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**El Paso Electric Company and International Brotherhood of Electrical Workers, Local Union 960, AFL-CIO.** Cases 28-CA-20136, 28-CA-20141, 28-CA-20265, 28-CA-20464, 28-CA-20695, 28-CA-20765, 28-CA-20766, 28-CA-20934, and 28-CA-20953

August 10, 2010

DECISION AND ORDER REMANDING

BY CHAIRMAN LIEBMAN AND MEMBERS SCHAUMBER  
AND BECKER

On March 1, 2007, Administrative Law Judge John J. McCarrick issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed limited cross-exceptions, a supporting brief, and an answering brief. The Respondent filed an answering brief to the cross-exceptions. Each party filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board 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>1</sup> and conclusions, as modified below, and to adopt the recommended Order as modified and set forth in full below.<sup>2</sup>

The Respondent is engaged in the generation, transmission, and distribution of electricity in west Texas and southern New Mexico. The complaint alleged that the Respondent committed multiple violations of Section 8(a)(1), (3), (4), and (5) of the Act in response to the Union's successful organizational efforts to add employee groups to a bargaining unit of the Respondent's employees which the Union has represented for several decades. With some modifications discussed herein,<sup>3</sup> we affirm

<sup>1</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>2</sup> We shall modify the judge's recommended Order and notice to conform to the Board's standard remedial language for the violations found.

<sup>3</sup> In affirming the finding that the Respondent violated Sec. 8(a)(1) by giving employee Sira Fanelly an unsatisfactory performance evaluation and consequently denying her a raise and bonus, we rely only on the judge's finding that the Respondent's reasons for its actions were pretextual, raising an inference of discriminatory motive and negating the Respondent's rebuttal argument that it would have taken the same

the judge's disposition of all issues except for his findings that: (a) the Respondent violated Section 8(a)(3) and (4) by denying employee William Power's leave request; (b) the Respondent also violated Section 8(a)(5) by refusing to bargain about the economically-motivated decision to close its Chelmont, Texas customer service facility and to transfer unit employees working there to other facilities; (c) and the Respondent did not violate Section 8(a)(5) by changing the policy for posting union bulletin boards at Las Cruces, New Mexico facilities. As discussed below, we reverse the judge and dismiss the allegation relating to Power's leave request and we find the violation for changing the bulletin board policy. We remand the Chelmont facility decisional bargaining issue to the judge for further analysis of whether the Employer has carried or can carry its burden of proving that labor costs were not a factor in the decision or, even if they were, that the Union could not have offered labor cost concessions that could have changed the Respondent's decision.<sup>4</sup>

action in the absence of Fanelly's protected activities. See, e.g., *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enf. 705 F.2d 799 (6th Cir. 1982).

There are no exceptions to the judge's finding that the Respondent's treatment of Fanelly did not violate Sec. 8(a)(4). We find it unnecessary to pass on the judge's finding that this conduct violated Sec. 8(a)(3) inasmuch as such a finding would not materially affect the remedy.

There are no exceptions to the judge's findings that the Respondent violated Sec. 8(a)(1) by including a no-solicitation clause in its collective-bargaining agreement and by disparaging a union official. Nor are there exceptions to his findings that the Respondent violated Sec. 8(a)(5) by discharging employee Mario Navarro, but that this discharge did not independently violate Sec. 8(a)(1).

In affirming the judge's finding that the Respondent violated Sec. 8(a)(5) by failing to supply the Union with requested information, we rely only on the judge's analysis indicating that the information requested was not a witness statement under *New Jersey Bell Telephone Co.*, 300 NLRB 42 (1990).

We affirm the judge's finding that the Respondent violated Sec. 8(a)(5) by limiting employee Felipe Salazar's use of company resources for union business. We find it unnecessary to pass on the judge's finding that the Respondent violated Sec. 8(a)(3) by warning employee Salazar in his midyear appraisal about this conduct. The finding would not materially affect the rescission remedy required for the Respondent's 8(a)(5) violation. There are no exceptions to the judge's finding that the midyear appraisal did not violate Sec. 8(a)(4).

There are no exceptions to the judge's findings that the Respondent violated Sec. 8(a)(5) by unilaterally changing its work rules regarding breaks for the meter readers, collectors, and facilities work groups, but that it did not violate Sec. 8(a)(5) by: (a) unilaterally changing its work rules to impose stricter monitoring and discipline procedures for these work groups; (b) giving verbal warnings to certain employees pursuant to unilateral work rule changes on breaks and stricter monitoring and discipline; and (c) intentionally impeding the parties from reaching a collective-bargaining agreement.

<sup>4</sup> Chairman Liebman would limit the remand to whether labor costs were a factor in the decision to close the Chelmont facility, a matter that is encompassed within the Respondent's exceptions and supporting brief. The Respondent does not except to the judge's finding that it

On March 13, 2006, Supervisor Debra Duran unlawfully denied Power's right to union representation at an investigatory interview that culminated in Power's 2-day suspension for losing a radio.<sup>5</sup> On Tuesday April 11, Power asked Duran for 2 to 3 hours of leave on Thursday April 13 so that he could meet with a Board agent regarding the suspension. Duran denied the request, telling Power that it was not possible to give him leave since it was a holiday workweek,<sup>6</sup> the office was busy and would be closed on Friday, and others had already requested time off. Duran testified that she generally requires employees to schedule time off at least a week in advance and that she had previously denied requests for time off on short notice. She admitted that she had granted time off on short notice in certain exigent circumstances.

In determining whether the Respondent violated Section 8(a)(3) and/or (4) of the Act when Duran denied Power's leave request, the General Counsel bears the initial burden of proving, by a preponderance of the evidence, that protected conduct was a motivating factor in the employer's adverse action.<sup>7</sup> The judge found that the timing of Duran's denial of leave, soon after Power's request for union representation and the filing of an unfair labor practice charge concerning his suspension, was evidence of an unlawful motive. The judge further relied on what he viewed as Duran's departure from her practice of allowing time off in similar circumstances to find that Duran's stated reason for denying the leave request was pretextual and that the denial was in retaliation for the charges filed on Power's behalf by the Union.

We disagree with the judge's analysis. In our view, the General Counsel has failed to establish that union activity or the resort to the Board's processes was a motivating factor in the denial of Power's request. Although the denial of leave occurred shortly after Power's protected activity, the timing of Power's leave request effectively determined the timing of Duran's response.

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offered no evidence at the hearing that the Union could not have offered labor cost concessions that could have affected the Respondent's decision to close the Chelmont facility.

<sup>5</sup> In affirming the finding that Duran violated Sec. 8(a)(1) by denying Power his right to union representation at an interview, we rely only on the fact that the Respondent had not finalized its disciplinary decision before the interview. Supervisor Duran admitted that in the past she had been convinced by employees at disciplinary hearings not to issue discipline, and she gave Power an open-ended invitation to speak, which could have had the effect of providing evidence to bolster her disciplinary decision or to convince her not to impose discipline.

<sup>6</sup> In 2006, Easter Sunday was April 16.

<sup>7</sup> *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399-403 (1983). The *Wright Line* causation test has been applied to 8(a)(4) claims. See, e.g., *American Gardens Management Co.*, 338 NLRB 644, 645 (2002).

Under these circumstances, the probative value of a temporal relationship between the employer's action and the employee's protected activity is diminished. There is no other basis for finding Duran's reliance on the stated reasons for denying the leave request to be pretextual. Contrary to the judge's finding, the General Counsel did not show that Duran departed from her past practice and thereby treated Power in a disparate manner. Duran testified that she would grant short notice leave requests in exigent circumstances, but there is no evidence that Power's request conveyed to Duran or should have been perceived by her as involving any exigency similar to those in which she had previously granted leave on short notice. Thus, we decline to draw from the factors cited by the judge an inference of discriminatory motivation sufficient to meet the General Counsel's initial *Wright Line* burden of proving a violation of Section 8(a)(3) or (4). We therefore reverse the judge and dismiss the complaint allegations on this issue.

With respect to the allegations that the Respondent violated Section 8(a)(5) of the Act by altering the policy for union bulletin boards at Las Cruces facilities, the parties' 2003-2006 collective-bargaining agreement provided that the Respondent would "furnish space in convenient places in all Departments under this Agreement for the use of the Union in placing bulletin boards. The Union shall furnish such bulletin boards and may place thereon notices and other matters concerning Union business." This agreement was extended to the meter readers, collectors, and facilities services employees at the existing Las Cruces facility shortly after the Union was certified to represent them. At some point thereafter, the Union and the Respondent orally agreed to share space evenly on the bulletin board at this facility.

According to the testimony of employee Janet Hallsted, when the Respondent's postings on the bulletin board at Las Cruces began overcrowding the Union's space in mid-2006, she asked New Mexico Division Vice President for Operations Bob McNeal if the Union could post an additional bulletin board there. McNeal agreed. Subsequently, Hallsted asked McNeal if a bulletin board could also be posted at the Respondent's new Solano Street office in Las Cruces, where customer service unit employees worked. Again, McNeal agreed. However, on August 2, 2006, Las Cruces Supervisor Duran removed the Las Cruces bulletin board and placed it on Hallsted's chair with a note informing her that the board would not be allowed up until a new contract had been ratified. Duran later informed Hallsted that no bulletin board was to be posted at the Solano facility.

The judge dismissed allegations that Duran's actions violated Section 8(a)(5). He found that McNeal was not

involved in ongoing negotiations for a new bargaining agreement and was not the Respondent's agent for purposes of bargaining. Since McNeal lacked authority to bind the Respondent to an agreement with the Union concerning new bulletin boards, the judge concluded that Duran's actions could not have constituted a repudiation of any such agreement.

Contrary to the judge, we find no need to pass on whether McNeal had the authority to act as the Respondent's bargaining agent. McNeal did not negotiate any policy change in his communications with Hallsted. He simply gave permission, consistent with the past practice established under the expired 2003–2006 contract, to provide space for posting bulletin boards in departments where the Union represented employees. This practice was extended to the newly-organized employees in Las Cruces after they voted to join the bargaining unit. The record fails to show that the parties' subsequent space-sharing arrangement for the bulletin boards in extant facilities changed past practice by placing an absolute limit on the number of bulletin boards available for the Union's use. There was no bulletin board space for the Union's notices at the new Solano facility, and the Respondent's notices had overcrowded the agreed-on shared space for the Union's postings at the existing Las Cruces facility bulletin board. In these circumstances, it was Duran, not McNeal, who unilaterally changed the existing bulletin board policy by removing one bulletin board and prohibiting the posting of another. We therefore reverse the judge and find that the Respondent violated Section 8(a)(5).

With respect to the judge's finding that the Respondent violated Section 8(a)(5) by failing to bargain about the decision to close its Chelmont customer service facility, we find that further analysis is required to resolve this complaint allegation. Prior to the facility's closing, bargaining unit customer service representatives (CSRs) working there handled a variety of walk-in customer service matters, including the processing of payments. It is undisputed that the facility was overcrowded and technologically antiquated. After receiving a January 2006 financial evaluation of options for addressing the facility's shortcomings, the Respondent's officials chose the option of closing the facility, subcontracting the customer payment function to independent pay stations, and transferring all Chelmont CSRs to other facilities where they continued to perform other customer service functions. The Respondent refused to bargain with the Union about the decision to close.

The judge applied the Board's multistep burden-shifting test in *Dubuque Packing Co.*, 303 NLRB 386 (1991), enf. 1 F.3d 24 (D.C. Cir. 1993), cert. denied 511

U.S. 1138 (1994), in determining whether the decision to close the Chelmont office was a mandatory subject of bargaining.<sup>8</sup> Under this test, the General Counsel must initially show that the decision involved a relocation of unit work unaccompanied by a basic change in the nature of the employer's operation. Satisfaction of that burden establishes a prima facie case that the relocation decision is a mandatory subject of bargaining. The employer may rebut the prima facie case by establishing that the work performed at the new location varies significantly from that performed at the old facility, that the work performed at the old facility is to be discontinued entirely rather than moved, or that the employer's decision involves a change in the scope and direction of the enterprise. Alternatively, the employer may proffer an affirmative defense and "show by a preponderance of the evidence: (1) that labor costs (direct and/or indirect) were not a factor in the decision<sup>9</sup> or (2) that even if labor costs were a factor in the decision, the union could not have offered labor cost concessions that could have changed the employer's decision to relocate." *Dubuque Packing*, 303 NLRB at 391.

The judge correctly found that the decision to close the Chelmont facility involved a relocation of unit work that did not constitute a basic change in the scope and direction of the Respondent's business. However, his further analysis of the Respondent's affirmative defenses did not adequately detail the evidence relied upon in reaching his conclusion that labor costs were a factor in the decision to relocate. Moreover, the judge did not adequately explain the basis for his summary conclusion that the Respondent offered no evidence that the Union could not have offered labor cost concessions to the Respondent

<sup>8</sup> Even where there is no obligation to bargain over the decision, there remains a duty to bargain upon request over its effects. Such bargaining, if requested, must occur before the decision is implemented. See, e.g., *KIRO, Inc.*, 317 NLRB 1325, 1327 (1995), citing *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 681–682 (1981). We affirm the judge's finding that the Respondent failed to meet its obligation to bargain about the effects of the decision to close the Chelmont facility. We also affirm the judge's dismissal of the allegation that the closing violated Sec. 8(a)(3). We find that the General Counsel failed to establish that employees' union activity was a motivating factor in the closure and that, in any event, the Respondent showed that it would have closed the facility for economic reasons even in the absence of such activity.

<sup>9</sup> Member Schaumber notes that this first factor involves a motivational test. *Dubuque Packing*, 303 NLRB at 392 (referring to the employer's "motivation for the relocation decision"). He further notes that in approving the *Dubuque* test, the D.C. Circuit explained that this analysis will distinguish relocations motivated by labor costs from those motivated by other perceived advantages of the new location. *Compare* 303 NLRB at 390 fn. 9 (collecting cases in which the relocation was motivated by labor costs) *with id.* at 390 fn. 10 (collecting cases in which the decision was motivated by other factors). 1 F.3d at 30.

that could have changed its decision to close and relocate the unit work. We therefore conclude that the judge's decision provides an insufficient basis for determining the merits of the Respondent's defenses. Accordingly, we shall sever and remand this issue to the judge for further explanation of the evidentiary basis, including credibility resolutions, for his finding that the Respondent failed to prove that labor costs were not a factor in the decision or that, to the extent they were a factor, the Union could not have offered concessions that would have changed the decision. The judge may reopen the record upon the request of any party to take additional testimony or receive additional documentary evidence concerning the specified issue. Parties may file supplemental briefs with the judge concerning that issue.

#### ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, El Paso Electric Company., El Paso, Chelmont, Fabens, and Van Horn, Texas, and Las Cruces, Hatch, and Anthony, New Mexico, its officers, agents, successors, and assigns, shall

##### 1. Cease and desist from

(a) Refusing to meet at reasonable times and places and bargain in good faith, including bargaining with respect to the effects of the decision to close the Chelmont facility, with the International Brotherhood of Electrical Workers, Local Union 960, AFL-CIO as the certified collective-bargaining representative of the employees in the following unit:

**Including:** The employees of El Paso Electric Company working in the following classifications in the **Power Supply Operating Departments:** Janitors, Apprentice Operator, Operator, Inside Operator, Senior Operator, and Working Supervisor; the employees of El Paso Electric Company working in the following classifications in the **Power Supply Division Maintenance Department:** Insulator, Helper, Helper/Apprentice, Apprentice Mechanic, Apprentice Electrician, Apprentice Laboratory Technician, Apprentice Instrumentation Technician, Mechanic, Electrician, Laboratory Technician, Instrumentation Technician, Electronic Specialist, Predictive Maintenance Technician, Working Supervisor, Vibration Specialist, Level II, Vibration Specialist, Level III, and Working Supervisor-Vibration Specialist; the employees of El Paso Electric Company working in the following classifications in the **Transmission and Distribution Division, Distribution Construction, Distribution Operations, Transmission Design and Maintenance:** Helper,

Helper/Apprentice, Apprentice Lineman, Apprentice Cable Splicer, Apprentice Equipment Operator, Lineman, Cable Splicer, Equipment Operator, and Working Supervisor; the employees of El Paso Electric Company working in the following classifications in the **Transmission and Distribution Division Meter Testing/Service:** Helper, Helper/Apprentice, Apprentice Meter Technician, Meter Technician, Meter Laboratory Specialist, Service Worker, Inspector-Wiring and Meter Service Order Worker, and Working Supervisor; the employees of El Paso Electric Company working in the following classifications in the **Transmission and Distribution Division Substation and Relay Department:** Helper, Helper/Apprentice, Apprentice Electrician, Apprentice Equipment Operator, Apprentice Relay Technician, Equipment Operator, Electrician, Relay Technician, Relay Specialist, and Working Supervisor; the employees of El Paso Electric Company working in the following classifications in the **Transmission and Distribution Division Communications Department:** Helper, Helper/Apprentice, Apprentice Communication Technician, Communication Technician, and Working Supervisor; the employees of El Paso Electric Company working in the following classifications in the **Administrative Division Garage Section:** Janitor, Helper, Tool and Material Handler, Senior Tool and Material Handler, Apprentice Mechanic, Mechanic, Technician, and Working Supervisor; the following employees of El Paso Electric Company working in the following classifications in the **Treasury Services Warehouse Section:** Fuel Handler, Warehouse Helper, Tool and Material Handler, Senior Tool and Material Handler, Material Handler, Senior Material Handler, Material Truck Operator, Working Supervisor, and Working Supervisor-Power Supply; and **Miscellaneous:** Laborer (Temporary), and Laborer (After 1 Year) employees; all full-time and regular part-time Meter Readers, and Collectors, Technician-Sr. Electrical/Technician-Sr. HVAC/Technician-Jr. Electrical/Technician-Sr. Maintenance/Technician-Maintenance/Clerk-Facilities Services VI; and all full-time and regular part-time Customer Service Representatives I, II, III and Customer Service-Clerk-Telephone Center employees employed by the El Paso Electric Company at the telephone center at 100 N. Stanton, El Paso, Texas, and the outlying offices including Chelmont, Fabens and Van Horn, Texas, and Anthony, Hatch, and Las Cruces, New Mexico.

**Excluding:** All other employees, office clerical employees, dispatchers, professional employees, guards and supervisors as defined in the Act.

(b) Refusing to furnish information requested by the Union that is necessary and relevant to the Union's performance of its duties as the collective-bargaining representative of the unit employees.

(c) Changing terms and conditions of employment of unit employees without notice to or bargaining with the Union by:

(i) Changing its policy concerning when meter readers may take break and lunchtimes.

(ii) More strictly enforcing its tardiness and absentee policy.

(iii) Changing the access of employees to its telecommunications resources in order to conduct union business.

(iv) Changing the manner of informing the Union of employee disciplinary meetings.

(v) Changing its policy concerning CSRs working on coworkers' accounts.

(vi) Issuing performance improvement plans to more strictly enforce its changed policy regarding tardiness and absenteeism.

(vii) Issuing discipline to employees to enforce its changed policy regarding working on coworkers' accounts.

(viii) Changing its boot allowance policy for meter readers and collectors.

(ix) Discharging employees pursuant to its changed policy concerning when meter readers may take breaks and lunch periods.

(x) Removing or prohibiting the posting of bulletin boards contrary to its past practice of providing bulletin board space for the Union's use at its Las Cruces, New Mexico facilities.

(d) Issuing unfavorable performance appraisals, denying raises and bonuses, or otherwise discriminating against employees for engaging in protected concerted activity or supporting the Union.

(e) Denying the right of employees to be represented by the Union in investigatory meetings that can reasonably lead to discipline.

(f) Maintaining a rule prohibiting employees from engaging in union activities on company time.

(g) Threatening employees with more onerous working conditions or discharge as a means of enforcing unilaterally imposed rules changes dealing with absences and tardiness.

(h) Threatening employees with discipline for using company telecommunications resources for union activities.

(i) Engaging in surveillance of employees' union activities.

(j) 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) Meet and bargain, including bargaining with respect to the effects of the decision to close the Chelmont facility, at reasonable times and places with International Brotherhood of Electrical Workers, Local Union 960, AFL-CIO as the exclusive collective-bargaining representative of the employees in the above-mentioned unit.

(b) If requested by the Union, rescind any unlawful changes made in terms and conditions of employment, noted above, and reduce to writing and sign any agreement reached with the Union concerning these terms and conditions of employment.

(c) Within 14 days from the date of this Order, offer Mario Navarro 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.

(d) Make Mario Navarro, Sira Fanely, Mary Perryman, and Delma Gonzales 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 judge's decision.

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Mario Navarro and within 3 days thereafter notify him in writing that this has been done and that the discharge will not be used against him in any way.

(f) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discipline of Mary Perryman, Maria Davila, and Delma Gonzales dated February 20, 2006; the February 2006 performance improvement plans of Antonya Watson, Delma Garcia, Lucy Flores, Pat Cruz, and Stephanie Alarcon; the December 17, 2004 appraisal of Sira Fanely; and the July 2005 midyear appraisal of Felipe Salazar and within 3 days thereafter notify the employees in writing that this has been done and that the discipline, performance improvement plans, and appraisals will not be used against them in any way.

(g) 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 papers, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of back pay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its Texas and New Mexico facilities copies of the attached notice marked "Appendix"<sup>10</sup> in both 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 immediately upon receipt 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 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 any of the facilities 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 August 3, 2004.

(i) 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.

IT IS FURTHER ORDERED that the complaint allegation that the Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain with the Union about the decision to close the Chelmont, New Mexico facility and to transfer Chelmont employees to other facilities is severed and remanded to an administrative law judge for further appropriate action consistent with this decision.

IT IS FURTHER ORDERED that the judge shall prepare and serve on the parties a supplemental decision, after which the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

IT IS FURTHER ORDERED that the second consolidated complaint and the August 24, 2006 complaint are dis-

missed insofar as they allege violations of the Act not specifically found.

Dated, Washington, D.C. August 10, 2010

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Wilma B. Liebman, Chairman

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Peter C. Schaumber, Member

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Craig Becker Member

(SEAL) 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 refuse to meet at reasonable times and places and bargain in good faith, including bargaining with respect to the effects of the decision to close the Chelmont facility, with International Brotherhood of Electrical Workers, Local Union 960, AFL-CIO (the Union), as your certified collective-bargaining representative in the following bargaining unit (the unit):

**Including:** The employees of El Paso Electric Company working in the following classifications in the **Power Supply Operating Departments:** Janitors, Apprentice Operator, Operator, Inside Operator, Senior Operator, and Working Supervisor; the employees of El Paso Electric Company working in the following classifications in the **Power Supply Division Maintenance Department:** Insulator, Helper, Helper/Apprentice, Apprentice Mechanic, Apprentice Electrician, Apprentice Laboratory Technician, Apprentice Instrumentation Technician, Mechanic, Electrician, Laboratory

<sup>10</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."

Technician, Instrumentation Technician, Electronic Specialist, Predictive Maintenance Technician, Working Supervisor, Vibration Specialist, Level II, Vibration Specialist, Level III, and Working Supervisor-Vibration Specialist; the employees of El Paso Electric Company working in the following classifications in the **Transmission and Distribution Division, Distribution Construction, Distribution Operations, Transmission Design and Maintenance**: Helper, Helper/Apprentice, Apprentice Lineman, Apprentice Cable Splicer, Apprentice Equipment Operator, Lineman, Cable Splicer, Equipment Operator, and Working Supervisor; the employees of El Paso Electric Company working in the following classifications in the **Transmission and Distribution Division Meter Testing/Service**: Helper, Helper/Apprentice, Apprentice Meter Technician, Meter Technician, Meter Laboratory Specialist, Service Worker, Inspector-Wiring and Meter Service Order Worker, and Working Supervisor; the employees of El Paso Electric Company working in the following classifications in the **Transmission and Distribution Division Substation and Relay Department**: Helper, Helper/Apprentice, Apprentice Electrician, Apprentice Equipment Operator, Apprentice Relay Technician, Equipment Operator, Electrician, Relay Technician, Relay Specialist, and Working Supervisor; the employees of El Paso Electric Company working in the following classifications in the **Transmission and Distribution Division Communications Department**: Helper, Helper/Apprentice, Apprentice Communication Technician, Communication Technician, and Working Supervisor; the employees of El Paso Electric Company working in the following classifications in the **Administrative Division Garage Section**: Janitor, Helper, Tool and Material Handler, Senior Tool and Material Handler, Apprentice Mechanic, Mechanic, Technician, and Working Supervisor; the following employees of El Paso Electric Company working in the following classifications in the **Treasury Services Warehouse Section**: Fuel Handler, Warehouse Helper, Tool and Material Handler, Senior Tool and Material Handler, Material Handler, Senior Material Handler, Material Truck Operator, Working Supervisor, and Working Supervisor-Power Supply; and **Miscellaneous**: Laborer (Temporary), and Laborer(After 1 Year) employees; all full-time and regular part-time Meter Readers, and Collectors, Technician-Sr. Electrical/Technician-Sr. HVAC/Technician-Jr. Electrical/Technician-Sr. Maintenance/Technician-Maintenance/Clerk-Facilities Services VI; and all full-time and regular part-time Customer Service Representatives I, II, III and Customer Service-Clerk-Telephone Center

employees employed by the El Paso Electric Company at the telephone center at 100 N. Stanton, El Paso, Texas, and the outlying offices including Chelmont, Fabens and Van Horn, Texas, and Anthony, Hatch, and Las Cruces, New Mexico.

**Excluding:** All other employees, office clerical employees, dispatchers, professional employees, guards and supervisors as defined in the Act.

WE WILL NOT refuse to provide information requested by the Union that is relevant and necessary to the Union's performance of its duties as your collective-bargaining representative.

WE WILL NOT change your terms and conditions of employment without notice to or bargaining with the Union by:

- (1) Changing our policy concerning when meter readers may take break and lunchtimes.
- (2) More strictly enforcing our tardiness and absentee policy.
- (3) Changing your access to our telecommunications resources in order to conduct union business.
- (4) Changing our manner of informing the Union of employee disciplinary meetings.
- (5) Changing our policy concerning CSRs working on coworkers' accounts.
- (6) Issuing performance improvement plans to more strictly enforce our changed tardiness and absentee policy.
- (7) Issuing discipline to employees to enforce our changed policy regarding CSRs working on coworkers' accounts.
- (8) Changing our boot allowance policy for meter readers and collectors.
- (9) Discharging employees pursuant to our changed policy concerning when meter readers may take break and lunchtimes.
- (10) Removing or prohibiting the posting of bulletin boards contrary to our past practice of providing bulletin board space for the Union's use at our Las Cruces, New Mexico facilities.

WE WILL NOT issue unfavorable performance appraisals, deny raises, bonuses, or otherwise discriminate against you for engaging in protected-concerted activity or supporting the Union.

WE WILL NOT deny your right to a union representative at an investigatory meeting that could reasonably lead to discipline.

WE WILL NOT maintain a rule prohibiting you from engaging in union activities on company time.

WE WILL NOT threaten you with more onerous working conditions or discharge you as a means of enforcing unilaterally imposed rules or changes dealing with absences and tardiness.

WE WILL NOT threaten you with discipline for using company telecommunications resources to conduct union activities.

WE WILL NOT engage in surveillance of your union activities.

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

WE WILL meet at reasonable times and places and bargain in good faith, including with respect to the effects of the decision to close the Chelmont facility, with the Union as your designated collective-bargaining representative for the unit described above.

WE WILL upon request from the Union, rescind any unlawful changes we made in your terms and conditions of employment after March 2005, noted above, and reduce to writing and sign any agreement reached with the Union concerning these terms and conditions of employment.

WE WILL, within 14 days from the date of the Board's Order, offer Mario Navarro to 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.

WE WILL make Mary Perryman, Mario Navarro, Delma Gonzales, and Sira Fanely whole for any loss of wages and benefits, with interest, that they suffered as a result of their discharge, suspension, unfavorable appraisal, or any other unlawful action taken against them.

WE WILL, within 14 days from the date of this order, remove from our files any reference to the unlawful discharge of Mario Navarro; the suspensions of Mary Perryman and Delma Gonzales; the warning to Maria Davila; the performance improvement plans of Antonya Watson, Delma Garcia, Lucy Flores, Pat Cruz, Stephanie Alarcon, and Mary Perryman; and the unfavorable performance appraisals of Sira Fanely and Felipe Salazar; and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharge, suspension, warning, performance improvement plans, and unfavorable performance appraisals will not be used against them in any way.

EL PASO ELECTRIC COMPANY

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

*Jarrett R. Andrews and Daniel C. Dargene, Esqs. (Winstead, Sechrest & Minick)*, of Dallas, Texas, and *Sylvia Porter, Esq.*, of El Paso, Texas, for the Respondent El Paso Electric Company.

*Duane R. Nordick, International Representative I.B.E.W.*, of Wichita, Kansas, for the Charging Party.

## DECISION

### STATEMENT OF THE CASE

JOHN J. MCCARRICK, Administrative Law Judge. This case was tried in El Paso, Texas, on August 23–25, August 29–September 1, and September 19–21, 2006. The charge was filed February 2, 2002, the complaint was issued May 31, 2006, and was further consolidated under a second consolidated complaint and notice of hearing issued on August 24, 2006, by the Regional Director for Region 28.

The second consolidated complaint<sup>1</sup> alleges that El Paso Electric Company (Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by denigrating International Brotherhood of Electrical Workers, Local Union 960, AFL–CIO (the Union), by maintaining an overly-broad no-solicitation rule; by threatening employees not to use company telecommunications resources for union activities; by threatening employees for continuing to engage in union activity; for engaging in surveillance of and creating the impression of engaging in surveillance of union activities; by threatening employees with more onerous working conditions or discharge because of their union activities; by denying an employee's request for union representation; by threatening employees with a refusal to bargain or delayed bargaining if the Union pursued charges with the Board; by telling employees it was futile to select the Union as their bargaining representative or to attempt to bargain because the Union filed charges with the Board; and by threatening employees it would delay bargaining if the Union maintained its demand to bargain in the unit of meter readers, collectors, and facilities employees group.

The second consolidated complaint (the complaint) alleges Respondent violated Section 8(a)(3) of the Act by issuing employee Fanely an unsatisfactory appraisal; by denying Fanely a

<sup>1</sup> At the outset of the hearing, counsel for the General Counsel made a motion to amend the second consolidated complaint by replacing par. 9 with language that states: Respondent engaged in the conduct described above in par. 8(c), because Power requested leave for the purpose of meeting with a Board agent to give testimony in support of the Union's charge in Case 28–CA–20695. Par. 10(u) of the second consolidated complaint was amended to allege that pursuant to Respondent's conduct in subpar. 10(m) on various dates within the 6-month period prior to March 7, 2006, Respondent issued performance improvement plans to employee Pat Cruz and other unknown employees. The proposed amendment deleted the allegation that Respondent issued a performance improvement plan to employee Jackie Small. Par. 13 was replaced with language that alleges: By the conduct described above in pars. 8(c) and 9, the Respondent has been discriminating against employees for filing charges or giving testimony under the Act in violation of Sec. 8(a)(1) and (4) of the Act. See GC Exh. 1(tt). The amendment was granted. Respondent denied the allegations of the second consolidated complaint as amended.

raise and a bonus; by issuing employee Felipe Salazar a poor evaluation; by closing its Chelmont facility; and by denying leave to employee Powers.

The complaint alleges Respondent violated Section 8(a)(4) of the Act by issuing employee Fanely an unsatisfactory appraisal; by denying Fanely a raise and a bonus; and by denying leave to employee Powers.

The complaint further alleges Respondent violated Section 8(a)(5) of the Act by numerous unilateral changes to employees' working conditions without notice to or bargaining with the Union, by refusing to meet and bargain at reasonable times with the Union, by issuing discipline to employees pursuant to the unilateral changes in working conditions, by refusing to furnish the Union upon request information necessary and relevant to its duty as collective-bargaining representative.<sup>2</sup>

Respondent filed a timely answer to the second consolidated complaint stating it had committed no wrongdoing.

In the complaint issued by the Regional Director on August 24, 2006, it is alleged Respondent violated Section 8(a)(1), (3), and (5) of the Act by discharging employee Mario Navarro<sup>3</sup> and 8(a)(5) of the Act by unilaterally changing employees' terms and conditions of employment without notice to or bargaining with the Union, by insisting on proposals to impede the parties from reaching agreement, and by renegeing on an agreement regarding a union bulletin board at its Las Cruces facility. Respondent filed a timely answer denying it had violated the Act.

#### FINDINGS OF FACT

Upon the entire record herein, including the briefs from the General Counsel<sup>4</sup> and Respondent, I make the following

##### I. JURISDICTION

Respondent admitted it is a Texas corporation, with offices and places of business located in El Paso, Chelmont, Fabens, and Van Horn, Texas, and in Las Cruces, Hatch, and Anthony, New Mexico, where it is engaged in the generation, transmission, and distribution of electricity in the States of New Mexico and Texas. Annually, Respondent in the course of its business operations derived gross revenues in excess of \$250,000 and purchased and received at its Texas facilities goods valued in excess of \$50,000 directly from points located outside the State of Texas.

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

<sup>2</sup> At the hearing on September 20, 2006, counsel for the General Counsel moved to amend the second consolidated complaint at par. 10(y) to add that the information the Union requested from Respondent as set forth in par. 10(w) was furnished by Respondent to the Union on June 20 and August 2, 2006. The motion was granted.

<sup>3</sup> At the hearing on September 19, 2006, counsel for the General Counsel moved to amend the complaint to withdraw the August 24, 2006 complaint allegations that Respondent discharged Navarro in violation of Sec. 8(a)(3) of the Act. The motion was granted.

<sup>4</sup> After the hearing closed counsel for the General Counsel filed a motion to correct the record. No opposition to the motion was filed and good cause appearing, the motion is granted.

##### II. LABOR ORGANIZATION

Respondent admitted and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

##### III. THE PROCEDURAL HISTORY

On August 1, 2005, the Regional Director approved a settlement agreement in Cases 28-CA-20136, 28-CA-20141, and 28-CA-20265 and on February 21, 2006, approved a settlement agreement in Case 28-CA-20464.<sup>5</sup>

On May 26, 2006, the Regional Director issued an Order setting aside and vacating informal settlement agreements<sup>6</sup> in Cases 28-CA-20136, 28-CA-20141, 28-CA-20265, and 28-CA-20464 and on May 31, 2006, issued the second consolidated complaint in Cases 28-CA-20136, 28-CA-20141, 28-CA-20265, 28-CA-20464, 28-CA-20695, 28-CA-20765, and 28-CA-20766. On July 24, 2006, Respondent filed a motion for reinstatement of settlement agreements and dismissal of presettlement cases<sup>7</sup> with the Board. The General Counsel filed its opposition.<sup>8</sup> On August 22, 2006, the Board issued its Order<sup>9</sup> denying Respondent's motion stating that the motion should be appropriately heard before an administrative law judge.

On the first day of the hearing herein, Respondent renewed its motion for reinstatement of settlement agreements and dismissal of presettlement cases. Having considered the arguments of the parties together with their written motions, I denied Respondent's motion finding there was evidence of a failure to comply with the settlement agreements in that the new charges involved similar allegations to the conduct that was the subject of the settlement agreements. *Scripps Memorial Hospital Encinitas*, 347 NLRB 52 (2006).

After one day of hearing on August 24, 2006, the Regional Director issued a complaint in Cases 28-CA-20934 and 28-CA-20953 and on the same date counsel for the General Counsel filed a motion to consolidate cases for hearing. On August 29, 2006, Respondent filed its response. On August 29, 2006, I granted counsel for the General Counsel's motion to consolidate cases.

On September 15, 2006, after 7 out of 10 days of hearing had taken place, the Regional Director issued a complaint in Case 28-CA-20979 alleging Respondent had violated Section 8(a)(1), (3), and (5) of the Act by threatening employees with loss of work if the Union did not acquiesce to its bargaining demands and by changing work rules, canceling employees' time off, and requiring employees to work overtime. At the hearing on September 19, 2006, the day Respondent commenced its case-in-chief, counsel for the General Counsel moved to consolidate the complaint in Case 28-CA-20979 with the extant consolidated cases. On September 21, 2006, Respondent filed its response. After considering the arguments of the parties, I denied General Counsel's motion finding under *U-Haul of Nevada, Inc.*, 345 NLRB 1301 (2005), that the Gen-

<sup>5</sup> GC Exhs. 2 and 3.

<sup>6</sup> GC Exh. 1(ddd).

<sup>7</sup> GC Exh. 1(III).

<sup>8</sup> GC Exh. 1(vvv).

<sup>9</sup> GC Exh. 1(xxx).

eral Counsel would not be precluded from litigating the issues contained in the complaint in Case 28–CA–20979 since the same facts and charges in the instant case would not be relitigated and that a substantial delay in this case would result if the new case was consolidated, resulting in prejudice to the parties.

#### IV. THE ALLEGED UNFAIR LABOR PRACTICES

##### A. The Facts

###### 1. Respondent's organization and bargaining history

Respondent is a public utility engaged in the generation, transmission, and distribution of electricity in west Texas and southern New Mexico. It has facilities located in El Paso, including its Chelmont, and downtown Call Center. There are additional offices in Fabens and Van Horn, Texas, as well as Anthony, Hatch, and Las Cruces, New Mexico. Respondent's executives include: President and CEO Gary Hedrick (Hedrick), Chief Operating Officer Frank Bates (Bates), Vice President of Customer Services Kerry Lore (Lore), and Assistant General Counsel and member of its bargaining committee Sylvia Porter (Porter).

Respondent's management team includes: Director of Supply Chain Management and the chairman of its bargaining committee Paul Garcia (P. Garcia), Director Customer Service Representatives Judy Kummrow (Kummrow), Operations Supervisor at the Newman Power Plant William Westfall (Westfall), and Labor Relations Specialists Manny Hernandez (Hernandez) and Marcello Rios (Rios).

Directing Respondent's El Paso Call Center customer service representatives (CSR) is Eduardo Valdez (Valdez), Respondent's El Paso Call Center manager and Elizabeth Carrasco (Carrasco), and Respondent's El Paso Call Center supervisor.

Respondent's CSR employees at its outlying offices in Texas, including Chelmont, Fabens, and Van Horn; and in New Mexico, including Anthony, Hatch, and Las Cruces, were supervised by Respondent's customer service representative supervisor, Rose Lowe (Lowe). Respondent's Chelmont CSR team leader was Yvonne Garcia (Y. Garcia).

Jeff Izes (Izes) operated Izes Consulting Solutions, a consultant to Respondent at its Call Center and outlying CSR offices.

Directing Respondent's meter reading and collections department employees were Respondent's meter reader and collections manager, John Robinette (Robinette), Respondent's El Paso meter reading supervisor, Gregory Gonzales (Gonzales), Respondent's El Paso collections supervisor, Oscar Coral (Coral), and Respondent's Las Cruces, New Mexico meter reading and collections supervisor, Debbie Duran (Duran).

It was stipulated at hearing that at all times material herein all of the above-named individuals were either supervisors or agents of Respondent, within the meaning of the Act.

###### a. The historical unit

Since 1944, the Union has been the exclusive collective-bargaining representative of about 300 of Respondent's linemen and other employees who work in its power plants and

substations<sup>10</sup> (the historical unit). Respondent and the Union have been parties to a series of collective-bargaining agreements covering the historical unit, the most recent of which is effective from June 16, 2003, to June 15, 2006.<sup>11</sup>

###### b. The meter reading and collections department

On October 2 and 3, 2003, a majority of Respondent's approximately 75 employees in the meter reading and collections departments in Case 16–RC–10523 including: all full-time and regular part-time meter readers and collectors, excluding all employees in facilities services, dispatchers, guards, supervisors, professional employees, and all others employees as defined in the Act (the meter reader and collector work group), in a self-determination election, designated the Union as their representative for collective bargaining and further selected to be included for the purposes of representation in the historical unit. On October 14, 2003, the Union was certified as the exclusive collective-bargaining representative of employees in the meter reader and collector work group, included in the historical unit.

###### c. The facilities services department

On October 16, 2003, a majority of Respondent's seven employees in Respondent's facilities services department in Case 16–RC–10525, including: technician-Sr.; electrical/technician-Sr.; HVAC/technician-Jr.; electrical/technician-Sr.; maintenance/technician-maintenance/clerk-facilities services VI. Excluding all office clerical, guards, professional employees and supervisors as defined in the Act (the facilities work group), in a self-determination election, designated the Union as their representative for collective bargaining with Respondent and further selected to be included for the purposes of representation in the historical unit. On October 24, 2003, the Union was certified as the exclusive collective-bargaining representative of employees in the facilities work group who chose to be included in the historical unit.

###### d. The customer service department

Lowe supervised the CSRs at Respondent's Chelmont, Fabens, and Van Horn, Texas, as well as the Anthony, Hatch, and Las Cruces, New Mexico offices. The CSRs handled customer payments, new service requests and cancellations of service, as well as customer complaints. Customers may come to the outlying offices in person or make service requests by telephone.

Respondent's downtown El Paso Call Center CSRs are managed by Valdez and Carrasco reports to Valdez. The Call Center CSRs handle customer requests to start and stop service as well as customer complaints. They also service customer accounts.

On August 20, 2004, a majority of Respondent's 66 CSR employees in Case 16–RC–10572, including: all full-time and regular part-time customer service representatives I, II, III, and customer service-clerk-telephone center employees, employed by the Respondent at the telephone center at 100 N. Stanton, El

<sup>10</sup> See GC Exh. 1(ff) at pp. 7–8 for a more detailed listing of employees included in the historical bargaining unit.

<sup>11</sup> GC Exh. 74.

Paso, Texas, and the outlying offices including Chelmont, Fabens, and Van Horn, Texas, and Anthony, Hatch, and Las Cruces, New Mexico; but excluding all office clerical employees, professional employees, guards and supervisors, as defined in the Act, and all other employees (the CSR work group), in a self-determination election, designated the Union as their representative for collective bargaining with Respondent and further selected to be included for the purposes of representation in the historical unit. On August 30, 2004, the Union was certified as the exclusive collective-bargaining representative of employees in the CSR work group who chose to be included in the historical unit.<sup>12</sup>

At all times material, the parties stipulated and I find that the following employees of Respondent constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

**Including:** The employees of El Paso Electric Company working in the following classifications in the **Power Supply Operating Departments:** Janitors, Apprentice Operator, Operator, Inside Operator, Senior Operator, and Working Supervisor; the employees of El Paso Electric Company working in the following classifications in the **Power Supply Division Maintenance Department:** Insulator, Helper, Helper/Apprentice, Apprentice Mechanic, Apprentice Electrician, Apprentice Laboratory Technician, Apprentice Instrumentation Technician, Mechanic, Electrician, Laboratory Technician, Instrumentation Technician, Electronic Specialist, Predictive Maintenance Technician, Working Supervisor, Vibration Specialist, Level II, Vibration Specialist, Level III, and Working Supervisor-Vibration Specialist; the employees of El Paso Electric Company working in the following classifications in the **Transmission and Distribution Division, Distribution Construction, Distribution Operations, Transmission Design and Maintenance:** Helper, Helper/Apprentice, Apprentice Lineman, Apprentice Cable Splicer, Apprentice Equipment Operator, Lineman, Cable Splicer, Equipment Operator, and Working Supervisor; the employees of El Paso Electric Company working in the following classifications in the **Transmission and Distribution Division Meter Testing/Service:** Helper, Helper/Apprentice, Apprentice Meter Technician, Meter Technician, Meter Laboratory Specialist, Service Worker, Inspector-Wiring and Meter Service Order Worker, and Working Supervisor; the employees of El Paso

Electric Company working in the following classifications in the **Transmission and Distribution Division Substation and Relay Department:** Helper, Helper/Apprentice, Apprentice Electrician, Apprentice Equipment Operator, Apprentice Relay Technician, Equipment Operator, Electrician, Relay Technician, Relay Specialist, and Working Supervisor; the employees of El Paso Electric Company working in the following classifications in the **Transmission and Distribution Division Communications Department:** Helper, Helper/Apprentice, Apprentice Communication Technician, Communication Technician, and Working Supervisor; the employees of El Paso Electric Company working in the following classifications in the **Administrative Division Garage Section:** Janitor, Helper, Tool and Material Handler, Senior Tool and Material Handler, Apprentice Mechanic, Mechanic, Technician, and Working Supervisor; the following employees of El Paso Electric Company working in the following classifications in the **Treasury Services Warehouse Section:** Fuel Handler, Warehouse Helper, Tool and Material Handler, Senior Tool and Material Handler, Material Handler, Senior Material Handler, Material Truck Operator, Working Supervisor, and Working Supervisor-Power Supply; and **Miscellaneous:** Laborer (Temporary), and Laborer (After 1 Year) employees; all full-time and regular part-time Meter Readers, and Collectors, Technician-Sr. Electrical/Technician-Sr. HVAC/Technician-Jr. Electrical/Technician-Sr. Maintenance/Technician-Maintenance/Clerk-Facilities Services VI; and all full-time and regular part-time Customer Service Representatives I, II, III and Customer Service-Clerk-Telephone Center employees employed by the El Paso Electric Company at the telephone center at 100 N. Stanton, El Paso, Texas, and the outlying offices including Chelmont, Fabens and Van Horn, Texas, and Anthony, Hatch, and Las Cruces, New Mexico.

**Excluding:** All other employees, office clerical employees, dispatchers, professional employees, guards and supervisors as defined in the Act.

Felipe Salazar (Salazar), Respondent's laboratory technician at the Newman Power Plant, has been the Union's business representative and chief officer of Local 960 for the past 10 years.

## 2. The alleged 8(a)(1) conduct

### *a. Second consolidated complaint paragraph 6(a)*

#### (1) The no-solicitation rule

The June 16, 2003, to June 15, 2006 collective-bargaining agreement between Respondent and the Union provides at article II, section 5, the following:

#### Section 5. No Solicitation on Company Time

Neither the Union, its agents nor any of its members shall solicit employees for Union membership, collect dues or engage in other Union activities on Company time, unless specifically authorized in advance by the immediate Supervisor.

While Labor Relations Specialist Hernandez initially explained that the term "Company time" meant other than lunch or breaktime, he later expanded the definition to include any

<sup>12</sup> While the original certification of representative forms, GC Exhs. 38, 39, and 43, do not reflect that Respondent's employees in the various work groups elected to be included in the historic unit, the election agreements, GC Exhs. 37 and 42, and the Supplemental Decision and Direction of Election issued by the Regional Director for Region 16, GC Exh. 46, leave no room for doubt that Respondent was well aware that its employees in the above work groups elected to be included in the historic unit. Moreover the original certification of representative forms for the meter readers and collectors was corrected on April 8, 2004, in GC Exhs. 38 and 39 and the original certification of representative for the facilities services work group was corrected on April 14, 2004, in GC Exh. 45 to reflect the inclusion of those employees in the historical unit. The certification of representative for the customer service employees in GC Exh. 47 dated August 30, 2004, at all times reflected the inclusion of those employees in the historical unit.

time the employee is at work. Respondent's chief negotiator, Paul Garcia, admitted that Respondent permitted employees to conduct blood drives, to sell raffle tickets, to promote golf tournaments, to have bake sales, and to promote an American Heart Association Walk during working hours.

(2) Analysis

Solicitation by employees may be prohibited only during working time. *Valmont Industries v. NLRB*, 244 F.3d 454 (5th Cir. 2001); *Johnson Technology, Inc.*, 345 NLRB 762 (2005); *Wexler Meat Co.*, 331 NLRB 240 (2000).

The above contract provision is so broad that it encompasses both time when employees are on the clock and employees' own time. That this no-solicitation clause is part of a collective-bargaining agreement is of no effect since the parties cannot agree to waive employees' rights under Section 7 of the Act. *NLRB v. Magnavox of Tennessee*, 415 U.S. 322 (1974). Further, Respondent's contention that this provision was never enforced is belied by Hernandez' definition of "company time" as extending to any time employees were at work. I find that the no solicitation clause cited above violates Section 8(a)(1) of the Act.

*b. Second consolidated complaint paragraph 6(b)*

- (1) The alleged threats by Westfall not to use company resources for union activities and surveillance of employee's union activities

William Westfall, the operations supervisor at Respondent's Newman Power Plant, supervised Respondent's laboratory technicians, including Union Business Representative Felipe Salazar. Salazar is the chief officer of Union Local 960. In his capacity as business representative, Salazar directs all local union officers and stewards, is the Union's chief negotiator, and handles all third-step grievances and arbitrations. While at work, Salazar regularly communicates with Respondent's management, including Respondent's labor relations representatives. In his capacity as laboratory technician, Salazar spends 80 to 90 percent of his time in the field where he takes samples, performs repairs, takes readings, and treats chemicals. Salazar shares computers with two other laboratory technicians. Salazar conducted most of his union business with his cell phone. Prior to July 2005, Salazar was permitted by Respondent to use company fax machines, telephones, and e-mail for union business.

At the end of July 2005, Salazar received his midyear performance evaluation from Westfall.<sup>13</sup> Westfall admitted that he thought Salazar was too occupied with conducting union business while at work. The appraisal directed Salazar to stop, "Use of company resources (phone, email, and computer) for Union Business during working hours." Westfall admitted that he and other employees regularly use Respondent's computers and telephones for personal business during working hours.

<sup>13</sup> GC Exh. 23. While Westfall contends that he amended Salazar's midyear evaluation and that the final evaluation, GC Exh. 21, modified the prohibition on Salazar's use of Respondent's resources to union business in response to Respondent's requests and matters of urgent importance, there is no evidence Salazar ever received the amended evaluation.

When Westfall gave Salazar a copy of his appraisal (GC Exh. 23), Westfall told Salazar he could not use Respondent's phone, e-mail, or computer to conduct union business during working hours. Salazar replied that it had been Respondent's practice to allow use of those resources to conduct union business during working hours. Westfall replied that Salazar had to stop. When Salazar said he could not agree with this because it would prevent him from conducting union business, Westfall said if you continue you will suffer the consequences at the end of the year.

Westfall admitted that he knew Salazar was involved in Board proceedings including the filing of unfair labor practice charges and giving affidavits. Westfall monitored Salazar's union and NLRB activities in a calendar with notations when Salazar engaged in union and NLRB activities.<sup>14</sup> After Salazar's midyear appraisal, Westfall was present in the area where Salazar worked and in the area where Salazar used Respondent's fax machine on a more frequent basis.

(2) Analysis

Counsel for the General Counsel contends that the limitations on Salazar's use of company resources violate Section 8(a)(1) of the Act. Respondent contends that Westfall never threatened Salazar, but requested that Salazar monitor his use of company resources.

In *Postal Service*, 341 NLRB 684 (2004), the Board affirmed the administrative law judge who found that a respondent's new requirement that a union steward request in writing permission to conduct union business or suffer corrective action violated both Section 8(a)(1) and (5) of the Act since it constituted a threat to discipline an employee for violation of a rule established by unilateral change.

As discussed below in section 5,d, Respondent's limitation on Salazar's use of company resources was a material, substantial, and significant change made without bargaining with the Union. As noted in Salazar's appraisal, Westfall did not request Salazar to monitor his use of company resources but prohibited their use. Contrary to Respondent's assertion, Westfall threatened Salazar that if Salazar did not cease his use of company resources, Salazar would suffer the consequences at the end of the year. This constituted a threat to discipline Salazar for violating the rule unilaterally implemented and violated Section 8(a)(1) of the Act. *Advanced Installations, Inc.*, 257 NLRB 845 (1981).

Counsel for the General Counsel also argues that Westfall's monitoring of Salazar's union activities after the midyear appraisal was unlawful surveillance. Respondent counters that Westfall was simply observing Salazar in a public area and performing his normal job duties as Salazar's supervisor.

In *Caterpillar Inc.*, 322 NLRB 674, 684 (1996), the Board found no surveillance where a supervisor observed union officials working on a grievance in the workplace. The supervisor observed the union officials from the supervisor's assigned place of work without evidence that he knew the employees were engaged in union activity. Like the supervisor in *Caterpillar*, Westfall observed Salazar in the workplace using the fax

<sup>14</sup> GC Exh. 24.

machine. Westfall certainly had a legitimate interest in observing Salazar's performance of his job duties. Unlike the facts in *Caterpillar*, however, here Westfall went beyond benign observation of Salazar's job performance in a public area at work and maintained a daily diary logging when Salazar engaged in both union and Board activity. See *Fred'k Wallace & Son, Inc.*, 331 NLRB 914 (2000); *Hospital Episcopal San Lucas*, 319 NLRB 54 (1995); *Programming & Systems*, 275 NLRB 1147, 1159 (1985), where respondent's activity went beyond mere public observation of union activity. In *Key Food Stores*, 286 NLRB 1056 (1987), there was no surveillance since the supervisor, without taking notes, merely observed open union activity on or near its property. Respondent's reliance on *Days Inn Management Co.*, 306 NLRB 92 (1992), is misplaced as that case involved not 8(a)(1) conduct but objections to an election. Westfall's recording of Salazar's union and Board activity constitutes surveillance in violation of Section 8(a)(1) of the Act.

*c. Second consolidated complaint paragraph 6(c)*

(1) The alleged disparagement of a union official  
by George Reyes

In September 2005, George Reyes (Reyes), Respondent's field analyst<sup>15</sup> in the collection department, told collector Hector Carlos (Carlos) that an employee got fired and Union Business Representative Felipe Salazar did not show up at the employee's discharge meeting. Reyes said that Salazar did not care about the employees. The following day, Carlos confronted Reyes and said that Reyes story about Salazar was not true since Salazar was never given notice of the meeting. Reyes replied that was what he was told by his supervisor, Gregory Gonzales (Gonzales), Respondent's meter reading and collections department supervisor.

(2) Analysis

Counsel for the General Counsel contends that Reyes is an agent of Respondent and that his statement that Salazar did not care about employees disparaged the Union.

Section 2(13) of the Act 29 U.S.C. § 152(13) provides:

In determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

Agency status may be actual or apparent. In *Communications Workers Local 9431*, 304 NLRB 446, 448 (1991), the Board defined how both actual and apparent agency may be created:

According to the Restatement 2d, *Agency*, § 7, actual authority refers to the power of an agent to act on his principal's behalf when that power is created by the principal's manifestation to him. That manifestation may be either express or implied. Apparent authority, on the other hand, results from a manifestation by a principal to a third party that another is his

agent. Under this concept, an individual will be held responsible for actions of his agent when he knows or "should know" that his conduct in relation to the agent is likely to cause third parties to believe that the agent has authority to act for him. Restatement 2d, *Agency*, § 27. As with actual authority, apparent authority can be created either expressly or, as in this case, by implication.

The Board has long held that an employer may be responsible for the acts or statements of a nonsupervisory employee who is acting as the employer's agent. *Diehl Equipment Co.*, 297 NLRB 504, 507 (1989); *Kidd Electric Co.*, 313 NLRB 1178 (1994); *Tyson Foods*, 311 NLRB. 552 fn. 2 (1993).

The burden of proving agency status is on the party asserting that agency status exists. *Food Mart Eureka, Inc.*, 323 NLRB 1288, 1295 (1997); *United Federation of Teachers Welfare Fund*, 322 NLRB 385, 391 (1996); *Millard Processing Services*, 304 NLRB 770 (1991).

In the instant case, there is no evidence that Respondent actually authorized Reyes to act as its agent by acting as a conduit for management with employees, beyond his assignment of work to employees. Further there is no evidence that Respondent created apparent agency ratifying Reyes actions thereby creating the impression of agency. Counsel for the General Counsel's citation to *Regency House of Wallingford, Inc.*, 347 NLRB 173 (2006), is wholly inapposite as in that case the Board vacated and remanded the ALJ's decision for a new decision by another ALJ. I will dismiss this allegation.

*d. Second consolidated complaint paragraph 6(d)*

(1) January 9, 2006 alleged threats and impression  
of surveillance by Call Center Supervisor  
Elizabeth Carrasco

On January 9, 2006, CSR Linda Montes received her 2005 performance evaluation from Call Center Supervisor Carrasco. During the interview, Carrasco told Montes that she would more closely supervise CSRs and document their schedule adherence, i.e., absences and tardiness. Carrasco said that she would put CSRs on probation and fire employees if necessary. Carrasco warned Montes to be careful because her tardiness could affect her. Carrasco said that employees would be put on performance improvement plans to hold them accountable.

(2) Analysis

In her brief, counsel for the General Counsel withdrew complaint paragraph 6(d)(2), alleging that Carrasco created the impression of surveillance.

Counsel for the General Counsel argues that Carrasco threatened Montes with discipline for violating a rule unilaterally implemented in violation of Section 8(a)(5) of the Act. Respondent contends that there is no evidence Carrasco was threatening employees for engaging in union activity. Respondent's argument is misplaced. As discussed below in section 5.f, I have found Respondent violated Section 8(a)(5) of the Act by implementing a formal disciplinary scheme with respect to CSRs. Thus, as discussed above, under *Postal Service*, 341 NLRB 684 (2004), and *Advanced Installations, Inc.*, 257 NLRB 845 (1981), a threat of discipline for violation of a rule established in violation of Section 8(a)(5) of the Act is a viola-

<sup>15</sup>As a field analyst Reyes regularly assigns work to employees. There is no evidence that Reyes acted as a conduit for management with bargaining unit employees.

tion of Section 8(a)(1) of the Act. Carrasco's threats to Montes violated Section 8(a)(1) of the Act as alleged.

*e. Second consolidated complaint paragraph 6(e)*

- (1) March 13, 2006 denial of *Weingarten* rights to Respondent's meter reader, Billy Power

William (Billy) Power (Power) was employed by Respondent as a meter reader at its Las Cruces, New Mexico facility. On about March 2, 2006, Power lost a two-way radio valued at about \$1000. March 6, 2006, Power reported the loss to his route coordinator Art Sanchez (Sanchez) who in turn notified Debra Duran (Duran), the Las Cruces facility supervisor. Both Duran and Sanchez told Power to backtrack where he had been to locate the radio. Power was unable to find the radio. A week later, on March 13, 2006, Duran told Power to report for a disciplinary meeting at 3 p.m. Duran admitted that the purpose of the meeting was to get Power's side of the story which could result in the employee's exoneration.

At about 2:50 p.m., Power appeared for the meeting and Duran asked if he had a union representative. Power replied that one would be present. At 3 p.m., without a union representative present, Duran started the disciplinary meeting. Duran handed Power a disciplinary form<sup>16</sup> and said he would be suspended 2 days for losing the radio. She then asked Power if he had anything to say. Power replied that he did not want to be considered accident prone and that he accepted responsibility for losing the radio.

After the meeting, Union Steward David Stout (Stout), who had been told that the disciplinary meeting was to occur at 3:15 p.m. Stout had arrived at 3:02 p.m. but was unable to find the participants. Stout confronted Duran and insisted that they needed to sit down and conduct the disciplinary meeting. Duran replied that Stout was late and that the meeting was done. After Stout protested that he had been told the meeting was to take place at 3:15 p.m., Duran agreed to sit down again but said she was not changing her mind. The evidence reflects that the Union was notified by Respondent's labor relations specialist, Manuel Hernandez, that Power's disciplinary meeting was to take place at 3:15 p.m. At the reconvened disciplinary meeting, Stout argued that the discipline was excessive and that the radio might still show up.<sup>17</sup> Duran said that Power had a previous accident with a company truck in January 2004, received a written warning and that the current discipline was progressive, despite admitting that Power a "model employee." Duran admitted had Power found the radio he might not have received a suspension.

(2) Analysis

Respondent contends that the disciplinary meeting involving Power was one where the adverse action had been decided and Power was simply being informed. Moreover, since Power never requested a union representative, his *Weingarten* rights could never have attached.

<sup>16</sup> GC Exh. 5.

<sup>17</sup> The record reflects that the radio was returned by the Las Cruces police in June 2006.

Employees have a Section 7 right to union representation at interviews where there is a reasonable belief that the employee will be disciplined. *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975). However, this right does not apply where the adverse action has been decided and the employee is only being informed. *LIR-USA Mfg. Co.*, 306 NLRB 298, 305 (1992); *Baton Rouge Water Works Co.*, 246 NLRB 995 (1979). But the Board has held that where an employer informs an employee of a disciplinary action and then questions the employee to seek information to bolster that decision, the employee's right to representation applies. *Titanium Metals Corp.*, 340 NLRB 766 (2003).

Contrary to Respondent's assertion, Power did assert his right to request union representation at his disciplinary meeting. Power told Duran a union representative would be present but Duran began the meeting 15 minutes early before the union representative had a change to appear. Having once asserted his right to union representation, Power need not endlessly repeat that notification to Duran.

In this case, Duran had the written discipline prepared before the meeting with Power and handed it to him, apparently having decided on the discipline before the meeting. Had Duran simply handed Power the discipline no *Weingarten* rights would have attached under the *Baton Rouge Water Works Co.* guidelines. However, rather than simply handing Power the discipline, Duran invited Power to speak. There is no evidence that Power had previously been asked for his side of the story and he proceeded to admit that he had lost the radio and been in a previous accident involving company property. As Duran explained, in the past she had been convinced by employees at disciplinary hearings not to issue the discipline. Duran's open-ended invitation to Power to speak could have had the effect of providing evidence to bolster her disciplinary decision or to convince her not to impose discipline. In either case, Duran went beyond merely handing out discipline and collected additional evidence in the disciplinary investigation. *Titanium Metals Corp.*, 340 NLRB 766 (2003). While it might be argued that reconvening the disciplinary meeting after the union representative appeared at 3:15 p.m. cured the violation, the harm had already been done by Duran's invitation to Power to speak without his representative present. Moreover, Duran indicated that reconvening the meeting would change nothing. The matter had been decided, in part perhaps due to Power's volunteered admissions. I find that Respondent violated Section 8(a)(1) of the Act in denying Power's request for union representation.

*f. August 24, 2006 complaint paragraph 6(b)—The discharge of Mario Navarro*

In June 2006, Respondent's manager of meter readers and collections terminated meter reader Mario Navarro (Navarro) for reconnecting his own electric service and leaving his meter reading route.

Respondent, through Meter Reader Supervisor Greg Gonzalez, conducted an investigation into whether Navarro had improperly reconnected his own electric service without permission. In addition to concluding that Navarro had improperly reconnected his electric service, Gonzalez found that Navarro

left his work area to engage in personal business at the end of his work shift. Navarro had skipped his lunch and breaktime so that he could work straight through and leave work early. There is no evidence that Respondent has a requirement that employees must request permission to leave their work area. Gonzalez admitted that no employee had ever been terminated for leaving a route early nor did Respondent monitor where its meter readers were during their routes.

Gonzalez' investigation revealed that Navarro was moving to Savannah Street in El Paso. The electric service at Savannah Street had been disconnected by Respondent at the request of the prior occupant. On May 12, 2006, Navarro placed an order with Respondent's customer service department for reconnection of the electrical service at Savannah Street. Respondent issued an order<sup>18</sup> to restart service at the new address on May 15, 2006. At the end of Navarro's shift on May 15, 2006, Navarro went to the Savannah Street address and Navarro met Respondent's employee assigned to restart the electricity. Navarro asked the employee if he was there to restart electric service. The employee said he was and Navarro told him he had already restarted the meter. The employee said, "OK."<sup>19</sup> Respondent's meter reading manual notes that seals on meters are the primary means of preventing theft of electricity.<sup>20</sup> The manual provides that employees may not cut or replace seals on their own meters.<sup>21</sup> Providing information on theft of electricity may result in termination.<sup>22</sup>

In the August 24, 2006 complaint at subparagraph 6(a), the General Counsel alleges that Navarro engaged in protected-concerted activity by concertedly complaining to Respondent about wages, hours, and conditions of employment by voicing complaints about safety issues, work schedules, hours of work, the failure of Respondent to bargain with the Union at a safety meeting, and a November 2005 rally. No evidence was adduced concerning this allegation nor did counsel for the General Counsel argue in her brief that Navarro was discharged for engaging in protected-concerted activity. I will dismiss this allegation.

*g. Second consolidated complaint paragraph 7(c)*

On December 15, 2004, Respondent issued CSR Sira Fanely (Fanely) an unsatisfactory performance evaluation, denied Fanely a raise and a bonus. Fanely was a CSR at Respondent's Chelmont facility with over 16 year's experience. Prior to December 2004, Fanely had received nothing but high ratings in her performance appraisals. In her July 2004 midyear appraisal, Lowe, Fanely's supervisor, praised Fanely for both assisting and being helpful to her fellow team members.

In the spring of 2004, CSR Supervisor Lowe held a meeting with CSRs and stated that they would be required to work at Respondent's office in Van Horn, Texas, 135 miles from El Paso. The drive from El Paso to Van Horn is through desolate, sparsely populated country. Several CSRs, including Fanely raised safety issues about the trip to Van Horn including

whether a two-way radio would be provided. On April 12, 2004, Lead CSR Garcia told Lowe that Fanely was talking to her coworkers about safety concerns in driving to Van Horn. About 2 weeks later, Fanely, CSRs Rosalba Vargas, and Hilda Bautista were discussing safety concerns in driving to Van Horn when Lowe called on the phone. Vargas answered and told Lowe of the conversation the CSRs were having concerning driving to Van Horn. In May 2004, Lowe decided that she would not compel CSRs to go to Van Horn but that she would take volunteers, thus resolving the issues Fanely had raised about going to Van Horn.

In August 2004, Fanely told Lead CSR Garcia that she had a lot of followup work, i.e., documenting transactions on a customer account, and she needed a half hour of overtime to complete the work. Garcia replied that Lowe had to authorize the overtime. At the end of the day, Garcia told Fanely that she had not been able to contact Lowe and that Fanely had to leave. Fanely stayed to perform the followup work on her own time because if she had not completed her paperwork a customer would have been disconnected. The following day Fanely spoke with Lowe and advised her that Garcia had denied the overtime the previous evening. Lowe told Fanely to put in for the overtime. Fanely told Lowe she had already worked on her own time but Lowe insisted that Fanely put in for overtime. Fanely told Lowe that in order to complete their followup work, CSRs needed time to perform that work. Lowe said she had no problem with doing that and immediately conducted a poll of CSRs to determine how many needed time to do followup work. Every CSR raised her hand and Lowe arranged for followup time that day for all CSRs.

On about December 17, 2004, Lowe issued Fanely her annual performance appraisal.<sup>23</sup> In support of her evaluation of Fanely Lowe recited in the appraisal that Fanely:

[D]id not meet expectations to provide coverage for and assist Customer Service/Cashiering at the Chelmont, Fabens and Van Horn offices, as needed, nor did serve as the back-up for end of day balancing and reporting when required. You were instructed to provide coverage for the Van Horn office and declined based on the drive time and mileage to that office and being alone in an office with union employee's you did not know. You also declined to do the end of day reports for cashiering/customer service or keep statistical data up-dated. In the future I expect you to assist in the offices, as required, and to perform your job duties.

Sira is a competent employee in the technical aspect of here role at EPE; however, she does not project leadership qualities on a daily basis that are expected at her tenure and level. Although capable she does not display the willingness and behavior necessary to establish, maintain and promote harmonious and professional working relationships. Her absence of work place courtesy and approachability discourages a pleasant office environment with positive, interactive communications.

In testimony both Lowe and Garcia explained that the reasons for Fanely's poor appraisal began in the spring of 2004 and included Fanely's insubordination to Garcia regarding

<sup>18</sup> R. Exh. 33.

<sup>19</sup> R. Exh. 34.

<sup>20</sup> R. Exh. 37.

<sup>21</sup> Id. at p. 21, item 4.

<sup>22</sup> Id. at p. 21, item 5.

<sup>23</sup> GC Exh. 9.

overtime work for followup, Fanely's refusal to assist in training Chelmont CSRs during the period July through December 2004, Fanely's refusal to open computers in the morning and run night deposit in the evening, Fanely's failure to adhere to her schedule and Fanely's poor treatment of coworkers.

In writing Fanely's appraisal, Lowe relied upon CSR Hilda Bautista's exit interview<sup>24</sup> in which Bautista complained that Fanely's attitude was hurting performance at Chelmont and the interview<sup>25</sup> with Norma Munoz in which Munoz accused Fanely of being angry and saying, "I hate her, I hate Hilda, I fucking hate her."

As a result of that appraisal, Fanely did not receive a raise or bonus.

Counsel for the General Counsel argues that Respondent issued Fanely a poor appraisal, denied her a bonus and a raise as a result of her protected-concerted activity. Respondent contends that Fanely did not engage in protected concerted activity but rather was acting solely on her own behalf.

In *Meyers Industries*, 268 NLRB 493, 497 (1984) (*Meyers I*), and *Meyers Industries*, 281 NLRB 882 (1996) (*Meyers II*), the Board defined when an individual engages in concerted activity for other mutual aid or protection. The Board in *Meyers I* stated:

In general, to find an employee's activity to be "concerted," we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself. Once the activity is found to be concerted, an 8(a)(1) violation will be found if, in addition, the employer knew of the concerted nature of the employee's activity, the concerted activity was protected by the Act, and the adverse employment action at issue (e.g., discharge) was motivated by the employee's protected concerted activity. [*Meyers Industries*, 268 NLRB at 497.]

In *Meyers II*, the Board emphasized that its definition of concerted activity included individual activity where, "individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management." *Meyers Industries*, 281 NLRB at 887.

Employees do not have to accept the individual's call for group action before the invitation itself is considered concerted. *Whittaker Corp.*, 289 NLRB 933, 934 (1988); *El Gran Combo*, 284 NLRB 1115 (1987). The Board in *Meyers II* held that, "the activity of a single employee in enlisting the support of his fellow employees for their mutual aid and protection is as much 'concerted activity' as is ordinary group activity." *Owens-Corning Fiberglass Corp. v. NLRB*, 407 F.2d 1357, 1365 (4th Cir. 1969). *Winston-Salem Journal*, 341 NLRB 124 (2004).

Once the General Counsel has established its prima facie case under *Meyers I* and *II*, the burden shifts to the respondent to show that the same action would have taken place in any event. *Wright Line*, 251 NLRB 1083, (1980).

Contrary to Respondent's assertion, there is no doubt that Fanely engaged in and discussed protected concerted activities

with her fellow employees, raising safety concerns over the assignment of CSRs to Respondent's Van Horn, Texas facility. Lowe was aware that not only Fanely but also other CSRs raised safety concerns concerning driving to Van Horn. The next issue is whether Fanely's December 17, 2004 appraisal was retribution for engaging in protected activity. There is no question that the December 17, 2004 appraisal was a poor appraisal and resulted in Fanely receiving no bonus or raise.

The Administrative Law Judge's decision in *El Paso Electric Co.*, Case 28-CA-19551 JD(SF)-28-05 issued on April 4, 2005, is instructive on the causation issue. Judge Lana Parke found that respondent violated Section 8(a)(3) of the Act by issuing Fanely an unwarranted written warning on September 29, 2004. The warning stated:

You have made statements and exhibited other behavior in the office that displays dislike or anger towards others. You also openly resist coaching and instruction from the office leadership. This behavior is offensive, creates an uncomfortable work environment, and is in violation of Company policy. As a result of your behavior, you are receiving a written warning which will be placed in your personnel file for a period of five years.

In the future you are expected to refrain from abusive, threatening, insubordinate, or inappropriate behavior towards your fellow employees, customers, or management . . . .

Judge Parke concluded that the reasons for Fanely's discipline, including quietness and rudeness to her supervisor, questioning why the office team leader was present during her July review, her insubordination in staying overtime in August, her defensive, and angry manner in an August meeting with supervisors and coworker complaints about Fanely were pretextual.<sup>26</sup>

The reasons Respondent gave for Fanely's December 17, 2004 appraisal echo the September 29, 2004 written warning Judge Parke has found violated the Act. The underlying reasons for both the September 29, 2004 warning and the December 17, 2004 appraisal include poor attitude towards supervisors and coworkers and insubordination in working overtime.

It is undisputed that Fanely was an excellent worker. As in Judge Parke's case Respondent once again raises the contention that Fanely's attitude toward her job and coworkers took a turn for the worse in the spring of 2004. As Judge Parke noted there is inconsistency in Respondent's evidence as to when Fanely's attitude changed from excellent to unacceptable. Both Garcia and Lowe date the change to the spring of 2004. Either assessment is challenged by Fanely's July 22, 2004 midyear appraisal which reflects Respondent was fully satisfied with Fanely's work and the absence of comments about attitude problems. In the midyear appraisal Fanely is praised as, "helpful to her fellow coworkers" and "diligent about following rules and regulations." Like Judge Parke, I do not credit Garcia or Lowe's testimony that Fanely exhibited attitude problems beginning in March 2004. For Lowe's timing to be accurate,

<sup>26</sup> While I am not bound to follow this decision, I find that the reasoning and analysis of the ALJ is persuasive and helpful in assessing this case.

<sup>24</sup> R. Exh. 7.

<sup>25</sup> R. Exh. 8.

Fanely's attitude would have had to make abruptly changed immediately after the midyear appraisal. I find this so unlikely that I cannot accept its occurrence in the absence of documentary evidence which Respondent has failed to proffer. I do not accept, therefore, that Respondent was dissatisfied with Fanely's attitude in or before July, and I find Respondent's unreliable assertion of it is evidence of pretext.

In this case, Respondent repeats the accusation that Fanely was insubordinate when she worked overtime in August 2004. I also concur with Judge Parke's assessment that Respondent's accusation that Fanely was insubordinate when she worked overtime in August is similarly untrustworthy. Respondent not only failed to discipline Fanely for the incident but also made overtime available for all CSRs to perform followup duties. For Respondent now to cite Fanely's conduct in that instance as insubordination is additional evidence of pretext.

Here, Respondent has renewed the allegation that Fanely was rude to fellow employee Bautista. Like Judge Parke, I find these allegations without substance. As to the Bautista and Munoz' complaints, there is no evidence that Respondent conducted an investigation of their assertions. Respondent's failure to conduct any investigation and its failure to give Fanely an opportunity to explain her alleged conduct before imposing discipline significantly support a finding that Respondent's motivation in issuing her poor appraisal was discriminatory. See *Midnight Rose Hotel & Casino, Inc.*, 343 NLRB 1003, 1005 (2004).

Lowe's complaints that Fanely refused to adhere to her work schedule consists of allegations that Fanely refused to come into work early to open and stay late to close. As noted above both Lowe and Fanely contend these problems began in spring of 2004. Yet these allegations are also contradicted by Fanely's favorable July 2004 midyear appraisal. Based on this documentary inconsistency, I do not credit the testimony of either Lowe or Garcia concerning Fanely's poor schedule adherence. I find this further evidence of pretext.

Lastly, Respondent contends that Fanely's poor appraisal was as a result of her refusal to travel to cover the Van Horn facility. I find this additional evidence of pretext given the fact that Lowe resolved the issue of covering the Van Horn office by taking volunteers before Fanely was ever required to travel to Van Horn.

Respondent's reliance on *Meurer, Serafini and Meurer*, 224 NLRB 1373, 1380 (1976), is misplaced as the Board in *Meurer* found it unnecessary to pass on whether the employee was involved in protected-concerted activity since the employee had been fired for cause.

Inasmuch as Respondent's evidence of Fanely's alleged transgressions suffers from the above-described deficiencies, I cannot give it significant weight. Accordingly, I find that Respondent has failed to show it would have taken action against Fanely in the absence of her protected activities and that Respondent violated Section 8(a)(1) of the Act by issuing the unfavorable December 17, 2004 appraisal which resulted in no bonus or raise for Fanely.

#### *h. Second consolidated complaint paragraph 10(z)*

##### (1) The August 31, 2004 statements by Gary Hedrick

Paragraph 10(z) states that Respondent would refuse to bargain with the Union or delay bargaining with meter readers, collectors, facilities work groups if the Union pursued additional charges with the Board; that it would be futile for employees to select the Union as their collective-bargaining representative or continue to bargain because the Union filed charges with the Board and that Respondent would continue to delay bargaining if the Union continued to demand bargaining with Respondent in the meter readers, collectors, and facilities work groups unit.

In about October or November 2004,<sup>27</sup> Salazar had a conversation with Respondent's president, Hedrick. Salazar told Hedrick he was unhappy with the progress of negotiations. Hedrick said he was tired of having unfair labor practice charges filed against him. Union International Representative Duane Nordick told Hedrick to stop violating the law. Hedrick said it is not as easy as you think. Salazar said that Respondent's negotiating team was insisting on three separate contracts. Hedrick said the negotiating team would bargain for separate contracts for each group.

##### (2) Analysis

Counsel for the General Counsel contends that Hedrick's statements that he would bargain for separate contracts amounted to a statement that the Union would have to go on strike and, thus, violated Section 8(a)(1) of the Act as statements of futility. Counsel for the General Counsel also contends that Hedrick's complaint about the Union filing charges against Respondent after Salazar complained about the progress of negotiations was a thinly veiled threat to delay bargaining if the Union continued to file charges.

Counsel for the General Counsel cites *CBF, Inc.*, 314 NLRB 1064 at fn 12 (1994), in support of its contention. In *CBF* there was a clear nexus made by the respondent between filing charges and ongoing bargaining. Moreover in *Winkle Bus Co.*, 347 NLRB 1203 (2006), the Board emphasized that there is nothing wrong with an employer telling employees that bargaining may be delayed by a good faith and lawful challenge to certification.

Counsel for the General Counsel's allegation that Hedrick's statements amounted to unlawful threats of futility or that Respondent would unlawfully delay bargaining are not supported by the record. There was nothing in Hedrick's statements that suggested Respondent would unlawfully delay bargaining. There is no nexus between Salazar's complaints about bargaining and Hedrick's statement about the Union filing charges. Initially, it is not clear from the record that Hedrick's statement followed immediately upon Salazar's complaint. Moreover, it is not clear if Hedrick's statement following the Union's suggestion that Respondent cease violating the law that "it is not as easy as you think," refers to not violating the law or reaching a contract in bargaining. There is nothing to suggest Hedrick

<sup>27</sup> Salazar said he had two conversations with Hedrick about negotiations. One about 2 to 3 months after the August 30, 2004 certification of the CSRs and the second about 3 months later.

conditioned ongoing bargaining upon the Union not filing charges. I will dismiss these allegations.

3. The alleged 8(a)(3) conduct<sup>28</sup>

*a. Second consolidated complaint paragraph 7(c)*

On December 15, 2004, Respondent issued CSR Sira Fanely (Fanely) an unsatisfactory performance evaluation, denied Fanely a raise, and denied Fanely a bonus.

During the Union's summer of 2004 organizing campaign for the CSRs, Respondent admitted that Fanely was a leading union supporter. Fanely handed out authorization cards and at work in the presence of her supervisor, Lowe, wore a union pin on her clothing. Judge Parke has found Respondent issued discipline to Fanely on September 29, 2004, in violation of Section 8(a)(3) of the Act. On June 6, 2004, Respondent's president, Hedrick, conducted a preelection meeting with CSRs at the Chelmont facility. Fanely was present and raised issues concerning CSRs with Hedrick. Hedrick told Fanely his door was always open and Fanely replied that your door is open but your managers and supervisors should take care of employee problems. Fanely said she came from a union company and would vote union because they would look at the issues. CSR Cissy Rodriguez then said the company she came from did things more professionally. Hedrick replied, "Why don't you go back where you came from?" After CSR Rosalba Vargas said there was favoritism at Chelmont, Hedrick said, "You guys are going to vote union just to get back at me."

The General Counsel has the initial burden of establishing that union activity was a motivating factor in Respondent's action alleged to constitute discrimination in violation of Section 8(a)(3) of the Act. The elements required to support such a prima facie violation of Section 8(a)(3) are union activity, employer knowledge of the activity, and a connection between the employer's antiunion animus and the discriminatory conduct. Once the General Counsel has established its prima facie case, the burden shifts to Respondent to show that it would have taken the disciplinary action even in the absence of protected activity. *Wright Line*, 251 NLRB 1083 (1980).

There is no doubt that counsel for the General Counsel has established a prima facie case that Respondent violated Section 8(a)(3) of the Act in issuing Fanely's December 17, 2004 appraisal. Fanely engaged in union activity, her union activity was known to Respondent, and as Judge Parke found, Hedrick's June 6, 2004 statements to CSRs Fanely and Vargas were threats of reprisals against employees in violation of Section 8(a)(1) of the Act and demonstrate the required antiunion animus. The burden shifts to Respondent to establish it would have issued Fanely the unfavorable appraisal even in the absence of her union activity.

<sup>28</sup> At the hearing counsel for the General Counsel moved to amend par. 8(d) of the second consolidated complaint to read "Respondent engaged in the conduct described in paragraphs 7(c), 8(a) through 8(c) and paragraph 10(o) because . . ." Counsel for the General Counsel also moved to amend par. 12 of the second amended complaint to read "By the conduct described above in paragraphs 7(c), 8 and 10(o) the Respondent has been discriminating. . . ." The amendments were granted.

The analysis set forth above in section 2,g establishes that the reasons proffered for Fanely's December 17, 2004 appraisal are pretext. I incorporate that analysis herein and conclude that Respondent issued the December 17, 2004 appraisal to Fanely in violation of Section 8(a)(1) and (3) of the Act.

*b. Second consolidated complaint paragraph 8(a)*

(1) The August 3, 2005 Salazar performance evaluation

At the end of July 2005, Salazar received his midyear performance evaluation from Westfall.<sup>29</sup> There is no dispute that the limits imposed by the appraisal issued because Westfall felt Salazar had engaged in too much union business while at work. The midyear appraisal did not directly affect Salazar's receipt of a raise or bonus as noted above in section 2,b, however, Westfall told Salazar if he continued to use company resources he would suffer the consequences at the end of the year. On December 22, 2005, Salazar received his annual performance appraisal from Westfall.<sup>30</sup> The annual appraisal rating was 1.86 and constituted a good review.

(2) Analysis

Counsel for the General Counsel contends that Salazar's midyear appraisal violated Section 8(a)(3) of the Act by prohibiting Salazar's use of company resources for union business in retaliation for Salazar's union activity. Respondent argues that there was no discrimination in Salazar's midyear appraisal.

In *Postal Service*, 341 NLRB 684 (2004), and *GHR Energy Corp.*, 294 NLRB 1011, 1048 (1989), it was found that a threatened corrective action in violation of Section 8(a)(1) which affected how a union official carried out his representational duties did not also violate Section 8(a)(3) where the unilateral requirement was a procedural requirement that was not an adverse personnel action.

However in *Jennie-O Foods, Inc.* 301 NLRB 305 fn. 18 (1991), the administrative law judge rejected an employer's argument that verbal warnings were not part of the disciplinary system where the verbal warnings could lead to suspension or discharge. Further, issuing warnings pursuant to stricter enforcement constitutes a further violation of Section 8(a)(3) of the Act. *Dynamics Corp. of America*, 286 NLRB 920, 921 (1987). Respondent's reliance on *Colburn Electric Co.*, 334 NLRB 532, 541 (2001), and *Northeast Iowa Telephone Co.*, 346 NLRB 465, 485 (2006), are misplaced as in neither case was there any adverse employment action taken entailing harm to the alleged discriminate. In *Colburn* the employer refused to give the discriminatee, a job applicant, an application. However, the employer in *Colburn* did not use applications to seek future job applicants thus there was no potential for future discrimination. In *Northeast Iowa Telephone*, there was no evidence of harm to the discriminatee.

<sup>29</sup> GC Exh. 23. While Westfall contends that he amended Salazar's midyear evaluation and that the final evaluation, GC Exh. 21, modified the prohibition on Salazar's use of Respondent's resources to union business in response to Respondent's requests and matters of urgent importance, there is no evidence Salazar ever received the amended evaluation.

<sup>30</sup> R. Exh. 20.

It is apparent that Salazar's midyear appraisal was a warning to cease using company resources. The warning standing alone was benign. However, when coupled with Westfall's admonition that if Salazar did not cease using company resources he would suffer the consequences at the end of the year, the warning threatened harm in the form of Salazar's annual appraisal. An adverse appraisal could affect Salazar's eligibility to receive a raise or a bonus.

Having found that the midyear appraisal and the concomitant threat by Westfall constituted an adverse employment action entailing harm to Salazar, I must turn to whether Respondent issued the midyear appraisal in retaliation for Salazar's union activities in violation of Section 8(a)(3) of the Act.

There can be no dispute that Salazar engaged in union activity in his capacity as the chief union official or that Respondent was aware Salazar engaged in union activity at work. There is a clear nexus between Salazar's use of company resources in conjunction with his representational duties as union business representative and the prohibitions and threats of further adverse employment action by Westfall. It is admitted that Westfall thought Salazar was spending too much time engaged in union activity at work. Westfall's maintenance of a calendar documenting Salazar's union activity corroborates this conclusion. Thus, the midyear appraisal and Westfall's threats of further discipline were Respondent's mechanism to curb Salazar's union activity.

The fact that Respondent did not follow through on its threat of adverse action in Salazar's annual appraisal does not diminish the threat or its impact on Salazar's union activity. Westfall's threat and the limitations he put on Salazar's union activity through prohibiting use of company telecommunications resources was a more stringent use of company resources than had been permitted by Respondent in the past. Consequently, Westfall's threat of discipline in order to enforce his newly minted edict constituted more strict enforcement of discipline and by issuing Salazar the midyear appraisal and threatening further discipline, Respondent violated 8(a)(3) of the Act. *Jennie-O Foods, Inc.*, supra; *Dynamics Corp. of America*, supra.

*c. Second consolidated complaint paragraph 8(b)*

(1) The March 3, 2006 closing of the Chelmont facility

Respondent's Chelmont office was located in El Paso. The Chelmont office handled walk-up customer payments and requests for service. The office was the busiest of Respondent's outlying offices. It had not been remodeled since 1995. It is acknowledged that the building was overcrowded and too small to adequately handle the heavy volume of customers. There were longstanding complaints of workstations not being ergonomic and customer lines that wound outside the front doors. While there was a report of a fight among customers in the lobby at the Chelmont office, there is no evidence that the frequency of security issues at Chelmont exceeded those at other outlying offices. Moreover, Lowe stated that security was not an issue at Chelmont given the bullet proof glass at the teller's stations and the presence of a security guard during working hours.

In February 2005, a committee composed of Lowe, Kummrow, and Steve Checchia from Respondent's maintenance department began looking at other sites to replace the Chelmont office. Four buildings were considered, the last of which was visited by the committee in December 2005. In April 2005, Vice President for Administration Lore became involved in the decision to relocate Chelmont since the lease on the building was about to expire in July 2005. From April to December 2005 Lore met monthly with Lowe, Kummrow, and Respondent's financial analyst, Clay Doyle (Doyle), to assess the options concerning Chelmont. The options considered were to stay at Chelmont and remodel the office, move to a new location and close the Chelmont office. A final recommendation was not made until Doyle completed the financial analysis in January 2006.<sup>31</sup> Meanwhile, in the fall of 2005 Kummrow and again in December 2005 Lowe assured employees that the Chelmont office would be relocated.

Doyle's January 2006 cost analysis reflected that moving the Chelmont office to a new location would cost Respondent an additional \$100,000 a year to operate. While both Kummrow and Lowe were in favor of moving the Chelmont office to a new location, Lore citing the additional operating costs of a new location, and the inadequacy of the Chelmont building even if it were remodeled, recommended that Chelmont office be closed and the customers sent to private pay stations to pay bills.

In late January 2006, Lore met with CFO Bates and recommended closing the Chelmont office because of the physical limits at the Chelmont office and the cost effectiveness of closing Chelmont and utilizing pay stations. A few days later, Bates agreed with Lore's recommendation and said Chelmont would be closed. On February 1, 2006, Lore told Lowe to tell Human Resources Manager Hernandez of the decision to close Chelmont and for Hernandez to notify the Union. Lore also told Lowe that the Chelmont CSRs would be relocated and asked for Lowe's input. Lowe recommended to which offices the CSRs should be transferred and her recommendations were followed. On February 1, 2006 at 8:30 a.m. Hernandez notified Salazar that the Chelmont office was being closed and the CSRs reassigned. When Salazar expressed his shock at the decision to close Chelmont and said there had been no negotiations about the decision, Hernandez replied that the decision was not up for discussion. Hernandez said that the Chelmont CSRs were being sent to the downtown El Paso Call Center, the Fabens, and Anthony offices. According to Hernandez, Salazar raised the issue of three employees who were being transferred. Salazar said he would talk to the employees and get back to Hernandez. There is no dispute that before the decision to close Chelmont and relocate the CSRs no notice was given to the Union about either decision. Later on February 1, 2006, Lore met with the Chelmont CSRs and told them of the decision to close the Chelmont office on March 1, 2006, and send CSRs to the Call Center, Fabens, and Anthony.

According to Hernandez, a few days later he spoke with Salazar. Salazar said that if he did not hear from the CSRs by the end of the day the "proposed movements would stay as is,

<sup>31</sup> GC Exh. 19.

would remain unchanged.” When Salazar did not get back to Hernandez, Hernandez assumed that Salazar had no problem with the sites to which the CSRs were being transferred.

On March 1, 2006, the Chelmont CSRs were transferred to the downtown El Paso Call Center to the Fabens and Anthony offices. The CSRs transferred to the Call Center had to pay for parking and had all of their time monitored while at work via computer. Fewer Call Center CSRs were allowed to be on vacation at any given time than at Chelmont. The CSRs transferred to Fabens and Anthony incurred substantially longer commutes.

Salazar stated that a week or two after March 1, 2006,<sup>32</sup> he had a conversation with Hernandez and raised issues concerning the training as well as seniority and vacation schedules for CSRs transferred to the Call Center. Hernandez investigated the issues and told Salazar that two transferred CSRs would be allowed to take scheduled vacation. Hernandez said that the transferred employees would get only 3 weeks of training and they had better catch on. Hernandez made it clear that these matters were not subjects for discussion since the decision to close Chelmont was a business decision. Salazar said it was unfair to give them only 3 weeks of training when other new employees received 3 months training. Salazar called Hernandez again in February 2006 and tried to get him to bargain about the issues surrounding the effects of the Chelmont closing and Hernandez refused to talk to Salazar about the issues.

#### (2) Analysis

As noted above under *Wright Line*, the General Counsel has the burden of establishing that Respondent closed its Chelmont facility in retaliation for its employees’ union activity. Here, counsel for the General Counsel has established that the Chelmont CSRs engaged in union activity that was known to Respondent and that Respondent exhibited antiunion animus toward the Chelmont CSRs at a preelection meeting in June 2004. Having established a prima facie case, the burden shifts to Respondent to show that it would have closed the Chelmont facility even in the absence of its employees’ union activity.

It is undisputed that the Chelmont office was inadequate to handle its heavy load of customers. It was overcrowded, its facilities were not ergonomically sound and its lone bathroom was not ADA compliant. It appears that in February 2005, Respondent began a search for a replacement office that was large enough to handle the customer load. The search for a replacement facility continued through December 2005. It appears Respondent considered four options for Chelmont: doing nothing, remodeling Chelmont, relocating to a new facility and closing Chelmont. It was not until a financial study of these options was prepared by Respondent in January 2006 that a final decision was made. The financial study reflected that closing Chelmont, opening private pay stations and reassigning CSRs to other offices would cost \$2,185,871, doing nothing with Chelmont would cost \$3,776,207, remodeling Chelmont would cost \$3,916,394, and relocating to a new office would cost between \$4,836,050 and \$5,096,174. There is no evi-

<sup>32</sup> It is clear from Salazar’s April 12, 2006 affidavit that these conversations occurred in mid-February 2006, 2 weeks after Salazar was notified of the Chelmont closing.

dence that the financial study was flawed. When Respondent’s Vice President Lore received the financial study she concluded that the prudent course to take financially was to close the Chelmont facility and implement private pay stations. Lore presented her rationale to Respondent’s CFO Bates who concurred with Lore and ordered Chelmont closed. The evidence reflects that the decision to close the Chelmont office was based solely on financial considerations and not the union activities of Respondent’s CSRs. While counsel for the General Counsel contends that Respondent offered contradictory and shifting reasons for closing Chelmont, I find that once Respondent had obtained and assessed the financial costs of its options for Chelmont, Respondent consistently said it was closing Chelmont for business reasons that included the Chelmont office’s physical inadequacy and that closing was the least costly option. I find that Respondent has satisfied its burden to show it would have closed the Chelmont facility even in the absence of its employees’ union activity. I will dismiss this allegation.

#### d. Second consolidated complaint paragraph 8(c)

##### (1) The April 11, 2006 denial of leave to employee Power

At the end of March or early April 2006, 2 weeks after his suspension for losing a radio, Las Cruces Meter Reader Power asked his supervisor, Duran, for 2 to 3 hours of leave to speak with someone from the Union or the NLRB regarding his suspension. The meeting with the Board agent was scheduled for Thursday and Power made the request for time off on Tuesday. Duran said this would not be possible since it was a holiday workweek and others had already requested time off. However, Duran admitted that in emergency situations she had previously granted time off on short notice. Duran was unable to specifically define what constituted an emergency. Duran acknowledged that she knew there had been unfair labor practice charges filed against her regarding Power’s suspension.

##### (2) Analysis

Discrimination against an employee for invoking *Weingarten* rights or engaging in union activities violates Section 8(a)(3) of the Act. See *Exelon Generation Co.*, 347 NLRB 815 (2006); *Circuit-Wise, Inc.*, 308 NLRB 1091, 1109 (1992); *Salt River Valley Water Users Assn.*, 262 NLRB 970 (1982).

In the instant case, Power invoked his *Weingarten* rights in the case of his disciplinary meeting with Duran. Moreover, 2 weeks later, before Duran denied his request for a few hours leave, Power told Duran he needed time off to engage in union business with the NLRB. Thus, the elements of union activity and knowledge of those activities has been established. That the denial of leave was motivated by Power’s exercise of his protected activity is demonstrated by the timing of Duran’s denial of leave 2 weeks after Power’s request for union representation and after he had filed an unfair labor practice charge concerning his suspension and Duran’s hostility toward Stout during the course of the resumed investigatory meeting, insisting that nothing would be changed by Stout’s presence. Having established a prima facie case that Respondent violated Section 8(a)(3) of the Act, the burden shifts to Respondent to show it would have denied Power’s request in the absence of his protected activity.

Respondent contends it denied Power's request for leave because he had not submitted his request in advance and because other employees were scheduled to be off that day. It is uncontested that in the past Duran had given Power time off under similar circumstances and had given other employees time off with little notice in exigent circumstances. Moreover, Duran admitted that she could have covered Power's time off with other employees. Given Duran's past practice of granting leave without prior request, I find Respondent's defense is pretext. By denying Power's request for leave, I find Respondent violated Section 8(a)(3) of the Act.

#### 4. The alleged 8(a)(4) conduct

##### *a. Second consolidated complaint paragraph 9(a)*

On December 15, 2004, Respondent issued CSR Sira Fanely (Fanely) an unsatisfactory performance evaluation, denied Fanely a raise, and denied Fanely a bonus.

In her brief, counsel for the General Counsel fails to argue that the issuance of the December 17, 2004 appraisal to Fanely violated Section 8(a)(4) of the Act. There was no evidence adduced that Respondent was aware Fanely filed charges or gave testimony to the Board. With respect to Cases 28-CA-19551, et al., involving, among things, the September 2004 discipline of Fanely, no evidence was adduced concerning who filed the charges, when they were filed or the substance of the charges. Absent some nexus between availing herself of Board processes and the alleged discrimination, I am unable to conclude that Fanely's December 17, 2004 appraisal was retaliation for filing charges or giving testimony to the Board. I will dismiss this allegation.

##### *b. Second consolidated complaint paragraph 8(c)*

###### (1) The April 11, 2006 denial of leave to employee Power

As noted above in section 3,d, at the end of March or early April 2006 Duran refused to provide Power a few hours leave to speak with a Board agent, knowing that unfair labor practice charges had been filed against her concerning Power's suspension.

###### (2) Analysis

It appears that Duran departed from her past practice of granting time off to employees in exigent circumstances even if they had not made a prior request for leave. Given the timing of the denial of Power's request for leave and Duran's departure from allowing time off in exigent circumstances suggests the pretextual nature of her excuse for denying time off. I conclude that Duran denied Power's leave request to give testimony to the Board agent was in retaliation for the charge filed on Power's behalf by the Union and violated Section 8(a)(4) of the Act.

##### *c. The unpled allegation that the Salazar midyear appraisal violated Section 8(a)(4) of the Act*

In her brief, counsel the General Counsel has alleged that Respondent's midyear appraisal of Salazar warning him against using Respondent's resources for union business, not only violated Section 8(a)(1) but also Section 8(a)(3) and (4) of the Act. Neither the second consolidated complaint nor the August 24,

2006 complaint alleges that Respondent violated Section 8(a)(4) of the Act by discriminating against Salazar for filing charges or giving testimony under the Act.

An adverse party must be given notice of the claim upon which relief is sought. *Curtiss-Wright Corp. v. NLRB*, 347 F.2d 61, 71 (3d Cir. 1965). "All that is requisite in a valid complaint before the Board is that there be a plain statement of the things claimed to constitute an unfair labor practice that the respondent may be put upon his defense." *American Newspaper Publishers Assn. v. NLRB*, 193 F.2d 782, 800 (7th Cir. 1951). While an unpled but fully litigated matter may support an unfair labor practice finding despite the lack of an allegation in the complaint, in the instant case the contention that Respondent violated Section 8(a)(4) of the Act by limiting Salazar in the use of company resources was not remotely litigated by counsel for the General Counsel. The first suggestion that this conduct violated Section 8(a)(4) of the Act is recited in counsel for the General Counsel's posthearing brief. Accordingly, I will not find that Respondent violated Section 8(a)(4) of the Act in limiting Salazar's use of company resources.

#### 5. The alleged 8(a)(5) conduct

##### *a. Second consolidated complaint paragraphs 10(b), (d), (f), and (h)*

It is alleged that since August 3, 2004, Respondent has refused to bargain at reasonable times and places for collective bargaining with respect to meter readers, collectors, facilities, and CSR work groups as part of the historical unit or together independent of the historical unit.

On November 4, 2003, after the Union was certified as the collective-bargaining representative of the meter readers, collectors, and facilities work groups, Salazar sent Respondent's general counsel, Raul Castillo (Castillo), a letter<sup>33</sup> demanding collective bargaining for the new groups of employees. By letter<sup>34</sup> dated November 12, 2003, Carrillo referred Salazar to Respondent's labor relations specialist, Rios, to schedule negotiations. Rios said he would not be available to bargain until January 2004.

From January 16 to September 20, 2004, the parties engaged in a number of bargaining sessions. The testimony of the witnesses to the bargaining sessions varies substantially. The primary spokesmen for the parties were Salazar and Garcia who both had truncated and poor memories of the substance of what was said at the various negotiation meetings when compared to the extensive bargaining notes<sup>35</sup> each side maintained. Garcia and Salazar's testimony was self-serving and often inconsistent with the bargaining notes. Accordingly, I will follow the bargaining notes where the witness testimony is not consistent with what has been recorded in those notes.

The first bargaining session took place on January 16, 2004. At this session Salazar raised the issue of incorporating the newly certified work groups into the historical unit.

<sup>33</sup> GC Exh. 29.

<sup>34</sup> Id.

<sup>35</sup> GC Exhs. 55, 63, and 70; R. Exh. 51.

The next bargaining session did not take place until February 16, 2004. While the Union presented its proposals,<sup>36</sup> Respondent had none to offer. Salazar stated that the Union was bargaining for the meter readers, collectors, and facilities employees as part of the overall historical unit and that he wanted one contract. To that end the Union's proposals were based on the extant contract in the historical unit. Porter said that Respondent did not have to bargain in one unit and that for the new groups of employees in the historical unit and that there should be three separate units and three separate contracts. Salazar proposed meeting on March 1 through 4 and March 15 through 19, 2004. When Garcia said Respondent was available only on March 1, Salazar said he wanted to meet at least twice a week or on weekends. Garcia canceled the March 1 meeting.

The third bargaining session took place on March 15, 2004. Again, Respondent offered no proposals. Both Respondent's chief spokesman, Garcia and Assistant General Counsel Porter rejected the Union's proposals and insisted on separate proposals for each bargaining unit. While this session lasted 4 hours only 20 minutes was devoted to direct discussions between the parties. Salazar proposed meeting on April 1 and 2, 2004. Garcia canceled the meetings scheduled for April 1 and 2. Garcia also canceled a proposed meeting for April 19. In an e-mail dated April 22, 2004, Salazar protested meeting only on Mondays.<sup>37</sup>

The fourth negotiation meeting occurred on May 10, 2004. Salazar stated that there had been a *Globe* election in the new units and that the Union wanted to bargain for one contract. It is clear from Respondent's proposals<sup>38</sup> that it was continuing to insist on bargaining in separate units despite the clarified certifications issued by Region 16 on April 8 and 14, 2004. Salazar proposed meeting on May 13 and 14 but Garcia insisted on May 17, 2004. Salazar again proposed meeting on weekends or after work.

At the fifth bargaining session on May 17, 2004, Respondent's assistant general counsel, Porter, said that the Union had to realize there are separate bargaining units and Respondent wanted separate contracts. Garcia reinforced this concept by saying that Respondent would provide separate proposals for each new group of employees. Salazar made it clear that the Union was bargaining for one contract not three separate agreements. Garcia made it clear that the Union's proposals were being rejected not on the substance of the proposals but only because they were offered for the three groups of employees as one unit. Porter stated that the new groups had to bargain for everything.

On June 14, 2004, the parties met for a sixth bargain session. Various proposals were discussed and Salazar said he could not meet the following Monday but could meet on any other day including June 23. Salazar once again advocated more frequent bargaining sessions requesting weekend and nighttime meetings.

The parties next met on July 12, 2004. During this meeting Salazar said that the Union was willing to meet after work or on

weekends to negotiate. Garcia insisted on only Monday meetings. On July 22, 2004, Salazar notified Garcia that the Union could not meet for bargaining on July 26 but asked for additional dates.

The eighth bargaining session took place on August 30, 2004. There was no movement on the issue of one contract versus three contracts. Salazar once again called for more frequent bargaining sessions. The next bargaining session was scheduled for September 13, 2004.

On August 30, 2004, the Union was certified as the collective-bargaining representative of the CSRs. In September 2004, Salazar contacted Garcia and demanded bargaining for the CSRs. Garcia did not want to include CSRs in bargaining with the meter readers, collectors, and facilities services employees, arguing that the parties were moving along with bargaining in the extant units. Salazar protested that there had been no movement in bargaining in the meter readers, collectors, and facilities services unit. Garcia insisted that the parties not join the CSRs in the current bargaining.

Sometime between August 30 and September 20, 2004, in a meeting with Respondent's president, Hendrick Salazar, indicated in a that the Union wanted one overall contract to include the newly certified groups into the historical unit contract.

Respondent canceled the September 13, 2004 bargaining meeting and the parties met for a ninth time on September 20, 2004. Richard Schwartz, a member of Respondent's bargaining committee, replied that Respondent wanted separate contracts. Salazar again demanded one contract. Garcia reaffirmed that Respondent wanted separate contracts and would submit separate proposals. There were no further bargaining sessions until May 2005 although Respondent proposed meeting on October 4 and November 1, 2004, as well as February 21, 2005. On January 3, 2005, the Union proposed commencing contract negotiations for the CSRs and include them in the ongoing negotiations. Respondent insisted on separate negotiations for CSRs through at least May 17, 2005. The Union on December 2, 2004, proposed renewed negotiations as well as meeting on January 13, Saturdays and Sundays after 10 a.m.; any day in January 2005 after 5 p.m.; February 26, 27, April 27, 28, 29, May 3-8, May 17, 18, and 19; June 18, 19, 25, 26, 29 and 30, 2005. Respondent refused to meet on weekends or after work.

It was not until after February 3, 2005, when the Union filed unfair labor practice charges alleging Respondent's refusal to bargain with the Union with the meter readers, collectors, and facilities services employees as a single unit and Respondent's August 1, 2005 settlement agreement agreeing to bargain with the Union with all four groups as a single unit that Respondent agreed to bargain for one contract with the Union in the historical unit as well as the three newly certified groups.

In her brief, counsel for the General Counsel contends that the essence of these allegations in second consolidated complaint subparagraphs 10(b), (d), (f), and (h) is the failure of Respondent to meet the Union as the representative of any of the newly certified groups of employees at reasonable times and places.

Section 8(d) of the Act defines the duty to bargain collectively as "the performance of the mutual obligation of the em-

<sup>36</sup> GC Exh. 54.

<sup>37</sup> GC Exh. 31.

<sup>38</sup> R. Exh. 40, pp. 1 and 2.

ployer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment. . . .” *NLRB v. Insurance Agent’s Union*, 361 U.S. 477, 485 (1960).

The Board has frequently addressed the question of what constitutes “meeting at reasonable times” under Section 8(d) of the Act. In *Regency Service Carts, Inc.*, 345 NLRB 671,674 (2005), the Board found that a 2-month delay from certification to initial bargaining coupled with 29 bargaining sessions in 30 months was evidence of dilatory tactics and violated Section 8(a)(5). In *Lancaster Nissan, Inc.*, 344 NLRB 225 (2005), the Board found respondent violated Section 8(a)(5) by failing to meet at reasonable times. The Board relied on the respondent’s refusal to permit employees’ unpaid time off in order to attend bargaining sessions, limiting the time available for meetings to evenings and weekends, then refusing to meet on weekends, offering no reason at all for this refusal. In *Lancaster Nissan* supra, the respondent met with the union for a total of only 12 meetings during the initial certification year, a frequency, the Board noted, which was strikingly similar to many cases in which it had found that a respondent had not met its obligation to meet and bargain. In *Calex Corp.*, 322 NLRB 977, 978 (1997), the Board concluded that respondent engaged in delaying tactics in negotiations where 19 bargaining sessions were held in the 15 months following the union’s certification when coupled with the respondent’s cancellation of meetings, the respondent’s arbitrary decision to limit the number of meetings to once a month, the respondent’s repeated refusal of the union’s requests for more frequent meetings, and certain statements which the respondent’s negotiator made during the course of bargaining limiting how often the parties could meet. The Board found based on respondent’s overall conduct in bargaining, that the respondent violated Section 8(a)(5) by failing and refusing to meet at reasonable times with the union for the purpose of collective bargaining. In *Bryant & Stratton Institute*, 321 NLRB 1007, 1042 (1996), the Board found the respondent failed to meet its procedural obligations under Section 8(d) of the Act and violated Section 8(a)(5) by failing to meet at reasonable times in order to negotiate with the union. In *Bryant* the evidence shows that the respondent refused to meet on weekends despite repeated requests to do so by the union, made itself available for negotiations only approximately 1 day per month, limited the time available for bargaining by insisting that negotiations take place late in the afternoon, was generally reluctant to schedule multiple days for negotiations and admitted its unwillingness to meet on weekends or to schedule consecutive days for bargaining.

The cases Respondent has relied upon, including *People Care, Inc.*, 327 NLRB 814, 825–26 (1999); *88 Transit Lines, Inc.*, 300 NLRB 21 (1990); and *Milwhite Co.*, 290 NLRB 1150 (1988), are inapposite since they were decided on a more limited set of facts than those involved in this case. *People Care* involved the union insisting only on night meetings, in *88 Transit* the respondent was willing to meet on a more frequent basis than actually occurred and *Milwhite* involved only the issue of allowing employees time to negotiate.

In this case, Respondent delayed bargaining from November 3, 2003, when the Union made its initial demand for bargaining

until January 16 2004. Thereafter, Respondent insisted on bargaining only on Monday afternoons despite the Union’s plea that meeting on Mondays was inconvenient for an employee union bargaining committee member. Despite the Union’s request for weekend, after work, and consecutive days of bargaining, Respondent refused each of these requests without plausible explanation. From the Union’s demand for bargaining in November 2003 to August 3, 2004, a period of 9 months, only seven bargaining sessions took place. From August 3, 2004, to May 2005, a period of 9 months, there was only one bargaining session despite repeated requests from the Union to bargain. This evidence establishes dilatory tactics by Respondent and a failure in its obligation to meet the Union at reasonable times under Section 8(d) since at least August 3, 2004. By this conduct Respondent has violated Section 8(a)(5) of the Act. *Lancaster Nissan*, supra.

*b. Second consolidated complaint paragraph 10(i)*

- (1) February 2005 unilateral changes to Respondent’s work rules regarding breaks for Meter reader, collectors, and facilities work groups

Respondent employed about 30 meter readers at its El Paso facility. The meter readers worked in various geographical areas throughout El Paso often miles from the El Paso office. Meter readers walked their assigned routes from 7 a.m. to 3:30 p.m. and took readings by using a hand-held computer that recorded the meter reading and the time the reading was taken. Senior Meter Reader Cesar Camacho, a 9-year meter reader, said that despite the number of meters to be read in a route that it usually took about 5-1/2 hours to perform an assigned route. Meter readers were allowed two 15-minute breaks and a 30-minute lunchbreak. In addition, meter readers could take additional bathroom and water breaks. Prior to March 2005, meter readers were allowed to take their breaks in the morning and evening with their lunchbreak around noon or they could combine the breaks and lunch period and take them at the end of the day.

Meter reader Albert Galindo (Galindo) testified that in late 2003 or early 2004 and again in about March 2004, after the Union was certified as the representative of meter readers, John Robinette (Robinette), Respondent’s supervisor of meter readers and collectors in El Paso, told meter readers that they should take their breaktimes in the morning and afternoon and their lunch at midday and that they could not leave before the end of their shift at 3:30 p.m. Galindo also testified that at a meeting of meter readers in January 2005, Robinette told employees that if a gap in time between meter readings appeared in their hand held computers, it would be considered a break. Robinette also told the meter readers to take their 15-minute breaks in the morning and afternoon and their lunch at midday. He said that he would now be keeping an eye on meter readers’ read times. While there is evidence that Respondent has monitored read times, this was the first time meter readers had been told that their read times would be monitored. Galindo said he always combined his breaks at the end of the day and up to the present has continued this practice. Robinette denied that he had told meter readers they had to take breaks in the morning

and afternoon and could not combine break and lunch period at the end of the day.

I found Galindo to be a witness with an unreliable memory who needed significant refreshing of his recollection before he could recall events. His testimony also seemed evasive. I do not credit the events related by Galindo as his memory is not trustworthy.

At a meeting of meter readers in March 2005, their supervisor, Greg Gonzalez (Gonzalez), told the meter readers that they had to take their breaks in the morning and afternoon and their lunchbreak at midday. Camacho asked Gonzalez why the meter readers could no longer combine their breaks and lunch. Gonzalez replied that if the meter reader finished his route early they would add more meters to the route. Gonzalez added that if the meter reader stopped to talk to a customer about the customer's bill that would be considered a break. Camacho said that employees took breaks during the day for a couple of months and then went back to the old practice of combining breaks at the end of the day. Gonzalez testified that meter readers could always take their breaks and lunch whenever they liked and he never told them they could not combine these periods at the end of the day.

Camacho's testimony was given in an honest and straightforward manner. He was consistent and his memory needed no refreshing. His testimony was detailed and his demeanor gave no impression of hostility toward Respondent. His testimony that employees followed Gonzalez' order to take breaks and lunch during the day for only a few months and then returned to the old policy of combining breaks at the end of the day is credible in view of the timing of the settlement agreement Respondent entered into in July 2005 in which it agreed to rescind changes to its break policy.<sup>39</sup> I will credit Camacho's testimony.

#### (2) Analysis

Counsel for the General Counsel contends the change to the meter reader's break and lunch periods was a substantial, material and significant change. On the other hand, Respondent argues that Respondent made no changes to employees' lunch and break periods.

Both the testimony of Robinette and Gonzalez and with it Respondent's contention that there were no changes to employees' lunch and break periods is undermined by its reason for terminating meter reader Mario Navarro (Navarro) in June 2006.

Respondent admitted that it terminated Navarro in part for leaving his route early. Navarro had combined his breaks and lunch period and left his route after he had completed his assignments as employees had been free to do before March 2005. By terminating Navarro, at least in part for leaving work early, Respondent enforced its new policy limiting when employees could take their break and lunch periods. This enforcement acknowledged Respondent's change in policy, prohibiting employees from aggregating breaks and lunch at the end of their shift.

<sup>39</sup> GC Exh. 2.

In *Pepsi-Cola Bottling Co. of Fayetteville*, 330 NLRB 900, 903 (2000), the Board found that lunch and break periods may constitute terms and conditions of employment. Unilateral changes to lunch and break periods and limiting employees' conversations during the break periods were material, significant, and substantial changes violating Section 8(a)(5) of the Act. Likewise unilaterally limiting where employees could take their breaks constituted material, substantial, and significant changes to terms and conditions of employment. *Indiana Hospital*, 315 NLRB 647, 655 (1994).

In the instant case, Respondent's changes limited when employees could take their breaks and lunch period. In the past employees could take their breaks and lunch period at any time they chose and, thus, could aggregate the time so they could leave work early. After March 2005, meter readers could take their breaks only in the morning and afternoon and their lunch period at midday. Unlike those case cited by Respondent, I find that this change was material, substantial, and significant. Unlike *Trading Post, Inc.*, 224 NLRB 980 (1976), the changes here constituted new rules. Contrary to the holdings in *Pan American Grain Co.*, 343 NLRB 318 (2004), and *Crittenton Hospital*, 342 NLRB 686 (2004), the new break and lunch rules were a material departure from the old policy permitting employees to take breaks and lunch at their discretion.

I find Respondent's changes to its break and lunch periods without notice to or bargaining with the Union violated Section 8(a)(5) of the Act as alleged.

#### *c. Second consolidated complaint paragraph 10(j)—The February 2005 unilateral changes*

- (1) Respondent's work rules imposing stricter monitoring and discipline procedures with respect to meter reader, collectors, and facilities work groups

It is hard to discern what counsel for the General Counsel considers a violation of this complaint allegation since it was not discussed in the post hearing brief. However, the record reflects that at a meeting of meter readers in March 2005, employee Camacho asked Gonzalez why the meter readers could no longer combine their breaks and lunch. Gonzalez replied that if the meter reader finished his route early they would add more meters to the route. Gonzalez added that if the meter reader stopped to talk to a customer about the customer's bill that would be considered a break.

Respondent has long monitored the data from hand-held computers used by meter readers to determine how many meters to assign to a particular route in order to provide each meter reader a route lasting 5-1/2 hours. The 5-1/2-hour routes have been the norm since 2003.

#### (2) Analysis

I find no evidence that Respondent imposed more onerous monitoring or disciplinary procedures upon its meter reader or collectors. Respondent has long monitored the time it takes meter readers to complete a route. Changing technology including the use of hand-held computers and wireless meters has changed the time it takes to read an individual meter. Thus, Respondent has had to constantly monitor how many meters can be read in a 5-1/2-hour shift. Adding meters to a route is

nothing new and does not constitute stricter monitoring. Respondent has long had the ability to monitor how long a meter reader spends reading each customer's meter. Thus, investigating how long a meter reader has spent on each customer's reading is not a new procedure. I will dismiss this allegation.

*d. Second consolidated complaint paragraph 10(k)—July 1, 2005 changes*

(1) Respondent's policy regarding union access to telephone, computer, e-mail, and fax machines for union business

As set forth above in section 2,b, Union Business Representative Salazar was told by Westfall that he could no longer use company resources, i.e., telephone, e-mail, fax, and computer, for union business. There is no dispute that this was a departure from Respondent's past practice of allowing Salazar to use company resources to conduct union business. Nor is there any dispute that this change was made without notice to or bargaining with the Union.

(2) Analysis

Counsel for the General Counsel contends that Respondent's prohibition on the use of company resources for union business was a unilateral change. Respondent argues that since Salazar continued to use company resources there is no evidence of a prohibition on his use of those resources.

In *Postal Service*, 341 NLRB 684 (2004), the Board affirmed the administrative law judge who found that a respondent's new requirement that a union steward request in writing permission to conduct union business or suffer corrective action violated both Section 8(a)(1) and (5) of the Act since it constituted a threat to discipline an employee for violation of a rule established by unilateral change.

Contrary to Respondent's assertion, there is ample evidence in Salazar's appraisal that Respondent told him to cease using company resources for conducting union business or suffer the consequences in his annual appraisal. This was a material, substantial, and significant change from past practice in that it severely limited Salazar's ability to effectively carry out the duties and responsibilities of his position as union business representative while at work. Respondent's argument that Salazar's continued use of company resources conclusively establishes that there were no changes, is misplaced. This argument fails to factor in the fact that Respondent's limits on Salazar's use of company resources under threat of discipline was never rescinded nor despite his occasional use of company resources, the effect the prohibition had on Salazar's ability to carry out his functions as union representative. I find that Respondent's change to its past practice allowing the Union use of company resources without notice to or bargaining with the Union violated Section 8(a)(5) of the Act.

*e. Second consolidated complaint paragraph 10(l)—The August 3, 2005 change*

(1) Respondent's policy in the way union officials were informed of disciplinary meetings regarding unit employees

Following the required practice under the extant collective-bargaining agreement in the historical unit, Respondent notified

the Union if there was going to be discipline issued to an employee. The notification of the Union of disciplinary meetings was extended to the new groups of employees added to the historical unit. Respondent's labor relations specialist, Hernandez, was primarily responsible for notifying Salazar. According to Hernandez, "roughly" in May 2005 he began to provide Salazar with notification by both phone and email. Before May 2005, Hernandez used many methods to notify Salazar including phone calls, face-to-face notification, notification of union stewards, and e-mail but he primarily used e-mail to notify Salazar of disciplinary meetings. According to Salazar, since 1999 the primary way he was contacted by Rios and later Hernandez about disciplinary meetings was by cell phone. In 1999, Rios asked Salazar to get a cell phone so that Rios could stay in touch with him during the workday and unlike other employees who were prohibited from having cell phones at work, Rios received authorization for Salazar to carry the cell phone during the workday. After Hernandez replaced Rios in 2003, Hernandez began following up the cell phone calls with an e-mail. After July 2005, the primary method of notification to Salazar of disciplinary meetings was email. After July 2005, Hernandez called Salazar and said he was tired of being unable to contact Salazar by cell phone and that he was only going to notify Salazar of disciplinary meetings by e-mail. For the next 3 months until Salazar filed an unfair labor practice concerning the method of notification and a settlement agreement was signed by Respondent, the only way Salazar was notified of disciplinary meetings was by e-mail. I credit Salazar's testimony that after July 2005 Hernandez notified him of disciplinary actions by e-mail. Hernandez' testimony was not inherently believable. For example, it is not credible that before July 2005 Hernandez notified Salazar primarily by e-mail in view of the efforts Rios had made to secure a cell phone for Salazar because Respondent was unable to reliably contact Salazar. Moreover, as noted, supra, I found Hernandez testimony to be both vague and lacking in specific details one would expect of an employee in his capacity. After the settlement agreement, Salazar was notified by Hernandez by both cell phone and e-mail.

(2) Analysis

Counsel for the General Counsel contends that Respondent changed its method of notifying Salazar of disciplinary meetings via phone calls, e-mails, and personal contact to solely email while Respondent contends there was no change in the manner it notified Salazar.

There is no evidence that Respondent ceased giving Salazar notice of employee disciplinary meetings. Thus, the issue for resolution is whether any departure from past practice was a material, significant, and substantial change. *Pepsi-Cola Bottling Co.*, 330 NLRB 900, 903 (2000).

The evidence reflects that at Respondent's urging at some point in about 1999 Salazar acquired and was permitted to carry a cell phone at work so that Respondent's labor relations department could effectively contact Salazar at work regarding matters affecting the bargaining unit including grievance matters. Other methods of notifying Salazar apparently were ineffective.

Respondent by its past actions felt the cell phone method of notifying Salazar of disciplinary meetings under the collective-bargaining agreement in the historical unit was a significantly better means of providing notification than other methods used. Respondent went to great lengths to have Salazar acquire a cell phone then exempt him from the prohibition that applied to other employees' use of cell phones at work. I find that a past practice of notifying Salazar of disciplinary meetings via cell phone was established by Respondent. Further, Respondent's own action in establishing the past practice of cell phone notification to the Union establishes that any change in the means of providing the Union with a contractual obligation to provide notice was neither immaterial nor insubstantial like the mere paperwork changes and the application of an extant dress code in *Pan American Grain Co.*, 343 NLRB 318 (2004), and *Crittenton Hospital*, 342 NLRB 686 (2004).

I find that Respondent's unilateral change in the manner of contractual notification to the Union of disciplinary hearings without notice to or bargaining with the Union violated Section 8(a)(5) of the Act.

*f. Second consolidated complaint paragraph 10(m)*

(1) The January 2006 change in Respondent's policy implementing a more onerous disciplinary procedure for CSRs at the Call Center

In January 2006, Jeff Izes (Izes) of Izes Consulting Solutions, an agent of Respondent, provided recommendations to both Eduardo Valdez (Valdez), manager of the Call Center, and Elizabeth Carrasco (Carrasco), supervisor of CSRs at the Call Center, to improve the productivity of CSRs. Izes recommended that Respondent more closely monitor CSRs calls and their adherence to their work schedule.<sup>40</sup>

On January 9, 2006, CSR Linda Montes (Montes) received her 2005 performance evaluation from Call Center Supervisor Carrasco. During the interview, Carrasco told Montes that she had just met with Izes and that Izes told Carrasco she needed to start cracking down on employees to increase productivity. Izes recommended that Carrasco document CSRs activities. Carrasco told Montes that she planned to follow Izes' recommendations and become more strict by more closely supervising CSRs and documenting their schedule adherence, i.e., absences and tardiness. Carrasco said that she would put CSRs on probation and fire employees if necessary. Carrasco warned Montes to be careful because her tardiness could affect her. Carrasco said that employees would be put on performance improvement plans (PIP) to hold them accountable.

Respondent issued PIPs<sup>41</sup> to CSRs Antonya Watson and Delma Garcia on February 8, 2006, to CSR Lucy Flores on

February 10, 2006, and to CSRs Pat Cruz, Stephanie Alarcon, and Mary Perryman on February 17, 2006. Each of the PIPs notified the employee that either their schedule adherence, i.e., tardiness or absenteeism, or call quality was unacceptable and that they had 3 to 6 months to improve their performance or face further discipline up to and including termination. The PIP could seriously affect an employees' eligibility for a raise or bonus.

(2) Analysis

Counsel for the General Counsel contends that in implementing a more formalized discipline program, the performance improvement plan, without notification to or bargaining with the Union violated Section 8(a)(5) of the Act. Respondent asserts that there was no change in Respondent's requirement that employees be at work on time and that the performance improvement plans were not discipline.

Contrary to Respondent's assertion, I find that the performance improvement plans were part of a disciplinary scheme that could lead to an adverse action, up to and including termination. The PIPs essentially placed employees on probation by giving them notice that their performance was unacceptable and unless changed during the next 3 to 6 months would result in discipline.

Further there is no evidence of a CSR having previously been placed on probation or disciplined in any manner for excessive tardiness or absenteeism. Moreover, Izes' own report recommended and Respondent followed the recommendation to more closely monitor the CSR's schedule adherence.

In *Rahco, Inc.*, 265 NLRB 235, 257 (1982), the Board found that a new formalized system of issuing written warnings and disciplining employees was a sharp change from the respondent's absence of a formal system. Its implementation without bargaining with the union violated Section 8(a)(5) of the Act. The judge noted at page 257:

The new disciplinary system gave Respondent's work rules a new and different stature because rules which are subject to discretionary and flexible enforcement are transferred in nature when subject to a highly structured and formalized disciplinary procedure. See *Murphy Diesel Company, v. N.L.R.B.*, 454 F.2d 303, 307 (7th Cir. 1971), and *N.L.R.B. v. Miller Brewing Company*, 408 F.2d 12, 16 (9th Cir. 1969). This was vividly demonstrated on April 30, the first day the new disciplinary system was implemented, at which time four employees received eight written reprimands and three of the employees were placed on probation. In short, the disciplinary system which Respondent put into effect on April 28 constituted a significant change in the employees' working conditions which materially and substantially affected employees' job security. Such a material change in conditions of employment is a mandatory subject of bargaining, and Respondent violated Section 8(a)(5) and (1) by making this change unilaterally. *N.L.R.B. v. Amoco Chemicals Corp.*, 529 F.2d 427, 431 (5th Cir. 1976); *Murphy Diesel Company, v. N.L.R.B.*, supra.

In *Murphy Diesel Co.*, 184 NLRB 757, 762-763 (1970), enf'd, at 454 F.2d 303, 307 (7th Cir. 1971), the Board found that the

<sup>40</sup> Respondent contends that "schedule adherence" in Izez' recommendations refers only to breaktime and lunchtime. However, it is clear that the term "schedule adherence" is a term of art at Respondent that includes an employee's absences and tardiness. Moreover, Carrasco's conversation with Montes where Carrasco warned Montes about her tardiness and absences makes it clear that schedule adherence included those items. Respondent's contention that they did not implement Izez' recommendations is belied by the issuance of PIPs to employees for failure lack of schedule adherence.

<sup>41</sup> GC Exhs. 13 and 14.

more stringent enforcement of rules involving excessive tardiness and absenteeism contained new requirements on their face and radically changed the past practice in their operation.

Likewise in this case, Respondent had been lax its enforcement of absentee and tardy rules, hence Izes' recommendation to more strictly monitor adherence to CSRs' work schedule. There is no record of probation or discipline previously issued to a CSR who was excessively absent or late. The implementation of PIPs, placing CSRs on probation with discipline for failure to improve, was a significant, material, and substantial change to employees' working conditions. By failing to notify or bargain with the Union before implementing this change Respondent violated Section 8(a)(5) of the Act.

*g. Second consolidated complaint paragraph 10(n)*

- (1) The January 2006 change in Respondent's policy regarding performing work on the account's of Respondent's employees

On February 20, 2006, Carrasco issued discipline<sup>42</sup> to three CSRs for working on the accounts of coworkers. Each of the written disciplinary letters stated that the CSRs were receiving discipline for working on the accounts of a coworker. Nowhere in the written disciplinary letters was working on a friends account listed as a violation. CSR Delma Gonzalez was suspended for 2 days, CSR Maria Perryman was suspended for 1 day, and CSR Maria Davila received a written warning. The disciplinary letters reflected that the CSRs had violated company and departmental policy. In 2006, Maria Davilla voided a collection on the account of Delma Gonzalez. Later, Gonzalez voided a collection on Perryman's account and Perryman extended a payment deadline on Gonzalez' account. However, no evidence was adduced of any written company policy concerning employees working on the accounts of coworkers. The only documentary evidence of any policy was an orientation memo<sup>43</sup> that listed prohibited activity at the Call Center. Prohibited conduct included: "Do not work on personal account, relatives or friends." No mention is made of a prohibition on working on coworkers' accounts. Carrasco testified that she had told CSRs verbally that they were not to work on other CSRs' accounts. Carrasco also said that trainer Pat Rivera told CSRs in their orientation that they could not work on other CSRs' accounts. Rivera did not testify. In fact of the eight CSRs who testified, seven said that while they could not work on their account, that of a friend or relative, they were not prohibited from working on coworkers' accounts and many of them had done so. Only CSR Lucila Flores said she was not allowed to work on coworkers' accounts. Based on the absence of a clear written policy prohibiting CSRs from working on coworkers' accounts and the weight of the evidence, including the vast majority of the CSRs who testified that they were not prohibited from working on coworkers' accounts, I do not credit Carrasco's testimony that there was a verbal policy prohibiting CSRs from working on coworkers' accounts, including other CSRs.

<sup>42</sup> GC Exh. 17.

<sup>43</sup> R. Exh. 15.

The record reflects that prior to 2006, Respondent has issued discipline to employees working on their own account, a son's account, and a girlfriend's account.<sup>44</sup> There is no other documentary evidence of an employee being disciplined for working on a coworker's account. While Carrasco stated that she had previously given written warnings to two CSRs for working on each other's accounts, no documentary evidence was proffered to support this allegation nor could Carrasco remember when she issued this discipline. I do not credit Carrasco.

(2) Analysis

Counsel for Respondent contends that Respondent made no changes to its policy concerning CSRs working on the accounts of other employees. Counsel for the General Counsel made no argument concerning this allegation in her brief.

I have rejected Respondent's argument that there was an unpublished policy prohibiting CSRs from working on coworkers' accounts. No such policy existed. Moreover there is no probative evidence that Respondent has disciplined a CSR for working on a coworkers' account. Respondent's written policy concerning CSRs prohibited only working on their own account, the account of a relative or the account of a friend. Any argument that the three CSRs were disciplined for working on friends' accounts is a belated effort to justify the discipline on grounds not stated in the written disciplinary letters.

Respondent's expansion of prohibited conduct that has resulted in suspension and termination is a material, significant, and substantial change to terms and conditions of employment. By making this change without notice to or bargaining with the Union, Respondent violated Section 8(a)(5) of the Act. *Rahco, Inc.*, 265 NLRB 235, 257 (1982).

*h. Second consolidated complaint paragraph 10(o)*

- (1) March 3, 2006 closure of Respondent's Chelmont facility and transfer of the CSRs

As noted more specifically above in section 3,c, Respondent decided to close its Chelmont facility on about February 1, 2006, and on the same date notified the Union.

In late January, Lore met with CFO Bates and recommended closing the Chelmont office because of the physical limits at the Chelmont office and the cost effectiveness of closing Chelmont and utilizing pay stations. A few days later, Bates agreed with Lore's recommendation and said Chelmont would be closed. Lore also told Lowe that the Chelmont CSRs would be relocated and asked for Lowe's input. Lowe recommended to which offices the CSRs should be transferred and her recommendations were followed. On February 1, 2006, Lore told Lowe to tell Human Resources Manager Hernandez of the decision to close Chelmont and for Hernandez to notify the Union. On February 1, 2006, at 8:30 a.m. Hernandez notified Salazar that the Chelmont office was being closed and the CSRs reassigned. When Salazar expressed his shock at the decision to close Chelmont and said there had been no negotiations about the decision, Hernandez replied that the decision was not up for discussion. Hernandez said that the Chelmont CSRs were being sent to the downtown El Paso Call Center, the Fabens, and

<sup>44</sup> R. Exh. 16.

Anthony offices. According to Hernandez, Salazar raised the issue of three employees who were being transferred. Salazar said he would talk to the employees and get back to Hernandez. There is no dispute that before the decision to close Chelmont and relocate the CSRs no notice was given to the Union about either decision. Later on February 1, 2006, Lore met with the Chelmont CSRs and told them of the decision to close the Chelmont office on March 1, 2006, and send CSRs to the Call Center, Fabens, and Anthony.

According to Hernandez, a few days later he spoke with Salazar. Salazar said that if he did not hear from the CSRs by the end of the day the “proposed movements would stay as is, would remain unchanged.” When Salazar did not get back to Hernandez, Hernandez assumed that Salazar had no problem with the sites to which the CSRs were being transferred.

On March 1, 2006, the Chelmont CSRs were transferred to the downtown El Paso Call Center to the Fabens and Anthony offices. The CSRs transferred to the Call Center had to pay for parking and had all of their time monitored while at work via computer. Fewer Call Center CSRs were allowed to be on vacation at any given time than at Chelmont. The CSRs transferred to Fabens and Anthony incurred substantially longer commutes.

Salazar stated that a week or two after March 1, 2006,<sup>45</sup> he had a conversation with Hernandez and raised issues concerning the training as well as seniority and vacation schedules for CSRs transferred to the Call Center. Hernandez investigated the issues and told Salazar that two transferred CSRs would be allowed to take scheduled vacation. Hernandez said that the transferred employees would get only 3 weeks of training and they had better catch on. Hernandez made it clear that these matters were not subjects for discussion since the decision to close Chelmont was a business decision. Salazar said it was unfair to give them only 3 weeks of training when other new employees received 3 months training. Salazar called Hernandez again in February 2006 and tried to get him to bargain about the issues surrounding the effects of the Chelmont closing and Hernandez refused to talk to Salazar about the issues.

#### (2) Analysis

Counsel for the General Counsel contends that Respondent was obligated to bargain with the Union under *Fibreboard Paper Products v. NLRB*, 379 U.S. 203 (1964), over both the decision and the effects of the decision to close the Chelmont facility because Respondent did not change the nature of its business and because the change was essentially a decision to subcontract. Respondent argues that while it may have an obligation to bargain over the effects of a decision to close all or part of its business, it has no obligation to bargain over the decision under *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). Respondent argues further that it bargained with the Union over the effects of its decision to close the Chelmont office.

In *Dubuque Packing Co.*, 303 NLRB 386 (1991), the Board harmonized the differing results in *Fibreboard* and *First Na-*

*tional Maintenance*, overruling *Otis Elevator Co.*, 269 NLRB 891 (1984).

In *Dubuque Packing*, supra at 391, the Board noted that in *First National Maintenance*, supra, the employer did not replace its employees or move its operation elsewhere while in *Fibreboard*, supra, the employer replaced existing employees with those of an independent contractor. In *First National Maintenance*, the employer made a decision changing the scope and direction of the enterprise, i.e., a decision whether to be in business at all, while in *Fibreboard*, the employer’s decision did not change the company’s basic operation. In *First National Maintenance*, the employer’s decision was based only on how large a fee its customer was willing to pay whereas in *Fibreboard*, reduction of labor costs was the core reason for the employer’s decision to subcontract.

In harmonizing these principles, the Board in *Dubuque Packing*, supra, concluded that a decision “to relocate unit work is more closely analogous to the subcontracting decision found mandatory in *Fibreboard* than the partial closing decision found nonmandatory in *First National Maintenance*.” above at 391. The Board formulated a test for determining whether an employer’s decision is a mandatory subject of bargaining.

Initially, the burden is on the General Counsel to establish that the employer’s decision involved a relocation of unit work unaccompanied by a basic change in the nature of the employer’s operation. If the General Counsel successfully carries his burden in this regard, he will have established prima facie that the employer’s relocation decision is a mandatory subject of bargaining. At this juncture, the employer may produce evidence rebutting the prima facie case by establishing that the work performed at the new location varies significantly from the work performed at the former plant, establishing that the work performed at the former plant is to be discontinued entirely and not moved to the new location, or establishing that the employer’s decision involves a change in the scope and direction of the enterprise. Alternatively, the employer may proffer a defense to show by a preponderance of the evidence: (1) that labor costs (direct and/or indirect) were not a factor in the decision or (2) that even if labor costs were a factor in the decision, the union could not have offered labor cost concessions that could have changed the employer’s decision to relocate. Id

In applying the Board’s test in *Dubuque Packing*, I note initially that here, unlike *First National Maintenance*, respondent chose not to discontinue its operation and not be in business at all. Here, Respondent chose to relocate its employees at its offices elsewhere, where they continued to perform essentially the same tasks as at Chelmont, i.e., dealing with Respondent’s customers in the El Paso area, including starting and stopping service, dealing with service problems and account problems. Those tasks no longer performed by the Chelmont CSRs, payment of bills, were subcontracted to independent pay stations in the El Paso area. Counsel for the General Counsel has satisfied her initial burden of proof establishing that Respondent’s decision to relocate was a mandatory subject of bargaining. The burden now shifts to Respondent.

<sup>45</sup> It is clear from Salazar’s April 12, 2006 affidavit that these conversations occurred in mid February 2006, 2 weeks after Salazar was notified of the Chelmont closing.

At the outset Respondent has failed to establish that the work performed at either the offices to which CSRs were transferred or the independent pay stations varies significantly from the work performed at Chelmont. The work performed by the CSRs at their new offices combined with the work of the independent pay station workers is identical to the work performed at Chelmont. Further there is no evidence that the work performed by the CSRs at Chelmont has been discontinued. To the contrary, as noted above, the work continues unabated. There is also no evidence that the decision to close Chelmont involved a basic change in the scope and direction of Respondent's business. Respondent is still engaged in the production and distribution of electric power to customers in west Texas and southeastern New Mexico. The servicing of customers' account is still performed in exactly the same manner as before the decision to close the Chelmont office. The only difference is the location of the employees and the choice to use subcontractors to receive customer payments.

Finally the evidence reflects that labor costs were a factor in the decision to close the Chelmont office. Use of workers at independent pay stations was a cost saving factored into the overall savings in the decision to close. Respondent has offered no evidence that the Union could not have offered labor cost concessions to Respondent that could have affected Respondent's decision to close the Chelmont facility.

Under the *Dubuque Packing* test Respondent was under a duty to bargain about its decision to close the Chelmont office. Its failure to bargain with the Union concerning this decision violated Section 8(a)(5) of the Act. *Eby-Brown Co. L.P.*, 328 NLRB 496, 497 (1999).

There is no doubt that an employer has an obligation to bargain over the effects of its decision to close a facility. *First National Maintenance*, 452 U.S. at 682.

With respect to bargaining over the effects of Respondent's decision to close the Chelmont facility, the record reflects that on February 1, 2006, Hernandez told Salazar about the decision to close Chelmont and transfer the employees to various locations. When Salazar protested that there had been no bargaining, Hernandez said the decision was not up for discussion. While there was some additional discussion between Hernandez and Salazar about some of the Chelmont CSRs in February and March 2006 concerning where the CSRs were being sent and about vacation scheduling, Hernandez made it clear to Salazar that there would be no bargaining since the decision to close Chelmont was a business decision. When Salazar pressed on issues involving the closure, Hernandez refused to discuss the issues.

It is apparent that Respondent presented the Union with a fait accompli concerning the closure of the Chelmont office and the transfer of the CSRs. Hernandez made it clear that there would be no discussions and other than discussing a few minor issues involving vacation schedules of transferred CSRs with the Union, Respondent refused to bargain over any of the effects of closing Chelmont. In refusing to bargain over the effects of the decision to close Chelmont, Respondent violated Section 8(a)(5) of the Act.

*i. Second consolidated complaint paragraph 10(r)—The verbal warnings*

Verbal warnings were given to Respondent's employees Eduardo Damian, Albert Galindo, Cesar Camacho, Mario Navarro, Gabriel Gonzales, Gabriel Guerro, and Adriane (last name unknown) pursuant to unilateral work rule changes on breaks and stricter monitoring and discipline.

Counsel for the General Counsel presented no evidence to support this complaint allegation. I will dismiss this allegation.

*j. Second consolidated complaint paragraphs 10(s), (t), and (u)*

The above-complaint paragraphs are alleged to violate Section 8(a)(5) of the Act by: 10(s)—the February 8, 2006 performance improvement plans (PIP) issued to Respondent's employees Antonya Watson and Delma Garcia due to changes in policy regarding CSRs working on Respondent's employees accounts; 10(t)—the February 10, 2006 PIP issued to Respondent's employee Lucy Flores as a result of the change in policy regarding more onerous disciplinary procedures in the Call Center and 10(u)—the issuance of PIPs to Respondent's employees Pat Cruz and others as a result of the change in policy regarding more onerous disciplinary procedures in the Call Center.<sup>46</sup>

(1) The facts

Pursuant to the policy discussed above in section 5,f, Respondent issued PIPs<sup>47</sup> to CSRs Watson and Garcia on February 8, 2006; to CSR Flores on February 10, 2006; and to CSRs Cruz, Alarcon, and Perryman on February 17, 2006.<sup>48</sup>

While second consolidated complaint paragraph 10(s) alleges that the PIPs issued to Watson and Garcia were due to changes to Respondent's policy regarding CSRs working on coworkers' accounts, each of the PIPs notified the employee that either their schedule adherence, i.e., tardiness or absenteeism, or call quality was unacceptable and that they had 3 to 6 months to improve their performance or face further discipline up to and including termination. At no place in any of the PIPs was working on coworkers' accounts mentioned.

The PIP could seriously affect an employees' eligibility for a raise or bonus. It was stipulated that no notice was given to the Union of the issuance of the PIPs. Contrary to counsel for the General Counsel's assertion, on July 11, 2002, CSR Team Leader Rudy Romero was put on the equivalent of a 90-day PIP<sup>49</sup> that provided for further discipline including termination for failure to successfully improve his performance.

<sup>46</sup> As amended. See fn. 1 above.

<sup>47</sup> GC Exhs. 13 and 14.

<sup>48</sup> There is testimonial evidence that CSR Jackie Small was also issued a PIP at about this time as a result of poor schedule adherence. However, in the amendment to the second consolidated complaint discussed above at fn. 1, counsel for the General Counsel specifically excluded Small from the complaint. Having intentionally withdrawn the allegation dealing with Small, I will not treat this as an unpled but litigated matter.

<sup>49</sup> GC Exh. 15.

## (2) Analysis

As noted above, the second consolidated complaint alleges that Respondent issued PIPs to CSRs Watson and Garcia for working on coworkers accounts. The evidence reflects that the PIPs were issued to those employees because of their poor schedule adherence. Despite counsel for the General Counsel's failure to amend the complaint to reflect the evidence adduced, the matters were fully litigated at the hearing and Respondent had a full opportunity to rebut the evidence concerning the PIPs issued to Watson and Garcia. *Hi-Tech Cable Corp.*, 318 NLRB 280 (1995).

Having found above in section 5,f that by unilaterally more onerously enforcing schedule adherence Respondent violated Section 8(a)(5) of the Act, the issuance of the PIPs to the above employees in the enforcement of that policy is a further violation of 8(a)(5). *Rahco, Inc.*, 265 NLRB 235, 257 (1982).

*k. Second consolidated complaint paragraph 10(v)*

This complaint paragraph concerns the February 20, 2006 issuance of written discipline to Respondent's employee Maria Davila, suspension of Respondent's employees Mary Perryman and D. Gonzales as a result of the change in policy regarding performance of work on Respondent's employees' electric accounts.

I have found in Section 5.g, above that Respondent unilaterally changed its policy concerning CSRs working on coworkers' accounts and violated Section 8(a)(5) of the Act. It follows that issuance of discipline to employees Davila, Gonzales, and Perryman constitutes an additional violation of Section 8(a)(5).

*l. Second consolidated complaint paragraph 10(w)*

## (1) Respondent's refusals to furnish information

In March 2005, Salazar verbally asked Hernandez for a list of all current meter readers, collectors, facilities employees, and CSRs. Salazar followed up this request with an e-mail on April 21, 2005.<sup>50</sup> On April 22, 2005, Salazar sent an e-mail<sup>51</sup> to Hernandez requesting information concerning Respondent's investigation of bargaining unit employee Delma Gonzalez. The e-mail requested "any and all information pertaining to the investigation, including but not limited to, the names of all the people that were questioned and there [sic] statements, copies of any and all written notes taken and the status of the investigation." No evidence was adduced concerning the existence or the nature of any statements given in the Delma Gonzalez investigation. On May 2, 2005, Hernandez telephoned<sup>52</sup> Salazar and refused to provide the current list of bargaining unit employees because Hernandez thought the Union would use the list for internal union business. Contrary to the assertion of counsel for the General Counsel in her brief and consistent with counsel for the General Counsel's amendment<sup>53</sup> to second consolidated complaint paragraph 10(y), after an unfair labor practice charge was filed and in settlement of the charges, the list of bargaining unit employees was furnished to the Union on June

20, 2005, and the information regarding the Delma Gonzalez investigation was furnished to the Union on August 2, 2005.

## (2) Analysis

Counsel for the General Counsel contends that Respondent was under an obligation to furnish the presumptively relevant information to the Union and the delay in doing so was an unwarranted violation of Section 8(a)(5) of the Act. Respondent argues that the Union failed to establish that the Union had a legitimate need for employee addresses and names, that the information was not relevant to the Union's duties, that the names and addresses of employees was privileged, that Respondent had no duty to provide witness statements taken as part of an internal investigation and that Respondent did not delay in providing the requested information.

In *Dynacorp/Dynair Services, Inc.*, 322 NLRB 602 (1996), the Board has held that names and addresses of bargaining unit employees is presumptively relevant information and the union is under no obligation to show the relevance of such information. Where the requested information concerns members of the bargaining unit, it is the employer's burden to show lack of relevance in the union's request for information not the union's burden to show relevance. *Contract Carrier's Corp.*, 339 NLRB 851, 858 (2003). Further an unreasonable delay in furnishing relevant information is a violation of Section 8(a)(5). In *Regency Service Carts, Inc.*, 345 NLRB 671, 674 (2005), the Board found a 16-week delay in furnishing information unreasonable. The Board has found delays of 14 weeks, *Pan American Grain*, 343 NLRB 318 (2004); 9 weeks, *Bundy Corp.*, 292 NLRB 671 (1989); and 7 weeks, *Woodland Clinic*, 331 NLRB 735, 737 (2000).

With respect to providing witness' statements Respondent appears to argue that it is protecting its employees' interest against the premature release of witness statements that could result in intimidation or coercion.

In *Anheuser-Busch, Inc.*, 237 NLRB 982, 984 (1978), the Board found that a union was not entitled to receive witness statements an employer had obtained in the course of an internal disciplinary investigation. The witnesses had adopted the statements and received assurances that their statements would not be divulged. In this regard the Board relied heavily upon the rationale of the Supreme Court in *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978), where the Court found that the FOIA did not require the Board to disclose witness statements given to Board agents. The Board said the Court discussed the potential dangers of the premature release of witness statements:

[i]ncluding the risk that employers, or in some cases, unions will coerce or intimidate employees and others who have given statements, in an effort to make them change their testimony or not testify at all. The Court also expressed concern that witnesses may be reluctant to give statements absent assurances that their statements will not be disclosed at least until after the investigation and adjudication are complete. [Id. at 984.]

<sup>50</sup> GC Exh. 36, p. 1.

<sup>51</sup> GC Exh. 36, p. 5.

<sup>52</sup> GC Exh. 36, p. 3.

<sup>53</sup> See fn. 2.

However, the Board held that the employer had an obligation to furnish the union with the witness' names. *Anheuser-Busch, Inc.*, fn. 5.

Since the *Anheuser-Busch* decision, the Board has had occasion to rule on what constitutes a "witness statement." In *New Jersey Bell Telephone Co.*, 300 NLRB 42 (1990), the Board concluded that notes made by an employer's representative of comments made by the employer's customer was not a witness statement as it had not been adopted by the customer nor did the employer give assurances that the statement would remain confidential.

Initially, with respect to the Union's March 2005 request for names and addresses of employees in the bargaining unit, this information is presumptively relevant. *Dynacorp/Dynair Services, Inc.*, 322 NLRB 602 (1996). Respondent has failed to satisfy its burden to show that the information lacked relevance. Its assertion that the Union intended to use the information for internal union political reasons is mere speculation without evidentiary support.

Respondent's proffered reason for the 3-month delay in furnishing the information was that the human resources department was busy. This vague and unsupported explanation does not justify the delay in furnishing the information to the Union.

Respondent appears to be asserting that it is protecting the confidential interests of its employees in refusing to furnish the Union with employee names and addresses. The burden of proof is on Respondent to establish a legitimate and substantial confidentiality interest of its employees. Respondent must specify what confidentiality interests of its employees it seeks to protect. A claim of confidentiality is an insufficient defense to a relevant claim for information where no evidence is presented to support such a claim. *Woodland Clinic*, supra at 736-737.

With respect to the Union's request for information regarding the Gonzalez investigation, Respondent appears to contend that it has no obligation to furnish the Union with witness statements. There is no doubt that the Union is entitled to the names of witnesses in an investigation. While *Anheuser-Busch, Inc.*, 237 NLRB 982, 984 (1978), in adopting the rationale of *Robbins Tire & Rubber Co.*, supra, holds that an employer need not furnish the union with witness statements, it must first be determined whether the document in question is a witness statement. In *Robbins Tire & Rubber Co.*, *Anheuser-Busch, Inc.*, and *New Jersey Bell Telephone Co.*, there is a common theme that in order to be a protected witness statement the statement must be adopted by the witness making it and there must be assurances to the witness that the statement will remain confidential. Here, there is no evidence concerning whether any witness statements were made, whether they are notes made by employer representatives, whether they were adopted by the witness or whether the statement was made under an assurance of confidentiality.

Similar to *Contract Carrier's Corp.*, 339 NLRB 851, 858 (2003), where the requested information concerns members of the bargaining unit, it is the employer's burden to show lack of relevance in the union's request for information not the union's burden to show relevance. Here, Respondent cannot make a bare assertion that it has no obligation to furnish witness state-

ments without establishing with probative evidence that employees gave statements, that they adopted those statements and that they were given assurances the statements would be confidential. Where the employer makes a bare assertion of privilege unsupported by any evidence, the defense must fail. *Woodland Clinic*, supra at 736-737.

I find that in failing to timely supply the Union with the information requested it violated Section 8(a)(5) of the Act as alleged.

*m. Second consolidated complaint paragraph 10(z)*

The complaint paragraph concerns the August 31, 2004 statements by Gary Hedrick that Respondent would refuse to bargain with the Union or delay bargaining with meter readers, collectors, and facilities work groups if the Union pursued additional charges with the Board, that it would be futile for employees to select the Union as their collective-bargaining representative or continue to bargain because the Union filed charges with the Board and that Respondent would continue to delay bargaining if the Union continued to demand bargaining with Respondent in the meter readers, collectors, and facilities work groups unit.

In about October or November 2004,<sup>54</sup> Salazar had a conversation with Respondent's president, Hedrick. Hedrick said he was tired of having unfair labor practice charges filed against him. Union International Representative Duane Nordick told Hedrick to stop violating the law. Hedrick said it is not as easy as you think. Salazar said that Respondent's negotiating team was insisting on three separate contracts. Hedrick said the negotiating team would bargain for separate contracts for each group.

For the reasons set forth above in section 2,h, I find that the statements by Hedrick did not violate Section 8(a)(5) of the Act and I will dismiss this allegation.

*n. August 24, 2006 complaint paragraph 7(a)*

This allegation restates the allegation contained in second consolidated complaint paragraph 10(i) discussed above in section 5,b. Having already addressed this issue, I will dismiss this portion of the August 24, 2006 complaint.

*o. August 24, 2006 complaint paragraphs 7(b)—August 7, 2006 change to Respondent's policy regarding new union bulletin Boards and 7(i)—Respondent's August 8, 2006 violation of its agreement to allow the Union to post bulletin boards*

(1) The facts

Respondent and the Union, as part of their most recent collective-bargaining agreement, provided that the Union could post bulletin boards in Respondent's facilities. The language in the June 16, 2003, to June 15, 2006 collective-bargaining agreement<sup>55</sup> provided:

<sup>54</sup> Salazar said he had two conversations with Hedrick about negotiations. One about 2 to 3 months after the August 30, 2004 certification of the CSRs and the second about 3 months later.

<sup>55</sup> GC Exh. 72.

### Section 8. Bulletin Boards

The Company agrees to furnish space in convenient places in all Departments under this Agreement for the use of the Union in placing bulletin boards. The Union shall furnish such bulletin boards and may place thereon notices and other matters concerning Union business.

After organizing the meter readers, collectors, and facilities services employees in 2004 the agreement concerning bulletin boards was extended to the meter readers, collectors, and facilities services employees in El Paso and Las Cruces. In early 2006, Respondent and the Union agreed that the parties would each use half the bulletin board space. While negotiations for a new collective-bargaining agreement in the historical unit were ongoing, in June 2006, when the bulletin board at the Las Cruces facility became too crowded, collector Janet Halstead<sup>56</sup> (Halstead) approached Respondent's vice president for New Mexico operations, Bob McNeal (McNeal),<sup>57</sup> and asked him if the Union could post additional bulletin boards at its Las Cruces facility. McNeal agreed. Later in August 2006, Halstead again spoke with McNeal and asked if a new bulletin board could be posted at Respondent's new Solano Street office in Las Cruces. Again, McNeal agreed. The boards were posted pursuant to this agreement. On August 8, 2006, Las Cruces Supervisor Duran left a board and a note on Halstead's work chair. The note<sup>58</sup> stated: "Janet, call me if you have questions—this board will not be allowed up until contract has been ratified. Debbie." On August 8, 2006, Halstead met with Duran who said that the Union could not post a bulletin board without negotiating due to past practice and that the board in the Solano office had to come down. The following day Halstead spoke with McNeal. McNeal said that Halstead had asked the wrong person and that he had given her the wrong answers. McNeal said Duran said the Union was not allowed to have the board up but that he had seen similar boards in every other El Paso Electric office. The remaining bulletin board shared with Respondent remained up but the second board and the board at Respondent's Solano Street office in Las Cruces were removed.

The parties are engaged in collective bargaining for a successor collective-bargaining agreement. In bargaining there has been a tentative agreement concerning bulletin board policy that tracks the prior contract language.<sup>59</sup> However, the parties' ground rules for bargaining specified that tentative agreement do not apply until there has been a final agreement.

#### (2) Analysis

It appears, although it is by no means clear from her brief, that counsel for the General Counsel takes the position on these

<sup>56</sup> Halstead was also a member of the Union's bargaining committee.

<sup>57</sup> In its first amended answer to consolidated complaint, Respondent denied that McNeal was a supervisor or agent of Respondent within the meaning of the Act. GC Exh. 1(iiii). At the hearing evidence was adduced that McNeal was in charge of Respondent's New Mexico division and all supervisors, including Duran reported to him. I find McNeal is a supervisor and agent of Respondent within the meaning of Sec. 2(11) and (13) of the Act.

<sup>58</sup> GC Exh. 62.

<sup>59</sup> GC Exhs. 71 and 72.

nearly identical complaint allegations that Respondent, through Duran, on August 8, 2006, reneged on Vice President McNeal's agreement to have additional bulletin boards at its Las Cruces offices and thereby violated Section 8(a)(5) of the Act. Respondent counters that there was no change its bulletin board policy in Las Cruces, if there was a change it was not material, significant or substantial and McNeal had no authority to enter into an agreement with the Union regarding bulletin boards.

The first issue for consideration is whether McNeal and Halstead could enter into a valid agreement binding the Union and Respondent. A review of Board cases dealing with principal and agent is helpful in order to provide guidance in this case.

In *Wometco-Lathrop Co.*, 225 NLRB 686, 687 (1976), the Board in following general agency law said, "It is well established that an agent may act for his principal only to the extent that such principal has conferred authority on his agent, real or apparent." The Board added that it is the burden of the party advancing agency status to establish real or apparent authority. *Id.* at 688.

In setting forth the principles it would follow concerning principal and agent the Board cited the *Restatement of Law on Agency* which states that as a general rule:

[A]uthority to do an act can be created by written or spoken words or other conduct of the principal which, reasonably interpreted, causes the agent to believe that the principal desires him so to act on the principal's account." *Restatement, Second, Agency* §26 (1958). "[A]pparent authority to do an act is created as to a third person by written or spoken words or any other conduct of the principal which, reasonably interpreted, causes the third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him." *Restatement, Second, Agency* §27 (1958). "Apparent authority is created by the same method as that which creates authority, except that the manifestation of the principal is to the third person rather than to the agent. For apparent authority there is the basic requirement that the principal be responsible for the information which comes to the mind of the third person, similar to the requirement for the creation of authority that the principal be responsible for the information which comes to the agent. Thus, either the principal must intend to cause the third person to believe that the agent is authorized to act for him, or he should realize that his conduct is likely to create such belief." *Restatement, Second, Agency* §27, *comment a* (1958). *Id.* at 687.

In *Wometco* the Board concluded that there was no evidence that the manager has authority to negotiate with the union from his principal and the manager had communicated this lack of authority to the union. Moreover, there was no evidence that the principal had communicated to the union that his manager had authority to negotiate with the union.

In *Property Resources Corp.*, 287 NLRB 1012 (1987), the Board found that a vice president who had previously negotiated a contract with the union and negotiated the current contract with the union which was repudiated by the president of the corporation had authority as an agent to negotiate with the union.

In *Richmond Toyota*, 287 NLRB 130 (1987), the Board found that the respondent's vice president and general manager, who was in charge of day-to-day operations and was the highest official at the car dealership had apparent authority to recognize the union as the exclusive representative of the Respondent's employees regardless of her husband's responsibility for labor relations matters.

In *Opportunity Homes, Inc.*, 315 NLRB 1210, 1217 (1994), the Board in affirming the administrative law judge, concluded that the respondent's administrator had authority to act on its behalf where the administrator alone acted for respondent in dealing with and recognizing the union and respondent's board of directors did nothing to repudiate the administrator's apparent authority.

In those cases where the Board has found that a management official has authority to act on behalf of the respondent in dealing with the union, there was evidence that the agent was in the highest ranking official at its facility in charge of day-to-day business operations, had previously negotiated agreements with the union or had entered into agreement with the union that the employer's principals had not repudiated, thereby creating apparent authority.

In this case, counsel for the General Counsel has established that McNeal was in charge of Respondent's New Mexico division and that all supervisors reported to him. Beyond these bare facts, it is unclear what McNeal's day-to-day responsibilities were. Unlike the vice president and general manager who was responsible for day-to-day business operations and the highest official at the facility in *Richmond Toyota*, supra, it is unclear what McNeal's day-to-day responsibilities were. There is no evidence that McNeal negotiated agreements with the Union, moreover, unlike in *Opportunity Homes*, supra, here Respondent quickly repudiated McNeal's agreement. Further, as a member of the union negotiating committee, Halstead knew that the subject of bulletin boards was being bargained for with Respondent's bargaining committee not McNeal.

In sum, I find that counsel for the General Counsel has failed to satisfy her burden of proof that Respondent had given apparent authority to McNeal to act as its agent in concluding bargaining agreements with the Union. *Wometco-Lathrop Co.*, supra.

Since McNeal had no authority to bind Respondent to an agreement with the Union concerning bulletin boards at its New Mexico facilities, there was no agreement to repudiate.

Likewise there was no change to Respondent's bulletin board policy which was made in agreement with the Union in 2005 to have three shared bulletin boards at each of its extant facilities for meter readers and collectors in El Paso and Las Cruces. Any argument that the Union and Respondent had agreed during bargaining for a new master agreement to have additional bulletin boards must also fail since there were only tentative agreements regarding bulletin boards and the parties had agreed that tentative agreements would not apply until there was a final agreement. I will dismiss these allegations.

*p. August 24, 2006 complaint paragraph 7(c)*

(1) The August 21, 2006 change to Respondent's policy regarding its meter readers and collector's boot allowance

Collector Halstead said that before August 2006 meter readers and collectors received a boot allowance twice a year. The practice was that the employee would receive an e-mail or Field Analyst Sanchez would tell employees to turn in boot receipts by the end of the week. This would signal employees to buy boots and turn in receipts for reimbursement. On August 21, 2006, Las Cruces Supervisor Duran gave Halstead a note that said, "I will only authorize boot replacements after I see they are needed. Come see me. DD."<sup>60</sup> Duran admitted that Respondent provided a boot allowance for its meter readers. Duran said at the first of the year meter readers got a boot allowance and then 6 to 10 months later they could request an additional pair if they had worn out the extant boots. Duran further admitted that the August 21 note reflected a change in her practice regarding the boot allowance for the first time requiring employees to demonstrate the need for new boots.

(2) Analysis

Counsel for the General Counsel contends that the new requirement that Duran inspect boots before Respondent's employees qualified for the boot allowance was a unilateral change in working conditions. Respondent argues that there was no change in Respondent's policy concerning the boot allowance since Duran always required employees get her approval before they received the boot allowance.

It is well established that clothing allowances are mandatory subjects of bargaining and unilaterally changing employees' uniform allowances without prior consultation or bargaining with the union violates Section 8(a)(5) of the Act. *Pine Brook Care Center*, 322 NLRB 740, 748 (1996).

Here, Duran admitted that she changed her practice by requiring that employees demonstrate the need for new boots for the first time. There is no evidence that Duran consulted or bargained with the Union concerning this change. Employees could no longer merely submit their boot receipts but now had to prove to Duran's satisfaction that they needed new boots. This change was material significant and substantial and violated Section 8(a)(5) of the Act.

*q. August 24, 2006 complaint paragraph 7(e)*

(1) The May 15, 2006 discharge of its employee Navarro pursuant to changes in its break policy

Navarro's discharge is discussed above in section 2,f. The record reflects that Respondent terminated Navarro for leaving his route early without permission and for reconnecting his electric service without permission.

(2) Analysis

Counsel for the General Counsel made no legal argument concerning Navarro's termination. Respondent contends that there was no change in the policy concerning breaks and lunch for El Paso meter readers and if there was such a change Re-

<sup>60</sup> GC Exh. 61.

spondent did not violate Section 8(a)(5) of the Act because Navarro was not discharged solely as a result of any alleged unilateral change.

I have previously found in section 5, b that Respondent violated Section 8(a)(5) of the Act by unilaterally changing work rules concerning breaks and lunch for its meter readers. Respondent has admitted that it terminated Navarro in part because he violated the work rules concerning lunch and break periods by leaving work early. Respondent contends that *Essex Valley Visiting Nurses Assn.*, 343 NLRB 817 (2004), and *Boland Marine & Mfg. Co.*, 225 NLRB 824, 825 (1976), hold that a discharge is unlawful only if it is solely for violating rules unilaterally implemented in violation of Section 8(a)(5) of the Act.

Respondent misreads the holding in *Boland Marine* and *Essex Valley Visiting Nurses Assn.* The Board in *Essex Valley Visiting Nurses Assn.* noted that, “[w]here an employer unilaterally changes the terms and conditions of employment in violation of Section 8(a)(5) of the Act, a discharge resulting directly from that unilateral change may also violate Section 8(a)(5).” *Id.* at 820. The Board went on to explain that in *Essex Valley* the discharge of nurses was not the direct result of the unilateral change but was made for other reasons including the inability of the nurses to perform their jobs. The Board explained *Anheuser-Busch, Inc.*, 342 NLRB 560 (2004), was similar because there was no nexus between the unilateral change (installation of cameras) and the reasons for the discharges (misconduct).

Here, Respondent has admitted that Navarro was discharged at least in part because he violated rules dealing with leaving work early, rules I have found were unilateral changes to extant terms and conditions of employment. Hence, Navarro’s discharge was a discharge “resulting directly” from a unilateral change and thus violated Section 8(a)(5) of the Act.

*r. August 24, 2006 complaint paragraph 7(g)*

The General Counsel alleges that during the period of April through August 2006, by Respondent’s insistence on proposals intended to impede reaching a collective-bargaining agreement, including subcontracting and rules prohibiting employees’ discussion of union activity, Respondent has refused to bargain in good faith.

(1) The facts

(a) *Subcontracting proposals*

On April 10, 2006, the Union submitted its proposal for subcontracting for a successor bargaining agreement in the historical unit.<sup>61</sup> From April 28 through at least July 19, 2006, during collective bargaining for a successor contract in the overall historical unit combined with the newly added employee groups, Respondent proposed unlimited subcontracting language<sup>62</sup> with respect to meter readers, collectors, facilities services employees, and CSRs. Respondent’s proposal stated:

Section 11. Subcontracting

The Company retains the right to hire contractors to perform work covered by this Agreement provided this contracting does not result in a reduction of an employee’s regular work hours or regular straight-time pay.

The company will advise the Union business Manager or President of the Company’s contracting decisions.

*For employees in Meter Reading, Collections, Facilities Services and Customer Services, the Company retains the right to hire contractors to do any and all work performed by these employees.*

During the period April through August 2006, the parties met for negotiations on three dates, July 17 and 18 and August 20.

At a negotiating session on July 18, 2006, Salazar protested that the above-subcontracting language unfairly discriminated against the newly organized groups of employees. According to the notes of union bargaining committee member Rudolf Aguirre, Respondent’s assistant general counsel, Porter, responded, “Well we didn’t organize them. It’s the right thing to do as a business decision.”<sup>63</sup> While union bargaining committee member Montes testified that Porter said it was the Union’s fault the new groups were being considered for subcontracting because they were organized by the Union, none of the Union’s or Respondent’s bargaining notes, including Montes’ own notes, record this statement.<sup>64</sup> I do not credit Montes. Respondent then indicated it would not move on the subcontracting language. At various bargaining sessions Respondent argued that it needed the unlimited right to subcontract the meter reader’s, collector’s, facilities service’s, and CSR’s work to remain competitive because other electric utilities had done so and because of deregulation. The record reflects that only one small private electric utility has subcontracted work similar to that performed by the newly organized groups, deregulation did not apply to Respondent and there was no estimate if or when deregulation would apply to Respondent. Neither the Union nor Respondent have made any movement on the subcontracting issue.

At the July 19, 2006 bargaining session, Respondent provided the Union with its final offer.<sup>65</sup> However, the terms of the final offer were never offered into the record. The complete package of proposals offered by both parties during bargaining in 2006 was never offered for the record nor was testimony adduced concerning the nature of the parties’ proposals, what tentative agreements were reached or what give and take took place during bargaining from April through August 2006.

(b) *No-solicitation proposals*

During collective bargaining for a successor contract in the overall historical unit combined with the newly added employee groups, Respondent proposed no-solicitation language.<sup>66</sup> On May 23 and 26, 2006, Respondent proposed the following language:

<sup>63</sup> GC Exh. 64, p. 8.

<sup>64</sup> GC Exhs. 64–65; R. Exhs. 53, 54, or 56.

<sup>65</sup> R. Exh. 53, p. 10.

<sup>66</sup> GC Exh. 67 pp. 6, 8, 10, 11, 13, and 15.

<sup>61</sup> GC Exh. 66, p. 2.

<sup>62</sup> *Id.* at p. 4.

Section 5. No Solicitation on Company Time.

Neither the Union, its agents nor any of its members shall solicit employees for Union membership, collect dues or engage in other Union activities during Company work time.

On June 1, 21, and 28 and July 19, 2006, Respondent proposed the following no-solicitation language:

Section 5. No Solicitation on Company Time.

The Union its agents, or any of its members shall not solicit employees for Union membership, collect dues, or engage in other Union activities during Company work hours. This section does not prohibit solicitation or union activity during authorized break periods or lunch periods. Nothing herein is intended to restrict normal conversation between employees that does not interfere with performance of work.

(2) Analysis

Counsel for the General Counsel argues in her brief that only Respondent's no subcontracting proposals, when coupled with Porter's statement at the bargaining table that Respondent would subcontract bargaining unit work in retaliation for employees' union activity, demonstrates Respondent's bad-faith bargaining. Respondent contends that neither of its proposals shows evidence of bad faith.

Respondent's initial proposal dealing with no solicitation was a restatement of extant contract language that I have previously found in section 2,a above violates Section 8(a)(1) of the Act. However, on June 1, 2006, a week after its initial proposal, Respondent offered new no-solicitation language that does not fall afoul of the Act's proscriptions on limiting employee exercise of their Section 7 rights during nonworktimes. Respondent's new language makes it clear that employees are prohibited from discussing union matters only during working time not on breaks or lunch. *Johnson Technology, Inc.*, 345 NLRB 762 (2005). This lawful proposal did not demonstrate bad faith on the part of Respondent.

The Board has held that while insisting on a bargaining position is not itself evidence of a refusal to bargain in good faith, other conduct may be indicative of a lack of good faith including delaying tactics, unreasonable bargaining demands, unilateral changes in mandatory subjects of bargaining, efforts to bypass the union, failure to designate an agent with sufficient bargaining authority, withdrawal of already agreed-upon provisions, and arbitrary scheduling of meetings. *Atlanta Hilton & Tower*, 271 NLRB 1600 (1984).

It is not unlawful for an employer to propose and bargain for a broad management-rights clause. *St. George Warehouse, Inc.*, 341 NLRB 904 (2004); *Commercial Candy Vending Division*, 294 NLRB 908 (1989). In those cases where the Board found surface bargaining broad management-rights clauses were accompanied by regressive bargaining, no strike provisions, absence of meaningful arbitration, discharge provisions giving the employer unfettered ability to discipline without regard to just cause, essentially leaving employees less than they would enjoy by simply relying on the certification

without a contract. *Public Service Co. of Oklahoma*, 334 NLRB 487 (2001); *Target Rock*, 324 NLRB 373 (1997); *Western Summit Flexible Packaging*, 310 NLRB 45 (1993).

Conduct away from the bargaining table is a factor the Board considers in determining if there has been a refusal to bargain. *U.S. Ecology Corp.*, 331 NLRB 223 (2000); *Western Summit Flexible Packaging*, supra.

While the General Counsel has alleged numerous instances of Respondent's refusal to bargain, including refusing to meet and bargain at reasonable times and places with the Union as representative of newly organized employee groups, making unilateral changes to terms and conditions of employment of newly organized employee groups, unlawfully disciplining newly organized employees, limiting union access to company resources, closing its Chelmont facility and transferring newly organized employees, and refusing to furnish information to the Union, the General Counsel's pleadings allege that Respondent engaged in surface bargaining only during the April to August 2006 negotiations by insisting upon two proposals intended to impede the parties from reaching an agreement.

The record here, apart from Respondent's insistence on unlimited subcontracting for the newly organized employees, is devoid of evidence reflecting that Respondent had no intent to reach an agreement with the Union in the overall historical unit. Initially I reject counsel for the General Counsel's contention that Porter said Respondent would subcontract bargaining unit work in retaliation for employees' union activity. The evidence here shows that in response to Salazar's protest that the subcontracting language applied only to the newly organized employees, Porter commented, "We didn't organize them." She went on to say that the subcontracting language was a business decision. Porter's statements establish no nexus between employees' union activities and the subcontracting proposal. During the relevant period of time herein, alleged in the complaint to be April to August 2006, based upon the scant record before me I am unable to divine if Respondent engaged in delaying tactics, made unreasonable bargaining demands, engaged in efforts to bypass the Union, failed to designate an agent with sufficient bargaining authority, withdrew already agreed-upon provisions, or arbitrarily scheduled meetings.

There is evidence that Respondent made unilateral changes to employees working conditions in August 2006 by changing its boot allowance policy as discussed above. However, I find that this action, standing alone, is insufficient to establish Respondent's intent to avoid entering into a collective-bargaining agreement.

Finally, there is no evidence that Respondent's subcontracting proposal was accompanied by other provisions so repugnant to the Union as to preclude agreement or leaving employees less than they would enjoy by simply relying on the certification without a contract. *Public Service Co. of Oklahoma*, supra.

I find that the General Counsel has failed to satisfy its burden of proof that Respondent violated Section 8(a)(5) of the Act by insisting on subcontracting and no solicitation proposals that

were intended to impede the parties from reaching a collective-bargaining agreement. I will dismiss this allegation.

*B. Summary*

I have found the following complaint paragraphs and subparagraphs were sustained and will be remedied, below. Second consolidated complaint: 6(a), (b)(1) through (b)(3), (d)(1), and (e), 7(c), 8(a), 9(b), 10(a) through (i), (k) through (q), (s) through (y), 11, 12, 13, 14, and 15; August 24, 2006 complaint: 7(c), (d), and (e), 10, and 11.

I have found the following complaint paragraphs and subparagraphs were not sustained and will be dismissed. Second consolidated complaint: 6(c), 8(b), 9(a), 10(j), (r), and (z). August 24, 2006 complaint: 6(b), 7(a), (b), (g), and (i).

THE REMEDY

Having found that the Respondents violated the Act as set forth above, I shall order that it cease and desist there from and post remedial Board notices addressing the violations found.

The Respondents, having discriminatorily discharged, suspended, and denied bonuses and wage increases to employees, they 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).

As part of the remedy herein, counsel for the General Counsel seeks an order requiring Respondents to reopen the Chelmont facility to the state in which it existed on March 3, 2006.

Where the closing of a facility is discriminatorily motivated in violation of Section 8(a)(3) of the Act, the Board may order a restoration of operations. *Fibreboard Paper Products Corp.*, 379 U.S. 203, 209 (1964); *Coronet Foods v. NLRB*, 981 F.2d 1284 (D.C. Cir. 1993), enfg. 305 NLRB 79 (1991); *Reno Hilton Resorts*, 326 NLRB 1421 (1998); and *Lear Siegler, Inc.*, 295 NLRB 857 (1989). Here, having found that the Chelmont facility was closed for valid economic considerations, a restoration remedy is not appropriate.

CONCLUSIONS OF LAW

On the basis of the above findings of fact and the record as a whole and Section 10(c) of the Act, I make the following conclusions of law.

1. Respondent has been at all times material an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by engaging in the following acts and conduct:

(a) Maintaining a rule prohibiting employees from engaging in union activities on company time.

(b) Threatening employees with discipline for using Respondent's resources for union activities.

(c) Threatening employees with more onerous working conditions or discharge to enforce unilaterally changed rules dealing with absences and tardiness.

(d) Denying an employee the right to be represented by the Union during an investigatory meeting that could lead to discipline.

(e) Issuing an unfavorable performance evaluation, denying a bonus and a raise to Sira Fanelly for engaging in protected-concerted activity.

4. Respondents violated Section 8(a)(1) and (3) of the Act by:

(a) Issuing an unfavorable performance evaluation, denying a bonus and a raise to Sira Fanelly for engaging in protected-concerted activity.

(b) Issuing an unfavorable midyear performance evaluation to Felipe Salazar.

(c) Denying leave to employee William Power.

5. Respondents violated Section 8(a)(1) and (4) of the Act by:

(a) Issuing an unfavorable performance evaluation, denying a bonus and a raise to Sira Fanelly for engaging in protected-concerted activity.

(b) Denying leave to employee William Power.

6. Respondents violated Section 8(a)(1) and (5) of the Act by:

(a) Since August 3, 2004, refusing to meet and bargain at reasonable times and places with the Union as the exclusive collective-bargaining representative of employees in the following unit:

**Including:** The employees of El Paso Electric Company working in the following classifications in the **Power Supply Operating Departments:** Janitors, Apprentice Operator, Operator, Inside Operator, Senior Operator, and Working Supervisor; the employees of El Paso Electric Company working in the following classifications in the **Power Supply Division Maintenance Department:** Insulator, Helper, Helper/Apprentice, Apprentice Mechanic, Apprentice Electrician, Apprentice Laboratory Technician, Apprentice Instrumentation Technician, Mechanic, Electrician, Laboratory Technician, Instrumentation Technician, Electronic Specialist, Predictive Maintenance Technician, Working Supervisor, Vibration Specialist, Level II, Vibration Specialist, Level III, and Working Supervisor-Vibration Specialist; the employees of El Paso Electric Company working in the following classifications in the **Transmission and Distribution Division, Distribution Construction, Distribution Operations, Transmission Design and Maintenance:** Helper, Helper/Apprentice, Apprentice Lineman, Apprentice Cable Splicer, Apprentice Equipment Operator, Lineman, Cable Splicer, Equipment Operator, and Working Supervisor; the employees of El Paso Electric Company working in the following classifications in the **Transmission and Distribution Division Meter Testing/Service:** Helper, Helper/Apprentice, Apprentice Meter Technician, Meter Technician, Meter Laboratory Specialist, Service Worker, Inspector-Wiring and Meter Service Order Worker, and Working Supervisor; the employees of El Paso Electric Company working in the following classifications in the **Transmission and Distribution Division Substation and Relay Department:** Helper, Helper/Apprentice, Apprentice Electrician, Apprentice Equipment Operator, Apprentice

Relay Technician, Equipment Operator, Electrician, Relay Technician, Relay Specialist, and Working Supervisor; the employees of El Paso Electric Company working in the following classifications in the **Transmission and Distribution Division Communications Department**: Helper, Helper/Apprentice, Apprentice Communication Technician, Communication Technician, and Working Supervisor; the employees of El Paso Electric Company working in the following classifications in the **Administrative Division Garage Section**: Janitor, Helper, Tool and Material Handler, Senior Tool and Material Handler, Apprentice Mechanic, Mechanic, Technician, and Working Supervisor; the following employees of El Paso Electric Company working in the following classifications in the **Treasury Services Warehouse Section**: Fuel Handler, Warehouse Helper, Tool and Material Handler, Senior Tool and Material Handler, Material Handler, Senior Material Handler, Material Truck Operator, Working Supervisor, and Working Supervisor-Power Supply; and **Miscellaneous**: Laborer (Temporary), and Laborer (After 1 Year) employees; all full-time and regular part-time Meter Readers, and Collectors, Technician-Sr. Electrical/Technician-Sr. HVAC/Technician-Jr. Electrical/Technician-Sr. Maintenance/Technician-Maintenance/Clerk-Facilities Services VI;

**Excluding:** All other employees, office clerical employees, dispatchers, professional employees, guards and supervisors as defined in the Act.

(b) Since January 3, 2005, refusing to meet and bargain at reasonable times with the Union as the exclusive collective-bargaining representative of the employees in the following unit:

**Including:** The employees of El Paso Electric Company working in the following classifications in the **Power Supply Operating Departments**: Janitors, Apprentice Operator, Operator, Inside Operator, Senior Operator, and Working Supervisor; the employees of El Paso Electric Company working in the following classifications in the **Power Supply Division Maintenance Department**: Insulator, Helper, Helper/Apprentice, Apprentice Mechanic, Apprentice Electrician, Apprentice Laboratory Technician, Apprentice Instrumentation Technician, Mechanic, Electrician, Laboratory Technician, Instrumentation Technician, Electronic Specialist, Predictive Maintenance Technician, Working Supervisor, Vibration Specialist, Level II, Vibration Specialist, Level III, and Working Supervisor-Vibration Specialist; the employees of El Paso Electric Company working in the following classifications in the **Transmission and Distribution Division, Distribution Construction, Distribution Operations, Transmission Design and Maintenance**: Helper, Helper/Apprentice, Apprentice Lineman, Apprentice Cable Splicer, Apprentice Equipment Operator, Lineman, Cable Splicer, Equipment Operator, and Working Supervisor; the employees of El Paso Electric Company working in the following classifications in the **Transmission and Distribution Division Meter Testing/Service**: Helper, Helper/Apprentice, Apprentice Meter Technician, Meter Technician, Meter Laboratory Specialist, Service Worker, Inspector-Wiring and Meter Service Order Worker, and Working Supervisor; the employees of El Paso

Electric Company working in the following classifications in the **Transmission and Distribution Division Substation and Relay Department**: Helper, Helper/Apprentice, Apprentice Electrician, Apprentice Equipment Operator, Apprentice Relay Technician, Equipment Operator, Electrician, Relay Technician, Relay Specialist, and Working Supervisor; the employees of El Paso Electric Company working in the following classifications in the **Transmission and Distribution Division Communications Department**: Helper, Helper/Apprentice, Apprentice Communication Technician, Communication Technician, and Working Supervisor; the employees of El Paso Electric Company working in the following classifications in the **Administrative Division Garage Section**: Janitor, Helper, Tool and Material Handler, Senior Tool and Material Handler, Apprentice Mechanic, Mechanic, Technician, and Working Supervisor; the following employees of El Paso Electric Company working in the following classifications in the **Treasury Services Warehouse Section**: Fuel Handler, Warehouse Helper, Tool and Material Handler, Senior Tool and Material Handler, Material Handler, Senior Material Handler, Material Truck Operator, Working Supervisor, and Working Supervisor-Power Supply; and **Miscellaneous**: Laborer (Temporary), and Laborer (After 1 Year) employees; all full-time and regular part-time Meter Readers, and Collectors, Technician-Sr. Electrical/Technician-Sr. HVAC/Technician-Jr. Electrical/Technician-Sr. Maintenance/Technician-Maintenance/Clerk-Facilities Services VI; and all full-time and regular part-time Customer Service Representatives I, II, III and Customer Service-Clerk-Telephone Center employees employed by the El Paso Electric Company at the telephone center at 100 N. Stanton, El Paso, Texas, and the outlying offices including Chelmont, Fabens and Van Horn, Texas, and Anthony, Hatch, and Las Cruces, New Mexico.

**Excluding:** All other employees, office clerical employees, dispatchers, professional employees, guards and supervisors as defined in the Act.

(c) Since April 15, 2005 refusing to provide the Union with information necessary and relevant to its duties as collective-bargaining representative of employees in the above unit.

(d) By changing the following terms and conditions of employment of employees in the above unit without notice to or bargaining with the Union:

(1) Requiring meter reader to take breaks and lunch periods at designated times.

(2) Limiting employees' access to Respondent's telecommunications resources for union business.

(3) Changing the manner of informing the Union of employee disciplinary meetings.

(4) More strictly enforcing absence and tardiness policy among CSRs.

(5) By changing its policy regarding CSRs working on co-workers' accounts.

(6) By deciding to close the Chelmont facility and transfer Chelmont employees to other facilities.

(7) By issuing performance improvement plans to employees as a means of enforcing its unilaterally imposed changes in enforcement of absence and tardiness rules.

(8) By issuing discipline to employees as a means of enforcing its unilaterally imposed changes in rules regarding CSRs working on coworkers accounts.

(9) By unilaterally changing its policy concerning employees' boot allowance.

(10) By discharging employee Mario Navarro in enforcing its unilaterally imposed changes in rules dealing with break and lunchtimes for meter readers.

7. The unfair labor practices described above are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

8. The Respondents did not otherwise violate the Act as alleged in the second consolidated complaint and in the August 24, 2006 complaint and the remaining complaint allegations will be dismissed.

#### ORDER

Based upon the above findings of fact and conclusions of law, and on the basis of the entire record herein, I issue the following recommended Order.<sup>67</sup>

The Respondent, El Paso Electric, Texas and New Mexico facilities, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to meet at reasonable times and places and bargain in good faith with as the International Brotherhood of Electrical Workers, Local Union 960, AFL-CIO exclusive collective bargaining agent of the employees in the following unit:

**Including:** The employees of El Paso Electric Company working in the following classifications in the **Power Supply Operating Departments:** Janitors, Apprentice Operator, Operator, Inside Operator, Senior Operator, and Working Supervisor; the employees of El Paso Electric Company working in the following classifications in the **Power Supply Division Maintenance Department:** Insulator, Helper, Helper/Apprentice, Apprentice Mechanic, Apprentice Electrician, Apprentice Laboratory Technician, Apprentice Instrumentation Technician, Mechanic, Electrician, Laboratory Technician, Instrumentation Technician, Electronic Specialist, Predictive Maintenance Technician, Working Supervisor, Vibration Specialist, Level II, Vibration Specialist, Level III, and Working Supervisor-Vibration Specialist; the employees of El Paso Electric Company working in the following classifications in the **Transmission and Distribution Division, Distribution Construction, Distribution Operations, Transmission Design and Maintenance:** Helper, Helper/Apprentice, Apprentice Lineman, Apprentice Cable Splicer, Apprentice Equipment Operator, Lineman, Cable Splicer, Equipment Operator, and Working Supervisor; the employees of El Paso Electric Company working in the following classifications in the **Transmission and Distribution Division Meter Testing/Service:** Helper, Helper/Apprentice, Apprentice Meter Technician, Meter Technician, Meter Laboratory Specialist,

Service Worker, Inspector-Wiring and Meter Service Order Worker, and Working Supervisor; the employees of El Paso Electric Company working in the following classifications in the **Transmission and Distribution Division Substation and Relay Department:** Helper, Helper/Apprentice, Apprentice Electrician, Apprentice Equipment Operator, Apprentice Relay Technician, Equipment Operator, Electrician, Relay Technician, Relay Specialist, and Working Supervisor; the employees of El Paso Electric Company working in the following classifications in the **Transmission and Distribution Division Communications Department:** Helper, Helper/Apprentice, Apprentice Communication Technician, Communication Technician, and Working Supervisor; the employees of El Paso Electric Company working in the following classifications in the **Administrative Division Garage Section:** Janitor, Helper, Tool and Material Handler, Senior Tool and Material Handler, Apprentice Mechanic, Mechanic, Technician, and Working Supervisor; the following employees of El Paso Electric Company working in the following classifications in the **Treasury Services Warehouse Section:** Fuel Handler, Warehouse Helper, Tool and Material Handler, Senior Tool and Material Handler, Material Handler, Senior Material Handler, Material Truck Operator, Working Supervisor, and Working Supervisor-Power Supply; and **Miscellaneous:** Laborer (Temporary), and Laborer (After 1 Year) employees; all full-time and regular part-time Meter Readers, and Collectors, Technician-Sr. Electrical/Technician-Sr. HVAC/Technician-Jr. Electrical/Technician-Sr. Maintenance/Technician-Maintenance/Clerk-Facilities Services VI; and all full-time and regular part-time Customer Service Representatives I, II, III and Customer Service-Clerk-Telephone Center employees employed by the El Paso Electric Company at the telephone center at 100 N. Stanton, El Paso, Texas, and the outlying offices including Chelmont, Fabens and Van Horn, Texas, and Anthony, Hatch, and Las Cruces, New Mexico.

**Excluding:** All other employees, office clerical employees, dispatchers, professional employees, guards and supervisors as defined in the Act.

(b) Refusing to provide information to the International Brotherhood of Electrical Workers, Local Union 960, AFL-CIO.

(c) Changing the following terms and conditions of employment of employees in the above unit without notice to or bargaining with the Union:

(1) By changing its policy concerning when meter readers may take break and lunchtimes.

(2) By more strictly enforcing tardiness and absentee policy.

(3) By changing the access of employees to its telecommunication resources in order to conduct union business.

(4) By changing the manner of informing the Union of employee disciplinary meetings.

(5) By changing its policy concerning CSRs working on coworkers accounts.

(6) By deciding to close its Chelmont facility and transfer bargaining unit employees to other facilities.

<sup>67</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 shall be waived for all purposes.

(7) By issuing performance improvement plans to more strictly enforce its changed policy regarding tardiness and absenteeism.

(8) By issuing discipline to employees to enforce its changed policy regarding working on coworkers' accounts.

(9) By changing its boot allowance policy for meter readers and collectors.

(10) By discharging Mario Navarro pursuant to its changed policy concerning when meter readers may take breaks and lunch periods.

(d) Denying leave or otherwise discriminating against any employee for filing charges or giving testimony in a Board proceeding.

(e) Denying leave, issuing unfavorable performance appraisals, denying raises, bonuses, or otherwise discriminating against any employee for engaging in protected-concerted activity or supporting International Brotherhood of Electrical Workers, Local Union 960, AFL-CIO.

(f) Denying the right of employees to be represented by the Union in investigatory meetings that can reasonably lead to discipline.

(g) Maintaining a rule prohibiting employees from engaging in union activities on company time.

(h) Threatening employees with more onerous working conditions or discharge as a means of enforcing unilaterally imposed rules changes dealing with absences and tardiness.

(i) Threatening employees with discipline for using company telecommunications resources for union activities.

(j) Engaging in surveillance of employees' union activities.

(k) 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) Meet and bargain at reasonable times and places with International Brotherhood of Electrical Workers, Local Union 960, AFL-CIO as the exclusive collective-bargaining representative of the employees in the above mentioned unit.

(b) If requested by the Union, rescind any changes made in your terms and conditions of employment, noted above, and reduce to writing and sign any agreement reached with the Union concerning these terms and conditions of employment.

(c) Make William Power, Mario Navaro, Sira Fanelly, Mary Perryman, and Delma Gonzales 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.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Mario Navarro and within 3 days thereafter notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discipline of William Power dated March 6, 2006, the unlawful discipline of Mary Perryman, Maria Davila, and Delma Gonzales dated February 20, 2006, the February 2006 performance improvement plans of Antonya Watson, Delma Garcia, Lucy Flores, Pat Cruz, and

Stephanie Alarcon, the December 17, 2004 appraisal of Sira Fanelly, and the July 2005 midyear appraisal of Felipe Salazar and within 3 days thereafter notify the employees in writing that this has been done and that the discipline, performance improvement plans and appraisals will not be used against them in any way.

(f) 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 papers, and all other records, including an electronic copy of such records if stored in electronic form necessary to analyze the amount of back pay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its Texas and New Mexico facilities copies of the attached notice marked "Appendix"<sup>68</sup> in both the English and Spanish languages. Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondents' authorized representative, shall be posted by the Respondents immediately upon receipt 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 notices are not altered, defaced, or covered by any other material. In the event Respondent has gone out of business or closed any of the facilities involved in these proceedings, the Respondents shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since August 3, 2004.

(h) 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.

IT IS FURTHER ORDERED that the second consolidated complaint and the August 24, 2006 complaint are dismissed insofar as they allege violations of the Act not specifically found.

Dated, Washington, D.C. March 1, 2007

#### 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 this notice to employees in both English and Spanish 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

<sup>68</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."

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT do anything that interferes with these rights.

WE WILL NOT refuse to meet at reasonable times and places and bargain in good faith with International Brotherhood of Electrical Workers, Local Union 960, AFL-CIO (the Union) as your certified collective-bargaining representative in the following bargaining unit (unit):

**Including:** The employees of El Paso Electric Company working in the following classifications in the **Power Supply Operating Departments:** Janitors, Apprentice Operator, Operator, Inside Operator, Senior Operator, and Working Supervisor; the employees of El Paso Electric Company working in the following classifications in the **Power Supply Division Maintenance Department:** Insulator, Helper, Helper/Apprentice, Apprentice Mechanic, Apprentice Electrician, Apprentice Laboratory Technician, Apprentice Instrumentation Technician, Mechanic, Electrician, Laboratory Technician, Instrumentation Technician, Electronic Specialist, Predictive Maintenance Technician, Working Supervisor, Vibration Specialist, Level II, Vibration Specialist, Level III, and Working Supervisor-Vibration Specialist; the employees of El Paso Electric Company working in the following classifications in the **Transmission and Distribution Division, Distribution Construction, Distribution Operations, Transmission Design and Maintenance:** Helper, Helper/Apprentice, Apprentice Lineman, Apprentice Cable Splicer, Apprentice Equipment Operator, Lineman, Cable Splicer, Equipment Operator, and Working Supervisor; the employees of El Paso Electric Company working in the following classifications in the **Transmission and Distribution Division Meter Testing/Service:** Helper, Helper/Apprentice, Apprentice Meter Technician, Meter Technician, Meter Laboratory Specialist, Service Worker, Inspector-Wiring and Meter Service Order Worker, and Working Supervisor; the employees of El Paso Electric Company working in the following classifications in the **Transmission and Distribution Division Substation and Relay Department:** Helper, Helper/Apprentice, Apprentice Electrician, Apprentice Equipment Operator, Apprentice Relay Technician, Equipment Operator, Electrician, Relay Technician, Relay Specialist, and Working Supervisor; the employees of El Paso Electric Company working in the following classifications in the **Transmission and Distribution Division Communications Department:** Helper, Helper/Apprentice, Apprentice Communication Technician, Communication Technician, and Working Supervisor; the employees of El Paso Electric Company working in the following classifications in the **Administrative Division Garage Section:** Janitor, Helper, Tool and Material Handler, Senior Tool and Material Handler, Apprentice Mechanic, Mechanic, Technician, and Working Supervisor; the following employees of El Paso Electric Company working in the following classifications in the **Treasury Services Warehouse Section:** Fuel Handler, Warehouse Helper, Tool and Material Handler, Senior Tool and Material Handler, Material Handler, Senior Ma-

terial Handler, Material Truck Operator, Working Supervisor, and Working Supervisor-Power Supply; and **Miscellaneous:** Laborer (Temporary), and Laborer (After 1 Year) employees; all full-time and regular part-time Meter Readers, and Collectors, Technician-Sr. Electrical/Technician-Sr. HVAC/Technician-Jr. Electrical/Technician-Sr. Maintenance/Technician-Maintenance/Clerk-Facilities Services VI; and all full-time and regular part-time Customer Service Representatives I, II, III and Customer Service-Clerk-Telephone Center employees employed by the El Paso Electric Company at the telephone center at 100 N. Stanton, El Paso, Texas, and the outlying offices including Chelmont, Fabens and Van Horn, Texas, and Anthony, Hatch, and Las Cruces, New Mexico.

**Excluding:** All other employees, office clerical employees, dispatchers, professional employees, guards and supervisors as defined in the Act.

WE WILL NOT make changes to your terms and conditions of employment without prior notice to the Union in order to permit the Union to bargain with us about those changes.

WE WILL NOT refuse to furnish information requested by the Union that is relevant and necessary to the Union's performance of its duties as your collective-bargaining representative.

WE WILL NOT suspend you, issue you unfavorable appraisals, deny leave, or deny your right to a union representative at a meeting that could lead to discipline because of your union activities or because you selected the Union as your collective-bargaining representative or because you engaged in protected-concerted activities, including filing charges or giving testimony in a Board proceeding.

WE WILL NOT, discharge you, discipline you, give you unfavorable performance appraisals, give you performance improvement plans, or deny you boot allowances, as a result of making changes to your terms and conditions of employment without first giving the Union notice or an opportunity to bargain.

WE WILL NOT decide to close our facilities or transfer our employees without first giving the Union notice or an opportunity to bargain.

WE WILL NOT threaten you with discipline for using company telecommunications resources to conduct union activities or with more onerous working conditions because of your union activities or because you selected the Union as your collective-bargaining representative or because you engaged in protected-concerted activities.

WE WILL NOT spy on your union or other protected-concerted activities.

WE WILL NOT enforce the following contractual provision in the June 16, 2003 to June 15, 2006 collective-bargaining agreement between Respondent and the Union which provides at article II, section 5 the following:

#### Section 5. No Solicitation on Company Time

Neither the Union, its agents nor any of its members shall solicit employees for Union membership, collect dues or engage in other Union activities on Company time, unless specifically authorized in advance by the immediate Supervisor.

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

WE WILL offer reinstatement to Mario Navarro to his former position of employment with us with no loss of seniority or other benefits and WE WILL make William Power, Mary Perryman, Mario Navarro, Delma Gonzales, and Sira Fanely whole for any loss of wages and benefits, with interest, that they suffered as a result of their discharge, suspension, unfavorable appraisal or any other unlawful action taken against them.

WE WILL remove from our files any reference to the unlawful discharge of Mario Navarro, the suspensions of William Power, Mary Perryman, and Delma Gonzales, the warning to Maria Davila, the performance improvement plans of Antonya Watson, Delma Garcia, Lucy Flores, Pat Cruz, and Stephanie Alarcon and Mary Perryman, and the unfavorable performance appraisals of Sira Fanely and Felipe Salazar; and WE WILL not make reference to the permanently removed materials in response to any inquiry from any employer, employment agency, unemployment insurance office, or reference seeker and we will not use the permanently removed material against you.

WE WILL meet at reasonable times and places and bargain in good faith with the Union as your designated collective-

bargaining representative for the unit described above; WE WILL upon request from the Union rescind any changes we made in your terms and conditions of employment after March 2005, including the changes to meter readers break and lunchtimes, the changes to employees access to company telecommunications resources to conduct union business, the changes to the means by which union representatives were notified of disciplinary meetings, changes in the enforcement of rules regarding tardiness and absenteeism for CSRs at Respondent's Call Center, changes in rules concerning CSRs work on coworkers' accounts, changes to boot allowance policy for meter readers and collectors at the Las Cruces, New Mexico facility, the decision to close the Chelmont facility, and the decision to transfer Chelmont bargaining unit employees to other facilities.

WE WILL offer to bargain in good faith with the Union concerning these and other terms and conditions of employment of unit employees.

WE WILL reduce to writing and sign any agreement reached with the Union concerning these and other terms and conditions of your employment.

EL PASO ELECTRIC COMPANY