

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

EL PASO DISPOSAL, L.P.

and

Cases 28-CA-22252
28-CA-22304
28-CA-22403
28-CA-22502
28-CA-22578

INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 351, AFL-CIO

Mara-Louise Anzalone, Esq.,
for the General Counsel.

Juan De La Torre, Business Representative,
for the Union.

Charles P. Roberts, III, and Mark R. Flora, Esqs.,
(*Constangy, Brooks & Smith, L.L.P.*)
of Winston-Salem, NC and Austin, TX, for the Respondent.

DECISION

Statement of the Case

WILLIAM G. KOCOL, Administrative Law Judge. This case was tried in El Paso, Texas, on August 25-26, 2009. The original charge was filed November 25, 2008,¹ and the order further consolidating cases, third consolidated complaint and notice of hearing, (herein the complaint) was issued on July 31, 2009. The complaint, as amended at the hearing, alleges that El Paso Disposal, L.P. (herein El Paso) violated Section 8(a)(1) after its employees engaged in a strike and after the International Union of Operating Engineers, Local 351, AFL-CIO (herein the Union) made an unconditional offer to return to work on behalf of the strikers by informing striking employees that they were required to complete new-hire paperwork as a condition of returning to their former positions and soliciting employees to resign their employment if they were unwilling to return to work in a position that was not substantially equivalent to their former position. The complaint also alleges that El Paso violated Section 8(a)(3) and (1) by refusing to recall to work five named former strikers, imposing new and more onerous working conditions on employee Arturo Gasca and then terminating his recall rights, discharging him, and refusing to give him his longevity bonus; reducing the pay scale and then terminating the recall rights of employee Victor Flores, and discharging and denying a bonus to employee Manuel Cordova, all because the employees assisted the Union. Finally, the complaint alleges that El Paso violated

¹ All dates are in 2008 unless otherwise indicated.

Section 8(a)(5) and (1) by informing striking employees that they were required to complete new-hire paperwork as a condition of returning to their former positions, by withdrawing recognition from the Union as the bargaining representative for separate units of drivers and maintenance employees and thereafter engaged in a number of unilateral changes in the working conditions of these employees.

El Paso filed a timely answer that admitted the allegations of the complaint concerning the filing and service of the charges and amended charges, jurisdiction and interstate commerce, labor organization status, supervisory and agency status of certain persons, the appropriateness of the two bargaining units, and the certification of the Union as the collective-bargaining representative of the employees in those units. El Paso denied the Union's Section 9(a) status and denied that it has violated the Act. El Paso plead as an affirmative defense that it withdrew recognition from the Union based on petitions signed by a majority of employees in each unit.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and El Paso, I make the following.

Findings of Fact

I. Jurisdiction

El Paso, a limited partnership, is engaged in the business of providing waste disposal services to business and residential customers from its facility in El Paso, Texas, where it annually purchases and receives goods valued in excess of \$50,000 from points located outside the State of Texas. El Paso admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. Background

As described above, El Paso provides waste disposal services. It places containers at locations for its customers to use and then collects waste from these containers. On September 28, 2006, the Union was certified as the collective-bargaining representative of two units of employees. Employees in the maintenance unit² repair and maintain the vehicles and the containers used in the waste collection process. Employees in the driver unit³ drive several different types of vehicles used as part of waste collection process.

² That unit is "All compactor maintenance employees, container maintenance employees and fleet maintenance employees employed by the Employer in El Paso, Texas; excluding all drivers, dispatchers, sales employees, office clerical employees, janitors, guards and supervisors as defined in the Act."

³ That unit is "All front load drivers, residential drivers, relief drivers, roll off drivers, buggy drivers, storage unit drivers, Poly Cart drivers, and bulk drivers employed by the Employer in El Paso, Texas; excluding all other employees, including compactor maintenance employees, container maintenance employees and fleet maintenance employees, dispatchers, sales employees, office clerical employees, janitors, guards and supervisors as defined in the Act."

Many of the issues in this case will be decided by or subsumed within the final outcome of an earlier case. In *El Paso Disposal, L.P.*, JD(SF) 18-09 (April 27, 2009), Judge Burton Litvack concluded that El Paso committed a number of serious unfair labor practices affecting employees in both units. In that case employees had filed a decertification petition involving the driver unit. Judge Litvack concluded that the petition was tainted by El Paso's unlawful conduct. Accordingly, Judge Litvack dismissed the RD petition. On November 21, 2007, employees in both units stuck. On December 4, 2007, the Union made an unconditional offer to return to work on behalf of the strikers. Judge Litvack concluded that the strike was an unfair labor practice strike and found that El Paso violated Section 8(a)(3) by refusing to immediately reinstate those strikers.⁴

B. Section 8(a)(5) Allegations

The complaint alleges that El Paso violated Section 8(a)(5) by withdrawing recognition from the Union as the collective-bargaining representative of the employees in both units. On January 7, 2009, El Paso sent the Union the following letter:

This is to advise you that the Company (El Paso Disposal, LP) has been presented with petitions signed by a substantial majority of employees in each bargaining unit indicating that they no longer wish to be represented by the Union. The Company has carefully verified the validity of the signatures. Inasmuch as it is clear that the Union has actually lost majority support in each unit, the Company hereby withdraws recognition of the Union in both units effective immediately.

El Paso withdrew recognition based on two petitions it received, one for each unit, signed by a majority of employees in each unit. Both petitions unambiguously indicate that the signers do not want to be represented by the Union.

An employer may not lawfully withdraw recognition from a union in the context of unremedied unfair labor practices of a nature likely to cause disaffection with the Union among employees. *Master Slack Corp.*, 271 NLRB 78, 84 (1984) and cases cited therein. Judge Litvack has already concluded that El Paso has committed unfair labor practices of the type that would likely cause employees to abandon support for the Union. Those unfair labor practices have not yet been remedied and the passage of time merely exacerbates the likely feeling among employees that the Union is incapable of adequately representing them. Until these matters are straightened out, expressions of disaffection by employees such as the petitions signed by the employees in this case cannot be genuinely assessed. It follows that El Paso's unlawful conduct precludes reliance on those petitions as a basis for withdrawing recognition. By withdrawing recognition of the Union as the collective-bargaining representative of the employees in the driver unit and in the maintenance unit, El Paso violated Section 8(a)(5) and (1).

The parties stipulated that during the first pay period of March 2009 El Paso gave all incentive-based drivers a 6.2 percent wage increase. At the same time all non-strikers and recalled strikers approximately 3.2 percent increase. The last wage increase that these unit

⁴ In *Overstreet v. El Paso Disposal*, ___ F. Supp. ___ Civ. No. EP-09-0275 (W.D. Tex. 2009), the Court granted Section 10(j) interim relief requiring El Paso to reinstate the striking employees, recognize and bargain with the Union, and rescind certain unilateral changes made in working conditions of the employees in the units.

employees received was in 2006. An employer may not unilaterally changed terms and conditions of employment for employees who are represented by a labor organization. *NLRB v. Katz*, 369 U.S. 736 (1962). By unilaterally granting wage increases, El Paso violated Section 8(a)(5) and (1).

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On about April 30, 2009, El Paso implemented a new severance package for terminated employees that required terminated employees to sign a detailed, three-page “Severance Agreement and Release of Claims” that covered topics such as severance pay, insurance benefits, unemployment benefits, release, an affirmation that the terminated employee has no pending claims or suits, etc. against the employer, proprietary information, non-admission of liability or wrongful conduct, no further employment, confidentiality, governing law and jurisdiction, severability and binding nature, sole and entire agreement, no other promises, and legally binding agreement. By unilaterally implementing a severance agreement and release of claims, El Paso violated Section 8(a)(5) and (1).

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Before the strike El Paso used employee Manny Cordova and another employee to wash its vehicles. At some point the second washer moved into a maintenance position. During the strike El Paso used an outside service to wash the trucks. Cordova joined the strike and after the strike he was the first striker recalled to work; he resumed washing trucks together with the employees of the outside service. On April 30, 2009, El Paso terminated Cordova. El Paso decided to give his work to the employees of the outside service who come to the facility and wash the vehicles. Armando Lopez is the operations manager for El Paso. He has a wide range of duties, including overseeing the day-to-day operations. Lopez testified that El Paso decided to contract out the washing operation because he needed more trucks washed so he hired the outside contractor and got rid of Cordova. But the details of Lopez’s explanation are so inherently implausible that I do not credit that testimony. Lopez later more credibly explained that he received a mandate from his superiors to eliminate four positions from the payroll. Undisputed evidence shows that El Paso and its parent and sister companies suffered a downturn in business as part of the recent economic recession. They implemented a hiring freeze in October 2008 and then a salary freeze for certain management employees. They also did not replace nearly 400 employees, or about 7 per cent of their total work force, lost by attrition. This was followed by a direction to eliminate an additional 175 positions. El Paso share of this additional reduction was to eliminate four additional positions. On April 30, the same day that Cordova was terminated, El Paso terminated two other employees, neither of whom was a unit employee, as part of the reduction in force. Apparently a fourth employee resigned that same day. Replacing unit employees with workers employed by another employer who continue to work “side-by-side” with the remaining unit employees, when done in an effort to reduce labor costs, falls squarely within the holding of *Fibreboard Paper Products, Corp., v. NLRB*, 379 U.S. 203 (1964). By unilaterally subcontracting unit work and discharging Manny Cordova, El Paso violated Section 8(a)(5) and (1).⁵

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The complaint alleges that El Paso unlawfully reduced the size of each bargaining unit. Immediately before the strike El Paso employed 65 workers in the driver unit and 34 workers in the maintenance unit. During the strike El Paso hired 40 drivers to replace the 28 striking

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⁵ The General Counsel also contends that El Paso violated Section 8(a)(3) when it terminated Cordova. But Cordova was one of many strikers and there is no evidence of animus towards him. The General Counsel points out that Cordova was the first striker recalled, but that hardly shows that El Paso harbored animus towards him. And so far as this record shows, his return to work went smoothly, unaccompanied by any sign of hostility towards him for having taken part in the strike. I dismiss this allegation of the complaint.

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employees; it hired two more drivers because at the time of the strike it was two drivers below its needed complement of drivers. As of August 24, 2009, El Paso employed 56 drivers and 28 maintenance employees. But, among other things, the General Counsel failed to establish when the reductions occurred, the cause of the reductions (terminations, layoffs, retirements, etc.), and whether the reductions were inconsistent with existing practice. I dismiss this allegation.

C. Section 8(a)(3) Allegations

El Paso uses roll-off trucks and front-load trucks to retrieve waste from the containers. Each type of truck requires a somewhat different set of skills; this difference is at the heart of issues that follow concerning whether El Paso made proper recall offers to drivers. Roll-off trucks haul large containers ranging from 20-40 feet; these large containers are frequently used at construction sites. Drivers of roll-off trucks hoist the containers onto the truck and haul the container to a dump site where the container is emptied; the empty container is then returned to the customer location if needed. These drivers typically handle about six containers per day. Drivers of front-load trucks use prongs at the front of the truck to lift containers over the front of truck and dump the waste into the back of the truck. These drivers typically back up the truck before the container is hoisted and these trucks have a camera to assist in the backing-up process. Front-load drivers typically handle an average of 150 containers per day. Front-loader trucks often operate in narrow alleyways and lift containers in cramped overhead conditions while roll-off trucks are involved in extensive expressway travel. Newly employed drivers are trained for the type of the truck that they will be driving; the training process takes about 10 days. Lopez conceded that jobs of driving the two types of trucks are “pretty different” and the on-the-job training is likewise “pretty different.”

El Paso created a recall list that it used to recall the former strikers. Employees on the list were sorted according to job classification and then ranked after considering a number of factors. Roll-off drivers were ranked and listed separately from front-load drivers.⁶ El Paso used the list to recall the first three ranked front-load drivers to drive front-load trucks and the first three ranked roll-off drivers to drive roll-off trucks. El Paso then recalled drivers Arturo Gasca and Victor Flores. Both had been front-load drivers but were offered positions to drive roll-off trucks. In doing so El Paso bypassed the next two roll-off drivers, Roberto Ortiz and Jasen Cardenas. Moreover, although Gasca was ranked fourth on the list of front-load drivers, Flores was ranked eight. Between Gasca and Flores on the recall list were front-load drivers Francisco Aveytia, Moises Pereyra, and Francisco Villalobos. Alfredo Minjares is the operation supervisor for El Paso; he reports to Lopez. Lopez testified that he and Minjares made the decision to recall Gasca and Flores. According to Lopez, El Paso decided to offer Gasca and Flores these positions because both had experience, at some earlier time, as roll-off drivers and he wanted them cross-trained to be able to drive both types of trucks. Minjares admitted that he and Lopez did not consult the recall list in deciding to recall Flores and Gasca. Minjares testified that back in 1994 or so he saw Gasca drive roll-off trucks to move around containers. To emphasize, Minjares did not see Gasca drive roll-on trucks in the field and he had not seen

⁶ In his brief the General Counsel argues that El Paso “violated the Act by failing to provide the Union with adequate notice and an opportunity to bargain over its recalling of the former strikers.” But there is no allegation in the complaint that covers this issue. Respondents are to be accorded due process; that requires notice and an opportunity to defend against allegations made by the government. Because El Paso has not had a fair opportunity to defend itself on this issue, I do not resolve it.

Gasca drive them in any event for about 14 years. From this Minjares extrapolated that Gasca should be recalled as a roll-off truck driver.

5 As indicated, Flores worked for El Paso as a front-load driver; he started there in 1995. Before the strike he worked as a relief driver, filling in for other front-load drivers while then were on vacation or off sick etc. This required that he be familiar with all the routes as opposed to doing the same route every day. As such he had been told in the past by El Paso that he was too valuable as a relief driver to get his own route. During the many years that he worked there Flores worked only about two days training as a roll-off driver. After the strike ended Flores
10 found employment with another waste disposal company driving a front-load truck. After receiving a telephone call the day before from El Paso, on October 31 Flores went to the facility and met with Lopez and Minjares. Lopez announced that El Paso had a vacant position as a roll-off driver that it was offering to Flores. Flores responded that his job was a front-load driver. He said he needed to be trained before he could work as a roll-off driver. Lopez nodded his
15 head in agreement and said that Flores probably would be trained. Flores then asked about a front-load position; Lopez replied that there were no front-load positions available and asked whether Flores wanted the roll-off position. Flores said he would take that position, but he needed training because he did not have experience in that position. Flores asked how much he would be paid. He was told the pay would be \$12 per hour; that was less than the \$13.40
20 per hour he could earn before the strike. Flores said he needed a week to tell his current employer that he was leaving. Lopez then sent Flores to see Gracie Silva, human resources director. Silva told Flores that he had to submit to a drug test and a physical exam; Flores did so. The foregoing facts are based on Flores' credible testimony. According to Lopez and Minjares, there was no discussion with Flores concerning the wage rate that Flores would be
25 paid upon his return; Minjares explained that they could not tell Flores what his pay would be because that "depends on the distance from the landfill." But he later testified that during the ten-day training period trainees pay "depends (on) what their last hourly rate was." Minjares also testified that he told Flores that Flores would receive training; Minjares explained:

30 Corporate policy states anybody that comes back or new, they have to have a ten-day training period, even if that's what they did before.

But Minjares was unable to explain this policy in a coherent fashion, no one corroborated this
35 testimony, and no documents support for the "corporate policy" identified by Minjares. In addition, Minjares' demeanor was not convincing. I conclude that this part of Minjares' testimony was wholly fabricated, and I am reticent to credit any of his testimony that is not solidly corroborated.

40 Meanwhile, on November 3 Flores received a letter dated October 30 from Minjares advising him:

45 We are happy to notify you that currently we have a vacant position available that I would like to offer you. The vacant position is for a driver (for which you are qualified) in the Operations Department at (the El Paso facility.) The benefits and compensation program remains the same as when you were placed on inactive status.

Please notify our office within the next five working days, if you wish to return to work. I look forward to your response.

50 During the week Flores changed his mind and decided not to accept the offer to return to El Paso. That Friday, November 7, Flores called Minjares and announced he was rejecting the offer. Minjares asked why and Flores explained that he had no experience as a roll-off driver,

that if El Paso had a front load position he would stay. Minjares said that El Paso did not have front load position available at that time, but that if one did open up Flores would be considered for the position, but Flores would return as a relief driver and not as a driver with a permanent route. Minjares said that Flores had to see Silva again to fill out the paperwork showing that he was refusing the position. The following Monday Flores did so; he and Silva had a conversation similar to the one he had earlier had with Minjares concerning why he was refusing to accept the position. Silva told Flores that he had to sign his “resignation papers” and Silva told him that he needed to “sign here and here” which he did without reading what he was signing. The papers that Flores signed indicated that he was resigning to pursue a better opportunity and that he had another job. I conclude that El Paso compelled Flores to resign because he rejected the offer to return as a roll-off driver.

As indicated, Gasca worked as a front-load driver for El Paso; he began working there in May 1993. Early in his employment there Gasca did drive a roll-off truck to move containers around but he never drove a roll-off route. Gasca joined the strike and found work at another employer, Friedman, as a front-load driver. After being called the day before, on October 31 Gasca, like Flores, visited El Paso’s office. He parked his car in the area where employees are allowed to park and entered the building through the dispatch door that is used by employees. After saying hello to some of the dispatchers, he encountered Mike Ramirez, a roll-off dispatcher. Ramirez told Gasca that he was no longer an employee and could not enter the building through that door or park in that area; that he had to remove his car from that parking area, park in front of the building and enter through the reception area. Gasca protested that he was an employee but nonetheless he did as Ramirez instructed.

Gasca then spoke to Minjares, who said that El Paso had a lot of roll-off work and asked if Gasca could help. Gasca answered that he had not driven a roll-off truck for many years and that there were a lot of other roll-off drivers available to do that work. Minjares told Gasca that Gasca would not receive any training because Minjares felt Gasca did not need any training. Gasca asked for some time to think about the offer and Minjares agreed to allow him one week to do so. Gasca then spoke to Silva and was required to complete paperwork and undergo drug testing as if he were a new employee. Gasca wrote on the forms that he was a front-load driver, but Silva insisted that he was also a roll-off driver and Gasca marked the form accordingly.⁷ About a week later Gasca asked Minjares if a front-load driver position had become available; Minjares answered that there was only roll-off work available. Gasca again asked for training but Minjares again declined, indicating that they had too much roll-off work. Minjares asked whether Gasca was comfortable working at Friedman. Gasca said that he was doing the work he liked to do there as a front-load driver, and that if there were no other work opportunities at El Paso then he would stay at Friedman. Minjares again sent Gasca to see Silva where he was told he had to sign some papers. On one of the forms he wrote that he already had another job as the specific reason he was leaving El Paso. El Paso terminated Gasca on November 6. The foregoing facts are based on Gasca’s credible testimony. I have already found Minjares not to be credible; his testimony on this subject was no more credible than his earlier testimony, and his demeanor was entirely unconvincing, especially when I questioned him about what appeared to be gaps in his version of events. I conclude that El Paso discharged Gasca because he rejected the offer to return as a roll-off driver.

El Paso does pre-employment drug testing. It also does return-to-duty drug testing under circumstances where an employee has been off-duty after having tested positive for drug

⁷ Gasca generally communicates in Spanish and reads very little English. Silva and Gasca communicated in Spanish with Silva translating the English on the forms as needed.

use. It does not otherwise test employees upon their return to duty. However, Gracie Silva, El Paso’s human resources director, admitted that all recalled strikers were required to under pre-employment drug screening.

5 I have already identified Michael Ramirez as a roll-off dispatcher for El Paso. He receives work orders and customer requests and then he then assigns the work to the approximately 18 roll-on drivers. This involves grouping the work orders by area and placing them in the proper route. Ramirez and other dispatchers report to Minjares. Minjares will sometimes ask Ramirez to inform a driver to see him (Minjares) after the driver completes his route. Ramirez plays no part in hiring or disciplining drivers.

15 The General Counsel alleges that El Paso unlawfully recalled Flores and Gasca to the roll-off driver positions. I begin my analysis by noting that in Judge Litvack’s decision Flores and Gasca are classified as unfair labor practice strikers who have been unlawfully denied immediate reinstatement. In this case the General Counsel argues that even if they are economic strikers instead of unfair labor practice strikers El Paso still violated the Act. I apply *Laidlaw Corp.*, 171 NLRB 1366 (1968); *enfd.* 414 F.2d 99 (7th Cir. 1969) and *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967) to resolve these issues. I first examine whether Flores and Gasca were recalled to substantially equivalent jobs for which they are qualified. I conclude that driving a roll-off truck is not the substantial equivalent of driving a front-load truck and neither Flores nor Gasca were qualified to so. I have already described the different skills required to drive the different trucks. El Paso itself has recognized the difference by training employees for the truck they are to drive rather than training employees to be able to drive both trucks. El Paso further recognizes a difference in that it does not use front-load drivers to drive roll-off trucks and visa versa. Moreover, on its recall list El Paso segregated and separately ranked its roll-off drivers from its front-load drivers. The scant and aging experience that Flores and Gasca had driving roll-off trucks only serves to expose the sham nature of the offers that El Paso made to them. It follows that Flores and Gasca were not required to accept those offers and El Paso could not discharge them (in the case of Gasca), or force them to resign thereby effectively discharging them (in the case of Flores), for failing to do so.

35 Citing *Little Rock Airmotive, Inc.*, 182 NLRB 666 (1970). El Paso argues that Flores and Gasca were not entitled to be recalled because each had acquired regular and substantial employment elsewhere. But as the General Counsel points out:

40 The Board has held that, in order to cancel the recall rights of economic strikers, an employer must show that the striker attained regular and substantially equivalent employment *and* that the striker unequivocally intended to abandon his employment with the employer. *Marchese Metal Industries*, 313 NLRB 1022, 1028–1031 (1994) (emphasis added). ... The Respondent also failed to show that either employee intended to abandon his job with the Respondent.

45 *Pirelli Cable Corp.*, 334 NLRB 1538, 1541 (2000). Here the facts show that both Flores and Gasca desired to return to El Paso and would have done so if they had been offered their pre-strike positions.

50 By terminating Flores and Gasca for failing to accept offers of employment to positions that are not substantially equivalent to their pre-strike positions, El Paso violated Section 8(a)(3) and (1).

In a related allegation the General Counsel alleges that El Paso unlawfully reduced Flores’ pay rate. In fact, however, Flores never experienced a reduction in his pay because he

did not accept the offer to work as a roll-off driver. The case cited by the General Counsel, *Brooks, Inc.*, 228 NLRB 1365, 1368 (1977), does not support this allegation. Rather, it stands for the proposition that an offer of reinstatement at a reduced pay rate is not a proper offer. This allegation is therefore subsumed within my conclusion that that El Paso did not make a proper offer of reinstatement to Flores. I therefore dismiss this allegation insofar as it alleges an independent violation of Section 8(a)(3). The same reasoning leads me to dismiss the allegations in the complaint that El Paso unlawfully refused to train Gasca to operate a roll-off truck and required him to complete new-hire paperwork.

In another related allegation, the complaint alleges that El Paso unlawfully refused to allow Gasca to enter its facility through the employee entrance and refused to allow him to park in the employee parking area. But these allegations are premised on a showing that Mike Ramirez was acting as El Paso's agent. The General Counsel presents no argument in its brief to support an agency finding and I will not create one for him. I dismiss this allegation too.

The General Counsel alleges that El Paso unlawfully refused to recall former strikers Roberto Ortiz, Jasen Cardenas, Francisco Aveytia, Moises Pereyra, and Francisco Villalobos. I have described above how El Paso bypassed the next two roll-off drivers on its striker recall list, Roberto Ortiz and Jasen Cardenas, when it recalled front-load drivers Flores and Gasca to those positions. It follows that by failing to recall Ortiz and Cardenas, El Paso violated Section 8(a)(3) and (1). It will be recalled that the three other employees, Aveytia, Pereyra, and Villalobos, are front-load drivers who were ranked on El Paso's recall list between Gasca and Flores. There is no evidence that there were front-load driving positions available to them. I dismiss this allegation.

The General Counsel contends that El Paso unlawfully withheld longevity bonuses from Cordova and Gasca. El Paso had a practice of giving longevity bonuses to employees of \$1000 for 10 years of service, \$2000 for 15 years of service, and \$5000 for 20 years. Under this policy according to El Paso's own records Gasca was entitled to receive a longevity bonus of \$2000 effective May 3, 2008, and Cordova was entitled to receive \$5000 on April 27, 2009; he was terminated April 30, 2009. Neither Gasca nor Cordova received their longevity bonuses. But as El Paso points out in its brief, Judge Litvack found that it had developed a practice by awarding the longevity bonuses in December. The General Counsel does not even mention this finding much less make an effort to reconcile that finding with the allegations he makes in this case.

I dismiss these allegations.⁸

D. Section 8(a)(1) Allegations

The complaint alleges that El Paso violated Section 8(a)(1) when Silva informed former strikers that they were required to complete new-hire paperwork as a condition of returning to their former positions. In his brief the General Counsel states:

By *informing* Gasca that he had to fill out paperwork as if he were a new hire, and requiring him to do so, Respondent violated Section 8(a)(1) and (3). See, *Pirelli Cable Corp.*, 331 NLRB 1538 (2000). (emphasis supplied)

⁸ Of course, as discriminatees Gasca and Cordova may be entitled to their longevity bonuses, but that is an issue left for resolution in the compliance stage of these proceedings.

But I searched that case in vain for any support for the contention that the Board found an independent violation of Section 8(a)(1) by *informing* returning strikers that they had to complete new-hire paperwork. I dismiss this allegation.

5 Next, the complaint alleges that El Paso violated Section 8(a)(1) when Silva and Minjares solicited employees to resign their employment if they were unwilling to return to work in a position that was not substantially equivalent to their former position. In support of these allegations the General Counsel argues:

10 Moreover, Minjares' and Silva's repeated solicitation of Gasca and Flores' resignation. . . violated Section 8(a)(1) of the Act. See *California Gas Transport, Inc.*, 347 NLRB No. 118 (August 31, 2006).⁹

15 But the closest support for that proposition that I can find in that rather lengthy decision is Judge Meyerson's findings, affirmed by the Board, that the respondent violated Section 8(a)(1) when it solicited striking employees to resign if they continued to strike and thereby, in effect, threatening employees with discharge if they continued to strike. *Id.* at 1348. The solicitations of resignation in this case by El Paso were unconnected with any protected concerted activity. I dismiss these allegations.

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Conclusions of Law

1. Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act by:

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(a) Withdrawing recognition of the Union as the collective-bargaining representative of the employees in the driver unit and the maintenance unit.

(b) Unilaterally granting wage increases to employees represented by the Union.

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(c) Unilaterally implementing the severance agreement and release of claims.

(d) Unilaterally subcontracting unit work and discharging Manny Cordova.

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2. Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act by:

(a) Terminating Victor Flores and Arturo Gasca for failing to accept offers of employment to positions that are not substantially equivalent to their pre-strike positions.

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(b) Failing to recall Roberto Ortiz and Jasen Cardenas as roll-off drivers.

Remedy

45 Having found that the 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 Respondent having discriminatorily discharged Victor Flores and Arturo Gasca, thereby terminating their right to be recalled as either unfair labor practice strikers or as economic strikers, it must reinstate their status as such, as the Board

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⁹ The more correct cite is 347 NLRB 1314 (2006).

ultimately determines, and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from the date they would have been recalled to date of a proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondent having unlawfully discharged Manny Cordova, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondent having discriminatorily failed to recall Roberto Ortiz and Jasen Cardenas, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended.¹⁰

ORDER

The Respondent, El Paso Disposal, L.P., El Paso, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Withdrawing recognition of the Union as the collective-bargaining representative of the employees in the driver unit and the maintenance unit.

(b) Terminating employees for failing to accept offers of employment to positions that are not substantially equivalent to their pre-strike positions.

(c) Unilaterally granting wage increases to employees represented by the Union.

(d) Unilaterally implementing a severance agreement and release of claims.

(e) Unilaterally subcontracting unit work and discharging employees as part of that process.

(f) Refusing to recall strikers to positions that become available for them.

(g) 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.

¹⁰ 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.

(a) On request, bargain with the Union¹¹ as the exclusive representative of the employees in the following appropriate units concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in signed agreements:

5 All compactor maintenance employees, container maintenance employees and fleet maintenance employees employed by the Employer in El Paso, Texas; excluding all drivers, dispatchers, sales employees, office clerical employees, janitors, guards and supervisors as defined in the Act.

10 and

15 All front load drivers, residential drivers, relief drivers, roll off drivers, buggy drivers, storage unit drivers, Poly Cart drivers, and bulk drivers employed by the Employer in El Paso, Texas; excluding all other employees, including compactor maintenance employees, container maintenance employees and fleet maintenance employees, dispatchers, sales employees, office clerical employees, janitors, guards and supervisors as defined in the Act.

20 (b) Reinstate the rights of Victor Flores and Arturo Gasca to be recalled as either unfair labor practice strikers or as economic strikers, as the Board ultimately determines.

(c) Bargain with the Union concerning wage increases.

25 (d) Upon request of the Union, rescind the severance agreement and release of claims, including those already signed by employees.

30 (e) Restore to the unit the work that was unlawfully subcontracted and within 14 days from the date of the Board's Order, offer Manny Cordova full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

35 (f) Within 14 days from the date of the Board's Order, offer Roberto Ortiz and Jasen Cardenas, full reinstatement to their former jobs or, if that job no longer exists, to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges previously enjoyed.

40 (g) Make Victor Flores, Arturo Gasca, Manny Cordova, Roberto Ortiz and Jasen Cardenas whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

45 (h) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful terminations, and within 3 days thereafter notify the employees in writing that this has been done and that the terminations will not be used against them in any way.

50 (i) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such

¹¹ This is the standard remedy for unlawful withdrawals of recognitions.

records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

5 (j) Within 14 days after service by the Region, post at its facility in El Paso, Texas, copies of the attached notice marked "Appendix"¹² in English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the 10 notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 31, 2008.

15 (k) 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 that the Respondent has taken to comply.

20 IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

25 Dated, Washington, D.C. , December 2, 2009.

30 _____
William G. Kocol
Administrative Law Judge

35
40
45
50 _____
¹² 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."

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 withdraw recognition of the International Union of Operating Engineers, Local 351, AFL-CIO as the collective-bargaining representative of the employees in the driver unit and the maintenance unit.

WE WILL NOT discharge striking employees for failing to accept offers of employment to positions that are not substantially equivalent to their pre-strike positions.

WE WILL NOT unilaterally granting wage increases to employees represented by the Union.

WE WILL NOT unilaterally implement a severance agreement and release of claims.

WE WILL NOT unilaterally subcontract unit work and discharge employees in the process.

WE WILL NOT refuse to recall strikers to positions that become available for them.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union as the exclusive representative of the employees in the following appropriate units concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in signed agreements:

All compactor maintenance employees, container maintenance employees and fleet maintenance employees employed by the Employer in El Paso, Texas; excluding all drivers, dispatchers, sales employees, office clerical employees, janitors, guards and supervisors as defined in the Act.

and

All front load drivers, residential drivers, relief drivers, roll off drivers, buggy drivers, storage unit drivers, Poly Cart drivers, and bulk drivers employed by the Employer in El Paso, Texas; excluding all other employees, including compactor maintenance employees, container maintenance employees and fleet

maintenance employees, dispatchers, sales employees, office clerical employees, janitors, guards and supervisors as defined in the Act.

WE WILL reinstate the rights of Victor Flores and Arturo Gasca to be recalled as either unfair labor practice strikers or as economic strikers, as the Board ultimately determines.

WE WILL bargain with the Union concerning wage increases.

WE WILL, upon request by the Union, rescind the severance agreement and release of claims, including those already signed by employees.

WE WILL, within 14 days from the date of this Order, offer Manny Cordova full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL, within 14 days from the date of the Board’s Order, offer Roberto Ortiz and Jasen Cardenas, full reinstatement to their former jobs or, if that job no longer exists, to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Victor Flores, Arturo Gasca, Manny Cordova, Roberto Ortiz and Jasen Cardenas whole for any loss of earnings and other benefits resulting from their unlawful treatment, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful terminations of Victor Flores, Arturo Gasca, and Manny Cordova, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the terminations will not be used against them in any way.

El Paso Disposal, L.P

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board’s Regional Office set forth below. You may also obtain information from the Board’s website: www.nlrb.gov.

2600 North Central Avenue, Suite 1800

Phoenix, Arizona 85004-3099

Hours: 8:15 a.m. to 4:45 p.m.

602-640-2160.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE’S COMPLIANCE OFFICER, 602-640-2146.