintenance employees, including Joe Montano, about some potential overtime bypass grievances.³⁷ He had received permission from his supervisor, Ralph Pesce, the previous day. (Tr. 247–49, 1129, 1135). Pesce, who was at this point in time the Maintenance Supervisor, was absent on June 2. Line Department Supervisor Dale Smyth was acting for Pesce but Cox was not aware of this. (Tr. 317, 809). Smyth was similarly unaware that Pesce had granted Cox time to work on grievances. Pesce had not left him a note, and nobody else had informed him about it.³⁸ (Tr. 820).

For the couple weeks prior, Cox had been away on Union business. Smyth came in and asked if Cox was “here today” and Cox responded that he was but he was investigating some grievances. (Tr. 248–49, 261). Unaware that Cox had been granted Union time on June 2, Smyth

³⁷ Other employees present were Joe Connors, Isaac Padilla and Gilbert Padilla. (Tr. 312, 1129).

³⁸ Mitchell testified that employees have the responsibility to enter information such as time permitted to work on grievances into PNM's electronic system, Telestaff. (Tr. 876). There is no evidence that Smyth accessed the Telestaff records on June 2, however, and Smyth's testimony did not address the Telestaff records.

had assigned him to a crew because he had seen him earlier that morning.³⁹ (Tr. 812). Smyth asked what the grievances were and which employees they concerned. (Tr. 79–80; 247–49, 811, 1130). Cox would not give specifics, but Smyth continued to question him about the grievances. According to Montano, Smyth’s tone of voice became progressively more aggressive. (Tr. 1131).
 5 Smyth stated he needed to speak to Cox alone in a manner Cox perceived as agitated. Cox called Tafoya because he was concerned the meeting could lead to discipline. (Tr. 249–50). Cox and Montano went to Smyth’s office, and Cox informed Smyth that Tafoya was out front and needed to be signed in. Smyth responded that Cox did not need a Union representative because the meeting could not lead to positive discipline. (Tr. 251, 314, 811). At the time Smyth was not
 10 contemplating the pursuit of discipline. (Tr. 814-16).

Cox went out to talk to Tafoya, who made calls to some managers, including Smyth and Mitchell. Smyth called Tafoya back. (Tr. 80, 253, 819). Tafoya told Smyth he was on speaker phone in his car and Cox was present. Smyth and Tafoya went back and forth to no avail.

15 According to Cox and Tafoya, Smyth stated there would be “consequences” if Cox would not answer his questions about the grievances. (Tr. 255). Tafoya told Smyth that was why he needed to be present as Cox’s Union representative and told Smyth he was violating the National Labor Relations Act by questioning Cox and was forcing him to file charges. (Tr. 255). Smyth told Tafoya he had filed unfair labor practice charges against him before and Tafoya could do it again
 20 because it did not bother him. (Tr. 165). After they hung up, Mitchell came out and talked to Tafoya and Cox, and told them that he wanted to find out what had happened and work though the issues rather than escalate them. (Tr. 863). He informed Cox that he did not have to discuss the specific grievances with Smyth. (Tr. 255, 835).

25 2. Analysis and Conclusions

a. Alleged Interrogation about Union Activities

In assessing the lawfulness of an interrogation, the Board applies the totality of
 30 circumstances test adopted in *Rossmore House*, 269 NLRB 1176, 1178 n. 20 (1984), *affd. sub nom.*, *HERE Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). This test involves a case-by-case analysis of various factors, including those set out in *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964): (1) the background, i.e., whether the employer has a history of hostility toward or discrimination against union activity; (2) the nature of the information sought; (3) the identity of
 35 the interrogator, i.e., his or her placement in the Respondent's hierarchy; (4) the place and method of the interrogation; and (5) the truthfulness of the interrogated employee's reply. *See, e.g., Sproule Constr. Co.*, 350 NLRB 774, 774 n. 2 (2007); *Grass Valley Grocery Outlet*, 338 NLRB 877, 877 n. 1 (2003), *affd. mem.* 121 F. App’x. 720 (9th Cir. 2005). The Board also considers whether the interrogated employees are open and active union supporters. *See, e.g., Gardner Eng’g*, 313 NLRB 755, 755 (1994), *enforced as modified on other grounds*, 115 F.3d 636 (9th Cir. 1997). These factors “are not to be mechanically applied”; they represent “some areas of inquiry” for consideration in evaluating an interrogation's legality. *Rossmore House*, 269
 40 NLRB at 1178, n. 20. Though most of the caselaw regarding interrogation arises in the context

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³⁹ A couple days later, Pesce told Smyth that Cox had let him know he had Union business that morning. (Tr. 845).

of organizing campaigns, the Board has found that interrogations intended to interfere with an employee's right to file and process a grievance may violate Section 8(a)(1). *See, e.g. Pabst Brewing Co.*, 254 NLRB 494, 495 (1981).

5 Cox was an active and open Union supporter, a factor that weighs in Respondent's favor. Most of the other factors, however, weigh in Cox's favor or are neutral. The history of hostility, at least as of late, is glaring, resulting in poor behavior all around. In light of the recent violations that PNM has accrued, both in this decision and in prior decisions, I find this weighs slightly in
10 Cox's favor. The nature of the information sought was the substance of potential employee grievances. It is self-evident that employees may not want a supervisor to know that they are contemplating a grievance. This factor therefore weighs in Cox's favor. The identity of the interrogator was a supervisor, who, at the time of the interrogation, Cox believed was outside his chain-of-command. Given Smyth and Cox's history, this factor would be neutral but for Smyth's supervisory status giving him elevated standing in PNM's hierarchy. The soured relationship
15 between Smyth and Cox, evident from Judge Schmidt's decision, has plainly spawned mistrust and miscommunication. Cox did not come out and say that Pesce had granted him Union time. Smyth did not come out and say that he was acting for Pesce and that he had assigned Cox to a crew. Things likely would have proceeded more smoothly if the lines of communication approached normalcy. While both parties bear some responsibility for escalating what really was
20 a simple misunderstanding, Smyth's supervisory status tips the "identity of the interrogator" factor in Cox's favor. The place and method of the interrogation weigh in Cox's favor. As Montano observed, Smyth became noticeably agitated in the NSD crewroom, where other employees were present, and then ordered Smyth to come to his office to meet with him one-on-one. Finally, the fifth *Bourne* factor speaks best to interrogations during organizing campaigns. As a corollary, however, I find Cox's decision not to respond to Smyth's questions, which
25 Mitchell ultimately supported, weighs in Cox's favor. I am also mindful of Board caselaw holding that it is a violation of Section 8(a)(1) for employers to tell employees to disclose union activity of other employees. *Bloomington-Normal Seating Co.*, 339 NLRB 191, 193 (2003); *Tawas Indus.*, 336 NLRB 318, 322 (2001).

30 Respondent argues that Cox is not susceptible to being intimidated by Smyth based on Cox's conduct at a meeting that was the subject of an allegation in the case tried before Judge Schmidt. This does not mean Smyth did not interrogate Cox about the grievances he was working on with the employees. Moreover, Mitchell, who saw Cox right after Smyth had
35 questioned him, described Cox as "very shaken up." (Tr. 863).

As noted, both parties bear some responsibility for the multiple miscommunications that occurred on June 2. However, considering the factors above, I find that Smyth's questioning Cox about the substance of potential grievances he was investigating on behalf of employees he
40 represents was an unlawful interrogation in violation of Section 8(a)(1) of the Act.

b. Alleged Threats, Misrepresentation about *Weingarten* Rights, and Denial of Representation

i. Smyth Telling Cox to Come to his Office

45 For many of the same reasons set forth directly above, I find Smyth threatened Cox and the other employees by telling Cox to come to his office to discuss the Union grievances he was

working on in the NSD crew room. There is some dispute in the testimony as to chain of events. According to Smyth, he peeked his head in the door of the NSD room and Cox told him that he needed a little more time for Union business. Smyth replied, “okay, as soon as you’re done come see me in my office.” (Tr. 810–11). According to Montano, Smyth made multiple inquiries in the NSD crew room asking specifically what union business and what grievances Cox was

5 investigating. When Cox did not respond, Smyth stated, in an aggressive tone, that he needed to speak with Cox alone. (Tr. 1130–32). Cox’s recollection is consistent with Montano’s. (Tr. 247-49). I credit Montano’s testimony because it was specific and his demeanor was open and straightforward. In addition, based on the history between Smyth and Cox, Montano is the most

10 objective person to have observed the encounter. Moreover, the Board has recognized that the testimony of a current employee which contradicts statements of supervisors is likely to be particularly reliable because these witnesses are testifying adversely to their pecuniary interests. *Gold Standard Enters.*, 234 NLRB 618, 619 (1978); *Fed. Stainless Sink Div. of Unarco Indus., Inc.*, 197 NLRB 489, 491 (1972); *Gateway Transp. Co.*, 193 NLRB 47, 48 (1971); *Ga. Rug Mill*, 131 NLRB 1304, 1305, n. 2 (1961). That Smyth acted aggressively is further corroborated by Mitchell’s testimony that Cox appeared very shaken up after the encounter with Smyth. Finally, Montano’s testimony is more plausible than Smyth’s because what occurred in the NSD crewroom led Cox to believe he needed representation to meet with Smyth, as evidenced by the fact that he called Tafoya. Accordingly, I find that Cox’s statement was a threat to employees, conveying the message that management will demand to know the substance of meetings with Union officials, including stewards. As such, I find it violated Section 8(a)(1) of the Act.

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ii. Alleged Comment Regarding Futility of Board Charges

25 Taken in context, I do not find that Smyth threatened Cox or Tafoya by stating that filing charges with the National Labor Relations Board would be futile. Smyth denied making such a statement, and this denial is uncontroverted. (Tr. 816). Tafoya testified that Smyth’s comment was that he (Tafoya) had filed charges before, and he could file them again, and it would not bother Smyth. This was in response to Tafoya saying he was going to file charges against Smyth

30 on the heels of an unproductive back and forth argument between them.

This case can be distinguished from cases where the Board has found comments about the futility of going to the Board violated the Act. In *7UP Bottling Co.*, 261 NLRB 894 (1982), a violation was found where a manager informed an employee that it had cost the respondent \$1000 to visit the Board’s offices to discuss a charge and told the employee to “make all the allegations you want, nothing is going to change.” Likewise, the Board found a violation in *Mesker Door, Inc.*, 357 NLRB No. 59 (2011), where the plant manager told employees that the Union charges had cost more than \$200,000 in legal fees, observing that the comment sent the message that filing charges was a futile act that cost employees bonuses. See also *Great W. Produce*, 299 NLRB 1004 (1990).

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The situation here involved Smyth, a first-level supervisor, who told the Union’s seasoned Business Agent to go ahead and file charges against him because it would not bother him. There was no reference to the cost of filing grievances, and no statement that PNM’s policies would not change as a result of Board charges. The comment was made over the telephone, with only Tafoya and Cox on the line, after Tafoya and Smyth had been arguing back and forth to no avail. I do not find it rises to the level of a threat, when taken in context, that

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Tafoya filing charges with the Board would be futile. Accordingly, I recommend dismissal of paragraph 5(k)(3) of the complaint.

iii. Alleged Threat of Unspecified Reprisals

According to Tafoya and Cox, Smyth stated there would be consequences if Cox refused to tell Smyth what specific grievances he was working on and what employees they concerned. (Tr. 255). Smyth did not recall saying anything of this nature. (Tr. 843). I credit Cox on this point, because his recollection is more specific, and Smyth’s testimony was merely that he did not recall such a comment. Because the interrogation regarding the potential grievances Cox was working on was unlawful, it follows and I find that the threat of discipline for failing to respond to the questions comprising the interrogation likewise interferes with Section 7 rights and therefore violates Section 8(a)(1).

iv. Alleged Misrepresentation of *Weingarten* Rights and Denial of Union Representation at Investigative Interview

The issues of misrepresentation of Cox’s *Weingarten* rights and denial of Cox’s right to Union representation at an investigative interview on June 2 are inextricably intertwined, and therefore I will address them together.

In *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975), the Supreme Court held that, under section 7 of the Act, 29 U.S.C. § 157, an employee who reasonably believes that an interview will result in disciplinary action against him or her has the right, upon request, to be accompanied at that interview by a union official. The reasonableness of a belief that discipline may result must be measured based on “objective standards under all the circumstances of the case.” *Id.* at 257. The Court found the action of an employee seeking the assistance of his or her union representative during a confrontation with an employer clearly falls within Section 7 of the Act. *Id.* at 260.

Given that the meeting Smyth wanted to have with Cox related to what I have found to be an unlawful interrogation, coupled with Cox’s reluctance to answer Smyth’s questions about the Union business he was conducting, I find it was reasonable for Cox to believe that discipline may ensue. I do not find, however, that Smyth’s initial comment to Cox that he did not need a representative was a misrepresentation of Cox’s *Weingarten* rights in violation of the Act. Smyth made the comment based on his belief, at the time, that no discipline could result from the meeting. Moments later, Smyth agreed to get Cox a steward. (Tr. 252). No interview ever occurred, and the only further communication involved Tafoya talking to Smyth on a speakerphone with Cox present. Under these specific facts, I do not find that Cox’s Section 7 rights were interfered with as alleged. To find otherwise would require viewing Smyth’s comment with monocular vision and in isolation from what transpired immediately following it. Accordingly, I recommend dismissal of the allegations set forth in complaint paragraphs 5(k)(4) and 5(1)-(n).

c. Alleged Imposition of More Onerous Working Conditions

The complaint, at paragraph 6, alleges that Respondent violated Section 8(a)(1) and (3) when on or about June 2, 2011, Respondent imposed more onerous working conditions on Cox by requiring him to go to a management office to be questioned about his Union activities.

I find this one-time request to go to Smyth’s office too insignificant to establish the imposition of an onerous working condition. *See W.D. Manor MechContractors, Inc.*, 357 NLRB No. 128, slip op. at 2 (2011); *Aladdin Gaming, LLC*, 345 NLRB 585, 622 (2005). I therefore recommend dismissal of this allegation.

G. Alleged Interrogation by Gary Cash

The complaint, at paragraph 5(j), alleges Respondent violated section 8(a)(1) of the Act when:

On or about May 10, 2011, the Respondent, by Gary Cash, at the Respondent’s Edith facility, interrogated employees regarding their Union activities by questioning them about discussions employees had with Union representatives.

1. Facts

In April 2011, Cox and Tafoya met at a table outside the PNM perimeter to discuss some grievances. Gary Stone, Vice President of Operations, had stopped briefly to talk. (Tr. 74; 242). After Cox returned to the NSD crew room, Gary Cash and Supervisor Don Wilkerson entered. According to Cox, Cash stated he had gotten a call from Tom Ruth, the Line Department Director, stating that Stone had wanted to know what Tafoya and Cox were discussing. (Tr. 242–43, 309) Cox responded that they were discussing Union business. Cash asked for specifics, but Cox declined to provide them. When pressed, Cox stated that he needed to get Tafoya to represent him. (Tr. 244). Cash set up a meeting for 1:00 that same day. Tafoya represented Cox at the meeting, with Cash and James Aragon, who was Cox’s acting supervisor that day, present. Cash asked Cox what he and Tafoya were discussing, and Cox replied “Union business.” Cash asked more specifically what Union business they were discussing, and ultimately Tafoya told Cash he thought he was conducting an unlawful interrogation. (Tr. 74–77; 246, 310). According to Tafoya, Cash replied that he really didn’t care what Cox and Tafoya were discussing, but the Vice President had asked him to “report back up the line.” (Tr. 78).

2. Analysis and Conclusion

The legal framework governing interrogations set forth above is hereby incorporated. Taking into account the totality of the circumstances, I find that Cash asking Cox what Union business he had been discussing with Tafoya was an unlawful interrogation. Supervisors Cash and Wilkerson were both present when Cox was initially questioned in the NSD crew room. Cash told Cox that Ruth, the Line Department Director, had called him and told him that Vice President Stone wanted to know what Cox and Tafoya were discussing. The later meeting also took place with two supervisors, Cash and Aragon, present. Cash informed Tafoya and Cox that the inquiry was on behalf of a PNM Vice President. Tafoya and Cash are both clearly open and

active in their Union support, a factor which weighs in Respondent's favor. Moreover, unlike the Smyth interrogations, Cash did not ask the questions at issue in the presence of other employees. (Tr. 242). Given that the questions originated from a very high place in PNM's organizational hierarchy and sought to elicit information regarding employee grievances, however, I find they were unlawful.⁴⁰ Despite the fact that Cash stated he really did not care what Cox and Tafoya were discussing, the comments undeniably sent a message to Cox that his activities as a Union steward were being monitored. This would plainly tend to coerce Cox in the exercise of his and other employees' Section 7 rights, and I therefore find Cash conducted an unlawful interrogation in violation of Section 8(a)(1).

H. Marie Plant Interview

The complaint, at paragraph 5(a) and (b), alleges that Respondent violated Section 8(a)(1) as follows:

(a) On or about October 7, 2010, the Respondent, by JoAnn Garcia, herein called Garcia, at the Respondent's facility located in Belen, New Mexico, herein called the Respondent's Belen facility, and threatened employees with unspecified reprisals because they engaged in union and other concerted activities.

(b) On or about October 7, 2010, the Respondent, by Garcia and Chris Jaramillo, herein called Jaramillo, at the Respondent's Belen facility, denied the request of its employee Marie Plant, herein called Plant, to be represented by the Union during an interview.

1. Facts

Marie Plant works in PNM's Belen office as a collector. She reports to Chris Jamarillo, who works in Albuquerque. Jamarillo visits the Belen office a couple times a month. (Tr. 715–17). Plant became a Union steward in 2008. In that capacity, she represented Joe Wisneski during an investigation regarding his misuse of the Company credit card to buy gas for personal use, an infraction for which he was ultimately terminated on September 14, 2010. (Tr. 683–86). Joann Garcia, the human resources consultant for marketing and customer service, conducted the factfinding investigation, and Jamarillo was also present. At some point, Plant asked for a restroom break. After time had passed, Jamarillo and Garcia found Plant and Wisneski meeting in a room, and Plant responded they were not ready to return to the interview. (Tr. 686, 709). In connection with the investigation, employee Mike Montoya, a non-Union coordinator, had sent an email stating Wisneski had told him that Plant had instructed Wisneski not to answer questions, and not to admit he was stealing gas.⁴¹ (Tr. 687, 691, 724). Castro told Garcia to convey the information in Montoya's email to Plant next time she saw her. (Tr. 699–70). Prior to the meeting, Garcia had consulted with labor relations, and they determined Plant would not be investigated or disciplined in connection with the email. (Tr. 701).

⁴⁰ While the individuals who ordered and/or did the questioning may not have known with certainty that Tafoya and Cox were discussing employee grievances, this is obviously a foreseeable topic of discussion between a steward and business agent.

⁴¹ Montoya's first name is Jason but he goes by Mike, his middle name. (Tr. 210).

On October 7, 2010, Jamarillo and Garcia were at the Belen complaint to do an investigation of another employee. (Tr. 718, 689). Jamarillo asked Plant if she had a few minutes, and they went to the community office adjacent to Plant’s office.⁴² Garcia also participated in the meeting. (Tr. 178, 687, 719). According to Plant, early in the meeting she twice asked if she needed a steward, and was told she did not because the meeting was only informational. (Tr. 179, 188). Garcia did not recall Plant asking if she needed a Union representative. (Tr. 692, 694). Plant testified that Garcia was holding a piece of paper in her hand and reading from it. (Tr. 179). Jamarillo and Garcia testified that Garcia was not holding anything when she spoke with Plant. (Tr. 692, 720). Garcia and Jamarillo informed Plant about Montoya’s email. (Tr. 180, 691). According to Plant, they also told her that the email stated that she (Plant) had at one time thought of using the Company card for fuel purchases.⁴³ (Tr. 180). Garcia did not recall telling this to Plant. (Tr. 701). Plant asked for a copy of the letter. According to Plant, Garcia told her to go through the appropriate channels to make the request. (Tr. 182). Garcia recalled that she simply told Plant she did not have the letter with her and “that was it.” (Tr. 692).

Plant recalled that Garcia said she was keeping the letter “on file”. (Tr. 182). Garcia denied making this statement. (Tr. 711). In fact, Garcia has the email “in an investigation file on all investigations I have.” When asked the name of the file, Garcia responded, “Well, it is everything that has to do with Marie Plant.” (Tr. 711). Plant wanted a copy of the letter because she was concerned that by keeping it on file, PNM could use it for future positive discipline. (Tr. 186). Plant viewed the meeting as informational until she was told the letter was being kept on file, at which point she regretted not having a steward present and feared her job was in jeopardy. (Tr. 188).

On October 11, Plant wrote to request a copy of the letter or a response that the request was being denied by October 15. On October 18, Tafoya sent Garcia a letter stating that she had not responded to Plant’s request for information, and giving a revised deadline of the following Wednesday. He advised that if she did not respond, he would consider it as a refusal to provide information. Garcia responded that she had sent Plant’s correspondence to “Labor.” Assuming “Labor” meant Cindy Castro, Tafoya contacted her and renewed his request. On October 19, Castro responded, telling Tafoya that she was not going to provide the letter based on her assessment that it was privileged attorney work product.⁴⁴ (Tr. 537). She told Tafoya he could get the same information by speaking to Mr. Wisneski. There were a couple of follow up meetings but the parties maintained their respective positions. (JT 3; Tr. 537).

⁴² Plant testified the meeting was October 8, which was clearly a mistake in light of other testimony and Garcia’s October 7 written summary of the meeting. (R B).

⁴³ Plant elaborated on this comment occurring in the context of being approached by a homeless person for money and having him point out that she had a card. She shared this with Jamarillo at the time of the incident, and with Jamarillo and Garcia at the meeting. (Tr. 187, 212-13).

⁴⁴ Castro testified she received legal advice on whether to produce the letter, but she did not know whether Montoya received legal advice to draft the letter. (Tr. 557-58).

2. Analysis and Conclusions

a. Alleged Threat

5 I agree with Respondent that the Acting General Counsel did not present evidence regarding any threat of unspecified reprisals Garcia made to Plant or any employees because they engaged in Union or other concerted activities. The Acting General Counsel likewise does not make an argument to support this allegation in its brief. Accordingly, I recommend dismissal of complaint paragraph 5 (a).

b. Denial of Union Representation

10 An employee’s right to representation under *Weingarten* is discussed above and incorporated into this section.

15 A threshold issue is whether Plant requested Union representation, as the right to such representation is triggered only upon request. *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 257 (1975). In *Sw. Bell Tel. Co.*, 227 NLRB 1223, 1227 (1977), the Board held that an employee asking the question of whether he should obtain union representation was sufficient to trigger a request for representation. See also *Ill. Bell Tel. Co.*, 251 NLRB 932, 938 (1980) (employee asking a supervisor if someone from the union should be present during the interview sufficient to trigger *Weingarten*).

20 There is conflicting testimony regarding whether Plant requested Union representation. Plant testified that she twice asked whether she needed a steward. Garcia testified that Plant never inquired about the need for a steward. I discredit Garcia’s statement that Plant never asked if she needed a steward. At the hearing, I asked Garcia, “Did you, or anybody that you heard, at the outset of the meeting, inform her that you had already talked to HR and there had been a predetermination that no discipline and no investigation was going to ensue?” Garcia responded, “The only thing we told her was that nothing was going to happen, and there would not be a need to get one.” (Tr. 712). I can only infer that “one” is a steward, and that Garcia therefore told Plant she did not need a steward. Counsel for PNM asked Jamarillo whether Plant requested a steward, to which he replied she did not. (Tr. 721). Later testimony casts doubt on this. I asked, “When, during this meeting, you advised her there wouldn’t be discipline, was that in response to her inquiry as to whether she would need a steward?” His response was, “I can’t recall specifically, no. I am not sure.” (Tr. 722). I therefore credit Plant’s testimony that she inquired as to whether she needed a steward, as it was unequivocal and straightforward.

25 I find, however, that Plant was not entitled to a Union representative, because the meeting was “held solely for the purpose of informing the employee of, and acting upon, a previously made disciplinary decision.” *Baton Rouge Water Works Co.*, 246 NLRB 995, 997 (1979). The Acting General Counsel has not established that the meeting consisted of anything more than Garcia and Jamarillo informing her of the statements Montoya had made, and of Human Resources’ decision that Plant would not be disciplined in connection with the matter. The Board in *Baton Rouge* spelled out when an informational meeting might turn into something that would trigger *Weingarten* rights:

Indeed, if the employer engages in any conduct beyond merely informing the employee of a previously made disciplinary decision, the full panoply of protections accorded the employee under *Weingarten* may be applicable. Thus, for example, were the employer to inform the employee of a disciplinary action and then seek facts or evidence in support of that action, or to attempt to have the employee admit his alleged wrongdoing or to sign a statement to that effect, or to sign statements relating to such matters as workmen's compensation, such conduct would remove the meeting from the narrow holding of the instant case, and the employee's right to union representation would attach. In contrast, the fact that the employer and employee thereafter engaged in a conversation at the employee's behest or instigation concerning the reasons for the previously determined discipline will not, alone, convert the meeting to an interview at which the *Weingarten* protections apply

Id. Respondent engaged in no further conduct at the meeting sufficient to convert it into a *Weingarten* interview.

The Acting General Counsel asserts that Respondent held the meeting with Plant in hopes that she would reveal facts and/or evidence to assist Respondent in determining whether to issue her discipline. This is speculation, however, and not supported by evidence. The Acting General Counsel cites to *Exxon Co.*, 223 NLRB 203 (1976), to support a contention that the Board has found *Weingarten* applicable to investigations regarding alleged dishonesty. Plant, however, was not investigated. The Acting General Counsel adduced no evidence that Garcia or Jamarillo asked her questions or otherwise sought to gather information from her. Accordingly, I recommend dismissal of complaint paragraph 5(b)–(d).

I. Requests for Information

The Acting General Counsel Alleges that Respondent violated Section 8(a)(1) and (5) of the Act by failing to respond to various requests for information from the Union. The requests are each analyzed separately below.

Pursuant to Section 8(a)(5), each party to a bargaining relationship is required to bargain in good faith. And part of that obligation is that both sides are required to furnish relevant information upon request. *NLRB v. Acme Indus. Co.*, 385 U.S. 432 (1967). In relation to information sought during the term of an existing contract, a Union's responsibilities include: (a) monitoring compliance and effectively policing the collective-bargaining agreement, (b) enforcing provisions of a collective-bargaining agreement, and (c) processing grievances. *Am. Signature, Inc.*, 334 NRB 880, 885 (2001). If the information sought relates to the processing of a grievance, (or potential grievance), the legal test is whether the information is relevant to the grievance and the determination of relevancy is made based on a liberal, discovery type of standard. *Acme*, 385 U.S. at 437; *Knappton Mar. Corp.*, 292 NLRB 236 (1985). Like a flat refusal to bargain, "[t]he refusal of an employer to provide a bargaining agent with information relevant to the Union's task of representing its constituency is a per se violation of the Act" without regard to the employer's subjective good or bad faith. *Brooklyn Union Gas Co.*, 220 NLRB 189, 191 (1975); *Procter & Gamble Mfg. Co.*, 237 NLRB 747, 751 (1978), *enforced*, 603 F.2d 1310 (8th Cir. 1979).

In determining possible relevance, the Board does not pass upon the merits, and the labor organization is not required to demonstrate that the information is accurate, not hearsay, or even, ultimately reliable. *U.S. Postal Serv.*, 337 NLRB 820, 822 (2002). “The [labor organization] is entitled to the information in order to determine whether it should exercise its representative function in the pending matter, that is, whether the information will warrant further processing of the grievance or bargaining about the disputed matter.” *Ohio Power Co.*, 216 NLRB 987, 991 (1975), *enforced*, 531 F.2d 1381 (6th Cir. 1976).

Information concerning employees in the bargaining unit and their terms and conditions of employment, is deemed “so intrinsic to the core of the employer-employee relationship” so as to be presumptively relevant. *Disneyland Park*, 350 NLRB 1256, 1257 (2007); *Sands Hotel & Casino*, 324 NLRB 1101, 1109 (1997). Presumptively relevant information must be furnished on request to employees' collective-bargaining representatives unless the employer establishes legitimate affirmative defenses to the production of the information. *Metta Electric*, 349 NLRB 1088 (2007); *U.S. Postal Service*, 332 NLRB 635 (2000). However, when the requested information does not concern subjects directly pertaining to the bargaining unit, such material is not presumptively relevant, and the burden is upon the labor organization to demonstrate the relevance of the material sought. *Disneyland Park*, 350 NLRB at 1257; *Richmond Health Care*, 332 NLRB 1304, 1305, n. 1 (2000).

1. E-mail Regarding Marie Plant

The complaint, at paragraph 8(a), alleges that the Union violated Section 8(a)(1) by failing to provide the following information:

Since on or about October 7, 11, 18 and 25, 2010, the Union, by oral and written requests, has requested that the Respondent furnish the Union with the letter referred to by Garcia and Jaramillo in an October 7, 2010 meeting with employee Plant, who was told such letter would be maintained on file.

The facts related to the e-mail are discussed fully in context above.

I find that the Acting General Counsel has not established that the e-mail is necessary or relevant for the Union to carry out its statutory duties. As Respondent correctly points out, Plant received no discipline. Castro provided un rebutted testimony that at the time of the request, there was no pending grievance related to Plant, and there was also no pending discipline or fact-finding related to potential discipline related to Plant. (Tr. 537-38). No grievance was filed, and presently there is no potential grievance, as Plant was not aggrieved. I agree with Respondent’s position that the e-mail may become relevant if, in the future, Plant is subject to investigation or discipline in connection with the e-mail. The mere potential for such, however, is not enough to render the e-mail relevant to the Union’s representational function.

Respondent asserted an attorney work-product privilege in response to the request. It did not argue this defense in its brief, and because of my finding that the Acting General Counsel failed to establish relevance, there is no current need to address it.

Based on the foregoing, I recommend dismissal of the allegation set forth in paragraph 8(a).

2. Medical Appointments and Paid Time Off

Paragraph 8(b) of the complaint alleges that the Union violated Section 8(a)(1) when it failed to provide information regarding non-unit employees who were disciplined under Respondent’s paid time off (PTO) policy. The specific requests appear below.

a. Facts

On December 6, 2010, Plant told Jamarillo she had a medical appointment on December 8. Jamarillo asked her to bring in a doctor’s note due to her having a low paid time off (PTO) balance. (Tr. 183). The Union filed a grievance and requested the following information:

- The total number of medical appointments scheduled and approved by supervision for any and all medical appointments for employees bargaining unit or non bargaining unit who are subject to the Company’s PTO policy
- The total number of medical appointment scheduled and approved by supervision for any and all medical appointments for employees bargaining unit or non bargaining unit who are subject to the Company’s PTO policy and were required to provide a Doctor’s note to verify a medical appointment.
- The names, classifications and work locations of any and all PNM employees who are subject to the Company’s PTO policy, bargaining unit or non bargaining unit who have scheduled a medical appointment with their supervisor.
- The names, classifications and work locations of any and all PNM employees who are subject to the Company’s PTO policy, bargaining unit or non bargaining unit who have been required to provide a Doctor’s note to verify a medical appointment

(Tr. 88; JT 5). Respondent provided the information of Unit employees but omitted any information pertaining to non-Unit employees. Tafoya requested the information pertaining to non-Unit employees based on his belief that they are subject to the same rules and policies as Unit employees. (Tr. 89).

b. Analysis and Conclusion

In the above circumstances, to the extent that the Union sought information about non-Unit employees, it was incumbent for the Union to have established the relevancy of such material. In this regard, “to demonstrate relevance, the General Counsel must present evidence either (1) that the union demonstrated relevance of the nonunit information, or (2) that the relevance of the information should have been apparent to the Respondent under the circumstances.” *Disneyland*, 350 NLRB at 1258.

As in the requests at issue before Judge Litvack, Tafoya explained that PNM’s internal paid time off (PTO) policy applied to Unit employees and non-Unit employees alike.⁴⁵ Respondent offered no evidence to dispute the applicability of the PTO policy to all employees. Instead, it points to some of the differences between Unit and non-Unit employees, such as the requirement to join the Union, the at-will status of non-Unit employees versus the good cause requirement to terminate a Union employee, differences in disciplinary policies and the ability to change terms and conditions of employment. These differences, however, do not change the unrefuted evidence that the PTO policy applies to all employees, regardless of Union status. The Board affirmed Judge Litvack’s decision finding that the Union established the relevancy of requests for information regarding discipline of non-Unit employees involving other rules and policies at PNM that applies to all employees. *Pub. Serv. Co. of N.M.*, 356 NLRB No. 160 (2011). *See also U.S. Postal Serv.*, 332 NLRB 635 (2000) (information regarding supervisor relevant where it concerned policy that applied to all employees). The instant request is no different.

Respondent asserts in its brief that it need not provide information to support a disparate treatment theory based on differences between Union and non-Union employees, as it did in the case before Judge Litvack. (R Br. 44). This mischaracterizes the grievance, which pertained to disparate treatment regardless of Union status. In any event, this argument is without merit. *U.S. Postal Service, supra* (information request regarding supervisor’s attendance relevant to Union’s claim of disparate treatment of supervisors and bargaining unit members). Respondent also argues that it is not impeding the Union’s ability to pursue the grievance process by withholding information regarding non-Union employees. This misses the point, as the Union’s request concerns getting at the evidence required to prove a grievance, not the right to pursue one.

Respondent further asserts that the request would intrude on the privacy concerns of non-Unit employees. This, however, was not used as a justification for denying Tafoya’s request and no evidence was presented to support this defense.⁴⁶ Respondent further argues that, under the CBA’s terms, information regarding non-Unit employees is always irrelevant. This contention is unsupported. Respondent points out that a grievance under the CBA is limited to a dispute between the Union and the Company about applications of the CBA or a specific policy to a specific employee. The CBA does not set parameters regarding the evidence that might be used to prove a grievance. Indeed, it is inconceivable that it could set such parameters, given the various possible unique factual scenarios in the universe of potential grievances.

After reviewing the record as a whole, the Union demonstrated, through Tafoya’s letter, the relevance of its requests insofar as they concerned information regarding non-Unit employees. *Pub. Serv. Co. of N.M.*, 356 NLRB No. 160; *U.S. Postal Serv.*, 310 NLRB 391, 392

⁴⁵ Respondent cites to Tafoya’s knowledge of its “standing objection” to providing information on non-Unit employees, based in part on Judge Litvack’s decision. That decision, however, found that PNM delayed in providing requested information on non-Unit employees. The Board affirmed this decision in May 2011. 356 NLRB No. 60 (2011). The blanket standing objection is apparently misplaced.

⁴⁶ The request does not seek any medical documentation or any specific medical information.

(1993); *U.S. Postal Serv.*, 301 NLRB 709, 711–712 (1991);. As such, I find that PNM’s failure to provide this information violates Section 8(a)(1) of the Act.

3. Rex Foss Discipline

Paragraph 8(c) alleges that Respondent violated Section 8(a)(1) of the Act when it did not provide information in connection with the following request:

Since on or about December 8, 2010, the Union, by written request, has requested that the Respondent furnish it with the following information:

The discipline issued to Rex Foss for violations of Company policies including Do the Right Thing that occurred as a result of Mr. Foss’s involvement in the Carlisle and Montgomery leak incident.

a. Facts

PNM maintains a policy called “Do the Right Thing” that addresses ethics and compliance standards. It applies to all employees and officers, the Board of Directors, and Company affiliates. (Tr. 480; CP 2). Tafoya requested information regarding employees who had been disciplined for safety violations. At the time, there were pending grievances regarding the discipline of employees Kenny Nunn and Art Montano. (Tr. 86, 98). Castro responded by providing him information on Unit employees, but did not provide this information for non-Unit employees. (Tr. 538–39). Tafoya testified that he made the request in an effort to determine if the policy was being applied consistently. (TR 149).

b. Analysis and Conclusion

For the same reasons I find the information related to medical appointments and PTO of non-Unit employees relevant, I find the information regarding Foss’s discipline is relevant. See *Public Serv. Co. of N.M.* 356 NLRB No. 60 (2011); *See also U.S. Postal Serv.*, 332 NLRB 635 (2000). With regard to Respondent’s argument that the issue has been previously litigated, the Board issued a November 10, 2011 Order denying Respondent’s motion to dismiss on the basis of *res judicata*. As the Board has ruled on the matter, any argument that the ruling was erroneous is properly addressed to the Board. Accordingly, I find that Respondent violated Section 8(a)(1) of the Act by failing to provide the information in Complaint paragraph 8(c).

4. Crew Changes

Paragraph 8(d) alleges that Respondent has refused to furnish the Union with information, detailed below, pertaining to a crew change.

a. Facts

At some point in 2010, Cox was removed from his duties working on a “trouble truck” in Belen and assigned to a maintenance crew. When Cox asked his supervisor, Gary Cash, about it, Cash responded that the crew change affected all employees. This was not consistent with Cox’s

observations. (Tr. 285). On January 27, 2011, Tafoya sent the following request for information to Castro:

- 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?

(JT 7). Tafoya requested the information so that he could process a grievance alleging that the crew changes were made in retaliation for employees engaging in Union activity. (Tr. 92). Castro did not think there was a grievance on the issue during her tenure with PNM. (Tr. 545). Castro asked Smyth to provide her with the crew change makeup, but not the reasons for the changes, and he complied. (Tr. 842). Castro then provided some information to Tafoya on February 2, including the crew change schedule, and noted in non-specific fashion that any other information either did not exist or was not relevant. (Tr. 546; JT 7). Tafoya followed up on February 3, noting what he perceived as holes or deficiencies. (JT 7).

Smyth testified that one of the reasons Cox was transferred to the maintenance crew was because, as a Union steward, he was taking time off to do Union business. (Tr. 840–41). Another reason was that the craft supervisor, Mark Martinez, had requested that Cox move to his group. (Tr. 853–54). In addition, PNM regularly rotates people through different jobs for cross-training purposes. (Tr. 854, 867).

b. Analysis and Conclusion

Tafoya requested the information to process a grievance alleging that the crew changes were made to retaliate against some of his members for their outspokenness. (Tr. 92). Respondent asserts that “apparently” no grievance was filed on the issue. (R Br. 50). Tafoya stated he filed one, and Castro stated she did not think one was filed while she worked at PNM. Tafoya’s specific recollection outweighs Castro’s equivocal testimony, and I therefore find Tafoya filed a grievance. In addition, Castro responded to the part of the request she deemed relevant, which suggests she knew Tafoya was entitled to at least some of the information he requested.

Respondent argues that it was within management’s discretion to make the periodic crew changes, and the changes did not have a material effect on wages, hours, or working conditions. (R Br. 50). This argument goes to PNM’s view of the grievance’s merits, not to whether it needs to respond to an information request. See *Island Creek Coal Co.*, 292 NLRB 480, 487 (1989), *enforced*, 899 F.2d 1222 (6th Cir. 1990)(unpublished table decision) (Board does not pass on the merits of a union’s claim in determining whether information relating to the processing of a grievance is relevant). Moreover, Smyth’s testimony that one of the reasons Cox was transferred related to his duties as a Union steward lends support to the validity of the request.

Because the request was related to the Union’s representation function and concerned changes to the work assignments of Unit members, I find it was presumptively relevant, and Respondent’s failure to provide a full response violates Section 8(a)(1).

5. Safety Manual Violations and Discipline

5 Paragraph 8(e) asserts that Respondent violated Section 8(a)(1) by filing to respond to an information request as follows:

Since on or about December 2 and 16, 2010, the Union, by written request, has requested that the Respondent furnish the Union with the following information:

- 10 • A list of any employees bargaining unit or otherwise who have been discharged by the Company for violation of the Employee Safety Manual.
- 15 • A list of any employees bargaining unit or otherwise who have been discharged by the Company for violation of “other established safety procedures.”
- A list of any employees bargaining unit or otherwise who have been disciplined by the Company for violation of the Employee Safety Manual.
- 20 • A list of any employees bargaining unit or otherwise who have been disciplined by the Company for violation of “other established safety procedures.”

a. Facts

25 Respondent’s safety procedures apply to Unit and non-Unit employees alike. (Tr. 149). Unit employee Kenny Nunn was terminated for safety violations including failure to participate in or initiate a documented “tailboard conference” prior to beginning a job; failure to wear rubber gloves while working on energized (electrified) equipment; removing power from a 480-volt meter while alone; and failure to wear a face shield when required. (JT 4). Tafoya filed a grievance on behalf of Nunn. (Tr. 98). Tafoya requested the information above in an e-mail to 30 Castro dated December 2, 2010. (JT 4). Castro provided information related to Unit employees, but did not provide information regarding non-Unit employees, asserting that they are not similarly situated to Nunn.

b. Analysis and Conclusion

35 Tafoya’s testimony that PNM’s safety procedures apply to all employees, regardless of Union status, is unrebutted. (Tr. 149). I incorporate by reference the legal framework and analysis set forth in the section above regarding the request information related to medical appointments and paid time off. Accordingly, I find Respondent violated Section 8(a)(1) by 40 failing to provide information regarding non-Unit employees.

6. Policy Requiring Management’s Approval for Visitors

45 Paragraph 8(f) of the complaint alleges a violation of Section 8(a)(1) for failure to respond to the following information request:

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:

- 5 The Union requests the policy that requires employees to get management’s permission to escort visitors into the service center.

a. Facts

- 10 The facts surrounding this information request are set forth fully above in the section regarding Tafoya and Fitzgerald’s access to PNM’s property. I will summarize the most pertinent facts here.

- 15 On January 11, 2011, Tafoya sent an email to Cindy Castro and Nawman requesting a copy of the policy at issue. In response, Castro stated that the January 15, 2009 Security and Access Control memo from the General Services Group/Security specifies the access control, and provided him with a copy of it. (Tr. 574; JT 2; CP 5). It states:

- 20 **Visitors:** All visitors will be required to sign in with Security or at the front desk of the Administration Building. Visitor’s badges or stickers will be issued to visitors by Security or by an ESC employee. Employees will be required to escort visitors at all times within the ESC compound. Visitors can be pre-announced to Security by calling 241-3642 and Security will provide notification when the visitor has arrived. Employees will be required to pick up and return visitors at either the main service gate (E-4) or the front lobby of the Administration Building. Visitor badges should be returned to Security at the end of the visit.
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(Tr. 99; JT 2-1; Schmidt decision at 42).

- 30 Castro also sent Tafoya an e-mail on February 2, reiterating what she said in her letter, and adding that employees must check with their supervisors when deviating from their assigned work. Tafoya replied on February 7, asking Castro to clarify that there was no written policy requiring management approval to escort visitors onto PNM property. Castro responded that his access to the ESC was pending a decision from an ALJ, and that PNM’s position remained unchanged. Tafoya reiterated this request on February 11. Castro responded on February 16, stating simply, “The Company stands by its previous responses.” (JT 2; Tr. 61). Castro testified that through these exchanges, she advised Tafoya there was no written policy requiring management’s approval to escort visitors. (Tr. 536). She also testified that she had no recollection of telling him there was no written policy requiring employees to obtain management’s permission to escort visitors onto the ESC premises. (Tr. 573).
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b. Analysis and Conclusion

- 45 Respondent did not raise a relevancy argument, and the request for this information plainly relates to the Union’s access to represent its members. I therefore find it is relevant. Respondent asserts that it responded to the request by telling Tafoya there was no policy. However, this is not the case. Castro’s testimony was that her e-mails comprised the response,

but she did not recall telling Tafoya there was no policy. She merely referred to the Security and Access control memo, set forth in relevant part above. Tafoya did not ask for that policy, however, so providing him with it was not responsive, particularly since the policy is silent as to any requirement for management to approve visitors. The additional response that employees must check with their supervisors before deviating from their work assignments is likewise non-responsive, as Tafoya had previously accessed the facility without management’s consent to visit with employees before work and during breaks. It would have been extremely simple to just state there was no such policy, and Respondent’s failure to do so is baffling. Then, in response to Tafoya’s request for clarification, Castro notified him that his access was under litigation and PNM’s position remained unchanged. Again, it begs the question as to why Respondent never simply and directly responded that there was no specific policy. Based on the foregoing, I find Respondent violated Section 8(a)(1) when it declined to inform the Union, for nearly a year, that there was no policy responsive to Tafoya’s request.

7. Unscheduled Absences

Complaint paragraph 8(g) asserts that, since on or around March 23, 2011, Respondent failed to provide requested information regarding absences. The specific requests are detailed below.

a. Facts

In the Fall of 2010 meter readers were told they were required to work mandatory overtime on Saturdays. The Union, through Tafoya, filed a grievance. (Tr. 92–93, 100). On February 20, 2011, Tafoya sent Castro a request for information pertaining to the schedules of meter readers. Castro responded with some, but not all, of the requested information. The information he did receive raised an issue with regard to absences and employee discipline that he wanted to investigate. Specifically, employees are subject to discipline if they incur 40 hours of unscheduled absences and not reporting to work on Saturday exposed Meter Readers to discipline. (Tr. 101). Meter Readers were required to notify their Supervisor if they desired to schedule a Saturday off and use paid time off (PTO). (Tr. 102, CP 3) If the Supervisor did not approve an employee’s request, the employee was charged with an unscheduled absence. (Tr. 102). Under Respondent’s Absences From Work policy, employees charged with unscheduled absences can use their PTO if available. (CP 3). According to Tafoya, Respondent was not allowing Meter Readers to use PTO days for unscheduled absences. (Tr. 102). Tafoya therefore sent a second request on March 23, asking for:

- The Company policy that requires discipline to be administered if any employee has been charged with 40 hours of “unscheduled absences” and the date that policy became effective.
- The “unscheduled time off requirements” referred to in Eric Morgan’s email of 1/25/11 and the policy that contains those requirements.
- The policy that requires employees to Pre-Approve for PTO on any day that is not designated a regular work day by the CBA.
- The definition of “unscheduled absence” and the company policy that contains the definition.

- The names classifications and work locations of any and all PNM employees, bargaining unit or non bargaining unit who have been disciplined for accruing 40 hours of “unscheduled absences” from April 1, 2008 or the date the policy became effective to March 1, 2011 whichever period is shorter.

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(Tr. 93–95; JT 8). In the request, Tafoya informed Castro that he was investigating a grievance, and explained that the absence policy at issue applied to both Unit as well as non-Unit employees. (JT 8; CP 3).

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Castro, who left PNM on April 9, 2011, testified at the hearing that she had meetings with Tafoya regarding the Saturday-schedule issue, and she thought she had responded to the request. (Tr. 548). There is no record evidence of a response.

b. Analysis and Conclusion

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The request, which Tafoya made to investigate a possible grievance related to one he had filed in connection with the meter readers’ changed schedule, concerned employee absences and discipline. It is presumptively relevant as to the Unit employees. With regard to the other employees, the Acting General Counsel has established that Union and non-Union employees were subject to the same absence policy. (CP 3). I therefore incorporate by reference the legal framework and analysis set forth above regarding the requested information related to medical appointments and paid time off.

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Castro stated that she thought she had responded to the request. However, no response was submitted, and Castro offered no testimony regarding the contents of the response she thought she provided. Because Respondent failed to produce or even describe its response, I infer that there is no such response. Accordingly, I find Respondent violated Section 8(a)(1) by failing to respond to this information request.

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8. Denial of Tafoya Visit Before Work

Lastly, paragraph 8(h) alleges that Respondent violated Section 8(a)(1) by failing to provide information regarding the decision not to permit Tafoya to come to the ESC to meet with members before work hours on March 28, 2011.

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a. Facts

On March 25, 2011, Tafoya told Oldham that he wanted to come to the ESC the following Monday before the work shift to talk to his members. (Tr. 901–02). There was no specific purpose for his visit. (Tr. 903). Oldham called Smyth, who was interim manager. Smyth said it was a really busy week because the CEO was visiting, and offered to let Tafoya visit after the shift on Monday, or in the morning any day during the following week. (Tr. 904–06). On March 28, 2011, Tafoya sent an email to Castro and Mick Oldham, Senior Labor Relations Representative, requesting information regarding his access to the ESC before working hours. Oldham responded with some of the information, but Tafoya contended that he did not furnish the following requested information:

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- The names of the Company management that made the decision to deny me access to the service center before normal working hours.
- 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.

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Oldham explained that he did not see the relevance of the request for the names of the managers involved, and that PNM did not rely on any documentation. He advised Tafoya to explain the relevance of this information and stated that he would then consider the request. (JT 9).

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b. Analysis and Conclusion

Oldham responded, on April 7, 2011, that no documents were relied upon in making the decision at issue. (JT 9). Accordingly, I recommend dismissal of this part of the complaint allegation.

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With regard to the names of the managers that decided to deny him the right to visit that morning, Oldham asked Tafoya to explain why he needed this information. In this context, with no purpose for Tafoya to come to the ESC other than to visit with his members, coupled with the offer for Tafoya to visit any afternoon that week or any morning the following week, I do not find the information requested to be presumptively relevant. The inability to talk to Tafoya that particular Monday morning did not impact a term or condition of any particular member's employment where there was no investigation or grievance that needed Tafoya's attention. *Nat'l Sea Prods.*, 260 NLRB 3 (1982). Tafoya did not respond to Oldham's request to explain the relevance of the information, and no explanation was elicited at the hearing. Accordingly, neither the Acting General Counsel nor the Union established the relevance of the information requested.

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The relevance burden may be established by showing that a logical foundation and a factual basis exist for such an information request. That burden is satisfied by a showing that there is a probability the requested information is relevant and would be of use to a bargaining representative in carrying out its responsibilities. *U.S. Postal Serv.*, 310 NLRB 391, 391–392 (1993). I recognize that this denial is part and parcel of Respondent's overall move to change its practices with regard to Tafoya's access. Tafoya's ever-waning access is part of the lengthy complaint at issue in this correspondingly lengthy decision. This specific denial is an enforcement of the policy requiring management's permission for Tafoya to access PNM's premises, which, as explained above, I have found to be unlawful. The allegation above pertains to information Tafoya wanted for a possible grievance. The topic of management permission for Tafoya to access the ESC has been adjudicated as part of this complaint, there is no pending grievance, and any potential grievance would be redundant. Accordingly, I recommend dismissal of complaint paragraph 8(h).

Conclusions of Law

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1. Respondent Public Service Company of New Mexico is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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2. Local 611 is a labor organization within the meaning of Section 2(5) of the Act that serves as the exclusive collective bargaining representative of the following appropriate unit of employees within the meaning of Section 9(a) of the Act:

5 All employees of the Respondent’s Electric, Water, Transmission, Distribution, Production, Meter Reader, and Collector departments in the divisions and jobs referenced in Respondent’s collective-bargaining agreement with the Union effective by its terms from May 1, 2009, through April 30, 2012.

10 3. By failing to provide Local 611 with the following relevant information it requested:

(a) The total number of medical appointments scheduled and approved by supervision for any and all medical appointments for employees bargaining unit or non bargaining unit who are subject to the Company’s policy; The total number of medical appointments scheduled and approved by supervision for any and all medical appointments for employees bargaining unit or non bargaining unit who are subject to the Company’s PTO policy and were required to provide a Doctor’s note to verify a medical appointment; The names, classifications and work locations of any and all PNM employees who are subject to the Company’s PTO policy, bargaining unit or non bargaining unit who have scheduled a medical appointment with their supervisor;

(b) The discipline issued to Rex Foss for violations of Company policies including Do the Right Thing that occurred as a result of Mr. Foss’s involvement in the Carlisle and Montgomery leak incident;

(c) information pertaining to crew changes, including who from management made the decisions and how employees were informed of the decisions;

(d) A list of any employees bargaining unit or otherwise who have been discharged by the Company for violation of the Employee Safety Manual; A list of any employees bargaining unit or otherwise who have been discharged by the Company for violation of “other established safety procedures; A list of any employees bargaining unit or otherwise who have been disciplined by the Company for violation of the Employee Safety Manual; A list of any employees bargaining unit or otherwise who have been disciplined by the Company for violation of “other established safety procedures”; and

(e) The Company policy that requires discipline to be administered if any employee has been charged with 40 hours of “unscheduled absences” and the date that policy became effective; The “unscheduled time off requirements” referred to in Eric Morgan’s email of 1/25/11 and the policy that contains those requirements; The policy that requires employees to Pre-Approve for PTO on any day that is not designated a regular work day by the CBA; The definition of “unscheduled absence” and the company policy that contains the definition; The names classifications and work locations of any and all PNM employees, bargaining unit or non bargaining unit who have been disciplined for accruing 40 hours of “unscheduled absences” from April 1, 2008 or the date the policy became effective to March 1, 2011 whichever period is shorter, Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

4. By unilaterally making changes to the Informal Step of the contractual grievance and arbitration procedures in or around July 2011 by: (a) requiring stewards at the initial stage of the informal step to explain in detail which articles of the contract are alleged to be violated and how these articles have been violated; (b) refusing to sign in receipt of grievances that have been put to writing after oral grievances have been presented; and (c) requiring more than one supervisor be present during Informal Step grievance meetings, Respondent violated Section 8(a)(1) and (5) of the Act.

5. By unilaterally changing the requirement for Local 611 representatives to access its ESC facility in Albuquerque, New Mexico, in January 2011, Respondent violated Section 8(a)(1) and (5) of the Act.

6. By unilaterally changing the requirement for Local 611 representatives to access its San Juan Generating facility in Farmington, New Mexico on July 15, 2011, Respondent violated Section 8(a)(1) and (5) of the Act.

7. By threatening and interrogating employees, as set forth herein, Respondent violated Section 8(a)(1) of the Act.

8. By refusing to process a discrimination complaint by Unit employee Eric Cox unless he proceeded without his Union representative, Respondent violated Section 8(a)(1) of the Act.

9. By denying Unit employee Eric Cox’s request to have his Union representative of choice represent him at an investigatory interview on March 28, 2011, Respondent violated Section 8(a)(1) of the Act.

10. Respondent did not engage in any other of the unfair labor practices alleged this consolidated proceeding.

11. The unfair labor practices described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent engaged in certain unfair labor practices, my recommended order requires them to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Affirmatively Respondent must forthwith furnish the information necessary and relevant to the performance of Local 611’s duties as the exclusive collective bargaining representative of Respondent’s employees that it unlawfully withheld.

Respondent must restore the method of processing the informal step of the grievance procedure set forth in the collective bargaining agreement as it existed prior to July 2011. In the event Respondent has altered its method of processing the informal step of the grievance process in the meantime, it will be required to process informal grievances in a manner substantially

equivalent to that which existed prior to July 2011 until it negotiates alternate procedures or reaches a lawful impasse attempting to do so.

Respondent must restore the ability of Local 611 agents to access its ESC facility in Albuquerque, New Mexico, as it existed from January until August 2009.⁴⁷ In the event Respondent has altered its access procedures in the meantime, it will be required to provide Local 611 representatives with a form of access substantially equivalent to that which existed from January until August 2009 until it negotiates alternate access procedures applicable to representatives of Local 611 or reaches a lawful impasse attempting to do so.

Respondent must restore the ability of Local 611 agents to access its San Juan Generating Facility in Farmington, New Mexico, as it existed prior to the changes that took place on July 15, 2011. In the event Respondent has altered its access procedures in the meantime, it will be required to provide Local 611 representatives with a form of access substantially equivalent that which existed prior to July 15, 2011 until it negotiates alternate access procedures applicable to representatives of Local 611 or reaches a lawful impasse attempting to do so.

Respondent must process employee Eric Cox's discrimination complaint, allowing him to be represented by the Union representative of his choice.

Respondent will also be required to post the notice attached as Appendix A in order to inform employees of the outcome of this matter.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴⁸

ORDER

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

1. Cease and desist from:

a. Refusing to bargain with Local 611 as the exclusive representative of the employees in the following appropriate unit:

All employees of the Respondent's Electric, Water, Transmission, Distribution, Production, Meter Reader, and Collector departments in the divisions and jobs referenced in Respondent's collective-bargaining agreement with the Union effective by its terms from May 1, 2009, through April 30, 2012.

⁴⁷ Though the instant complaint alleges unlawful changes only from January 2011, the appropriate remedy is in accordance with the prior changes that Judge Schmidt found unlawful.

⁴⁸ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

b. Refusing to provide Local 611 with the information it requests that is necessary and relevant to the performance of its duties as the exclusive collective bargaining representative of the employees in the above unit.

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c. Changing past practices that affect the terms and conditions of employment of its employees in the above unit without the prior consent of Local 611 or a lawful impasse in negotiations over any proposed change.

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d. Coercively interrogating any employee about the union activities of that employee or any other employee.

e. Threatening employees for engaging in union activity.

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f. Denying employees the right to have Union representation for complaints covered by the collective bargaining agreement’s grievance procedure;

g. Denying employees the right to have the available Union representative of their choice represent them during investigatory interviews

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h. In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

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a. Within 14 days of this Order, provide Local 611 with the following information necessary and relevant to the performance of its representative functions:

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(i) The total number of medical appointments scheduled and approved by supervision for any and all medical appointments for employees bargaining unit or non bargaining unit who are subject to the Company’s policy; The total number of medical appointments scheduled and approved by supervision for any and all medical

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appointments for employees bargaining unit or non bargaining unit who are subject to the Company’s PTO policy and were required to provide a Doctor’s note to verify a medical appointment; The names, classifications and work locations of any and all PNM employees who are subject to the Company’s PTO policy, bargaining unit or

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non bargaining unit who have scheduled a medical appointment with their supervisor;

(ii) The discipline issued to Rex Foss for violations of Company policies including “Do the Right Thing” that occurred as a result of Mr. Foss’s involvement in the Carlisle and Montgomery leak incident;

(iii) information pertaining to crew changes, including who from management made the decisions and how employees were informed of the decisions;

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(iv) A list of any employees bargaining unit or otherwise who have been discharged by the Company for violation of the Employee Safety Manual; A list of any employees bargaining unit or otherwise who have been discharged by the Company for violation of “other established safety procedures; A list of any employees bargaining unit or otherwise who have been disciplined by the Company for violation

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of the Employee Safety Manual; A list of any employees bargaining unit or otherwise who have been disciplined by the Company for violation of “other established safety procedures”; and

5 (v) The Company policy that requires discipline to be administered if any employee has been charged with 40 hours of “unscheduled absences” and the date that policy became effective; The “unscheduled time off requirements” referred to in Eric Morgan’s email of 1/25/11 and the policy that contains those requirements; The policy that requires employees to Pre-Approve for PTO on any day that is not designated a regular work day by the CBA; The definition of “unscheduled absence” and the
10 company policy that contains the definition; The names classifications and work locations of any and all PNM employees, bargaining unit or non bargaining unit who have been disciplined for accruing 40 hours of “unscheduled absences” from April 1, 2008 or the date the policy became effective to March 1, 2011 whichever period is shorter.

15 b. Within 14 days of this Order, restore the method of processing the informal step of the grievance procedure set forth in the collective bargaining agreement as it existed prior to July 2011, or in the event Respondent has altered its manner of processing the informal step, process informal grievances in a manner substantially equivalent to that which existed prior to
20 July 2011.

25 c. Within 14 days of this Order, restore the access Local 611 agents had to its Electric Service Center facility in Albuquerque, New Mexico, to that which existed from January until August 2009, or in the event Respondent has generally altered its access procedures, provide Local 611 agents with a form of access substantially equivalent to that which existed between
30 January and August 2009.

35 d. Within 14 days of this Order, restore the access Local 611 agents had to its San Juan Generating facility in Farmington, New Mexico, to that which existed prior to changes implemented in the summer of 2011, or in the event Respondent has generally altered its access
40 procedures, provide Local 611 agents with a form of access substantially equivalent that which existed prior to the changes in the summer of 2011.

45 e. Within 14 days of this Order, commence investigation of Eric Cox’s discrimination complaint in accordance with the terms of the collective bargaining agreement, permitting him to be represented by the Union representative of his choice.

50 f. Within 14 days after service by the Region, post at its facilities located in the State of New Mexico, copies of the attached notice marked “Appendix.”⁴⁹ Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent’s authorized representative, shall be posted and maintained for 60 consecutive days in conspicuous

45 ⁴⁹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed a facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees of Respondent at any time since March 31, 2009.

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

IT IS FURTHER ORDERED that the consolidated complaint be dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C., June 22, 2012.



Eleanor Laws
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities

WE WILL NOT refuse to bargain with Local 611 as the exclusive representative of our employees in the following appropriate unit:

All employees of the Respondent's Electric, Water, Transmission, Distribution, Production, Meter Reader, and Collector departments in the divisions and jobs referenced in Respondent's collective-bargaining agreement with the Union effective by its terms from May 1, 2009, through April 30, 2012.

WE WILL NOT refuse to provide Local 611 with the information it requests that is necessary and relevant to the performance of its duties as the exclusive collective bargaining representative of the employees in the above unit.

WE WILL NOT refuse to bargain collectively with the Union by unilaterally changing our past practice in order to prohibit Edward Tafoya and Shannon Fitzgerald, the nonemployee Union Assistant Business Managers, from having access to the facilities.

WE WILL NOT change past practices that affect the terms and conditions of employment of our employees in the above unit without the prior consent of Local 611 or a lawful impasse in negotiations over any proposed change.

WE WILL NOT interrogate employees concerning their and other employees union or protected/concerted activities.

WE WILL NOT deny employees the right to Union representation during investigatory interviews covered by Weingarten or during the processing of employee complaints covered by the grievance procedure in the collective bargaining agreement.

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

WE WILL restore the manner in which supervisors process the informal step of the grievance procedure that existed prior to July 2011.

WE WILL restore the access Local 611 agents had to our Electric Service Center facility in Albuquerque, New Mexico, to that which existed from January until August 2009.

WE WILL restore the practices and conditions prevailing before July 15, 2011 in Farmington, regarding the Union's access to our property for purposes of discharging its function as the representative of our employees.

WE WILL permit Unit employees to have the available Union representative of their choice represent them in investigatory interviews under Weingarten and in any complaint that falls within the definition of a grievance in the collective bargaining agreement.

PUBLIC SERVICE COMPANY
OF NEW MEXICO

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

2600 North Central Avenue, Suite 1800
Phoenix, Arizona 85004-3099
Hours: 8:15 a.m. to 4:45 p.m.
602-640-2160.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 602-640-2146.