

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 ACTING GENERAL COUNSEL'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. Acting General Counsel ("AGC") filed an answering brief (the "AGC Answering Brief") on August 20, 2012.

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

The AGC Answering Brief presents the case of *United Cerebral Palsy of New York City*, 347 N.L.R.B. 603 (2006) in support of the AGC's contention that PNM's supervisor training constituted a violation of the Act. Although PNM agrees that *United Cerebral Palsy* is a useful lens through which to analyze this case, the *United Cerebral Palsy* decision is materially distinguishable from this case and supports a finding that PNM did not commit any violation.

In *United Cerebral Palsy*, the employer and union were already parties to a collective-bargaining agreement that included a grievance procedure. *Id.* at 608. The employer unilaterally issued to each employee a “handbook” that added new preconditions: an employee was now required to discuss potential grievances with a supervisor first, and then with the employer’s director of human resources, before filing a grievance with the union. *Id.* The Board likened this change to that of *Arizona Portland Cement Co.*, 302 N.L.R.B. 36, 36 (1991), where the employer was found to have “eliminated the existing grievance/arbitration procedure.”

In marked contrast, PNM merely provided its supervisors (that is, its non-unit employees) with training on how better to comply with the existing, unmodified grievance procedure. Unlike *United Cerebral Palsy*, (a) there was no step or precondition added to the grievance procedure, (b) there was no “handbook,” procedure, or any other notification or directive given to the Union or to unit employees, and (c) no portion of the changes was binding on the Union or on unit employees. The AGC Answering Brief is incorrect in claiming that “[l]ike the employer in *United Cerebral Palsy* . . . [PNM] embarked on a training program designed to incorporate different practices into the Informal Step of the grievance procedure.” AGC Answering Brief at 10. PNM did not “train” any unit employees and did not “incorporate” any changes or additional steps into the contractual grievance procedure. Any directives to PNM supervisors are substantially different from any *United Cerebral Palsy*-style “requirements” imposed on the Union or on unit employees.

For example, the bullet-point list on AGC Answering Brief pages 7-8 includes the recommendation that a supervisor “[h]ave the employee/union steward identify the section(s) of Articles allegedly violated and *ask* them to explain how they were violated. *If employee/union steward cannot provide this information, document what they said.*” (emphasis added).

Instructing a supervisor to “ask” for information is not a change to the grievance procedure, especially when there is no obligation for the employee or steward to answer the question. Furthermore, there is nothing wrong with a supervisor asking which Articles were allegedly violated, when the same question appears on the “Grievance Procedure—Step 1” form that is later required to be filed.

Furthermore, because the collective-bargaining agreement requires the “informal step” to be completed before the grievance is “reduced” to writing, *see* PNM Exceptions Brief at 8-9, PNM supervisors did not alter the contractual grievance procedure by refusing to accept prematurely-written grievance forms.

Finally, the supervisor’s discretion to “[e]nsure [a] second supervisor is available and/or attends the meeting, *if you feel [it] is needed,*” *see* AGC Exceptions Brief at 7 (emphasis added), does not constitute any change in the contractual grievance procedure, because the inclusion of a second supervisor does not impose any requirement on the Union or any unit employees. Even if a supervisor’s election to include a second supervisor required an informal meeting to be scheduled in advance rather than occur “on the fly,” the ALJ correctly determined that any such advance-scheduling requirement does not constitute a material, substantial, and significant change. (Decision at 14: 34).

In short, PNM’s training for supervisors only did not change the existing contractual grievance procedure and did not impose any new requirements on the Union or employees, let alone impose any changes that were material, substantial, and significant. Accordingly, no violation should be found.<sup>1</sup>

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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”

## **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 AGC 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. Those changes alone were not material, substantial, and significant, nor did they constitute the removal of a real and substantial benefit. *See Peerless Food Products, Inc.*, 236 N.L.R.B. 161, 161 (1978).

### **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.

## **3. Fitzgerald's Access.**

The AGC Answering Brief at times (*see* AGC Answering Brief at 18-19) overlooks the fact that Fitzgerald was informed that if he needed to be elsewhere on the San Juan Generating

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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.

Plant facility (other than in the Administration building), he could do so, subject only to an escort requirement. (Decision 22: 31-34).

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, it must be recognized that the claimed "brief and temporary change" (AGC Answering Brief at 16) in the identity of the Union's Assistant Business Agent was temporary only in hindsight, and PNM's actions must be viewed in light of the changes assented to and later ratified by the conduct of Aaron King during his tenure in that position prior to Fitzgerald's return after another Union election.

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

Contrary to the AGC's characterizations on pages 22 and 23 of the AGC Answering Brief, PNM does not contend that the ALJ's analysis would "requir[e] all issues submitted outside the collective-bargaining agreement to be viewed as grievances." Instead, the problem is that if this particular employee "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), then the practical *effect* of such finding would be to require each employer to *examine* each 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."

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 the AGC concedes that it has not characterized

Cox's complaint as a grievance. AGC Answering Brief at 24. Thus, Board precedents regarding grievances are not relevant here.

The AGC Answering Brief devotes nearly five pages to responding to PNM's Exception but fails to cite a single Board decision in which a complaint submitted outside the collective-bargaining agreement is later characterized as a "grievance." Counsel for PNM is also unaware of any such Board decision.

Although the goals cited by the AGC Answering Brief are laudable, 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.

**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.**

Although the PNM Exceptions Brief and the AGC Answering Brief cite different statements in the record, it is clear under all interpretations 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 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.**

Section 7 of the PNM Exceptions Brief (*see* pages 23-24) takes exception to the ALJ's conclusion that Smyth threatened Cox by asking Cox to come to his office to discuss the union business he was working on. Although Section F of the AGC Answering Brief (pages 27-29) makes occasional references to a "threat," that Section F appears to conflate the allegations of "interrogation" and "threat," and thereby fails to provide a specific response to Section 7 of the PNM Exceptions Brief. Thus, for the reasons presented in that Section 7, the Board should find that Smyth's instruction that Cox come to his office did not violate the Act.

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

Section 8 of the PNM Exceptions Brief (*see* page 24) takes exception to the ALJ's conclusion that Smyth's alleged statement that "there would be consequences" (if Cox refused to tell Smyth what specific union business he was working on) was unlawful. However, the AGC Answering Brief does not provide a response to Section 8 of the PNM Exceptions Brief. Thus, for the reasons presented in that Section 8, the Board should find that this alleged statement by Smyth did not violate the Act.

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

Section 9 of the PNM Exceptions Brief (*see* pages 24-25) takes specific exception to the ALJ's conclusion that Gary Cash's questioning of Cox constituted an unlawful interrogation. However, it appears that the AGC Answering Brief does not provide any response to Section 9

of the PNM Exceptions Brief. Thus, for the reasons presented in that Section 9, the Board should find that Cash's alleged questioning of Cox did not violate the Act.

**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 specific exception to the ALJ's conclusions that PNM violated the Act by refusing to provide certain requested information regarding non-unit employees. The AGC Answering Brief (see pages 30-31) contains a consolidated response to those four exceptions, and this Reply will similarly address the four exceptions together because the same question of law applies to each exception.

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.

The Union's and the AGC'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>2</sup> The Board's adoption of that 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.

Respectfully submitted:

MILLER STRATVERT P.A.

/s/ Paula G. Maynes  
Paula G. Maynes  
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<sup>2</sup> The Union's and AGC'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).

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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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