UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
TWENTY-EIGHTH REGION

EL PASO ELECTRIC COMPANY,	§	
	§	
	§	**Case Nos. 28-CA-20136**
	§	**28-CA-20141**
and	§	**28-CA-20265**
	§	**28-CA-20464**
	§	**28-CA-20695**
INTERNATIONAL BROTHERHOOD	§	**28-CA-20765**
OF ELECTRICAL WORKERS, LOCAL	§	**28-CA-20766**
UNION 960, AFL-CIO	§	**28-CA-20934**
	§	**28-CA-20953**
	§	

EL PASO ELECTRIC COMPANY'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE SUPPLEMENTAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

NOW COMES the Respondent, El Paso Electric Company ("EPE" or "Respondent"), and submits this Brief in Support of its Exceptions to the Supplemental Decision of the Administrative Law Judge ("ALJ") John J. McCarrick ("Supplemental Decision") in the above-styled and numbered cases:

I.

STATEMENT OF THE CASE

A. Factual and procedural background.

1. The Parties

EPE is an electric utility that provides electricity to thousands of residential and commercial customers in west Texas and southern New Mexico. (Tr. GC-1(fff)). The International Brotherhood of Electrical Workers, Local Union 960 (the "Union") has represented EPE's operational employees (the "Historical Unit"), which compose approximately one-third of EPE's workforce, since approximately 1944. (Tr. GC-1(fff)). The most recent collective

bargaining agreement ("CBA") between EPE and the Union concerning the Historical Unit became effective on June 16, 2003 and expired by its terms on June 15, 2006. (GC-74).

2. Case History

This case was tried in El Paso, Texas, in August and September 2006, before ALJ John J. McCarrick. The Union filed underlying charges 28-CA-20136, 28-CA-20141, and 28-CA-20265 on February 2, 3, and April 27, 2005, respectively. On May 31, 2005, the Regional Director issued a consolidated complaint in these cases. On September 12, 2005, the Union filed charge 28-CA-20464, and the Regional Director issued a complaint on November 30, 2005. On March 7, 2006, the Union filed charge 28-CA-20695. On April 14, 2006, the Union filed charges 28-CA-20765 and 28-CA-20766. On May 31, 2006, the Regional Director issued a consolidated complaint in these cases. In August 2006, the Union filed charges 28-CA-20934 and 28-CA-20953 against EPE, and the Regional Director issued a complaint in those cases on August 29, 2006. The ALJ consolidated these two cases with cases with Cases 28-CA-20136, 28-CA-20141, 28-CA020265, 28-CA-20695, 28-CA-20765, and 28-CA-20766.

The ALJ issued his decision on March 1, 2007, concluding certain alleged conduct of EPE violated various sections of the NLRA. EPE filed exceptions, and the General Counsel filed limited cross-exceptions. On August 10, 2010, the NLRB issued its final Decision and Order.

As part of its Decision and Order, the NLRB remanded the complaint allegation that the Company unlawfully refused to bargain with the Union about its decision to close the Chelmont facility. In the Board's view, Judge McCarrick "did not adequately detail the evidence relied upon in reaching his conclusion that labor costs were a factor in the decision to relocate" or "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 that could have changed its decision to close and relocate the unit work." *El Paso Electric Company and IBEW Local 960, AFL-CIO*, 355 NLRB 71 (Aug. 10, 2010).

On remand, the ALJ gave the parties the option to reopen the record, which the parties declined. Thereafter, the parties filed supplemental briefs on the issue the Board remanded. On March 2, 2011, the ALJ issue his Supplemental Decision and Order.

B. Allegations and evidence relating to Respondent's exceptions.

Prior to its closing in March 2006, EPE's Chelmont facility was located at a shopping center in El Paso. (Tr. 177:14-19). EPE stationed CSRs at the Chelmont facility to handle a variety of walk-in, customer service functions. (Tr. 177:16-25). Rosa Lowe ("Lowe") was Supervisor of the Chelmont facility prior to its closure. (Tr. 174:5-5-15).

Prompted by the fact that the Company's lease at the Chelmont facility was set to expire in July 2005, EPE began analyzing its operations there in early 2005. (Tr. 477:4-16). The analysis began with a meeting between Vice President of Administration Kerry Lore ("Lore"), Manager of Outlying Offices Judy Kummrow ("Kummrow"), and Lowe. The group discussed the fact that EPE had outgrown the Chelmont office such that there was no longer enough room for the customers and employees. (Tr. 474:6-7, 477:15-16). Due to the lack of space, customer lines regularly extended out the front door, resulting in agitated customers and increased security issues. (Tr. 182:10-12, 183:3-12, 186:5-11, 300:3-8, 479:22-480:1). The facility also had ventilation problems because the door had to be kept open, and the cumbersome and non-ergonomic work areas caused some employees to experience repetitive-motion issues. (Tr. 180:23-181:4, 479:22-480:1, 489:16-17). Additionally, the Chelmont facility's only bathroom was not ADA compliant. (Tr. 299:11-300:2, 488:15-24).

Lore directed Kummrow and Lowe to conduct an analysis of the Chelmont office, focusing on whether to stay at the facility, make enhancements to the facility, move to another location, or expand pay stations. (Tr. 478:17, 480:2-6). Clay Doyle ("Doyle"), an analyst, was later asked to assist with the financial portion of the analysis. (Tr. 480:2-11).

In their report to Lore, Kummrow and Lowe state they considered the following factors in their analysis: whether to remodel or build out, the cost of renting versus purchasing, payroll, and non-payroll expenses. (Union Exh. 18, p. 520). With regard to payroll expenses, the report makes clear: "Closing Chelmont **assumes no net reduction in staff costs** because those resources would be reassigned to the call center, home agents or the Fabens office." (*Id.* at 526) (emphasis supplied).

Furthermore, Lore clarified at the hearing that while the Company looked at payroll expense, this was essentially a moot point:

> Q. Okay. And you looked at payroll expense?
>
> A. Yes. The current payroll expense, right.
>
> Q. And what was the — how was payroll expense factored in exactly?
>
> A. Well, if we were to stay at Chelmont, we would continue to incur whatever payroll costs we were incurring. If we were to move to another location, we would factor in how many individuals would be at that location and their related payroll.
>
> Q. What if you didn't move to another location and you didn't stay at Chelmont, but instead, you took the Chelmont CSRs and put them in empty spots in the other offices? Would your payroll — you would have no payroll expense for the new offices, is that right?
>
> JUDGE MCCARRICK: No change in payroll.
>
> THE WITNESS: That's correct. Overall payroll would not change.
>
> Q. Okay.
>
> JUDGE MCCARRICK: Did you at a [sic] new facility increasing the number of personnel?

> THE WITNESS: I don't believe that was actually part of the documentation. It might have been part of the discussion, but I don't think that was part of the final financial analysis.

(Tr. 504:7-505:5). The fact that the Company did not consider the possibility of increasing the number of personnel into its decision is further evidenced by Doyle's financial report, wherein payroll costs for all of the different options assumed the number of full-time employees would remain constant at seven. (Union Exh. 19).

As for the option of expanding pay stations, Lore testified the Company would not need to assign any employees to the additional pay stations. (Tr. 530:9-22). Thus, if the Company selected the pay-station option, there would be no net reduction or increase in payroll because those employees would simply be reassigned within the Company. (*Id.*). Moreover, Lore testified with regards to the pay station option: **"We did not factor in any payroll savings."** (Tr. 533:2-3) (emphasis supplied). Thus, while expanding pay stations would save the Company from the expenses associated with owning or renting property (e.g. mortgage, security, pest control), it did not affect the Company's labor costs.

Based on the foregoing analysis, Lore recommended closing Chelmont — not because it would affect labor costs — but rather because doing so would alleviate operations problems, the facility could no longer accompany the Company's needs because of its various limitations, and the financial analysis supported expanding pay stations. (Tr. 541:16-21). The Company accepted Lore's recommendation. (Tr. 476:10-12). Thus, the ALJ's conclusion that Lore testified without contradiction that among the factors considered in deciding to close the Chelmont facility was payroll expense, such finding is not supported by the evidence at best, and misleading at worst.

After the Chelmont facility closed, the dislocated employees were assigned to either the call center or other outlying offices. Two of the employees filled openings in the call center, so the Company ultimately did reduce its labor costs by not having to hire two additional employees. However, Lore testified that the Company was unaware of the two openings in the call center at the time it made the decision to close the Chelmont facility; thus, the possibility of reducing labor costs by filling such positions with Chelmont employees did not factor into the Company's decision. (Tr. 530:20-531:9).

II.

QUESTIONS PRESENTED

(1) Whether the ALJ erred in finding that direct and indirect labor costs were a factor in Respondent's decision to close its Chelmont facility? (*See*, Respondent's Exceptions, I).

(2) Whether Paragraphs 3 and 4 of the Conclusions of Law in the Supplemental Decision are erroneous in light of the record and applicable case law? Furthermore, whether the remedies recommended in the Decision and imposed upon Respondent in the Order accompanying the Supplemental Decision are appropriate according to the facts and applicable case law? (*See,* Respondent's Exceptions, II).

III.

ARGUMENT AND AUTHORITIES

A. The ALJ erred in finding that direct and indirect labor costs were a factor in EPE's decision to close its Chelmont facility.

In *Dubuque Packing Co.*, the Board formulated the following 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 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.**

Id. at 391.

Whether labor costs are a factor in a relocation decision involves a **motivational** test. The D.C. Circuit explained that this analysis is designed to "distinguish relocations motivated by labor costs from those motivated by other perceived advantages of the new location." *United Food and Commercial Workers International Union, AFL-CIO, Nol. 150-A v. NLRB*, 1 F.3d 24, 30 (D.C. Cir. 1993). *Dubuque Packing Co.* at 391. In this regard, the court further observed:

> The Board's test exempts from the duty to negotiate relocations that, viewed objectively, are entrepreneurial in nature. It exempts decisions that, viewed subjectively, **were motivated by something other than labor costs.** And it explicitly excuses employers from attempting to negotiate when doing so would be futile or impossible. What is left are relocations that leave the firm occupying much the same entrepreneurial position as previously, **that were taken because of the cost of labor,** and that offer a realistic hope for a negotiated settlement.

United Food at 31-32 (emphasis supplied). The court's distinction between relocation decisions "motivated by something other than labor costs" and decisions "that were taken because of the cost of labor" highlights the fact that under *Dubuque Packing*, bargaining is required only when labor costs motivate the relocation decision.

The uncontroverted evidence presented at the hearing proves labor costs did not motivate — or even factor into — the Company's decision to close the Chelmont facility. In analyzing its various options, the Company was certainly entitled to evaluate whether its payroll

costs might be affected without having to bargain with the Union over its decision. Because the Company would retain the seven Chelmont employees regardless of whether it renewed its lease, remodeled, moved to another location, or closed down altogether and expanded pay stations, labor costs proved a non-issue and in no way factored into the Company's decision.

Of the options analyzed, the Company ultimately decided to close the Chelmont facility, transfer the Chelmont employees to other locations, and increase its use of "unmanned" pay stations. The ALJ plainly erred in concluding that the absence of workers at independent pay stations was a cost saving factored into the overall savings in the decision to close. To be clear, the Company does not assign employees to work at its pay stations. While the Company could have potentially saved in labor costs by closing Chelmont and expanding its pay stations, the evidence clearly demonstrates that it was always committed to retaining the Chelmont employees and transferring them to other locations. Thus, regardless of how many new pay stations the Company may have considered opening, its labor costs remained unchanged. Moreover, the fact that the Company would have to pay an independent contractor to maintain the additional pay stations represented a labor cost **increase** rather than cost savings, given the fact the Company would retain the displaced Chelmont employees. Accordingly, while expanding pay stations would lead to overall savings for the Company, labor costs were unaffected and therefore did not factor into the Company's decision to close the Chelmont facility.

The fact that closing Chelmont ultimately did result in labor cost savings for the Company because two vacant positions at other locations did not have to be filled as a result of transferred Chelmont employees filling them does not impact whether the Company had a duty to bargain with the Union. The *Dubuque Packing* test is designed to isolate an employer's motives **at the time the decision was made**. As Lore testified, the Company was unaware at the

time it made the decision to close Chelmont that two positions would be opening up at the call center that could be filled with displaced Chelmont employees. The ALJ claims Lore's testimony "did not establish that when Respondent made the decision to close Chelmont it did not know there were open positions at the Call Center." (Decision, p. 5:22-24). Ignoring the fact Lore unequivocally testified that EPE was unaware of the two openings in the call center at the time it made the decision to close the Chelmont facility (which was not contradicted by any evidence), the ALJ surmised without any factual basis whatsoever that "[f]rom the context of her testimony, I find that Lore was referring to the discussions she had with the committee members in formulating the various options regarding Chelmont from April to December 2005, well before a final decision was made regarding Chelmont." (Decision, p. 5:24-28). In reality, the ALJ had no factual basis for reaching this conclusion. Therefore, because the open positions were a non-factor in the Company's decision to close the facility, the fact that the Company subsequently was able to reduce its payroll in no way obligated it to bargain with the Union over its decision.

Furthermore, the ALJ erroneously concluded there were indirect labor costs associated with the decision to close Chelmont. (Decision, p. 5:30-31). Such indirect costs, he claimed, included the ergonomic work stations, a non-ADA compliant bathroom, climate control, and fire code issues. (Decision, p. 5:31-33). The ALJ cites no authority whatsoever to support his finding that these issues constitute indirect labor costs. In its review of the existing case law and NLRB decisions, Respondent found no authority that would support ALJ's characterization. In reality, the Chelmont facility was used by both employees and the general public alike. Thus, the non-ADA compliant bathroom, climate control, and fire code issues, can hardly be characterized as indirect labor costs, as the public would benefit just as much from such

renovations. Moreover, EPE would have to provide the affected employees with ergonomic work stations regardless of where they worked. Consequently, the ALJ erred in determining the Company considered indirect labor costs in deciding to close the Chelmont facility.

B. The ALJ erred in concluding Respondent violated Section 8(a)(1) and (5) by deciding to close its Chelmont facility, and that such action constituted an unfair labor practice within the meaning of Section 2(6) and (7) of the NLRA.

Paragraphs 3 and 4 of the Conclusions of Law in the Supplemental Decision are erroneous in light of the record and applicable case law set forth above. Consequently, the remedies recommended in the Decision and imposed upon Respondent in the Order accompanying the Supplemental Decision are inappropriate according to the facts and applicable case law.

IV.

PRAYER

FOR THE REASONS set forth above, Respondent requests that the Board sustain Respondent's exceptions to the adverse findings of fact, conclusions of law, conclusions of law, and remedies in the Supplemental Decision of the Administrative Law Judge, and for such other and further relief to which Respondent may show itself entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 30, 2011, a true and correct copy of the foregoing document was served on all other parties to the administrative proceedings:

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