IN THE COURT OF APPEALS FOR THE STATE OF NEW MEXICO

THE CITY OF ALBUQUERQUE,
RICHARD J. BERRY, MAYOR OF
CITY OF ALBUQUERQUE,

Appellant.

vs.

No. 31,075
Bernalillo County
CV-2010-04302

AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES,
AFL-CIO, LOCAL 3022,

Appellee,

DEFENDANT-APPELLANTS' REPLY BRIEF

Appeal from a Bench Trial before the
Honorable Nan Nash
Bernalillo County District Court

Respectfully submitted:

CITY OF ALBUQUERQUE
David Tourek
City Attorney

Michael I. Garcia
Assistant City Attorney
P. O. Box 2248
Albuquerque, NM 87102
(505) 768-4500

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGES

NEW MEXICO CASES:

Appellants (the City) respectfully submit this Reply to Appellee's (AFSCME's) Answer Brief, and for the reasons that follow, ask the Court to reverse the district court's decision.

A. AFSCME Waived Arbitration by Invoking the District Court's Discretion on the Question of Layoffs.

AFSCME argues that it did not invoke the discretion of the district court because the City took the position that the layoffs had not yet occurred at the time the complaint for injunctive relief was filed. *Answer Brief, p. 1* The reason the City took that position was that it was true, layoffs had not yet occurred at that time, and were not certain to occur if positions for transfer could be found, making injunctive relief unnecessary. *BIC 4*, **RP 00032-53** But that is a separate question from whether AFSCME had invoked the discretion of the district court. The only reason AFSCME asked for an injunction in the first place was to prevent the layoffs, or a mandamus to have any laid off employees reinstated. That the layoffs had not yet occurred does not mean AFSCME did not invoke the court's discretion.

On the contrary, AFSCME did indeed invoke the discretion of the district court by asking for coercive relief in the form of an injunction or a mandamus, **RP 001**, to prevent the City from laying off certain of its members. In fact, AFSCME complained that:

> 17. The City of Albuquerque notified the employees that were being laid off without notice to Petitioner, without seeking its input, and without bargaining with Petitioner over the unilaterally imposed decision.
> 18. Under the CBA between the City and Petitioner, the City is obligated to provide Petitioner notice of any layoff and recall procedure and accept input from Petitioner over the same.
> 19. The City unilaterally imposed the layoff upon the employees covered by the CBA between Petitioner and the City without prior notice to Petitioner or an opportunity to bargain over the change.

RP 005 AFSCME then specifically asked for a preliminary injunction "restraining the City of Albuquerque *from . . . laying off* the eight employees employed . . . [at the ARP] who are administering the program . . . . " (italics added) **RP 007 at para. A** Furthermore, to drive the point home, AFSCME stated that '[a]lthough the CBA provides for a grievance procedure, [AFSCME] should be excused from exhausting the contract remedies due to the time-sensitive nature of this Petition." **RP 006, para. 27** AFSCME thus asked for *itself* to be excused from the CBA grievance procedure—arbitration—so that it could obtain the injunctive relief. Seeing that AFSCME asked not to have the CBA requirement applied to it, AFSCME should not then ask the CBA requirement to be applied to the City. Moreover, AFSCME's request to be excused from arbitration is another way of saying that it waived the right to arbitrate.

Contrary to AFSCME's assertion, *Answer Brief, p. 2*, at the hearing on the petition for injunctive relief, the district court did decide that the City complied

with Section 35.1.2 of the CBA on the subject of layoffs, "[T]he Court cannot find that petitioners are entitled to a restraining order or a preliminary injunction under the Collective Bargaining Agreement provision 35.1.2, although I believe it's close, but I believe the City did comply." *Transcript of Proceedings, April 12, 2010, p.62, lines 1-7.* In denying the requested injunction, the district court made this finding after hearing testimony from both union and City personnel; taking evidence; considering the CBA itself; and hearing arguments on the City's compliance with the CBA concerning the layoff provision. *See BIC 2-4* This is precisely the same evidence, the same witnesses, and the same CBA an arbitrator would have considered if the same issue had been arbitrated—whether the City complied with the CBA requirements under Section 35.1.2.

The district court plainly refused to issue injunctive relief on the question of layoffs. Obviously, it would not even have entertained the question had not AFSCME brought it before the district court; or said another way, if AFSCME had not invoked the court's discretion on the question. The fact that AFSCME did not get what it requested does not change the fact that it did indeed ask the court to exercise its discretion on the matter.

AFSCME is also wrong that layoffs were not at issue in its Motion for Order to Show Cause. However that Motion was styled, its purpose was to require the City to reopen the ARP. **RP 64-67** Of necessity, if the ARP were reopened,

employees would have to have been reinstated to run it. Hence the district court's order on this Motion stating that: "Respondents will not be required to reopen the Albuquerque Recovery Program *or to reinstate any of its employees*...." (Italics added) **RP 00092** In any practical sense, reopening of the ARP would mean reinstating laid off employees. This was AFSCME's very purpose in attempting to stop closure of the ARP, as AFSCME had no standing to represent the ARP patients, only the ARP employees in AFSCME's membership. AFSCME invoked the discretion of the district court on this issue on this occasion as well.

To get a still clearer picture, consider if things had happened the other way around. If AFSCME had obtained an injunction on the question of layoffs and a finding that the City had violated the CBA provision, and the layoffs were enjoined, AFSCME would not then have sought to have arbitrated the issue it had already won. And it would have certainly opposed an attempt by the City to have an arbitrator undo its victory. AFSCME waived its right to arbitrate the layoffs under the CBA by twice invoking the district court's discretion on the matter, with hearings held, and the judicial waters tested. Board of Educ. Taos Mun. Sch. v. The Architects, Taos, 103 N.M. 462, 463-64, 709 P.2d 184, 185-86 (1985).

B. The Issue of Layoffs was Arbitrable Until AFSCME Waived It.

In arguing the *arbitrability* of the issue of layoffs at the Albuquerque Recovery Program, AFSCME shifts the focus to a question that is not in dispute.

The construction of the collective bargaining agreement (CBA), and whether the parties agreed to arbitrate layoffs, is secondary to the question whether AFSCME waived arbitration of layoffs by invoking the discretion of the district court on these matters to prevent its members from being laid off.

The City does not dispute that, had AFSCME not waived arbitration, arbitration may have been a suitable mechanism for resolving the dispute. In fact, the City was prepared to arbitrate the matter until AFSCME sued the City in state district court to enjoin the City's planned layoffs and contracting out of the services. But the fact that the matter may have been proper for arbitration under the CBA did not prevent AFSCME from waiving its right. In fact, waiver itself presumes a right to be waived. And while the law favors arbitration as a forum, The Architects, Taos, supra, which AFSCME accurately notes, it also favors finality of judgments and judicial economy, and it disfavors forum shopping, vexatious litigation, and multiple lawsuits on the same issues. AFSCME made its choice of how it wanted to resolve this question, and it opted for litigation in court. After having brought a civil lawsuit, AFSCME cannot now claim it seeks to preserve scarce judicial resources through arbitration. If it had wanted to arbitrate the matter, it should not have opted for court instead.

C. Prejudice to the City Exists in an Adverse Arbitration Award.

AFSCME incorrectly states that the City would not be prejudiced by being forced to arbitrate this issue. The City certainly would suffer prejudice if an arbitrator disagreed with the district court and ruled the City did not comply with the CBA. The risk of an inconsistent verdict, from which there is no appeal, easily qualifies as prejudice. The City would be liable for back pay to whomever it laid off in reliance on the district court's decision. The City would have to pay, again, the expense of litigating the same case before an arbitrator. In simple terms, it is unfair to the City to first be summoned into court on a contract issue; be found to have complied with the contract; and then be forced to answer the same claims before an arbitrator.

D. Conclusion.

For the foregoing reasons, the City respectfully asks the Court to reverse the decision of the district court ordering arbitration of the layoffs.

E. Statement of Compliance.

The Brief contains fewer than the permitted 15 pages. Counsel used Microsoft Word 2010 with a proportionally spaced Times New Roman font. The body of the brief consists of 1503 words total.

Respectfully submitted:

CITY OF ALBUQUERQUE
David Tourek
City Attorney

Michael I. Garcia
Assistant City Attorney
P. O. Box 2248
Albuquerque, NM 87102
(505) 768-4500

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of February, 2012, a true copy of the foregoing pleading was mailed to:

Marianne Lopez
Shane Youtz
900 Gold Ave. SW
Albuquerque, NM 87102
(505) 244-1200

Michael I. Garcia