

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

PUBLIC SERVICE COMPANY OF NEW MEXICO

and

Case 28-CA-023391

Case 28-CA-066164

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

**CHARGING PARTY’S ANSWER BRIEF TO RESPONDENT’S
EXCEPTIONS TO ADMINISTRATIVE
LAW JUDGE’S DECISION**

Charging Party, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 611, AFL-CIO (herein “Union”), by and through its undersigned counsel, pursuant to Section 102.46 of the Board’s Rules and Regulations, submits this brief in answer to Respondent’s exceptions to the Decision (“Decision”) of Administrative Law Judge Eleanor Laws, JD(SF)-28-12, issued under date of June 22, 2012, as follows:

1. **Changes to the Informal Step of the Grievance Procedure**

Respondent Public Service Company of New Mexico (“PNM”) claims (Brief at 5) that “[t]here was no unilateral change to any longstanding past practice regarding the informal step.” The unopposed factual findings of ALJ Laws show otherwise. After recounting testimony and exhibits, ALJ Laws found (Decision at 12:23-29):

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 it. I further find that this practice changed during the summer of 2011 [footnote 12 omitted]. 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.

PNM next asserts (Brief at 5) that “[t]he CBA’s plain language supported PNM’s interpretation of the informal step of the grievance procedure.” Even assuming *arguendo* that this was true, it would not excuse PNM’s unilateral changes to comport with its new interpretation contrary to the admitted longstanding past practice in accord with the Union’s interpretation. ALJ Laws found that both interpretations were “generally plausible” (Decision at 13: 25-27). The deciding difference was that (Decision at 14: 7-8): “In any event, the Union’s interpretation had clearly become the past practice [footnote15].” The referenced footnote 15 is particularly telling, reading (Decision at 14: 46-47): Indeed, Respondent conducted the MARC training and distributed the guidelines based on its view that this practice was incorrect.” ALJ Laws rejected (Decision at 14: 8-9) PNM’s argument that “its approach is mandated by the CBA....” PNM renews this argument here claiming that the Union’s interpretation is “contrary to the plain language of the CBA” (Brief at 6). PNM continues, *id.*, to confuse “the informal step” and what it calls the “informal, oral step.” Under the CBA, the “informal step” includes both an oral presentation, and a written grievance “if not adjusted to the satisfaction of the grievant.” Either the supervisor satisfactorily adjusts the oral grievance, or else a written grievance is presented to him/her for signature as receiving it. This is not complicated and does not in any way license PNM and its supervisors to delay and impede the grievance process by refusing to accept and sign for written grievances presented in the informal step.

Part of the past practice (Decision at 7: 36-37) was for the stewards to have the “written part of informal step filled out when they went into the initial meeting with the supervisor.” PNM now claims (Brief at 8-9) that this is a violation of the CBA. PNM’s argument elevates form over substance. Nothing prohibits a grievance from being written out before the initial meeting with the supervisor. Once a supervisor does not adjust the grievance to the satisfaction of the grievant, the grievance is “reduced to writing” by being presented in writing to the supervisor.

PNM also claims (Brief at 7-9) that the changes according with its “interpretation” were not “material, substantial, and significant.” PNM’s interpretation is that the oral part of the informal step is not completed until its supervisors say it is. See Informal Grievance Guidelines for Supervisors” quoted by ALJ Laws (Decision at 8: 17-37). This unilateral discretion is significant because the written grievance must be presented within 15 days “after occurrence of the event giving rise to the grievance.” If supervisors can decide when the written grievance can be presented, they can also determine if they are presented timely. Moreover, the informal step before the changes was “an informal discussion between the steward and the supervisor” but has now become “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” (Decision at 15: 6-10). Very little is more material, substantial and significant to the grievance process than the Union/grievant deciding when to file a written grievance. Yet with PNM’s changes, the whole process has been disrupted and as ALJ Laws found resulted in PNM refusing to accept grievances (Decision at 15: 13-33).

Accordingly, it is respectfully requested that the Board adopt the findings, conclusions, and recommended order regarding PNM's unilateral changes to the informal step of the grievance process of the CBA.

2. Changes to Ed Tafoya's Access and Related Threats

A. Access

Before January 11, 2011, Tafoya was not required to have management approval for access to the Edith Service Center ("ESC") and was not required to be escorted by a supervisor or a steward (Decision 18: 31-336) (Brief at 10). After January 11, 2011, these requirements were unilaterally imposed (*id.*). This was a progression of the unilateral changes to Tafoya's access found unlawful by ALJ William Schmidt noted by ALJ Laws in her footnote 17 (Decision at 16). PNM argues that the most recent changes requiring management approval and escort by a supervisor or a steward are not material or substantial and that the escort requirement did not constitute the removal of a "real and substantial benefit." PNM's argument disregards the obvious fact that with the new requirements, PNM's management and supervisors have exclusive unilateral control over if, when and where Tafoya has access to the ESC. To argue that these new requirements giving management exclusive control over Tafoya's access are not substantial and material changes is disingenuous at best. PNM relies upon *Peerless Food Products, Inc.*, 236 NLRB 161 (1978). At least in that case, the union representative did not have to get management approval to meet with unit employees in the lunchroom during break and lunch periods. By requiring employees to get management approval before escorting Tafoya, PNM doubly insures that Tafoya will not get access unless its management agrees. Moreover, PNM insures that its management will be able to keep tabs on who is

meeting with Tafoya, thereby chilling the “kind of candid exchanges possible between the represented employees and their union agents” (Decision at 19: 35-36).

B. Threats

PNM attacks only one of the threats found unlawful, that one heard by Bert Garcia and made by an unnamed security guard (Brief at 12). PNM claims “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.’” (*Id.*) ALJ Laws answered this argument (Decision at 20: 34-38):

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 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).

3. Fitzgerald’s Access

Here as with Tafoya, PNM claims that its unilateral changes restricting union representative Fitzgerald’s access to the San Juan Generating Station were not a “material, substantial and significant” change from past practice (Brief at 13-14). Before the changes in October 2011, Fitzgerald merely let the Human Resources employees know that he was coming to the plant, checked with the guard, and received a placard to place on his dashboard. He then entered the plant in his Union car and had free access to the employees and supervisors in the plant. (Decision at 21: 15-31.) On October 4, 2011, the guard denied Fitzgerald access to the plant. Later that afternoon, Tim Padilla as Senior Human Resources Consultant told Fitzgerald that if he needed to talk to employees or stewards, the employee “would be called up to meet with him in a room in

the Administration building” (Decision at 22: 30-31). As far as going elsewhere on the plant property, Fitzgerald would have to be escorted by Padilla, Ellie McIntyre (Human Resources Supervisor at the plant) or Ernie Rodarte, the compliance manager (*id.* 31-34). Thus Fitzgerald went from having unlimited access to the plant, the employees and the supervisors to being able to meet with employees and supervisors once they were called up to meet with him in the administration building, and he could only enter the plant proper while being escorted by one of the three management officials, Padilla, McIntyre, and Rodarte. What is implicit in the latter rule is that the PNM officials could decline to escort Fitzgerald and thus deny him access to the plant. Moreover, here as with Tafoya, management can keep tabs on whoever has the courage to speak with Fitzgerald and when, whether in the administration building or the plant. Fitzgerald’s original wide-ranging access to the plant is needed because of the nature and layout of the plant. Thus, as ALJ Laws describes it (Decision at 4: 14-17):

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).

PNM argues that it “took steps to provide Fitzgerald with the ability to meet privately with any aggrieved employee...” (Brief at 14). ALJ Laws rejected this argument saying (Decision at 23: 10-11): “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.” See Decision at 19: 31-38. To say that requiring a union agent to be “bird-dogged” by management in order to meet and converse with employees is not a real and substantial change is frivolous.

4. Refusal to Process Eric Cox's Complaint

Eric Cox, a black Union steward, in mid-2010 filed a complaint of discrimination based upon race and union activity (Decision at 25: 8-9). Thereafter, Cox insisted that Tafoya represent him as his union representative in the investigation of his complaint. PNM refused to process his complaint unless he agreed to waive having Tafoya represent him in the investigation. The complete email exchange is found in Charging Party's exhibit 7, and the partial is found in GC 2 referenced by ALJ Laws. Of particular note is Tafoya's email to Lee of October 29, 2010 (GC 2; CP 7 at 5-6). Tafoya states *inter alia*: "Certainly the Company recognizes both parties responsibility to abide by Article 8 in our CBA." He also states: "We also believe that Mr. Cox has a valid concern that any investigation that is conducted may affect his terms and conditions of employment and his desire to have Union representation is legitimate and must be honored." No one has ever claimed that Mr. Cox's claims of discrimination did not relate to his wages, hours, terms and conditions of employment. The Union, and thus Tafoya, was admittedly the collective-bargaining representative of Mr. Cox regarding his wages, hours, terms and conditions of employment. Clearly, the right to union representation is not limited to defending against possible disciplinary action as in *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975). Union representation is available for affirmative action as well, whether in the form of a grievance or other complaint procedures. PNM never claimed that Mr. Cox was limited to the contractual grievance procedures. Even absent a contract, employers are required to recognize and bargain with the chosen collective-bargaining representative of their employees regarding complaints or grievances related to their wages etc. PNM's insistence upon Cox agreeing to forego representation by his Union

representative if he wanted his complaints of discrimination investigated is the same as PNM insisting upon Cox agreeing to deal directly with PNM regarding his complaints about his working conditions. Moreover, Cox's complaints of unlawful discrimination because of his race and status as a Union steward were undoubtedly protected by Section 7. His demands that he be represented by his Union representative likewise were undoubtedly protected. PNM conditioned investigation of his complaints upon Cox giving up his rights to Union representation. By denying Cox representation by his union representative, Tafoya, PNM interfered with, coerced, and restrained him in the exercise of his Section 7 rights. See *Circuit-Wise, Inc.*, 306 NLRB 766, 767 (1992) (employer violated Section 8(a)(1) by excluding union from "problem solving procedure" and by dealing directly with employees regarding their grievances as well as violated Section 8(a)(3) by conditioning use of the problem solving procedure on an employee's willingness to forgo union representation). The Board ruled:

Under these circumstances, we find that the Respondent, in its problem solving procedure, unlawfully excluded the Union, unlawfully denied union representation to employees, and unlawfully dealt directly with employees regarding their grievances. The undisputed evidence establishes that the Respondent excluded the Union from its problem solving procedure and would agree to meet with the employee in an attempt to resolve his grievance only if he agreed not to have a union representative present. Those employees who gave up union representation had their grievances processed through the problem solving procedure. Those employees who continued to insist on having a union representative present had their grievances deferred to the negotiating sessions between the parties.

The Union had a right to be present at the problem solving meetings. In this regard, we note that the purpose of these meetings was to adjust the employment-related complaints of employees. In these [**5] circumstances, the meetings were "grievance adjustment" meetings, and the Union had a right to be present, without regard to whether the grieving employees desired such presence. n5

n5 See *Harowe Servo Controls*, 250 NLRB 958, 1049 (1980), and cases cited at fn. 250.

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

PNM claims (Brief at 19-20) that “[t]he evidence does not support a finding that Tafoya was available and ready when the meeting was scheduled to begin.” The incident giving rise to the investigation had occurred “a couple weeks prior.” (Decision at 29: 26.) Thus, nothing required the investigation to proceed immediately. The reasonable availability of Tafoya within a short amount of time is uncontroverted. ALJ Laws found (Decision at 29: 28-31; 30: 1-4):

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 meeting. (Tr. 590). Mitchell came out and told time [*sic*] 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).

Thus Tafoya was available and requested to attend the meeting as Cox’s union representative. Mitchell denied the request because Tafoya was not allowed on PNM property, as per PNM’s unlawful new rule denying Tafoya access to PNM’s property without management’s approval. The Analysis and Conclusion (Decision at 30: 12-34) of ALJ Laws squarely answers PNM’s argument made here.

6. **Interrogation by Smyth of Cox about Union Activities**

PNM passes off Smyth’s questioning of Cox as Smyth just trying to determine who was available for work. As ALJ Laws found, however (Decision at 32: 1-3):

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 what Smyth told Tafoya by cell phone on speaker mode with Cox present, Smyth said “that he needed to know exactly what Mr. Cox was doing, who he was talking to, what grievances it may involve, and who may be involved in those grievances” (Tr. 80: 20-22). In short, Smyth was not just trying to find out who Cox was meeting with. PNM’s argument otherwise is frivolous.

7. Smyth’s Threat Telling Cox to Come to his Office

Smyth’s threat was not only to Cox but to the other employees in the NSD crew room who heard Smyth interrogate Cox and then aggressively tell him to come to his office.

ALJ Laws mistakenly refers to “Cox’s statement” but she obviously meant Smyth (Decision at 34: 19-21). As found by the ALJ (Decision at 34: 4-8):

According to Montano, Smyth made multiple inquiries in the NSD crew room asking specifically what union business and what grievances Cox was 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).

She then credited the testimony of Montano, and thus Cox. The “message” conveyed to Cox and the other employees present was that “management will demand to know the substance of meetings with Union officials, including stewards” (Decision at 34: 19-21). The 8(a)(1) violation is clear.

8. Threat of Unspecified Reprisals

As set out above, Smyth said “that he needed to know exactly what Mr. Cox was doing, who he was talking to, what grievances it may involve, and who may be involved in those grievances” (Tr. 80: 20-22). Smyth’s threat was when he told

Tafoya and Cox that if Cox did not answer his questions, “there will be consequences” (Tr. 255: 2-3). The questioning and the threat violated Section 8(a)(1).

9. Interrogation by Gary Cash

PNM claims (Brief at 24) that “the record does not support the ALJ’s finding that Cash was attempting to ‘elicit information regarding employee grievances.’ (Decision at 37:3-4).” The actual interrogation was as to the specifics of what “Union business” Cox and Tafoya had been discussing (Decision at 36: 25-29). ALJ Laws answered PNM’s contention made here in her footnote 40 (Decision at 37: 43-46), reading:

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.

Moreover, employee grievances are clearly included within the subject of “Union business” which is what Cox had told Cash he and Tafoya were discussing.

10. Violations Related to Union Requests for Information

A. Medical Appointments and Paid Time Off (PTO)

The grievance giving rise to this request for information was occasioned by employee and Union steward Marie Plant being required to bring in a doctor’s note for a medical appointment (Decision at 42: 12-14). The information request (J. Exh. 5) is limited to bargaining unit and non bargaining unit employees “who are subject to the Company’s PTO policy.” It seeks information to compare to Plant’s being required to bring a doctor’s note. Tafoya’s information request (*id.*) anticipated a relevancy objection as follows:

In anticipation of the Company objecting to the relevancy of this request the Union offers the following. The Company PTO policy applies to both bargaining unit and non bargaining unit employees alike. As such, any

requirement to provide Doctor's notes to verify medical appointments must be applied equally regardless of Union status. As you know the Company has the obligation to apply its rules, orders and penalties evenhandedly and without discrimination to all workers.

PNM has not disputed that its PTO policy applies to its non-unit employees and certain of its unit employees (Decision at 43: 1-8). Presumably some of the unit employees and some of the non-unit employees had been required to provide doctor's notes for their medical appointments, and some had not. PNM did not claim otherwise. The Union had to see the information in order to analyze whether Plant had been subjected to disparate treatment. That was the reason for making the information request. Requiring unions to know in advance of an information request that certain non-unit employees have been treated differently than unit employees when they are subject to the same policies is illogical and an undue burden. It is also contrary to the liberal discovery type of standard for relevance espoused by the Board and the Supreme Court. *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 437 (1967); *Knappton Mar. Corp.*, 292 NLRB 236 (1985). Accordingly, the Board is urged to adopt the finding that PNM's failure to provide the requested information for the non-unit employees violates Section 8(a)(1) of the Act. (Decision at 43: 36-38; 44: 1-2). The Board should further find that such failure violates Section 8(a)(5) of the Act pursuant to *Acme*, supra.

B. Rex Foss Discipline

Here PNM merely seeks to incorporate possible findings of the Tenth Circuit in support of its exception if the Tenth Circuit finds in the described prior cases "that PNM was not required to provide the requested information regarding the discipline of non-unit employees..." (Brief at 27). As ALJ Laws recites (Decision at 44: 32-35): 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." PNM does not here argue that the ruling was erroneous.

C. Safety Manual Violations and Discipline

PNM makes the same argument as it made for the information request regarding medical appointments and PTO (Brief at 28). In turn, the Union makes the same arguments made above at 12.

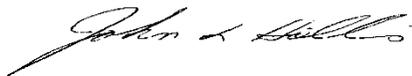
D. Unscheduled Absences

Here PNM excepts only to the ALJ's findings regarding a narrow portion of the subject information request (Brief at 28). The exception relates only to the last bullet point out of five in the information request (Decision at 48: 38-46; 49: 1-4). In support, PNM makes the same argument as it made for the information request regarding medical appointments and PTO (Brief at 28). In turn, the Union makes the same arguments made above at 12.

11. Conclusion

Accordingly, and based upon the entire record, the Union requests that the Board adopt the findings and conclusions of the ALJ as well as her Decision and recommended Order with regard to which PNM has taken exceptions.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of August, 2012, I e-filed the above with the NLRB, Office of the Executive Secretary and caused a true and correct copy of the foregoing to be served upon the following by email as indicated:

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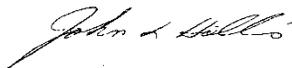
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