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.

RESPONDENT PUBLIC SERVICE COMPANY OF NEW MEXICO'S ANSWERING BRIEF TO ACTING GENERAL COUNSEL'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

Respondent Public Service Company of New Mexico ("PNM" or "Company"), pursuant to Section 102.46 of the Board's Rules and Regulations, submits the following Answering Brief and cross-exceptions to the Acting General Counsel's Exceptions to Administrative Law Judge ("ALJ") Eleanor Laws' June 22, 2012 Decision ("Decision") in these consolidated cases. Citations below to "AGC Exceptions Brief" refer to the Acting General Counsel's Brief in Support of Exceptions.

1. Response to Acting General Counsel's Exception 1

PNM does not oppose this exception by the Acting General Counsel, and believes that it would be sufficient to change the reference on Decision page 14, line 30, from "9(d)(2)" to "9(d)(3)".

2. Cross-Exception to Acting General Counsel's Exception 2

The ALJ correctly determined that 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.

First, it appears that the Acting General Counsel is conflating the issue of discussions "on company time" with the issue of PNM supervisors requiring discussions to be scheduled in advance. See AGC Exceptions Brief at 5 (arguing that stewards Barnard and Cox testified that supervisors began telling stewards that they had to schedule an appointment to discuss grievances). However, the issue of advance scheduling was "fully litigated" in this matter (Decision at 14: 32), and the ALJ found that the advance-scheduling requirement did not constitute a material, substantial, and significant change. (Decision at 14: 34). Thus, the AGC Exceptions Brief is incorrect in stating that the ALJ did not consider the advance-scheduling issue in her decision. (AGC Brief at 5).

Second, the AGC Exceptions Brief does not present or refer to any evidence at trial that the Company's requirement for grievance discussions to be scheduled in advance constituted a refusal to conduct such discussions "on company time." For purposes of argument, there may be a distinction between a supervisor telling an employee to "come back to see me later in your shift" (on company time), as opposed to "come back to see me after your shift ends" (outside company time). However, the ALJ found that the Acting General Counsel did not submit evidence that supervisors

refused to discuss grievances on company time, and the AGC Exceptions Brief does not contain any information sufficient to rebut that finding.

3. Cross-Exception to Acting General Counsel's Exception 3

The ALJ correctly determined that the Acting General Counsel did not present sufficient evidence to prove its allegation that supervisor Gary Cash "threatened employees by informing them that Union Assistant Business Manager Ed Tafoya . . . was not allowed on the property to represent them." (Decision 16: 15-20; 20: 22-23).

First, only hearsay testimony was provided to support the allegation. As the ALJ noted, the "working foreman" did not testify regarding this incident, and no other employee present in the room testified regarding this incident. (Decision 20: 23-26). The only person who testified about this incident was Ed Tafoya, who was not in the room and was only engaged in a telephone conversation with the working foreman. Tafoya's testimony that he could hear other crew members talking (Tr. 55) suggests that those other crew members were engaged in their own conversations rather than listening to a conversation between Tafoya and Cash, and supports the ALJ's finding that "[t]hough 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." (Decision 20: 26-28). Furthermore, because Tafoya's hearsay testimony was uncorroborated by any other evidence at trial, Tafoya's hearsay testimony is entitled to little weight. See W. D. Manor Mech. Contrs., Inc., 357 NLRB No. 128, 2011 NLRB LEXIS 685, **5-6 (Dec. 7,

2011) (noting that although the Board does not exclude hearsay testimony, such testimony is entitled to little weight when it is uncorroborated by additional evidence).

Second, the AGC Exceptions Brief improperly references unrelated allegations of the Consolidated Complaint. See AGC Exceptions Brief at 6 and n.1 (arguing that "on a later date" Cash and "agents other than Cash" informed other employees that Tafoya was not allowed into the facility). The allegations of Complaint paragraph 5(g) are wholly separate from those of paragraph 5(h), 5(i), and 5(j). The Acting General Counsel has the burden to prove the specific allegations of paragraph 5(g) of the Consolidated Complaint, and the Acting General Counsel cannot satisfy that burden by referencing events involving other dates and other persons.

4. Cross-Exception to Acting General Counsel's Exception 4

Paragraph 9(c) of the Consolidated Complaint alleged that PNM implemented a "new requirement" that meter readers had to work on Saturdays. (Decision 24: 11-15). However, the ALJ correctly determined that "[t]here 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." (Decision 24: 38-41).

First, the Acting General Counsel has the burden of proving a case by a "preponderance of the testimony taken." Whirlpool Corp., 281 N.L.R.B. 17, 22 (1986) (quoting Section 10(b) of the Act). If upon the preponderance of the testimony taken, "the proof creates an equipoise, or . . . if any essential element necessary to make a finding of an unfair labor practice is absent or left to surmise, speculation, or conjecture, the trier of the facts is required by Section 10(c) to dismiss the complaint."

Vernon Livestock Trucking Co., 172 N.L.R.B. 1805, 1809 (1968). Aside from a single reference to page 101 of the Transcript, see AGC Exceptions Brief at 9, the Acting General Counsel's nearly three pages of briefing regarding this Exception do not reference any testimony in support of the Exception.

Second, the ALJ correctly found that the Acting General Counsel failed to prove a deviation from "established past practice." (Decision 24: 39). The AGC Exceptions Brief does not reference any testimony regarding the parties' bargaining history or past practice as to meter-reader overtime. Nor does the AGC Exceptions Brief reference any testimony that would satisfy the Acting General Counsel's burden to prove that the alleged change was material, substantial, and significant. Alamo Cement Co., 281 N.L.R.B. 737, 738 (1986).

In short, because the Acting General Counsel failed to present sufficient testimony or other evidence at trial to support its allegation, and thereby failed to provide PNM with an opportunity to respond at trial to the arguments that Acting General Counsel is only now raising in its post-trial briefing, the Board should affirm the ALJ's dismissal of paragraph 9(c) of the Consolidated Complaint.

5. Cross-Exception to Acting General Counsel's Exception 5

Paragraph 6(a) of the Consolidated Complaint alleges that PNM violated Sections 8(a)(1) and (3) when, on or about June 2, 2011, PNM supervisor Dale Smyth "imposed more onerous working conditions on [Union steward Eric] Cox by requiring him to go to a management office to be questioned about his Union activities." (Decision 36: 3-5). The ALJ correctly determined that this "one-time request to go to Smyth's office" was

"too insignificant to establish the imposition of an onerous working condition." (Decision 36: 7-8).

First, in Aladdin Gaming, LLC, 345 N.L.R.B. 585 (2005), the General Counsel alleged that union supporter Herrera was assigned to work alone for a total of four to six hours over a six-month period, and that such assignments constituted the imposition an onerous working condition. Id. at 622. Rejecting that allegation, the ALJ found that even it were assumed that a connection existed between Herrera's union activity and the work-alone assignments, "the incidents are insignificant, and do not warrant the finding of a violation." Likewise, Smyth's one-time statement that he needed to speak to Cox alone in his office (Decision 32:5; Tr. 249) was also too insignificant to warrant the finding of an imposition of any onerous working condition.

Second, the AGC Exceptions Brief improperly references an unrelated allegation of the Consolidated Complaint. See AGC Exceptions Brief at 10-11 (alleging that PNM supervisor Gary Cash engaged in the same conduct as described in Consolidated Complaint paragraph 5(j), which references events on or about May 10, 2011). The allegations of Consolidated Complaint paragraph 6(a) are wholly separate from those of paragraph 5(j). The Acting General Counsel has the burden to prove the specific allegations of paragraph 6(a) of the Consolidated Complaint, and the Acting General Counsel cannot satisfy that burden by referencing events involving other dates and other persons.

6. Cross-Exception to Acting General Counsel's Exception 6

The ALJ correctly dismissed paragraphs 5(b), 5(c), and 5(d) of the Consolidated Complaint.

First, the Acting General Counsel inaccurately describes the ALJ's finding of fact. The ALJ did not find that Marie Plant "twice requested union representation" (AGC Exceptions Brief at 12) or "requested a union representative on two separate occasions during this interview (Id. at 15). Instead, the ALJ noted that Plant testified that "she twice asked whether she needed a steward." (Decision 39: 25 (emphasis added)). That question by Plant—herself a Union steward well acquainted with the interview process—of "whether she needed" a steward did not constitute an express request for representation sufficient to trigger Weingarten rights. See United Tel. Co., 251 N.L.R.B. 510, 513 (1980) (stating that to invoke Weingarten protection "the employee must request union representation," and finding that "at no time did [the employee] ever expressly request to have union representation at this discussion."

Second, even if it were assumed that Plant made an express request for union representation, the ALJ correctly concluded that the meeting between Plant and PNM supervisor Jaramillo and PNM labor relations consultant Garcia was not a Weingarten interview. (Decision 40: 14-15). As the ALJ found, the meeting was held solely for the purpose of informing Plant of, and acting upon, a previously made disciplinary decision. (Decision 39: 39-41 (quoting Baton Rouge Water Works Co., 246 N.L.R.B. 995, 997 (1979)). In this case, the previously-made decision was to take no disciplinary action. (Tr. 701-02, 722). Acting General Counsel appears to argue that the decision not to

impose any discipline falls outside the scope of a "previously made disciplinary decision." See AGC Exceptions Brief at 14 (stating that "Plant was not informed of a decision made to discipline her or any other employee during the interview"). However, Acting General Counsel does not cite any Board decision that excludes such "no-discipline" decisions from the application of the principle announced in Baton Rouge Water Works.

Finally, Acting General Counsel provides inadequate support for the proposition that the characterization of this meeting as a "confrontation" necessarily triggers Weingarten protections. See AGC Exceptions Brief at 13-14, 15. Nearly any meeting between an individual employee and supervisors has the potential to become "confrontational" in nature. However, the Board has previously established that certain types of meetings, such as those merely announcing a disciplinary decision and not seeking additional information from an employee, do not trigger a right of representation. Baton Rouge Water Works.

In short, it would strain both logic and controlling Board precedent to conclude, as requested by Acting General Counsel, that while a meeting to announce the imposition of particular discipline does not trigger Weingarten protections, a meeting to announce a decision not to impose any discipline would trigger Weingarten protections. Regardless of what Plant herself may have perceived regarding the nature of the interview, the ALJ correctly determined that Plant was "not investigated" (Decision 40: 22-23), that there was no evidence presented that anyone asked her questions or otherwise sought to gather information from her (Decision 40: 22:24), and that PNM

engaged in no conduct at the meeting sufficient to convert it into a Weingarten interview (Decision 40: 14-15).

7. Cross-Exception to Acting General Counsel's Exception 7

The ALJ correctly determined that the Acting General Counsel failed to establish that the requested e-mail message was necessary or relevant for the Union to carry out its statutory duties (Decision 41: 33-34).

First, as the ALJ noted, Plant was not disciplined (Tr. 214), there was no pending grievance related to Plant, and there was no pending discipline or fact-finding related to potential discipline of Plant (Tr. 537-38). The ALJ therefore was correct in finding that the mere potential for a future investigation or discipline of Plant in connection with the e-mail message is not sufficient to render the e-mail message relevant to the Union's representational function. (Decision 41: 39-41).

Second, the AGC Exceptions Brief provides no support for its sweeping proposition that "a document such as this e-mail, which suggests impropriety, placed in an investigatory file maintained by an employer, is quintessentially a form of discipline being given to the employee." (AGC Exceptions Brief at 17). The Fleming Companies case cited by Acting General Counsel concerns employees who have received discipline, and is not applicable to this situation where Plant has received no discipline. See Fleming Companies, Inc., 332 N.L.R.B. 1086, 1086 (2000) (Union requested personnel file of suspended and discharged employee in connection with grievance of that suspension and discharge). The Grand Rapids Press case is also not applicable, because in that case the Union sought the personnel files themselves, including a

supervisor's separately-maintained memoranda that the supervisor admitted he considered part of the employees' personnel files. Grand Rapids Press, 331 N.L.R.B. 296, 301 (2000). In fact, when adopting the ALJ's recommended Order in that case, the Board specifically noted that the memoranda at issue "were intended to be part of unit employees' personnel files." Id. at 296 n.2, 301. In contrast, there has been no evidence in the instant case that the e-mail message regarding Plant was intended to be part of Plant's personnel file.

For the foregoing reasons, PNM respectfully requests that the Board deny the Acting General Counsel's Exceptions 2 through 7 and affirm the Administrative Law Judge's Decision and recommended Order with respect to the findings to which Acting General Counsel 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 August 20, 2012, to the following:

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