

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

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
28-CA-20953**

ACTING GENERAL COUNSEL’S ANSWERING BRIEF

Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board (Board), Counsel for the Acting General Counsel submits this Answering Brief to the Exceptions filed by Respondent El Paso Electric Company (“Respondent”) to the March 2, 2011 Supplemental Decision of Administrative Law Judge (ALJ) John J. McCarrick.¹ Respondent has filed exceptions to the ALJ’s findings on the issue of whether labor costs were a factor in Respondent’s decision to shut down its Chelmont facility. As set forth below, the ALJ’s findings are appropriate, proper, and amply and fully supported by the credible record evidence. Accordingly, the Board should sustain the ALJ’s findings of fact, conclusions of law, proposed remedy and recommended order.

¹ References to the ALJ’s supplemental decision will be referred to as “SD” followed by the appropriate page number(s) and, where applicable, followed by a colon and the particular line number(s). Reference to the transcript will be designated as “Tr.” followed by the appropriate page number(s) and, where, applicable, followed by a colon and the particular line number(s). Reference to the Exhibits of the General Counsel will be designated as “GC” followed by the appropriate number or numbers for those exhibits.

I. PROCEDURAL BACKGROUND

After a ten-day hearing, ALJ McCarrick issued a comprehensive decision in which he found that Respondent engaged in 22 separate violations of the Act, including violating Section 8(a)(1) and (5) of the Act by shutting down its Chelmont office and transferring the bargaining unit customer service representatives (CSRs) who worked there without notice or bargaining. See Decision of ALJ John J. McCarrick, JD (SF)-03-07 (Mar. 1, 2007). By way of background, the CSRs at the Chelmont facility performed a variety of customer service functions, including processing customer payments. As the Board found, “[i]t is undisputed that the facility was overcrowded and technologically antiquated.” *El Paso Elec. Co.*, 355 NLRB No. 71, slip op. at * 3 (Aug. 10, 2010). Over a number of other options, Respondent determined to close the facility, subcontract its payment processing function to independent pay stations (manned by an outside contractor), and transfer all of the Chelmont CSRs to other facilities, where they continued to perform other customer service functions. *Id.* It is likewise undisputed that Respondent refused to bargain with the Union about the decision to close Chelmont and transfer the CSRs. See *id.*

On August 10, 2010, the Board issued its Decision and Order, severing and remanding the shut-down allegation 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.

El Paso Elec. Co., 355 NLRB No. 71, slip op. at * 5 (Aug. 10, 2010). The parties declined the ALJ’s invitation to re-open the record, and instead submitted briefs to the ALJ based on the extant record.

II. THE RECORD EVIDENCE

As the Board found, Respondent's decision to close Chelmont was based on a financial analysis which weighed several alternatives in addition to closure. Id. at * 3. Indeed, Respondent's own witness and key decision maker in the closing decision, Kerry Lore, admitted the decision was made based on a "financial analysis which supported looking at expanding pay stations" in lieu of continuing the Chelmont operation. (Tr. 541) Moreover, Respondent's written financial analysis, which compared the cost of the various alternatives, concluded that the "cost of processing payments," estimated to comprise 50% of the Chelmont employees' workload, would be decreased by nearly two-thirds by shutting down Chelmont and subcontracting the work to non-bargaining unit workers at independent pay stations. (GC 19, EPE000513)

The written financial evaluation Respondent relied upon – entitled, "Chelmont Office Situational Analysis & Recommendation" – leaves little doubt that Respondent considered its payroll in making the shut-down decision:

Considerations

To Evaluate Options We Considered the Following:

- Remodel or build out
- Rent yearly or purchase (amortize)
- **Payroll**
- Non-payroll expenses
 - √ Maintenance
 - √ Utilities
 - √ Janitorial
 - √ Security
 - √ Pest control
 - √ Alarm service
 - √ Insurance
 - √ Tax

(GC 18, EPEC000520) (emphasis added).

In addition, the record indicates that the shut-down resulted in a further, direct labor cost savings, because two of the Chelmont CSRs were transferred to positions that were already budgeted elsewhere. Respondent's witness, Lore, testified she was unaware of these openings when she evaluated the options; however, Lore was not the final decision maker in the Chelmont closure, and the documentary evidence indicates that Respondent had in fact considered transferring CSRs to the location in question. (Tr. 530-31; GC 18, EPE000526)

Finally, the record indicates that other, indirect labor costs were considered in deciding to close the facility. As noted by the ALJ, the Chelmont facility was the subject of "longstanding complaints" about its ergonomics. While Respondent could have renovated the facility, which would have left the Chelmont employees in place, this option was abandoned, based on the projected expense of the necessary repairs. (Tr. 180-81, 185, 477-78, 488-89, 504-05, 507; GC 18 at EPEC000517) In other words, but for the costs involved in updating the office's outdated ergonomics – about which employees had long complained – Chelmont may have remained viable economically for Respondent.

III. THE SUPPLEMENTAL DECISION

Relying on Respondent's own written documentation of the decision-making process, including the Situational Analysis & Recommendation (GC 19) and financial report (GC 18), the ALJ found that payroll costs "were a factor considered by Respondent in making the decision to close Chelmont." (SD 5:15-20) He additionally found that Respondent had taken other, indirect labor costs into consideration when it factored in the cost of "ergonomic work stations, a non-ADA compliant bathroom, climate control, and fire code issues." (SD 5:31-33) The ALJ found that Respondent had saved labor costs by transferring two Chelmont

CSRs to positions already budgeted at another location. (SD 5:20-21) Finally, the ALJ found that, contrary to Respondent's argument, the record evidence did not indicate that Respondent was unaware of the open, budgeted positions at the time the closure decision was taken. (SD 3:38-4:14)

IV. ANALYSIS

A. Respondent Failed to Demonstrate the Lack of Possible Labor-Cost Concessions.

As correctly noted by the ALJ, the record in this case contains no evidence whatsoever to suggest that the Union could not have offered labor-cost concessions sufficient to dissuade Respondent from shutting down its Chelmont facility (see 355 NLRB No. 71, slip op. at 29; "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"). Respondent declined to re-open the record to adduce such evidence and did not except to this finding by the ALJ.

B. The ALJ Properly Concluded that Respondent Considered Direct and Indirect Labor Costs.

The Board's remand required the ALJ to examine the sole, remaining issue: whether Respondent established, by a preponderance of the evidence, that labor costs played no role in the closure decision. In this regard, Respondent's exceptions claim that the ALJ erred by: (a) finding, pursuant to the Board's *Dubuque Packing Co.* analysis, see 303 NLRB 386 (1991), that the cost savings associated with subcontracting the CSR's work to an outside party and consolidating the CSR's remaining operations was a "labor cost"; and (b) that the costs of providing employees' with ergonomic work stations and an ADA-compliant restroom facility

were “indirect labor costs.” Neither of Respondent’s exceptions has merit. For the reasons discussed below, they should be rejected in their entirety.

1. Subcontracting and Consolidation of Operations

Respondent argues that the ALJ erred by not considering that, according to its Situational Analysis & Recommendation, it anticipated no net reduction in “staff costs” based on the closure, because it planned to transfer the Chelmont employees to other locations. See, e.g., GC 18, EPEC 000526. This wordplay detracts from the basic fact that it had determined that it could achieve significant cost savings by closing Chelmont and contracting with an outside party to perform 50% of the work performed by its unit employees. Indeed, both the documentary evidence and the testimony of Respondent’s own witnesses provide ample support for the ALJ’s conclusion that Respondent explicitly considered this direct labor cost as a factor in the decision to close Chelmont and relocate its employees. See *id.*

Where a relocation decision is based on the relative cost of having the work performed elsewhere, this squarely fits the definition of a “labor cost,” triggering a bargaining obligation. See, e.g., *Bell Atlantic Corp.*, 336 NLRB 1076, 1086 (2001) (finding duty to bargain over relocation based on *Dubuque* test where employer considered savings based on “reduction in the number of employees performing the work and the lower wage and benefit structure in the offices where the work was relocated”); *Elliott Turbomachinery Co., Inc.*, 320 NLRB 141, 157 (1995) (finding duty to bargain over relocation of unit work where staffing costs were a consideration); see also *Embarq Corp.*, 356 NLRB. No. 125 at * 2 (Mar. 31, 2011) (relocation and consolidation of unit work aimed towards improving the efficiency and productivity of call center employees constituted indirect labor costs). As Respondent admits, “the financial analysis supported expanding pay stations.” (Respondent’s Br. at 5) In other words, the

financial analysis supported processing customer payments without using bargaining unit employees: i.e., labor costs.

The ALJ also properly rejected Respondent's claim that it was unaware, at the time of the closure, that it would ultimately save the cost of budgeting two new CSR positions at another locations. This decision was based on his close reading of the record evidence, as compared to the documentary evidence. Respondent would now have the Board "reread" the record in its favor: that "Lore testified that *the Company* was unaware of the two openings. . ." (Resp. Br. at 6) But, as the ALJ discerned, that is simply not what Lore said; her testimony was that *she* – not the final decision maker – was unaware. Respondent cannot retry the case before the Board, and its efforts to do so should be rejected.

2. Improving Workstation Ergonomics and Meeting ADA Standards

As the Board held, "[i]t is undisputed that the [Chelmont] facility was overcrowded and technologically antiquated." 355 NLRB No. 71, slip op. at * 3. Moreover, the record is clear that Respondent considered, when deciding to shut down the facility, the cost involved in remedying its lack of ergonomic work stations, its failure to provide employees with an ADA-compliant restroom, its failure to comply with the local fire code, payroll expenses, cooling and ventilation and other employee environmental and safety issues. (Tr. 488-89; 504-05; GC 18) Ultimately, Respondent decided that renovating Chelmont to resolve its ergonomic and ADA problems – as an alternative to closing it and transferring the CSRs elsewhere – would be too expensive. (Tr. 507-09; 519)

Respondent, by its exceptions, claims that the ALJ misinterpreted the Board's

designation of “indirect labor costs” by finding that the cost of remedying long-standing ergonomic issues at Chelmont fit within that phrase. But, as the Board has made clear, the “labor costs” designation is not limited to an employer’s explicit comparison of respective employees’ wages, but also includes *total* labor costs. See *Westinghouse Electric*, 313 NLRB 452, 453, n.5 (1993), *enfd. sub nom. Salaried Employees Assn. v. NLRB*, 46 F.3d 1126 (4th Cir. 1995), *cert. denied* 514 U.S. 1037 (1995). Indeed, the cost of remedying Chelmont’s ergonomic failings falls firmly within the category of “labor costs” that would have been especially amenable to discussion with the Union. See *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 213-14 (1964) (decisions that turn on labor costs are “peculiarly suitable for resolution within the collective-bargaining framework. . . .”) Thus, Respondent’s Exceptions regarding the Chelmont closing, and its effects, are without merit and should be rejected.

V. CONCLUSION

Based upon the foregoing and the record as a whole, ALJ McCarrick properly found that Respondent considered direct and indirect labor costs in its decision to close the Chelmont facility and transfer its CSRs to other locations, and thus that the closure violated §§ 8(a)(1) and (5) of the Act, as set forth in the ALJ’s Supplemental Decision. Respondent’s Exceptions are without merit and should be rejected by the Board. The Board should affirm

and adopt ALJ McCarrick's findings of fact, conclusions of law, and recommended order, and order such other relief as it deems just and proper to remedy Respondent's violation of the Act.

Dated at Phoenix, Arizona, this 13th day of April 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of ACTING GENERAL COUNSEL'S ANSWERING BRIEF in EL PASO ELECTRIC COMPANY, Cases 28-CA-20136 et al., was served by E-Gov, E-Filing, E-Mail and Overnight Delivery via United Parcel Service, on this 13th day of April 2011, on the following:

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