

**California Gas Transport, Inc. and General Teamsters (Excluding Mailers), State of Arizona, Local 104, an affiliate of the International Brotherhood of Teamsters.** Case 28–CA–21287

March 19, 2008

DECISION AND ORDER

BY MEMBERS LIEBMAN AND SCHAUMBER

On September 26, 2007, Administrative Law Judge James M. Kennedy issued the attached decision. The General Counsel and Respondent each filed exceptions and a supporting brief. The General Counsel also filed an answering brief.

The National Labor Relations Board<sup>1</sup> has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings,<sup>2</sup> and conclusions<sup>3</sup> as modified and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, California Gas Transport, Inc., El Paso, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

<sup>1</sup> Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Members Liebman and Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

<sup>2</sup> In adopting the judge's finding that the Respondent violated Sec. 8(a)(5) of the Act by assigning its Nogales-based drivers to Juarez and Mexicali runs without first bargaining with the Union, we, like the judge, rely on the Board's finding in *California Gas Transport, Inc.*, 347 NLRB 1313, 1359 (2006), *enfd.* 507 F.3d 847 (5th Cir. 2007) (*California Gas*), that assigning the Nogales-based drivers to runs other than their regular runs constitutes a material and substantial change in the drivers' terms and conditions of employment.

<sup>3</sup> The General Counsel has excepted to the judge's dismissal of the allegation that the Respondent violated Sec. 8(a)(5) of the Act by withdrawing recognition of the Union. We find it unnecessary to pass on the judge's dismissal of that allegation given that the remedy would be duplicative of the bargaining order already imposed by the Board, and enforced by the court of appeals, in *California Gas I*, *supra*. In any event, the decision relied on by the General Counsel, *Hospital San Francisco*, 307 NLRB 84 (1992), does not support the General Counsel's position. The respondent in *Hospital San Francisco* did not except to the judge's finding that its withdrawal of recognition was unlawful. *Id.* at 84 fn. 1. The Board's adoption of that finding was therefore pro forma and has no precedential value. E.g., *Carpenters Local 370 (Eastern Contractors Assn.)*, 332 NLRB 174, 175 (2000).

*Johannes Lauterborn*, for the General Counsel.  
*Gregg J. Tucek (Sherman & Howard)*, of Phoenix, Arizona., for the Respondent.  
*Kathy Tiihonen, Organizer*, of Phoenix, Arizona, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JAMES M. KENNEDY, Administrative Law Judge. This case was tried before me in Tucson, Arizona, on July 18 and 19, 2007. The complaint, issued on May 31, 2007<sup>1</sup> by the Regional Director for Region 28 of the National Labor Relations Board (the Board) is based upon an unfair labor practice charge filed by General Teamsters (excluding Mailers), State of Arizona, Local 104, an affiliate of the International Brotherhood of Teamsters (the Union) on March 14, 2007. It alleges that Respondent, California Gas Transport, Inc. (Respondent), has engaged in certain unilateral changes in the working conditions of Respondent's Nogales-based drivers in violation of Section 8(a)(5) and (1) of the National Labor Relations Act (the Act). At the hearing, counsel for the General Counsel amended the complaint to assert that Respondent had withdrawn recognition of the Union. Respondent denies the allegations.

The parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. All parties have filed briefs which have been carefully considered. Based upon the entire record of the case, as well as my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent admits that at all times material it has been a Texas corporation headquartered in El Paso and having offices in Nogales, Arizona, and San Diego, California. It is engaged in the business of transporting propane gas by tanker truck. During the 12-month period ending March 14, 2007, Respondent in conducting its business purchased and received at its Nogales facility goods valued in excess of \$50,000 directly from points outside the State of Arizona. Accordingly, it admits that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. In addition, Respondent admits that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. BACKGROUND AND ISSUES

On August 31, 2006, the Board issued a bargaining order against Respondent requiring it to recognize and bargain with the Union over the wages, hours, and terms and conditions of employment of its Nogales-based drivers. *California Gas Transport, Inc.*, *supra*.<sup>2</sup> Respondent has filed an appeal of that

<sup>1</sup> All dates are 2007, unless otherwise noted.

<sup>2</sup> Administrative Law Judge Gregory Z. Meyerson conducted the hearing in that matter in the spring of 2005 and issued his decision on September 16 that year. While the Board was reviewing his decision, the Regional Director succeeded, 9 months later, in obtaining a temporary injunction from United States District Court on June 21, 2006, under Sec. 10(j) of the Act. Among other things, that order required

order in the United States Court of Appeals for the Fifth Circuit and has declined to recognize the Union pending the outcome of that appeal.

As was found in the earlier case, Respondent has only one customer, Universal Gas. Universal Gas has contracted with several propane suppliers in the United States to purchase large quantities of propane. The propane is picked up by Universal's carrier, Respondent, at various locations in United States. Those locations include a Valero Energy refinery in El Paso; a refinery in Gallup, New Mexico; a petroleum storage facility west of Phoenix (known as Bumstead LPG) (in the suburb of Waddell); and a refinery in Bakersfield, California. Respondent is contracted to Universal to deliver the propane to Universal's customer which, according to the contract of transport services between Respondent and Universal, is PEMEX, the state-owned petroleum monopoly of Mexico. PEMEX has storage facilities in the cities of Juarez, Nogales, Mexicali, and Tijuana, Mexico. I infer from the testimony that those locations are operated by Hidrogas Silza.

The Juarez location is usually served by Respondent's El Paso drivers short-hauling propane from the nearby Valero Energy refinery in El Paso which is only a few miles from the Juarez border station. Nogales, Mexico is always serviced by drivers located in Nogales, Arizona and who commonly pick up propane from the Gallup refinery or from the Bumstead storage facility. The Nogales, Mexico drop-point is about 8 miles beyond the border. On rare occasions these drivers have been asked to deliver to Juarez or to pick up from a Flagstaff, Arizona storage facility.

The San Diego drivers acquire their propane from three locations, the Bakersfield refinery, the Bumstead facility, or the Gallup refinery. They then deliver their LPG cargo to either Mexicali or Tijuana. The Mexicali drop-point is about 15 miles beyond the Calexico, California border crossing.

It is fair to say that the San Diego drivers are long-haul or over-the-road drivers. The Nogales drivers normally perform one long haul and one medium length run. The trucks from both cities are equipped with sleeper units enabling the drivers to sleep in the cabs. Their rest periods can occur at any time, depending on when they have exhausted their drivable hours as set forth by U.S. Department of Transportation regulations. Runs are based upon what Universal Gas' instructions from PEMEX are at any given moment. In early 2007, Respondent was required to deliver approximately 2 million gallons of propane per month. Gardea describes the manner that the deliveries are called for: "They [Universal] tell me every month how much gallons we are going to pick up, but during the month, they might need more propane and I have to deliver more propane. But are we talking about the same two million gallons. It is just a different amount of loads per day."

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Respondent to recognize and bargain with the Union and to reinstate certain employees who had allegedly been discharged under Sec. 8(a)(3) of the Act. During the course of this matter it was demonstrated that Respondent did in fact reinstate employees in question. One of those individuals testified in this matter. Although not shown in this record, it appears that the 10(j) injunction ended shortly after the Board issued its order; it was only in effect for slightly over 2 months.

Aware of these circumstances, the complaint alleges three incidents supposedly breaching the bargaining obligations of Section 8(d) and (a)(5). First, it asserts that on October 20, 2006, Respondent withdrew recognition of the Union in the Nogales bargaining unit. Second, it asserts that on January 27, Respondent changed the route of driver Rogelio Delgadillo by assigning him to drive to El Paso. Third, it contends that in January and February Respondent unilaterally changed the working conditions by assigning its drivers to runs to Mexicali, normally served by the San Diego drivers.

Respondent defends the first, arguing that any obligation to bargain must await the outcome of its appeal to the Fifth Circuit. It defends the second on a factual basis, observing that Delgadillo was one of three drivers assigned a Juarez run in that timeframe and that Delgadillo is splitting hairs between a Juarez run and an El Paso run; he knew he was expected to deliver to Juarez, but would not. It defends the third observing that the February Mexicali run was only temporary in order to deal with the temporary loss of the Bakersfield supplier due to an explosion, fire and temporary shutdown of that facility. However, there is one January run to Mexicali it does not address.

In addition, it should be observed at this juncture that there has been, and continues to be, a wildly differing perspective on what types of drivers these are. Respondent has consistently, starting with the previous proceeding, contended that the Nogales-based drivers, like the San Diego drivers, are over-the-road drivers who can be called upon to drive wherever the customer requires at any time of any given week. It does allow that it generally lets the drivers be home for many week nights and most weekends; indeed those making the Nogales-Waddell roundtrip would be at home that same night. The General Counsel argued to Judge Meyerson, and now to me, that the Nogales-based drivers are route drivers who drove only to Gallup and Waddell, ending their routes at their Nogales-area homes. Judge Meyerson, affirmed by the Board, accepted that argument and made an appropriate finding. See 347 NLRB at 1359, where he said:

[Nogales dispatcher] Velasco attempted to alter the Nogales-based drivers' route assignments by directly dealing with them. Of course, these route assignments were inherently related to their rates of pay, hours, and terms and conditions of employment. These are mandatory subjects over which the Respondent was required to bargain with the Union. See *Permanente Medical Group, Inc.*, 332 NLRB 1143 (2000); *Southern California Gas Co.*, 316 NLRB 979, 982 (1995). In attempting to make these changes in the route assignments without consulting and bargaining with the Union, the Respondent was engaged in direct dealing with the represented employees and was making unilateral changes in the terms and conditions of their employment in violation of the Act. *Christopher Street Owners Corp.*, 294 NLRB 277, 282 (1989).

Under principles of res judicata I am bound by that finding. Accordingly, as part of the background to the case, I find myself obligated to consider the drivers who drove from the No-

gales yard to be route drivers, not over the road drivers. See the collateral estoppel discussion *infra*.

### III. THE ALLEGED UNFAIR LABOR PRACTICES

#### A. *The Purported Withdrawal of Recognition*

As noted above, the Board has ordered Respondent to recognize and bargain with the Union in a bargaining unit consisting of Respondent's Nogales-based drivers. It directed that the bargaining take place on retroactive basis beginning August 30, 2004. As stated, the Board did not issue its order until August 31, 2006. At that time, Respondent made the decision to file an appeal of the Board's order in the United States Court of Appeals for the Fifth Circuit. Aside from a short period covered by the temporary injunction referred to in footnote 2, there was no formal bargaining order in place until August 31, 2006. During the 2-month period covered by the temporary injunction, the Union did make an effort to bargain. In fact, Respondent on July 7, 2006, asked the Union to submit a written contract proposal and to consider certain dates for negotiations. The Union, by letter of August 9, 2006, proposed to meet in October. However, the Board order intervened on August 31 and Respondent determined to appeal it. In mid-October one of the Union's business representatives, Frank Mendoza, telephoned one of Respondent's attorneys to follow up on a proposed meeting. The attorney advised him that Respondent had filed an appeal of the Board's order and would not agree to meet until the validity of the Board's order had been affirmed by the court. As a result of the appeal no bargaining has yet occurred.

#### B. *Delgadillo's Instructions to go to Juarez*

The assignment of Nogales-based drivers to drive to Juarez has never been frequent. Respondent has generally serviced Universal's needs in Juarez through propane pickup from a Valero Energy refinery in El Paso. Nevertheless, a Juarez run was given to Delgadillo beginning on Saturday, January 27. He was the second driver to be assigned that run during the late January timeframe. The first leg required Delgadillo to make an early morning run to Waddell for a pickup at Bumstead. He brought it back to Nogales at noon that day. He parked the loaded tanker at Respondent's Nogales, Arizona yard. He was off on Sunday. Early on Monday morning, January 29, he drove the load to El Paso.

Delgadillo had earlier been involved in the unfair labor practice hearing before Judge Meyerson, specifically an allegation concerning driving from Nogales to Juarez. He also knew that he did not possess a Juarez crossing badge issued by Mexican Customs.<sup>3</sup> His lack of a badge led to a conversation with dispatcher Velasco in which he attempted to negotiate around what he perceived to be the problem he would encounter when crossing the border at Juarez. Velasco didn't concur with his apprehensions. Apparently, in some frustration, Velasco told him to drive to the El Paso yard and take up the matter with operations manager, Oscar Gardea, who was officed there and

<sup>3</sup> Testimony shows that the Mexican Customs badge is required of commercial drivers only at the Juarez border station, not the border stations at Nogales, Mexicali, or Tijuana.

who would resolve the problem by assigning a passenger who possessed the appropriate badge and who would ride with him across the border. Delgadillo was not enamored of this procedure either. At this point he decided to contend that he had been instructed to drive only to El Paso, rather than to Juarez. Accordingly he drove to Respondent's El Paso facility. Once there, he had a conversation with Gardea who asked him if he was going to take truck across. When Delgadillo said he would not, Gardea told him to wait. Shortly thereafter another driver appeared and took the truck to Juarez. Delgadillo waited 6 hours until the truck was returned. He then took his DOT rest period, from 5 p.m. until 3 a.m. the following morning, staying in the sleeper unit of his truck. Afterwards, he drove the truck, as instructed, back to Waddell where he loaded an order and delivered it to Nogales, Mexico.

#### C. *The Runs to Mexicali*

Under normal circumstances, Nogales-based drivers never made runs to Mexicali, which is located across the border from Calexico, California. Both Mexicali and Tijuana are normally served by Respondent's San Diego drivers. Much of their LPG was obtained from a refinery in Bakersfield. Those drivers, leaving from San Diego, would pick up at one of three racks in the Bakersfield refinery. They would then haul to the appropriate destination, either Mexicali or Tijuana. Even so, there were recurrent occasions where the San Diego drivers were obligated to go to Bumstead/Waddell or even on to Gallup for loads.

On January 22, Delgadillo found himself in Waddell at 6 p.m., needing to take his DOT scheduled rest. At 4 a.m. on January 23, he loaded at Bumstead and, per instructions, took the load to Mexicali, despite the fact that Nogales drivers had never before delivered loads to Mexicali. He then returned to Waddell, reloaded and went back to Nogales. This run to Mexicali seems to have been an isolated incident. Indeed, Respondent's officials, when testifying, were mystified about it. In some respects their puzzlement is understandable, given their perspective that once drivers are on the road, Respondent's obligation is to serve Universal's ever-shifting requirements. This particular Mexicali run may simply have been a response to an immediate need specified by Universal, and Delgadillo's presence at Bumstead was fortuitous to a Mexicali delivery. Whatever the reason, Delgadillo's Mexicali run was in fact typical of all Respondent's longer runs, including Gallup. A Gallup roundtrip from Nogales was a little over 800 miles. This Mexicali excursion, Waddell-Mexicali-Waddell-Nogales was about 690 miles.<sup>4</sup> Drivers were expected to run through the entire week, ending up in Nogales. Certainly Delgadillo was back in Nogales by Wednesday, though his trip logs for the days later in the week are not in evidence.

The Mexicali situation changed for a short time in early February. It is undisputed that on Thursday, February 8, 2007, several of Respondent's San Diego drivers were awaiting loads at Bakersfield. At that time an explosion or fire occurred at the facility, although this record does not clearly describe the location or nature of the conflagration. The waiting drivers notified

<sup>4</sup> Including the run from the Mexicali border station to the drop point and back.

their dispatcher of the situation by either radio or cellular telephone in San Diego. He told them to leave the area for safety reasons and await further instructions.

Respondent's operations manager, Oscar Gardea, was visiting the San Diego office that day and learned of the Bakersfield problem as it was occurring. He notified his contact at Universal in Juarez, Palemon Solorzono, to find out what alternative sources Universal wished to use. His inquiry resulted in the San Diego-based drivers running from Bakersfield to both Waddell and Gallup. At first, this slowed their capability to serve Tijuana. As Respondent focused on Tijuana, that necessarily reduced its capability to serve Mexicali. After a day or two, Respondent determined that it could cover Mexicali by diverting some of its Nogales-bound trucks there, since Universal deemed the LPG demand in Nogales to be not as vital.

During the weeks of February 12–17 and 19–23, Respondent's Nogales-based drivers made a number of runs to Mexicali. Some were as a result of re-routes and some were scheduled. Over that 2-week period, approximately 24 deliveries were made to Mexicali from either Bumstead or Gallup, including some loads diverted from the Nogales yard. Most of Respondent's Nogales-based drivers participated in at least one run. Several made three or more.

#### IV. ANALYSIS AND CONCLUSIONS

To recap, this case has three contentions: 1. Unilateral changes insofar as runs from Nogales to Juarez are concerned; 2.(a) Unilateral changes with regard to the January 22 run to Mexicali made by Delgadillo and 2.(b). Unilateral changes with regard to the February runs to Mexicali triggered by the temporary loss of the Bakersfield supplier. 3. The alleged withdrawal of recognition.

Taking the last first, Respondent's recognition of the Union as the collective-bargaining representative of its Nogales drivers is based solely on the Board's order in *California Gas Transport, Inc.*, 347 NLRB 1314 (2006). Respondent has not voluntarily recognized the Union; it has been ordered to do so and has chosen to file an appeal with the appropriate United States Court of Appeals. This circumstance may be viewed two different ways. First, follow Respondent's assertion that I must await the outcome of the court's review of that order; or, second, as a Board administrative law judge, that I am bound to recognize Board orders as a matter of *res judicata*.

Certainly as the Board's judicial officer, I am obligated to recognize and give effect to what has gone before, at least insofar as Board findings are concerned. I am therefore not able, as a matter of law, to observe that in reality Respondent may eventually succeed in overturning the bargaining order which the Board issued.

In *American Thoro-Clean*, 283 NLRB 1120 (1987), Administrative Law Judge David S. Davidson found himself faced with a similar procedural circumstance. The preceding case there had not yet been decided by the Board, as opposed to here where the Board has decided it, but the Court of Appeals has not yet reviewed it. Judge Davidson made the following observation which I find persuasive:

For purposes of this decision, I rely on the findings and conclusions of Judge Giannasi in Case 13–CA–21389 with re-

spect to the unfair labor practice committed by Respondent before the issues in this case arose. To be sure, if his decision should be reversed in any substantial part, the underpinnings of this case may well disappear. However, whether affirmed or reversed by the Board or a court of appeals, the decision in that case will be *res judicata* as to the issues decided in it, and they are not subject to relitigation in this case. Thus, that decision establishes that Local 11 was the majority representative of Respondent's employees. . . .

Following Judge Davidson's logic, I find that the proof establishes that Respondent was obligated to recognize the Union as the collective-bargaining representative of the Nogales drivers effective August 30, 2004. This complaint alleges that Respondent withdrew recognition on October 20, 2006. Even so, the General Counsel has not shown what act Respondent took which constitutes a withdrawal of recognition. He does argue that when Respondent's attorney truthfully told the Union's business agent Mendoza that it was in the process of appealing the Board's order to the Court of appeals, that action constituted a withdrawal of recognition. Frankly, I find that argument to be unworthy of much consideration. A straightforward refusal to bargain in order to challenge a Board certification is certainly not a withdrawal of recognition. Indeed, it is part of the statutory process by which representation case issues can be reviewed by the courts. See Section 10(f) of the Act which requires a final Board order as a predicate to court review. A certification of representative is not a final order subject to direct challenge. Similarly, Respondent's refusal to bargain is the statutory predicate for an appeal of the bargaining order. It cannot be regarded as a withdrawal of recognition. Alleging a withdrawal of recognition adds nothing to the overall situation. Furthermore, ordinary unilateral changes do not usually qualify as a withdrawal of recognition. Indeed, the General Counsel does not cite any particular case for that proposition. Frankly, I fail to see the utility of the allegation.

As Judge Davidson said above, whatever happens in the previous case will become *res judicata* in the second. Indeed, it may fairly be said that Respondent is acting at its peril with respect to its decision to decline to bargain with the Union pending final resolution of the issue by the Court of Appeals.<sup>5</sup> I will agree with the General Counsel that the bargaining obligation attached as the Board said, but the simple fact is that despite the Board's order, Respondent has never recognized the Union in any meaningful way. Accordingly, I shall recommend that this allegation be dismissed. Respondent's refusal to bargain with the Union is simply a matter for compliance with the original Board Order.

Turning to the unilateral change allegations, once again the issue of *res judicata*, or more properly, collateral estoppel, comes into play.

The definitions of and distinction between the principles of *res judicata* and collateral estoppel were set forth by Justice Marshall in *Montana v. United States*, 440 U.S. 147, 153–154 (1979). The Board has adopted his reasoning and applied it. See *Sabine Towing & Transportation Co.*, 263 NLRB 114, 120

<sup>5</sup> *Mike O'Connor Chevrolet-Buick-GMC Co.*, 209 NLRB 701 (1974).

(1982), where Administrative Law Judge William Schmidt, affirmed by the Board, held that collateral estoppel barred re-litigation of an issue which had been previously decided against the General Counsel. He observed that Justice Marshall said in *Montana*: “Under *res judicata*, a final judgment on the merits bars further claims by parties or their privies based on the same cause of action. *Cromwell v. County of Sac.*, 94 U.S. 351, 352 (1877); *Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 326 (1955); 1B, Moore, *Federal Practice* ¶. 0.405 [1], 621, 624 (2d ed. 1974) (hereinafter 1B Moore); Restatement (Second) of Judgments Section 47 (Tent. Draft No. 1, March 28, 1973) (merger); *id.* Section 48 (bar). Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation. *Park Lane Hosiery Co. v. Shore*, 439 U.S. 322, 326 fn. 5 (1979).” Accordingly, Judge Schmidt dismissed the allegation.

In the previous case against Respondent Judge Meyerson and the Board clearly found that the Nogales-based runs to places other than Waddell, Gallup and probably Flagstaff, are material and substantial changes in the working conditions of the Nogales-based drivers. In making that finding, the Board held that the runs to which those drivers are assigned are regular routes, not over-the-road runs. It made that finding knowing full well that these drivers drove vehicles with sleeper units behind the cabs. It was aware that most of the runs were to Phoenix/Waddell and permitted the drivers, for the most part, to spend rest periods or nights at their homes in or near Nogales. These drivers did not normally depart in the first part of the week and return at the end of the week as long haul drivers might normally be expected to do. Therefore, the fact that the Juarez and Mexicali runs may be relatively similar to the Gallup run is of no moment, given the Board’s finding in the previous case. More specifically, it is settled law that an employer violates Section 8(a)(5) and (1) if a material change in the conditions of employment is made without consulting with the employees’ bargaining representative and providing a meaningful opportunity to bargain. *Ciba-Geigy Pharmaceuticals Division v. NLRB*, 772 F.2d 1120, 1126 (3d Cir. 1983). “An employer must inform the union of its proposed actions under circumstances which at least afford a reasonable opportunity for counter arguments or proposals.” *NLRB v. Centra*, 954 F.2d 366, 372 (6th Cir. 1992). Accordingly, I find that when Respondent assigned Delgadillo first to Mexicali in January and later in that month to Juarez, without first consulting with the Union, it violated Section 8(a)(5) and (1) of the Act.

I do not find, however, that Delgadillo suffered a loss of pay for his refusal to across the border. Respondent normally provides each driver with a bonus for each border crossing. Had Delgadillo allowed the badge-bearer to join him in taking that load across from El Paso to Juarez, he would have received the bonus. Whether it was he or the badge-bearer who was behind the wheel would have had no effect on his remuneration. Accordingly any backpay due him for making the January 27–29 Nogales-El Paso/Juarez run should not include the bonus.

As for the Mexicali runs which occurred for 2 weeks after the Bakersfield fire, I observe that Respondent did not immedi-

ately assign the Nogales drivers to cover Mexicali. It took a few days for Respondent to realize that the San Diego drivers were having difficulty meeting the needs in Tijuana if they were to also serve Mexicali. It therefore had sufficient time and opportunity to notify the Union that it needed to assign Nogales drivers to make Mexicali runs. It did not avail itself of that time window. More specifically, I find that the Bakersfield fire did not constitute an exigent circumstance. For the Nogales drivers, it was not an emergency. In addition, while Respondent was able to cobble together pay calculations for Nogales-Gallup-Mexicali and Nogales-Waddell-Mexicali, those runs did not have an established pay scale, such as those set forth in General Counsel’s Exhibit 10. Beyond that, runs to Mexicali meant that drivers could sometimes end up in Mexicali and need to deadhead home to Nogales, a leg for which they would not be paid anything beyond reimbursement for diesel fuel. Such circumstances clearly needed to be bargained with the Union.

Accordingly, I am unimpressed with Respondent’s defense that the Nogales drivers actually profited from Mexicali runs. It may be that some did earn more than they might have had they remained running solely to Gallup or Bumstead and back to Nogales. The change may indeed have provided earnings opportunities that they might not otherwise have had. Yet, that is not the issue. The issue is whether Respondent made a material and substantial change in Nogales drivers’ working conditions when it assigned them to those runs. In addition, it deprived the Union of the opportunity to negotiate appropriate remuneration for making them.

On that basis, I conclude that Respondent’s assignment of the Mexicali runs in February violated Section 8(a)(5) and (1).

#### REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. The affirmative action will include an order to post a notice to employees advising them of the remedial steps it will take. It shall also require Respondent to make whole the Nogales drivers for any pay losses they may have suffered, plus interest, due to their being assigned unusual runs in circumstances where their collective-bargaining representative had not been given the opportunity to bargain over such assignments. Interest will be calculated under *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Nevertheless, it will not be required to pay the border crossing bonus to driver Rogelio Delgadillo for his refusal to cross the border on January 29, since he, not Respondent, made the decision not to make that crossing and his reason for refusing to cross is not related to the unlawful unilateral change that the assignment entailed.

Based on the foregoing findings of fact and the entire record in this case, I issue the following

#### CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The General Counsel has failed to prove that Respondent withdrew recognition of the Union.

4. Respondent violated Section 8(a)(5) and (1) of the Act when on January 22 and 27, and in early February 2007 it unilaterally assigned its Nogales-based drivers to Juarez and Mexicali runs without first bargaining with the Union over the manner in which those assignments changed the drivers' wages, hours, and working conditions.

Based on the foregoing findings of fact and conclusions of law and the entire record, I issue the following recommended<sup>6</sup>

#### ORDER

The Respondent, California Gas Transport, Inc., El Paso, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Making unilateral changes in the routes, pay rates or other terms or conditions of employment its Nogales bargaining unit employees, without prior notice to or bargaining with the Union as their exclusive collective-bargaining representative.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days of the Board's decision, make whole the employees in the bargaining unit, together with interest, for any pay they may have lost due to the unlawful unilateral changes as set forth in the remedy section of this decision.

b. Within 14 days after service by the Region, post at its facility in Nogales, Arizona, copies of the attached notice marked "Appendix."<sup>7</sup> Copies of the notice, on forms provided by the Regional Director for Region 28 after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to

<sup>6</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

<sup>7</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since January 27, 2007.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps Respondent has taken to comply.

#### APPENDIX

##### NOTICE TO EMPLOYEES

##### POSTED BY ORDER OF THE

##### NATIONAL LABOR RELATIONS BOARD

##### An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT make unilateral changes in your routes, pay rates or other terms and conditions of employment without first notifying or bargaining with General Teamsters (excluding Mailers), State of Arizona, Local 104, an affiliate of the International Brotherhood of Teamsters as your exclusive collective-bargaining representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights guaranteed by the Federal law set forth above.

WE WILL make those of you whole, together with interest, for any pay you may have lost due to our unlawful unilateral changes in your routes, pay rates and other terms or conditions of employment

CALIFORNIA GAS TRANSPORT, INC.