

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

PUBLIC SERVICE COMPANY OF NEW MEXICO

and

**Cases 28-CA-023391
28-CA-066164**

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

ACTING GENERAL COUNSEL'S REPLY BRIEF

Pursuant to Section 102.46(h) of the Board's Rules and Regulations, Counsel for the Acting General Counsel (General Counsel) files this Reply Brief to Respondent's Answering Brief to General Counsel's Exceptions to the Decision (ALJD) of Administrative Law Judge Eleanor Law (ALJ) in the captioned case.

I. Introduction

In its Answering Brief, Respondent makes numerous inaccurate assertions about the representations contained in General Counsel's Brief-in-Support of Exceptions (General Counsel's Brief).¹ Contrary to Respondent's assertions, the facts and arguments set forth in the General Counsel's Brief are supported by the record.

II. Argument

A. Respondent's Makes Red Herring Claim that General Counsel Conflates Issues Regarding Company Time" Discussions

Respondent contends in its Answering Brief that the General Counsel conflates two issues: whether Respondent refused to engage in discussions with representatives of International Brotherhood of Electrical Workers, Local Union No. 611 (Union) during "company time" and whether Respondent violated the law by requiring that grievance

¹ RAB ___ refers to Respondent's Answering Brief to General Counsel's Exceptions followed by the page number. Transcript references are (Tr.__:__) showing the transcript page and line(s), if applicable. ALJD__ refers to JD-(SF)-28-12 issued by the ALJ on June 22, 2012, followed by the page number.

discussions be scheduled in advance. (RAB at 2) Respondent argues that the issue of advance scheduling was fully litigated and the ALJ held that the advance scheduling issue did not constitute an unlawful unilateral change by Respondent. (RAB at 2) This point is not dispositive as to whether Respondent has violated Section 8(a)(5) of the Act by refusing to talk about grievances with Union representatives on “company time” as alleged in paragraph 9(d)(3) of the Consolidated Complaint. Rather, it is Respondent who is conflating these issues in a red herring fashion.

The General Counsel argues in its brief that the ALJ erred by dismissing paragraph 9(d)(3) by failing to consider evidence that Union stewards approached supervisors during the work day and were told by those supervisors they would not discuss grievances with the stewards. In doing so, Respondent refused to talk about grievances with Union representatives during “company time.” The General Counsel contends this conduct by Respondent’s supervisors was contrary to past practice and establishes Respondent violated Section 8(a)(5) by unilaterally changing this past practice without first bargaining with the Union. The issue as to whether Respondent engaged in any unlawful action by requiring advance scheduling for grievance discussions is a separate allegation that is addressed in the ALJ’s decision. This issue is not dispositive to finding a violation of the law based on the allegation that Respondent refused to talk about grievances with Union representatives on “company time” as alleged in paragraph 9(d)(3) of the Consolidated Complaint.

B. Respondent’s Contention the General Counsel Only Relies on Hearsay Evidence Regarding a Threat Made by Respondent is not Correct

Respondent contends in its Answering Brief that only hearsay testimony was provided by the General Counsel to support the allegation in paragraph 5(g) of the Consolidated Complaint that Supervisor Gary Cash threatened employees by informing them that Union

Assistant Business Manager Ed Tafoya was not allowed on Respondent's property to represent those employees. (RAB at 3) This is not an accurate statement. Tafoya testified that a working foreman was speaking with him by phone when Supervisor Gary Cash approached the working foreman. While the working foreman was still on the phone with Tafoya, Supervisor Gary Cash told the working foreman that Tafoya was not allowed on Respondent's property and could not come to the training session to represent employees. (TR 53) Under these circumstances, an agent of Respondent, the working foreman, relayed Supervisor Cash's unlawful statement in the presence of employees. Thus, because the working foreman acted as an agent of Respondent, this out-of-court statement is not hearsay but rather an admission by a party-opponent. Respondent is incorrect that this testimony from Tafoya regarding comments made by an agent of Respondent should be accorded little evidentiary weight. Further, the ALJ also considered Tafoya's testimony that he heard voices of crew members in the background when the working foreman relayed Supervisor Cash's statement to him. In sum, all of these events, as attested by Tafoya, establish the Employer violated Section 8(a)(1) of the Act by telling Tafoya in the presence of employees that he was not allowed on company property to represent them.

Respondent also argues that the General Counsel improperly referenced other complaint allegations, stating that Respondent told employees that Tafoya was not allowed into the facility as a result of the incident involving Supervisor Cash in paragraph 5(g). Respondent contends these other instances were wholly separate from the allegation at issue in paragraph 5(g). Respondent's argument has no merit. The General Counsel is not arguing that the Employer's act of telling employees in other instances that Tafoya was not allowed on its property to represent them alone establishes the allegation involving Supervisor Cash.

Instead, the General Counsel argues that this evidence, when considered with other circumstances, demonstrates that there is a likelihood that Cash made the alleged statement on behalf of Respondent in violation of Section 8(a)(1) of the Act.

C. **Respondent's Assertion the General Counsel Fails to Provide Evidence Establishing Respondent Unilaterally Required Meter Readers to Work on Saturdays is Incorrect**

Respondent contends in its Answering Brief that the General Counsel did not reference any testimony in its exception brief regarding the ALJ's holding that Respondent's new requirement that meter reader employees work on Saturdays was not a unilateral change in violation of Section 8(a)(5). (RAB at 5) This argument is not correct. The General Counsel's Brief references transcript testimony demonstrating that, after imposing the mandatory overtime on Saturdays, Respondent notified meter readers that failure to report on Saturdays would now be considered an unscheduled absence, a disciplinary consequence associated with the alleged change. (Tr. 101)

Respondent also contends in its Answering Brief that the General Counsel does not reference any testimony in its exceptions brief regarding the parties' bargaining history or past practice, and fails to reference testimony regarding the alleged change being material, substantial, and significant. (RAB at 5) Respondent appears to be under the misguided notion that testimonial evidence is the only type of evidence that the Board can consider to conclude that a violation of the Act has occurred. Although the crux of the General Counsel's arguments for this exception comes from citations of the ALJD, much of this is attributed to many of the essential facts from the record that are not in dispute in this case. More importantly, there is nothing in the rules of evidence that requires the General Counsel to have witness testimony for documents such as the collective bargaining agreement, the seminal document associated with this allegation, in order to establish the violation. This is

particularly true when there is no dispute regarding the facts of the alleged change. As such, Respondent is mistaken in arguing that the General Counsel must establish the allegation with testimony and is prohibited from establishing the violation through other admissible evidence.

D. Respondent Incorrectly Asserts General Counsel Improperly References Unrelated Allegations

Respondent argues in its Answering Brief that the General Counsel improperly references an unrelated allegation of the Consolidated Complaint (paragraph 5(j)) in its exception brief, when addressing paragraph 6(a) of the same complaint, involving whether Respondent violated Section 8(a)(3) of the Act by imposing more onerous working conditions for employee Eric Cox by requiring him to come to management offices to be questioned about his Union activities. (RAB at 6) Respondent's argument has no merit.

In the ALJD, the ALJ assessed whether there was only one incident of Cox being required to go to management offices to be questioned about his Union activities. (ALJD at 36:7-8) In its exception brief, General Counsel cited record evidence of an additional instance of this same conduct occurring. (ALJD at 33, 38-40; 34, 19-21) Respondent contends the General Counsel improperly referenced this evidence because it was conduct associated with another complaint allegation wholly separate from the one subject to exception. (RAB at 6)

Respondent's contention has no basis in law. Record evidence supports a finding that Respondent engaged in the conduct alleged in paragraph 6(a) on more than one occasion, forming the basis of a Section 8(a)(3) violation. There is nothing in Board law that prohibits the General Counsel from relying on record evidence that may in and of itself establish a separate independent violation of the Act, and Respondent cites now authority showing otherwise. Respondent acknowledges in its Answering Brief that the General Counsel has the burden to establish the Section 8(a)(3) allegation and the General Counsel has done so with

references to record evidence in its brief that establish a pattern of Respondent subjecting Cox to more onerous working conditions. (RAB at 6; ALJD at 33, 38-40; 34, 19-21)

E. Respondent is Incorrect in Asserting the General Counsel Failed to Present Evidence Establishing Respondent Denied Employee Marie Plant's Request for Union Representation

Respondent argues in its Answering Brief that the General Counsel inaccurately describes in its exception brief the ALJ's finding that employee Marie Plant requested union representation during her meeting with management. (RAB at 7) This is not true. The General Counsel references Plant inquiring in two instances during her meeting with Respondent whether she would need a steward. (ALJD at 38, 5-7; 39, 26-27 and 36-37) The ALJ credits Plant regarding her testimony on this point. (ALJD at 39, 36-37) The ALJ also infers from Human Resources Consultant Joann Garcia's testimony that her response to the request was to tell Plant she would not need a steward for the meeting. (ALJD at 39, 27-31) All of this, contrary to Respondent's contentions, is sufficient to establish from the ALJ's finding that Plant made a request for representation during her meeting with management.

Respondent also contends Plant never *expressly* requested to have union representation at the meeting. (RAB at 7) Respondent's myopic view of employee rights to union representation under *Weingarten*, in addition to being inaccurate, does not overcome the fact that Plant made the requisite request. Contrary to Respondent's belief, there are no magic words required for employees to invoke their *Weingarten* rights. To request representation, an employee's actions need only be sufficient to put the employer on notice of the employee's desire for representation. *Consolidated Edison Company of New York*, 323 NLRB 910, 917 (1992); *Southwestern Bell Telephone Co.*, 227 NLRB 1223, 1223 (1977) (employee's statement that he would "like to have someone there that could explain to me what was happening" is sufficient to trigger *Weingarten* rights).

Plant, asking twice, if she needed a steward for the meeting was sufficient to put Respondent on notice of her desire for representation. *Consolidated Edison*, 323 NLRB at 917 (“I need a Union Steward;” “Do I need anybody here with me?” “Do I need a shop steward?” sufficient to trigger *Weingarten* rights); *Bodolay Packaging Machinery*, 263 NLRB 320, 325-326 (1982) (*Weingarten* rights triggered by employee asking whether he needed a witness). Plant actions sufficiently triggered her request for *Weingarten* representation.

Respondent also asserts that General Counsel did not provide adequate support for the proposition that a meeting being characterized as “confrontational” necessarily triggered *Weingarten* protections. (RAB at 8) In support of its argument, Respondent makes the broad-reaching argument that any meeting between an individual employee and management had the potential to be confrontation in nature. (RAB at 8) Respondent misses the mark on the standard observed by the Board for implicating an employee’s rights under *Weingarten*.

Whether an employee reasonably believes an interview might result in discipline is measured by an objective standard, one that considers all circumstances of the case and not simply the employee’s subjective motivation. *NLRB v. J. Weingarten*, 420 U.S. 251, 257, fn. 5 (1975); *United Telephone Co. of Florida*, 251 NLRB 510, 513 (1980). An employee’s rights under *Weingarten* generally apply to an interview when an employer investigates an employee’s alleged misconduct, such as theft or fraud. See *Exxon* 223 NLRB 203 (1976) (employer denied representative when investigation involved alleged adulteration of gasoline) *United States Postal Service*, 241 NLRB 141 (1979) (violation when employer denied representative when conducting investigation of unauthorized purchases).

In this matter, Respondent supervisors called Plant into a meeting and questioned her about an e-mail that addressed another employee who received discipline for alleged misuse

of a company gas card and Plant's potential involvement with that conduct. Contrary to Respondent's assertions, this questioning was clearly confrontational in nature, was sufficient to create Plant's reasonable belief that discipline could result from her meeting with management, and was sufficient to invoke *Weingarten* protections.

Lastly, in its Answering Brief, Respondent argues that its alleged pre-made decision not to discipline Plant was the equivalent of telling her that a previously-made decision to issue discipline had been made. (RAB at 7-8) Respondent further argues that the General Counsel failed to cite any Board decisions to refute this. (RAB at 7-8) The reason the General Counsel has no case citation to refute Respondent's position is because Respondent is attempting to turn the Board's decision in *Baton Rouge Water Works*, 246 NLRB 995 (1979), on its head. There is nothing in *Baton Rouge Water Works* that finds making a decision *not to discipline* an employee is the same as having made the decision to discipline an employee.

The Board in *Baton Rouge Water Works Co.* held that *Weingarten* rights were not properly invoked when the purpose of the meeting was to inform the employee of a disciplinary decision that had already been made. 246 NLRB at 997. Even if what Respondent purports is true regarding its decision not to discipline Plant, Plant was never informed of this decision. (ALJD at 39, 33-36) The General Counsel contends that, with this issue of discipline not being made clear, the holding of *Baton Rouge Water Works* is not applicable. Rather, Plant being questioned about her involvement in a disciplinary incident involving another employee, created the reasonable belief that she would receive discipline depending on her answers to questions posed by management and created the situation where the Employer violated Section 8(a)(1) of the Act by denying her requested representation.

F. **Respondent's Claim that the General Counsel Fails to Address Respondent's Intentions with the Plant E-mail is not Correct.**

In its Answering Brief, Respondent argues the General Counsel referenced no evidence in its exception brief that the e-mail subject to a request for information by the Union was intended to be part of Plant's personnel file, and thus provided no evidence that the e-mail being kept was discipline. (RAB at 9-10) Although it endeavors to do so in its Answering Brief, Respondent cannot simply ignore and disregard the evidence and arguments referenced in the General Counsel's Brief regarding the e-mail. The fact that the e-mail requested by the Union was kept by Respondent in a separate file for employee Marie Plant is a reflection of intentions by Respondent to keep the e-mail as part of Plant's personnel record. Respondent has provided no legitimate reason or business justification for keeping the document in this separate file. Whether the e-mail was kept in Plant's official personnel file, or an informal one the Employer kept on the side, the fact remains Respondent was keeping the document for future reference. (Tr. 182) The General Counsel argues in its exceptions brief such action by the Employer suggests the document was either being kept for disciplinary reasons or potential future discipline and thus was a relevant requested document that the Employer was obligated to provide the Union.

Respondent also argues in its Answering Brief that since there were no pending grievances related to employee Plant at the time the request for the e-mail was made, the mere potential for discipline in connection with the e-mail was not sufficient to establish its relevancy. Respondent is mistaken in its assessment of how relevancy is defined by the Board. The Board evaluates information requests on the basis of the relevance of information sought, not the merit of a grievance." *Pet Dairy*, 345 NLRB 1222, 1224 (2005).

More importantly, Section 8(a)(5) obligates an employer to provide a union with the requested information if there is a probability that the information would be relevant to the

union in fulfilling its statutory duties as bargaining representative. *Sheraton Hartford Hotel*, 289 NLRB 463, 463–464 (1988). When the requested information concerns wage rates, job descriptions, and other information pertaining to employees within the bargaining unit, the information is presumptively relevant. *Postal Service*, 332 NLRB 635 (2000). Here, the e-mail requested is relevant to potential discipline that has issued or may issue for employee Plant in the future, all events tied to her terms and conditions of employment. Even if the Union was mistaken in its claims, the information should have been provided, as the Union established the relevance of its request. *Otay River Constructors*, 351 NLRB 1105, 1108 (2007); *Certco Distribution Centers*, 346 NLRB 1214, 1215 (2006). As such, the Employer violated Section 8(a)(5) of the Act by failing to provide the e-mail to the Union as requested.

III. Conclusion

Respondent’s Answering Brief to General Counsel’s Exceptions, as discussed above, lacks merit and is not supported by the record. It is respectfully requested that the Board grant the General Counsel’s exceptions and otherwise affirm the decision of the ALJ.

Dated Albuquerque, New Mexico, this 4th day of September 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of ACTING GENERAL COUNSEL'S REPLY BRIEF in PUBLIC SERVICE COMPANY OF NEW MEXICO, Cases 28-CA-023391 and 28-CA-066164 was served by E-Gov, E-Filing, E-Mail, and regular mail on this 4th day of September 2012, on the following:

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