

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

IN THE MATTER OF:

PUBLIC SERVICE COMPANY OF NEW MEXICO

Respondent,

and

Case Nos. 28-CA-23391
28-CA-66164

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

Charging Party.

BRIEF IN SUPPORT OF
RESPONDENT PUBLIC SERVICE COMPANY OF NEW MEXICO'S
EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION

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A. STATEMENT OF THE CASE

Respondent Public Service Company of New Mexico (“PNM” or “Company”), pursuant to Section 102.46 of the Board’s Rules and Regulations, submits this brief in support of its exceptions to Administrative Law Judge (“ALJ”) Eleanor Laws’ June 22, 2012 Decision (“Decision”) in these consolidated cases.

PNM is an electric utility serving communities throughout the state of New Mexico. The International Brotherhood of Electrical Workers, Local Union No. 611, AFL-CIO (the “Union”) has represented bargaining units of PNM’s employees for approximately sixty years, most recently under a collective bargaining agreement (“CBA”) effective May 1, 2009 to April 30, 2012. ALJ Laws heard this consolidated proceeding over the course of six days (November 15-18, 2011 and January 18-19, 2012) and found that PNM violated Sections 8(a)(1) and (5) of the Act, as described more fully in the Decision.

For the reasons discussed below, PNM takes exceptions to specified findings by ALJ Laws and submits that these findings should not be adopted by the Board.

B. EXCEPTIONS, ARGUMENT, AND AUTHORITY

1. Alleged Change to Informal Step of the Grievance Procedure.

a. There was no unilateral change to any longstanding past practice regarding the informal step.

PNM takes exception to the ALJ's finding that the manner of processing the informal step in the internal grievance process in the CBA was a longstanding past practice that was changed unilaterally by PNM in the Summer of 2011. (Decision at 13:13-30, 14:1-11)

The ALJ erred in failing to give appropriate weight to evidence from Company HR staff and managers indicating that the Management Associated Results Company ("MARC") training and its application to the informal step was not some kind of departure from what the CBA provided for processing grievances (Tr. 1083), and that PNM continued to authorize supervisors to resolve issues at the informal step if they felt comfortable doing so (Tr. 617).

b. The CBA's plain language supported PNM's interpretation of the informal step of the grievance procedure.

PNM further takes exception to the ALJ's refusal to construe the plain language of the collective bargaining agreement, instead finding one interpretation as establishing the past practice. (Decision 13: 40-46, 14:1-4.)

The ALJ found both the Company's interpretation and the Union's interpretation of the informal-step language to be "generally plausible." (Decision at 13: 25-27). However, under the Union's interpretation the informal step would be of no significance

at all in many situations, because a supervisor's inability to provide an *immediate* "yes or no" response to a requested remedy would automatically conclude the informal step and permit the Union to deliver a written grievance to the supervisor.

For example, the ALJ's Decision described the situation faced by PNM supervisor Jeremy Shockey, who was presented with an oral request for a severance package of 9-10 months' pay as a remedy. Although Shockey thought that he would probably not be able to grant the remedy, he wanted to find out what Human Resources had to say about the issue before concluding the informal step and accepting a written grievance. (Decision 10: 2-9). Such action by Shockey was fully consistent with the CBA's language providing that the immediate supervisor "will attempt to adjust the grievance informally." (Decision 6: 30). The plain language of the CBA does not contain any express or implied requirement that the supervisor's final yes-or-no decision be rendered *on the spot* without an appropriate opportunity for consultation with PNM management. Put another way, the ALJ's and the Union's interpretation of the informal-step procedure would eviscerate the CBA's informal step by requiring that all difficult questions (that is, grievances requiring any research and analysis by the supervisor before rendering a yes-or-no decision regarding the requested remedy) be automatically removed from the informal, oral step. Because that interpretation is contrary to the plain language of the CBA, the Board should not adopt the Union's and the ALJ's interpretation of the informal-step provisions.

c. PNM's interpretation of the informal grievance procedure was not a material, substantial and significant change.

PNM takes exception to the ALJ's finding that the Company's interpretation of the informal grievance procedures constituted a "material, substantial and significant" change in the terms and conditions of the CBA. (Decision 15:6-11).

The facts of this case are materially different from others such as *Pan-Adobe, Inc.*, 222 N.L.R.B. 313, 325 (1976) (cited in Decision 14: 1-5) or *Pekar v. Local 181, Brewery Workers*, 311 F.2d 628, 636 (6th Cir. 1962), *cert. denied*, 373 U.S. 912 (1963) (cited in Decision 14: 4-5), where disputes regarding the interpretation of seniority provisions of collective-bargaining agreements were analyzed in light of the past practice of the parties relating to seniority. The instant case is also not analogous to *Bethlehem Steel Co.*, 136 N.L.R.B. 1500, 1502 (1962), *enforced*, 320 F.2d 615, 620 (3d Cir. 1963) (cited in Decision 11: 4-5), where the employer was found to have "abandoned" the contractual grievance procedure, or to *Westinghouse Electric Corp.*, 141 N.L.R.B. 733, 735-36 (1963), *reversed on other grounds*, 325 F.2d 126 (7th Cir. 1963), where the employer was found to have added a preliminary step to the grievance procedure. Instead, in the instant case, PNM merely provided its front-line supervisors with training on how to more closely adhere to the informal-step procedure that was already set forth in the CBA, including training on how to attempt to resolve more-complicated matters at the informal step even if that attempted resolution required at least some additional time and analysis by the supervisor. PNM supervisors' more thorough investigation and evaluation of oral grievances at the informal step,

without adding any additional steps or documents, does not rise to the level of “formalization” sufficient to trigger a duty to bargain. *Cf. Golden Stevedoring Co., Inc.*, 335 N.L.R.B. 410, 415 (2001) (finding that a unilateral change from an oral warning system to a written warning system was a material, substantial and significant change because written warnings tended to become a permanent part of an employee’s personnel file which could affect his future job security).

Furthermore, PNM’s Director of Human Resources for Utility Operations, Laurie Monfiletto, testified that PNM continued to authorize supervisors to resolve issues at the informal, oral step if they felt comfortable doing so. (Tr. 617). Thus, the ALJ’s statement that the informal discussion between a steward and a supervisor is “now a more formal and protracted affair” is incorrect, because PNM has never implemented any across-the-board requirement that informal discussions be delayed. Instead, PNM has simply provided its supervisors with tools for determining when they need to consult with others to determine if a requested remedy can be met.

Finally, a PNM supervisor’s decision not to accept a written grievance until the conclusion of the oral step must be evaluated in the context of the Union’s own violation of the procedure established by the CBA. As the ALJ noted (quoting Article 10 of the CBA), the CBA provides that “[i]f 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,” (Decision 6: 39-40; *see also* Decision at 6: 32 (referring to “this Informal Step, prior to the grievance being reduced to writing”)). The plain language of these provisions requires the grievant to attempt an oral resolution with the supervisor before

even putting the grievance on paper (that is, “reducing” the grievance to writing). If the Union and grievants complied with this procedure, there would be no written grievance in existence during the attempted oral resolution, and therefore the supervisor would have no need to refuse to accept such written grievance at that time. But when the Union or grievants violate that CBA provision and present supervisors with already-written grievances during the oral step, it cannot be a violation of the Act for PNM supervisors to refuse to accept such written grievances until after the supervisor has had an opportunity to examine the issue and provide a yes-or-no answer to the requested remedy. In short, because the Union and grievants have no right to short-circuit the CBA’s requirement that a grievance be reduced to writing only after the completion of the oral step, the supervisors’ adherence to the CBA’s procedures cannot constitute a “material, substantial and significant change” in the grievance procedure.

d. PNM’s interpretation of the informal grievance procedure did not result in a failure to process some grievances.

PNM takes exception to the ALJ’s finding that the Company’s interpretation and application of the informal grievance process resulted in a failure to process some grievances. (Decision 15: 13-20).

As explained in Sections (B)(1)(a) through (c) above, PNM’s interpretation and application of the informal step of the grievance process did not violate the Act. Accordingly, any alleged refusal by PNM labor relations personnel Oldham and Padilla to process written grievances that had not been through the required informal process was also not a violation of the Act.

2. Alleged Change in Tafoya's Access and Related Threats.

A. ACCESS ISSUE.

- a. There was not a material or substantial restriction on Tafoya's access.

PNM takes exception to the ALJ's decision that Ed Tafoya's access change was a material or substantial restriction on Ed Tafoya's access, thus concluding that there had been a violation of §8(a)(1) of the Act.

The ALJ noted that prior to January 2011, any employee could meet Tafoya at the front desk of the Electric Service Center ("ESC"), sign him in, and escort him. (Decision 18: 26-28; Tr. 789). From January 11, 2011 forward, Tafoya was required to have management approval for access to the ESC, and was also required to be escorted by a steward or a supervisor. (Decision 18: 32-35; Tr. 137-38).

At the hearing, Tafoya testified that "Right now, today, I believe I should have five days a week, 12 hours a day" access to the ESC. (Tr. 138). However, even after the changes made in January 2011, Tafoya effectively has that degree of access to the ESC to conduct union business, subject only to the requirements to obtain management permission and be escorted. Accordingly, the January 2011 changes in Tafoya's access to the ESC for union business did not constitute a material, substantial and significant change to Tafoya's access. See *Peerless Food Products, Inc.*, 236 N.L.R.B. 161, 161 (1978) (finding that there was no material, substantial, and significant change when a union business representative who previously "enjoyed virtually unlimited plant access" was restricted to meeting and conversing with unit employees and stewards in the lunchroom during break and lunch periods).

b. The requirement for Tafoya to be escorted did not constitute the unilateral removal of a real and substantial benefit.

PNM takes exception to the ALJ's finding that the requirement that Ed Tafoya have an escort while on PNM property at the Electric Service Center was a unilateral removal of a "real and substantial benefit". (Decision 19: 31-38.)

PNM incorporates by reference its argument and authorities described in Section 2(A)(a) above, because the Board's decision in *Peerless Food Products* compels the conclusion that the escort requirement was not a material, substantial and significant change.

Furthermore, in the *Granite City Steel* case cited by the ALJ, the changes made by the employer included restricting the union's agent to access during weekdays only, thereby denying him on-the-job access to the more the half of all unit members who worked on two night shifts and on Saturdays and Sundays. 167 N.L.R.B. 310, 315 (1967). In contrast, in the instant case there has been no evidence that PNM's escort requirement precluded Tafoya from meeting with any Union members for union business. The incremental change in PNM's policy requiring that all visitors be escorted was therefore not sufficient to constitute the removal of a "real and substantial benefit."

B. THREATS.

a. The allegation regarding an unnamed security guard's alleged statement overheard by Bert Garcia is unsupported.

PNM takes exception to the ALJ's finding that an unnamed security guard's statements, allegedly overheard by Bert Garcia, constituted a threat to Ed Tafoya.

The only unit employee who allegedly heard this statement was Bert Garcia. However, Garcia testified that this particular incident (where a statement was made by a security guard) occurred subsequent to a previous incident in which Garcia allegedly heard PNM supervisor Nawman tell Tafoya that Tafoya was not allowed on PNM premises. *See* Tr. 339 (Garcia referencing two instances where he witnessed someone from PNM management tell Tafoya that he was not allowed on company property); Tr. 339-40 (Garcia describing the first instance as when Nawman made the statement to Tafoya); Tr. 340 (Garcia describing the security guard's statements to Tafoya as the second instance). That sequence indicates that at the time of the security guard's alleged statement to Tafoya, (a) both Garcia and Tafoya had actual knowledge of PNM's access policy as applied to Tafoya and (b) Garcia could therefore not reasonably have perceived the security guard's statement as any "threat."

3. Fitzgerald's Access.

a. The changes to Fitzgerald's access procedures did not constitute a material and substantial change from past practice.

PNM takes exception to the ALJ's finding that the changes in Shannon Fitzgerald's access to the San Juan Generating Plant Facility were a "material, substantial and significant" change from past practice. (Decision 23: 3-8).

As described in the Decision, PNM informed Fitzgerald that when Fitzgerald needed to talk with any stewards or other employees, such employees would be called up to meet with Fitzgerald. (Decision 28: 29-31). PNM would also permit Fitzgerald to travel elsewhere on the PNM property (Decision 28: 31), and to meet privately with employees at such other locations (Tr. 445-46). Furthermore, while Fitzgerald's past practice was to visit the San Juan facility "on Tuesdays," there is no evidence that PNM limited Fitzgerald's access to Tuesday only. In essence, PNM granted Fitzgerald the right to visit the facility when he wished, meet privately with any employee he wished, and to travel anywhere on the facility he wished, subject only to the advance-notice and escort requirements. Moreover, PNM supervisor Eleanor McIntyre testified that Fitzgerald never told her that he was not able to conduct Union business to his satisfaction with that arrangement. (Tr. 1030). Nor did Fitzgerald ever tell her that he needed to see people he was not able to see. (Tr. 1030-31). Nor did PNM deny any request by Fitzgerald to release an employee or steward from work to speak with him. (Tr. 1031).

Fitzgerald testified that in the past (prior to the alleged change by PNM), he had been required to sign in to the San Juan facility and wear a temporary badge. (Tr. 359). Compared to that level of access, the addition of requirements that Fitzgerald merely provide advance notice of his visit and be escorted did not constitute a material, substantial and significant change to Fitzgerald's access. See *Peerless Food Products*, 236 N.L.R.B. at 161 (1978) (finding that there was no material, substantial, and significant change when a union business representative who previously "enjoyed virtually unlimited plant access" was restricted to meeting and conversing with unit employees and stewards in the lunchroom during break and lunch periods).

The Decision's reliance on *Ernst Home Centers, Inc.*, 308 N.L.R.B. 848 (1992), is misplaced for two reasons. First, the *Ernst* decision distinguished that case (involving access to employees on a sale floor) from the *Peerless Food Products* case involving access to employees in the production area of an industrial facility (a packing plant). *Id.* at 849. Second, the *Ernst* decision noted that in *Peerless Food Products* (where no violation was found), "the union's access to employees in the production area was not necessary in order to afford the union an opportunity to investigate grievances," and that "the union representative was offered, on request, the use of private facilities to meet with any aggrieved employee." *Id.* Because PNM, like the employer in *Peerless Food Products*, took steps to provide Fitzgerald with the ability to meet privately with any aggrieved employee, the instant case is not distinguishable from *Peerless Food Products* and therefore this finding by the ALJ should not be upheld.

4. Alleged Refusal to Process Eric Cox's Discrimination Complaint.

a. Cox's discrimination complaint was not filed as an internal grievance and was not required to be treated as an internal grievance.

PNM takes exception to the ALJ's conclusion that the CBA, through Articles 8 and 10, mandated PNM to process Eric Cox's discrimination complaint as an internal grievance under the CBA. (Decision 27: 34-37, 28:1).

First, there is no record evidence that Cox ever submitted his discrimination complaint through the grievance process established by the CBA. To the contrary, at the hearing in this matter the Union's attorney John Hollis represented to ALJ Laws that Cox had "made that complaint through the company's *other procedures*." (Tr. 288) (emphasis added).

Second, neither the Union nor Cox ever contended that Cox's discrimination complaint should be characterized as a grievance.

Third, Paragraph 5(e) of the Acting General Counsel's Consolidated Complaint contains no express or implied reference to a grievance, but instead alleges only that PNM failed to meet with Cox regarding his "complaint." (Complaint at 4; Decision 25: 1-4). The contention that Cox's discrimination complaint should have been characterized as a grievance was only raised for the first time in the Acting General Counsel's Brief filed on March 30, 2012. (AGC Br. 51-53). PNM therefore had no notice of this contention and no opportunity to respond to this contention during the hearing or in PNM's Post-Hearing Brief, which was also filed on March 30, 2012. While the Decision notes that PNM "did not present any evidence to refute the contractual

language that brings Cox's complaint within the ambit of a grievance," such lack of refutation occurred precisely because PNM (at the time of filing its Post-Hearing Brief) had no actual or constructive notice that the Acting General Counsel, the Union, or Cox had ever contended or would ever contend that the discrimination complaint should have been characterized by PNM as a grievance subject to the CBA.

Fourth, PNM takes exception to the ALJ's finding that certain language of the CBA brings Cox's complaint within the "ambit" of a grievance, and that therefore the complaint was a grievance. (Decision 27: 4-17, 34-35; Decision 28: 10-12). PNM's obligation to comply with federal and state laws against discrimination does not constitute a grievance, which is defined in the CBA as "a dispute between the parties [to the CBA] with respect to interpretation or application of the provisions of the [CBA] or to the application of a specific policy to a specific employee." (Decision 27: 9-11).

Fifth, PNM takes exception to the ALJ's suggestion that the "bypassing" of the grievance procedure was an "oversight" by parties including Cox and Tafoya. (Decision 28: 8-9). The Decision details at length the experience of Tafoya (the Union's assistant business manager) and Cox (the head Union steward) in the grievance process. Given that background, it is inconceivable that Cox's submission of his complaint outside the grievance process was the result of inadvertence rather than a deliberate decision. Even if it were assumed that the Decision is correct in stating that "Cox, as a Union steward, should have known that his complaint fell under the CBA, and asked for it to be processed as a grievance" (Decision 27: 36 to 28-1), it does not follow that PNM

should be found to have violated the Act for allegedly failing to “correct” Cox’s chosen method of submitting his discrimination complaint.

Finally, the Decision does not cite any prior Board decision where an employer was found to have violated the Act by failing to treat a complaint (submitted outside the grievance process) as a grievance subject to a CBA. Were the Board to affirm this finding by the ALJ, then the Board would effectively be imposing on employers a new duty to examine all complaints submitted *outside* of the CBA-prescribed grievance process to attempt to identify which complaints should be (or should have been) shoehorned into the grievance-handling process despite an employee’s or union’s decision not to submit any such grievance.

Consider, for example, a situation in which a unit employee wishes to complain of racial or sexual harassment by another unit employee who also happens to be a Union steward. The complaining employee may wish to submit the complaint outside the grievance process. If Human Resources decides that this complaint should be classified as a grievance under the CBA, and proceeds to involve the Union in each stage of the investigation, then Human Resources would be violating the privacy rights of the complaining employee. But if Human Resources does not treat this complaint as a grievance under the CBA, then Human Resources (under this Decision’s reasoning) would be exposing the company to a potential violation of the Act.

Similarly, the Decision also failed to consider the inherent conflict between a CBA-established grievance procedure and an employer’s independent obligations under federal law. For example, the Tenth Circuit has explained that an employer is subject

to vicarious liability for actionable harassment perpetrated by a supervisor with immediate (or successively higher) authority over the victimized employee in two situations. In one such situation, where no tangible employment action (such as discharge, demotion, or undesirable reassignment) is taken, the employer is liable unless it can prove an affirmative defense by a preponderance of the evidence. One of the necessary elements of that affirmative defense is that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior. *Helm v. Kansas*, 656 F.3d 1277, 1285 (10th Cir. 2011). As the United States Supreme Court has explained, this liability scheme gives credit to employers who make reasonable efforts to discharge their duty. *Faragher v. City of Boca Raton*, 524 U.S. 775, 806 (1998). However, the Equal Employment Opportunity Commission has published its "Enforcement Guideline on Vicarious Employer Liability for Unlawful Harassment by Supervisors" (hereinafter the "Guideline"), which is available at <http://www.eeoc.gov/policy/docs/harassment.html> and was last updated in April 2010. In stating that an employer's reasonable-care obligation to establish effective anti-harassment policies and complaint procedures would not be satisfied by the existence of a "union grievance and arbitration system," the EEOC explained: "Decision making under such a [union grievance and arbitration] system addresses the collective interests of bargaining unit members, while decision making under an internal harassment complaint process should focus on the individual complainant's rights under the employer's anti-harassment policy." *Id.* at n.57. Given the EEOC's own description of the material differences between a union grievance and arbitration system, on the one

hand, and an internal harassment complaint process, on the other hand, an employer that characterized an internal harassment complaint as a “grievance” subject to the CBA would arguably deprive itself of the right to raise the reasonable-care element of the affirmative defense to vicarious liability.

The key point is that neither the CBA nor the Act require an employer such as PNM to have to make such hair-splitting decisions as to whether or not a particular complaint (not filed as a grievance) should be treated as a grievance. Instead, it is properly left to the complaining employee to decide whether to submit a complaint through the Union (as a grievance) or to instead use “other procedures” to submit a complaint outside the scope of the CBA.

b. PNM was not required to permit Cox to have Union representation during the investigation of Cox’s discrimination complaint.

PNM, therefore, also takes exception to the ALJ’s finding that PNM violated §8(a)(1) by conditioning investigation of Eric Cox’s discrimination complaint on his being unrepresented. As described in the preceding Section 4(a), there is no evidence from the trial, in the CBA, or in the parties’ understanding of the CBA, that Eric Cox’s discrimination complaint had to be processed as an internal grievance. Given that the complaint was not an internal grievance, no representation right arose.

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

a. PNM did not deny Union representation to Cox.

PNM takes exception to the ALJ’s finding that Eric Cox’s representational rights were violated by denying him the representative of his choice, Ed Tafoya. The evidence

does not support a finding that Tafoya was available and ready when the meeting was scheduled to begin.

In *Coca-Cola Bottling Co.*, 227 N.L.R.B. 1276, 1276 (1977), the Board noted that the Supreme Court in *Weingarten* “was careful to point out that the exercise by employees of the right to representation at an interview may not interfere with legitimate employer prerogatives,” and that “[c]ertainly the right to hold interviews of this type without delay is a legitimate employer prerogative”). Furthermore, as in the *Coca-Cola* case, “[t]he fact is that Respondent did not compel [Cox’s] participation without representation.” *Id.* at 1276 n.6.

6. Alleged Interrogation by Smyth about Union Activities.

a. Smyth did not unlawfully interrogate Cox.

PNM takes exception to the ALJ’s finding that Dale Smyth’s questioning of Eric Cox about “union business” was an unlawful interrogation in violation of §8(a)(1) of the act. (Decision 33:38-40).

Cox testified that he had been “gone for a while” (Tr. 247) prior to the date of the incident, that he was the only daytime steward in the Line Department (Tr. 248), and that employees with overtime bypass grievances had to “pretty much wait for [Cox] to get back to be able to process those.” (Tr. 248). *See also* Decision 31: 35 (stating that “[f]or the couple weeks prior, Cox had been away on Union business”); Tr. 261 (Cox admitting that he was absent for “something like” two weeks prior). Cox testified that he was talking to “several employees” at the time that Smyth walked in (Tr. 247).

Smyth testified that crews start work at 7:00 a.m. and “should be out there on the ramp about 7:30 in the morning” headed toward the jobsite in their work trucks. (Tr. 816). However, at approximately 8:30 that morning, Smyth saw that Cox had not yet gone out to the crew he had been assigned to, but had instead gone to the foreman’s room. (Tr. 810, 816). Smyth opened the door to the foreman’s room and asked Cox if he was working that day, because at that point Smyth did not know if Cox was on union business or was actually scheduled for paid work that day. (Tr. 810; Tr. 248 (Cox stating that Smyth walked in and asked “was I here today”)). Smyth testified that he asked this question because he had Cox assigned to a crew, and Cox’s delay would have delayed the crew getting started doing their work. (Tr. 812). Smyth testified that because of a safety rule, there has to be a certain amount of linemen for each crew; if there are not enough linemen, then “the crew can’t actually do the work” and instead has to “sit and wait for that other [lineman] to show up.” (Tr. 812). Smyth testified that because Cox was assigned to a crew, he was holding up possibly three other employees from going out and starting their work. (Tr. 812, 824).

Cox testified that Smyth asked “what I was doing, . . . was I here today,” and Cox responded that he was conducting some investigations for possible bypass grievances. (Tr. 248-49).

Because Cox’s answer to Smyth’s initial, general question indicated that Cox was working on bypass grievances, the record evidence does not support the inference that Cox was subsequently attempting to find out specific information about the substance of those grievances. (Indeed, Cox’s statement that these were potential “bypass”

grievances essentially informed Smyth regarding the general substance of those grievances.) Rather, Cox was reasonably attempting to find out “who they were for” (Tr. 249)—meaning, which employees would be delayed from proceeding to their jobsites due to their meeting with Cox. Thus, the “nature of the information sought” was essentially which employees would be delayed in their work, rather than “the substance of potential employee grievances.” (Decision 33: 9-10).

Under the totality of the circumstances, it was reasonable and appropriate for Smyth to ask Cox which employees he was meeting with, so that Smyth would be fully informed regarding the availability of Cox and other employees for assigned work. *See, e.g.*, Tr. 791 (supervisor Nawman explaining that if there is a three-man bucket-truck crew, for example, and one member of the crew is talking with a union representative, “[t]hey no longer have a legal bucket crew to do their work and so you’ve shut down that crew for however long it takes to get that done”). The supposed need for Cox to meet with “several employees” on the same morning was self-inflicted by Cox and the Union due to (a) the Union having only one daytime-shift steward (Cox) in Cox’s department and (b) Cox being absent during the preceding weeks. Even if Cox had permission to conduct “union business” on the morning of June 2, that did not provide Cox with *carte blanche* to delay the assigned work of several other employees without affording Smyth an opportunity to know which employees would be affected and, thus, how the day’s scheduled work for that department would be affected. Furthermore, even if it is “self-evident that employees may not want a supervisor to know that they are contemplating a grievance” (Decision 33: 10-11), that concern does

not require a supervisor to remain silent upon seeing "several employees" apparently absent from their assigned work stations so as to meet with a Union steward who has just returned from an extended absence.

7. Allegation of Threat by Smyth telling Cox to Come to his Office.

- a. Smyth's request for a discussion with Cox did not constitute a threat.

PNM takes exception to the ALJ's conclusion that Dale Smyth threatened Eric Cox by asking Eric Cox to come to his office to discuss the union business he was working on in the NSD crew room. (Decision 33: 46-47, 34: 1, 19-21).

PNM incorporates by reference the evidence and argument presented in the preceding Section 6(a). Because it was reasonable and appropriate for Smyth to ask Cox which employees would be affected by Cox's "union business" that morning, it was also appropriate for Smyth to instruct Cox to come to his office for a discussion, rather than discuss the issue in front of other employees. In short, Smyth's request for a discussion with Cox was hardly a "threat" and did not violate the Act.

Furthermore, the ALJ erred in giving any consideration to the presence of other employees in the room with Cox. (Decision 33: 22-23, 47; Decision 34: 19). As ALJ Margaret G. Brakebusch noted in a recent decision that was approved by the Board, "[t]he Board has specifically noted that in the final analysis, the Board's task is to determine whether 'under all the circumstances the questioning at issue would reasonably tend to coerce *the employee at whom it is directed* so that he or she would feel restrained from exercising rights protected by Section 7 of the Act.'" *Sikorsky Aerospace Maint.*, 2011 N.L.R.B. LEXIS 20, *11-12 (Jan. 24, 2011) (emphasis added)

(quoting *Westwood Health Care Center*, 330 NLRB 935 (2000)), *affirmed by* 356 N.L.R.B. No. 144 (Apr. 27, 2011). Because Smyth's questions and statements were directed only at Cox, it is immaterial that other employees were also present, and no alleged effect on those other employees should be taken into consideration.

8. Alleged Threat of Unspecified Reprisal

- a. There was no threat of reprisal.

PNM takes exception to the ALJ's finding that Dale Smyth's statement that "there would be consequences" if Eric Cox refused to tell Smyth what specific union business he was working on" was unlawful under §7 and §8(a)(1) of the Act. (Decision 35: 8-14).

For the reasons presented in Section 6(a) above, it was not unlawful for Smyth to ask Cox which employees would be affected by Cox's "union business" on June 2. Because that questioning was not unlawful, it follows that the alleged mention of "consequences" cannot constitute an unlawful threat.

9. Alleged Interrogation by Gary Cash

- a. Cash did not unlawfully interrogate Cox.

PNM takes exception to the ALJ's conclusion that Gary Cash asking Eric Cox what union business he had been discussing with Ed Tafoya was an unlawful interrogation. (Decision 36: 41-42, 37: 3-5, 37-9).

First, the record does not support the ALJ's finding that Cash was attempting to "elicit information regarding employee grievances." (Decision at 37: 3-4). Neither Cox

nor Tafoya testified that Cash asked about any employee grievances. Instead, Cash allegedly asked what Cox and Tafoya had been talking about.

Second, under the totality of the circumstances, the questioning by Cash did not tend to restrain, coerce, or interfere with any of Cox's or the Union's statutory rights.

10. Alleged Violations Related to Union Requests for Information

a. Non-Unit employee PTO scheduling and medical appointment information.

PNM takes exception to the ALJ's decision that the failure to provide non-Unit employee PTO scheduling and medical appointment information was a violation of §8(a)(1). (Decision 42: 16-31, 43: 36-38, 44: 1-2).

The Board explained in *Disneyland Park* that a union satisfies its burden when it demonstrates a reasonable belief, supported by objective evidence, that the requested information is relevant. *Disneyland Park*, 350 N.L.R.B. 1256, 1257-58 (2007); *see also U.S. Postal Service*, 310 N.L.R.B. 391, 391 (1993) (stating that the requesting party must show that there is a both a logical foundation and a factual basis for an information request relating to persons outside the bargaining unit, and that such requests "require a special demonstration of relevance"); *U.S. Postal Service*, 1996 N.L.R.B. Lexis 13, at *12 (Jan. 25, 1996) ("Although a union is presumptively entitled to information regarding bargaining unit employees, that presumption does not follow when the information requested concerns non unit employees. Further, where such non unit information is requested, the Union must demonstrate some objective basis and not mere suspicion, to support the request's alleged relevance.").

The Decision cites the case of *U.S. Postal Service*, 332 N.L.R.B. 635 (2000), where the Board found that a union had sufficiently demonstrated the relevance of requested information regarding a particular supervisor's attendance records. (Decision at 43: 12-13). In that case, however, the ALJ found that the particular supervisor's "frequent absences had been directly observed by union members" and that "[p]ersons currently under [that supervisor's] supervision observed that [he] was 'out quite a bit' and had a history of being out frequently." *Id.* at 636. In marked contrast, Tafoya's request for information regarding non-unit employees was based only on (a) Jaramillo's request that unit employee Plant bring in a doctor's note (Decision 42: 12-14) and (b) Tafoya's belief that non-unit employees are subject to the same policies as unit employees (Decision 42: 34-36; Tr. 89). Tafoya's statement that he "wanted to look at disparate treatment" (Tr. 89) failed to satisfy the requirement for "some objective basis and not mere suspicion." Indeed, Tafoya's request for information regarding non-unit employees provided even less of a demonstration of relevance than did the union's request in *U.S. Postal Service*, 310 N.L.R.B. 701, 703 (1993), where the Board found that unit members' general allegations that supervisors "miss a lot of time" and may "border on being abusers of time and attendance" fell short of a showing of relevance. Accordingly, Tafoya and the Union failed to demonstrate the relevance of the requested information regarding non-unit employees.

b. Non-Unit disciplinary information for non-Unit employees alleged to have violated PNM's "Do the Right Thing" policy.

PNM takes exception to the ALJ's conclusion that the Company violated §8(a)(1) by not providing non-Unit disciplinary information for non-Unit employees alleged to have violated PNM's "Do the Right Thing" policy. (Decision 44: 29-36).

The issue of the relevance of information regarding the discipline of non-unit employees, including but not limited to discipline in connection with the Carlisle and Montgomery leak incident, was the subject of the earlier case numbered 28-CA-23148 and has also been briefed in the United States Court of Appeals for the Tenth Circuit. On March 21, 2012, the Tenth Circuit heard oral argument on PNM's petition for review of the Board's Decision and Order dated May 24, 2011 and the Board's cross-petition for enforcement of that Decision and Order. As of the July 20, 2012 filing of PNM's Exceptions and this Brief, a decision by the Tenth Circuit remains pending in those related cases numbered 11-9536 and 11-9540.

In the event that the Tenth Circuit finds in those cases that PNM was not required to provide the requested information regarding the discipline of non-unit employees, such findings are herein incorporated by reference in support of this Exception.

c. Non-Unit employee information regarding alleged violations of the employee safety manual or other established safety procedures.

PNM takes exception to the ALJ's conclusion that the Company violated §8(a)(1) by failing to respond to an information request seeking non-Unit employee information

regarding alleged violations of the employee safety manual, or other established safety procedures. (Decision 46: 10-20, 46: 39-40).

PNM incorporates by reference the arguments and authorities presented in Section 10(a) above regarding medical appointments and paid time off. Even if PNM's safety manual and other safety policies apply to both unit and non-unit employees, Tafoya's request for information regarding non-unit employees failed to satisfy the requirement for "some objective basis and not mere suspicion" regarding disparate treatment of unit and non-unit employees.

d. Alleged meter reader change in schedule.

PNM takes exception to the ALJ's conclusion that PNM violated §8(a)(1) by failing to respond to a request for information related to an alleged meter reader change in schedule. (Decision 39: 27-28.)

PNM does not take exception to the ALJ's findings relating to this request for information regarding unit employees.

However, for the reasons set forth in Section 10(a) above, PNM takes exception to the ALJ's findings regarding the request for information regarding non-unit employees. Even if a policy regarding unscheduled absences applied to both unit and non-unit employees, Tafoya's request for information regarding non-unit employees failed to satisfy the requirement for "some objective basis and not mere suspicion" regarding disparate treatment of unit and non-unit employees.

C. CONCLUSION

For the foregoing reasons, PNM respectfully requests that the Board decline to adopt the Administrative Law Judge's Decision and recommended order with respect to the findings to which PNM has taken exception.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was emailed and mailed via First Class mail, postage prepaid, on July 20, 2012, to the following:

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