

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.

**REPLY BRIEF IN SUPPORT OF**  
**RESPONDENT PUBLIC SERVICE COMPANY OF NEW MEXICO'S**  
**EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION**  
**AND IN RESPONSE TO CHARGING PARTY'S ANSWERING BRIEF**

Respondent Public Service Company of New Mexico ("PNM"), pursuant to Section 102.46 of the Board's Rules and Regulations, submits this reply brief (the "Reply") in support of its Exceptions to Administrative Law Judge ("ALJ") Eleanor Laws' June 22, 2012 Decision ("Decision") in these consolidated cases. PNM's Exceptions and a supporting brief (the "PNM Exceptions Brief") were filed on July 20, 2012. Charging Party ("CP") filed an answering brief (the "CP Answering Brief") on August 20, 2012.

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

Charging Party asserts that "[v]ery little is more material, substantial and significant to the grievance process than the Union/grievant deciding when to file a written grievance." CP Answering Brief at 3. However, Charging Party essentially describes that decision as being nearly automatic, because "[e]ither the supervisor [in the informal discussion] satisfactorily adjusts the oral grievance, or else a written grievance is presented to him/her for signature as

receiving it.” CP Answering Brief at 2. That is, in Charging Party’s view a written grievance should be presented to the supervisor unless the supervisor *immediately* provides a satisfactory resolution to an oral complaint; there is no time for the supervisor to evaluate the issue and provide an oral follow-up to the employee.

As described in the PNM Answering Brief at 8, PNM’s then-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 effect of PNM’s supervisor training has been merely to expand the range of oral-discussion outcomes from only two [(1) a supervisor immediately provides a satisfactory resolution, or else (2) the written grievance is immediately presented] to three [(1) the supervisor immediately provides a satisfactory resolution; (2) the supervisor rejects the oral request, and a written grievance is immediately presented; or (3) the supervisor determines that further evaluation or consultation is needed before an oral “yes or no” response can be given to the employee]. Or as Ms. Monfiletto stated more concisely: “There is a ‘yes,’ there is a ‘no,’ and there is a, ‘I don’t know the situation. I need to go look into it.’” (Tr. 619-20).

The oral step is already a part of the grievance procedure established by this collective-bargaining agreement. *Cf. United Cerebral Palsy of New York City*, 347 N.L.R.B. 603, 608 (2006) (finding a violation where the employer unilaterally *added* a requirement for discussion with a supervisor before filing a grievance.) It is not a material, substantial, and significant change to permit a PNM supervisor to consult with management, when needed, before providing

an oral “yes or no” response to an oral complaint, or to permit that supervisor to bring in another supervisor for the informal, oral discussion. Accordingly, no violation should be found.<sup>1</sup>

**2. Alleged Change in Tafoya’s Access and Related Threats.**

**A. ACCESS ISSUE.**

Paragraph 9(b) of the Consolidated Complaint deals only with the alleged changes of January 2011, and therefore the CP Answering Brief’s references to earlier changes have no relevance. The only changes in or around January 2011 were the requirements that Tafoya obtain management approval for access to the ESC and that Tafoya be escorted. Because Tafoya still retained the ability (subject to those requirements) to visit the facility at any time he pleased, and to travel anywhere on the facility, those changes alone were not material, substantial, and significant, nor did they constitute the removal of a real and substantial benefit. Furthermore, although the restrictions were imposed on Tafoya (a non-employee), they were not imposed on Union stewards who, as employees, had full access to the facility. *See Peerless Food Products, Inc.*, 236 N.L.R.B. 161, 161 (1978) (“While we do not minimize the value of employee access to union business representatives, the change effected here (*which does not apply to the job steward*) does not materially, substantially, or significantly reduce that value.”) (emphasis added).

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<sup>1</sup> In light of recent developments, PNM further notes that on July 27, 2012, PNM and the Union reached agreement on a new collective-bargaining agreement including, among other things, a revised Article 10 (“Grievances”) that more clearly distinguishes the initial, oral “Informal Step” from the subsequent “Step 1” and “Step 2” procedures to be followed. Accordingly, in the event that the Board finds a violation relating to the “informal step” of the grievance procedure, any remedial Order should be retrospective only and should not modify the new grievance procedure to which the Union and PNM have agreed.

The new collective bargaining agreement has an effective date of July 7, 2012. However, because that agreement was not ratified by the Union until July 27, 2012, PNM could not have presented this information in the PNM Exceptions Brief filed on July 20, 2012.

## **B. THREATS.**

As shown in the PNM Exceptions Brief at page 12, unit employee Bert Garcia already had notice that Tafoya was not allowed on company property. Thus, Garcia could not have reasonably perceived as a “threat” the security guard’s subsequent statement regarding the limitation on Tafoya’s access. Garcia’s deliberate conduct (signing Tafoya onto the property) with actual knowledge that such action was prohibited made it inherently and objectively *unreasonable* for Garcia—or any employee in Garcia’s situation—to perceive the security guard’s statement as a threat.

The issue presented in the CP Answering Brief is unrelated to that described above. If (for purposes of argument) the access policy was unlawfully promulgated, then PNM might not be able to claim mere “enforcement of the rule” when communicating that policy to a *typical* employee unaware of that policy. However, Garcia’s active conduct despite his actual knowledge of the policy would (for reasons described above) preclude a finding that the later statement to Garcia was a “threat.”

### **3. Fitzgerald’s Access.**

In this industrial workplace, PNM’s imposition of the advance-notice requirement and escort-requirement alone did not constitute a material, substantial, and significant change in Fitzgerald’s access. *See Peerless Food Products, Inc.*, 236 N.L.R.B. 161, 161 (1978). Furthermore, contrary to the implication of the description in the CP Answering Brief (e.g., stating that “Fitzgerald went from” one type of access to another), it must be recognized that the changes were not suddenly imposed on Fitzgerald himself, but instead were proposed to, assented to, and ratified by the conduct of Aaron King during his brief tenure in the position of business agent. Although subsequent events (a re-run Union election) returned Fitzgerald to his

position and ousted King after only a few weeks of service as business agent, that information is known only in hindsight and could not have been known to PNM at the time that King began his service and assented to the proposed changes in business-agent access.

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

Although Charging Party cites at length the Board's decision in *Circuit-Wise, Inc.*, 306 N.L.R.B. 766 (1992), that decision turned on unique facts and is not applicable to this matter. Prior to the arrival of the union, the employer in *Circuit-Wise* had its own "problem solving procedure" analogous to a grievance procedure. *See id.* at 772. After the union was certified as the exclusive collective bargaining representative, but during the nearly fourteen-month period (prior to a strike) when there was still no collective-bargaining agreement in effect, the employer continued to utilize its problem solving procedure, rejected the union's request for an "interim grievance procedure," and refused to allow union representatives to accompany employees to meetings related to the problem solving procedure. *Id.* The employer acknowledged at the time that "once we have a collective bargaining agreement it will provide for a complete grievance procedure that will include union representation at the various steps." *Id.*

The Board ultimately found in *Circuit-Wise* that the problem-solving procedure meetings were "grievance adjustment" meetings, and that the union had a right to be present. *Id.* at 767. However, that finding—providing the union with grievance-procedure rights even before a collective-bargaining agreement existed—does not support Charging Party's argument that the Union has grievance-procedure rights in connection with Cox's discrimination complaint, which was both (a) submitted during the effective period of an *existing* collective bargaining agreement and (b) submitted *outside* the grievance procedure established by that existing CBA.

Charging Party does not cite any decision in which the Board has found that a complaint

filed outside of an existing, CBA-established grievance process has been retrospectively characterized as a “grievance” under the terms of the CBA. Counsel for PNM is also unaware of any such Board decision.

If Cox had initiated the CBA’s grievance process in connection with his complaints, then Cox would have been unquestionably entitled to Union participation in the process. However, Cox did not initiate any grievance process, and therefore the Board’s precedents regarding grievances are not relevant here.<sup>2</sup> There must remain a bright-line division between a “grievance” (filed in accordance with the procedures established by a collective-bargaining agreement) and all “other procedures” not subject to a collective-bargaining agreement. There is no principled basis for finding an employer in violation of the Act for its decision not to provide grievance-specific rights to an employee who has chosen not to avail himself of the CBA-established grievance procedure.

If Cox’s discrimination complaint—which was submitted outside the collective-bargaining agreement—is retrospectively determined by the Board to be “a grievance under the terms of the CBA” (Decision 28: 10-11) as found by the ALJ, then the practical effect of such finding would be to require each employer to examine and analyze *every* non-grievance “complaint” on a case-by-case basis to attempt to determine whether it, too, might later be characterized by the Board as a “grievance.” Because that would amount to an unwarranted expansion of Board law and jurisdiction, the Board should find no violation in this case.

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<sup>2</sup> Page 7 of the CP Answering Brief quotes an e-mail message from Tafoya regarding Article 8 of the CBA. However, that Article 8 (“Union-Management Cooperation”) contains only precatory language regarding PNM’s and the Union’s obligation to comply with equal-opportunity laws and regulations, to settle differences in an orderly manner, to comply with governmental regulation, and to cooperate in other respects. Article 8 does not establish any right of Union representation in connection with complaints other than grievances.

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

No further Reply is necessary on this issue.

**6. Alleged Interrogation by Smyth about Union Activities.**

It is clear from the record that this was not a situation in which a supervisor, with premeditation, sought to discover what work a Union steward was undertaking. Instead, the facts show that the interaction began when supervisor Smyth, informed that Cox was back at work, discovered that Cox and several employees were not at their assigned locations and were in turn delaying the work of still more employees (fellow truck-crew members). Perhaps supervisor Smyth could have remained more calm, and spoken more precisely about the information he needed, during his attempt to find out from Cox why it was supposedly necessary for so many employees to be away from their stations at one time without management knowledge and approval. However, the totality of the circumstances nonetheless confirms that Smyth's interaction with Cox did not constitute an unlawful interrogation.

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

For the reasons presented in Section 6 above and in Section 6 of the PNM Exceptions Brief, the totality of the circumstances confirms that Smyth's statement (that he needed to meet with Cox alone) did not constitute a threat to Cox or to any other employee. To the contrary, Smyth testified that "all [he] wanted to do was find out what union business [Cox] needed and how much time he need[ed] to deal with it." (Tr. 829). In this situation where supervisor Smyth encountered six to eight employees (Tr. 249) away from their work stations, ostensibly at Cox's direction (or in response to Cox now being available after his extended absence (Tr. 248)), it was entirely appropriate for Smyth to direct Cox to meet with him privately—rather than in the presence of non-steward employees—to discuss the effects of Cox's "union business" on the

day's planned work. It would be incorrect for to find a violation of the Act based on only one of multiple potential inferences from Smyth's statement.

**8. Alleged Threat of Unspecified Reprisal.**

Cox testified that minutes after Smyth's initial interaction with Cox in the NSD crew room, Cox had telephoned Tafoya, Tafoya had driven to the facility, Tafoya had left several voice-mail messages for PNM supervisors, and then Smyth returned Tafoya's call as Tafoya and Cox were sitting alone in Tafoya's car. (Tr. 252-53). Cox testified that Tafoya asked Smyth: "So, what happens if [Cox] goes in there [to meet with Smyth] and he doesn't tell you what specific grievances he's working on and who they're for?" (Tr. 254-55). It was only in response to that question that Smyth allegedly stated over the phone: "Well, there will be consequences." (Tr. 255). The totality of the circumstances confirms that this alleged statement, which was made (a) over the phone to only Tafoya (the Union business agent) and Cox (a Union steward listening on speakerphone), (b) removed in time and location from the earlier interaction between Smyth and Cox, and (c) in response to Tafoya's hypothetical question, does not rise to the level of a "threat."

**9. Alleged Interrogation by Gary Cash.**

In analyzing this alleged violation, it does not matter what Cox and Tafoya were discussing, because that information was never conveyed to any PNM supervisors. Instead, the Board should find no violation because the ALJ's analysis is logically unsound. Based only on the premise that the topic of employee grievances is a "foreseeable topic of discussion" between a Union steward and business agent (Decision 37: 45-46), the ALJ concluded that Cash "sought to elicit information regarding employee grievances" (Decision 37: 4). It would be illogical to conclude that because the issue of grievances is a potential topic of discussion (but not the only

potential topic) between Cox and Tafoya, Cash's non-specific questions were directed at that topic in particular and constituted a violation of law.

**10. Alleged Violations Related to Union Requests for Information.**

Sections 10(a), (b), (c), and (d) of the PNM Exceptions Brief (see pages 25-28) take exception to the ALJ's conclusions that PNM violated the Act by refusing to provide certain requested information regarding non-unit employees. This Reply addresses the four exceptions together because the same question of law applies to each.

As explained by the PNM Exceptions Brief (*see* pages 25-26), a Union requesting information regarding non-unit employees (that is, employees to whom no presumption of relevance applies) must demonstrate "a reasonable belief, supported by objective evidence, that the requested information is relevant." *Disneyland Park*, 350 N.L.R.B. 1256, 1257-58 (2007). In connection with the three information requests corresponding to Sections 10(a), (c), and (d) of the PNM Exceptions Brief, the Union did not provide any "objective evidence" that any non-unit employee had been treated differently under the policy applicable to both unit and non-unit employees. *Cf. U.S. Postal Service*, 332 N.L.R.B. 635 (2000) (finding the attendance records of a particular non-unit employee relevant where unit members had directly observed that particular non-unit employee's frequent absences). Furthermore, in connection with the information request corresponding to Section 10(b) of the PNM Exceptions Brief, although the Union alleged that a particular supervisor (Rex Foss) had violated the company's "Do the Right Thing" policy, there was no logical or factual connection between the alleged conduct of Mr. Foss and that of the grievants.

Charging Party's position appears to be as follows: (A) a unit employee was disciplined for violating a particular policy; (B) that policy also applies to non-unit employees; and therefore

(C) based only on the foregoing factors, the Union is entitled to information about all non-unit employees who may have been disciplined under the same policy, even if the Union does not come forward with any objective evidence of disparate treatment.<sup>3</sup> See CP Answering Brief at 12 (“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.”)

However, the Board’s adoption of Charging Party’s position would essentially nullify the “objective evidence” prong of the *Disneyland Park* test because if an employer has a policy that applies to unit and non-unit members alike, the mere fact of the application of that policy to a unit employee would be sufficient to trigger (upon the Union’s bare request) an obligation by the employer to provide all information regarding the application of that policy to non-unit employees. Such a requirement would significantly change Board law by constructively establishing the “presumptive relevance” of information about non-unit employees whose only nexus with unit employees is the existence of a policy applicable to both unit and non-unit employees.

For the reasons presented above and in the PNM Exceptions Brief, 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.

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<sup>3</sup> Charging Party’s reasoning is even more expansive as applied to the request discussed in Section 10(a) of the PNM Exceptions Brief. Following a supervisor’s request that a unit employee with a low Paid Time Off (PTO) balance provide a doctor’s note prior to taking time off for a medical appointment, the Union sought information including but not limited to the names, classifications, and work locations of all PNM employees (including non-unit employees) who had scheduled a medical appointment with their supervisor. (Decision 42: 12-14, 25-27).

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 September 4, 2012, to the following:

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