No. 10-60771

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

EL PASO ELECTRIC COMPANY

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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STATEMENT REGARDING ORAL ARGUMENT

Since this case involves the application of well-settled principles to straightforward facts, the Board does not believe that oral argument would be of material assistance to the Court. If the Court nonetheless finds that oral argument is necessary, the Board requests that it be permitted to participate and suggests that 15 minutes per side would be sufficient.

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the petition of El Paso Electric Company ("EPE") to review, and the cross-application of the National Labor Relations Board ("the Board") to enforce, a Decision and Order issued by the Board against EPE. The Board had jurisdiction over the unfair labor practice proceeding under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151,

160(a)) ("the Act"), which authorizes the Board to prevent unfair labor practices affecting commerce. The Board's Decision and Order was issued on August 10, 2010 and is reported at 355 NLRB No. 71 (2010). (D&O 1-41.)[1] It is a final order with respect to all parties under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)). This Court has jurisdiction because the unfair labor practices occurred in El Paso, Texas. EPE's petition for review, filed on August 18, 2010, and the Board's cross-application for enforcement, filed on November 11, 2010, were timely; the Act places no limits on such filings.

STATEMENT OF THE ISSUES PRESENTED

1. Whether the Board is entitled to summary enforcement of numerous unfair labor practice findings because EPE does not contest them in its opening brief.

2. Whether substantial evidence supports the Board's findings that EPE violated Section 8(a)(5) and (1) of the Act when it took the following unlawful unilateral actions without bargaining:

a. More strictly enforcing its tardiness and absenteeism policy for Customer Service Representatives ("CSRs") at the Call Center, issuing performance

[1] The Board's brief cites directly to the Board's Decision and Order ("D&O"). "Tr." references are to the transcript of hearing; "GCX" and "RX" are to the exhibits introduced at that hearing by the Board's General Counsel and EPE, respectively. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

improvement plans to six CSRs pursuant to that more strictly enforced policy, and threatening another CSR with similar discipline;

b. Unilaterally implementing a policy restricting CSRs from working on coworkers' accounts, and imposing discipline on three CSRs pursuant to that new policy;

c. Changing its policy when meter readers could take their break and lunch periods and discharging employee Mario Navarro in part due to his violation of this new policy;

d. Changing the procedures for its free-boot policy for personnel working in Las Cruces, New Mexico.

3. Whether substantial evidence supports the Board's finding that EPE refused to engage in good-faith bargaining with the Union over the effects of EPE's decision to close its Chelmont customer service center.

STATEMENT OF THE CASE

This case involves EPE's numerous unfair labor practices in the aftermath of union victories in three Board elections covering different work groups. At the time of the elections, EPE and the United Brotherhood of Electrical Workers, Local Union 96 ("the Union") had a longstanding bargaining relationship involving linemen and similar employees who work at the El Paso power plant and various substations, a group referred to as the "historical unit." In the elections, the

meter readers/collectors department, the facilities department, and the CSRs, voted for the Union's representation and inclusion in the historical unit. (D&O 10; GCX 37-49.)

This case has a long procedural history. Based upon the Union's unfair labor practice charges, the Board's General Counsel issued multiple complaints. The instant case involves a consolidated complaint that includes the majority of the allegations. In one of the other complaints, tried separately, the Board found, and this Court agreed, that EPE violated the Act by disciplining employee Sira Fanely—an employee involved here—for her union and protected activities and made several unilateral changes to employment conditions without bargaining the day after the customer service representatives selected the Union as their representative.[2] *El Paso Electric Company*, 350 NLRB 151, 157 (2007), *enforced*, 272 F. App'x 381, 382 (5th Cir. 2008).

Most of the allegations in the instant case were resolved in two Board informal settlement agreements in August 2005 and February 2006. (GCX 2, 3.) However, upon the Union's filing of additional unfair labor practice charges, the

[2] Prior to the hearing in that case, the Board obtained a temporary injunction pursuant to Section 10(j) of the Act (29 U.S.C. § 160(j)) giving relief for certain allegations in the complaint (including, among other things, requiring bargaining with the Union and restoring earlier work rules regarding tardiness and lunch breaks) until it was resolved by the Board. (Attachment to GCX (1)(l), *Overstreet v. El Paso Electric Co.*, No. 3:05-CV-61 (W.D. Tex., El Paso Div. 2005).)

Regional Director set aside the settlement agreement and issued the underlying consolidated complaint. Following a hearing, the Board's administrative law judge issued a decision sustaining most of the unfair labor practices alleged. The Board adopted most of the judge's unfair labor practice findings, but severed and remanded for further fact-finding an allegation that EPE unlawfully refused to bargain about closing its Chelmont facility. This appeal followed.

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. The Parties' Longstanding Bargaining Relationship Covering the Historical Unit; EPE's Maintenance of an Overbroad Rule against Union Activities on Company Time

EPE generates and distributes electricity throughout Texas and New Mexico. Since 1944, the Union represented about 300 of EPE's linemen and other employees who work at the El Paso power plant and various substations, a group referred to as the "historical unit." In addition, EPE operates a number of other facilities, three in El Paso, several in Las Cruces, and small facilities in Fabens and Van Horn, Texas, and Anthony and Hatch, New Mexico. EPE's workforce comprises approximately 1000 employees. (D&O 10,11; Tr. 108, 112.)

The most recent agreement covering the historical unit ran from June 16, 2003 to June 15, 2006. The agreement contained a no-solicitation provision that

banned all "Union activities on Company time, unless specifically authorized in advance by the Immediate Supervisor." (D&O 11-12; Tr. 140-41, GCX 74 p. 8.)

B. Following the Union's Two Election Victories in October 2003, EPE Refuses to Meet at Reasonable Times, Refuses to Bargain on a Single-Unit Basis, Insists on Separate Agreements for the Two Newly Certified Additions to the Historical Unit, and Obstructs Progress In Negotiation

In October 2003, the Union won elections in the meter reader/collector department and the facilities department. In addition to selecting the Union as their representative, the employees chose to be included in the historical unit. After the Board certified the Union as the collective bargaining representative of the meter readers/collectors and the facilities groups, the Union requested bargaining on November 4, 2003. (D&O 10; Tr. 43, GCX 38.)

In response to the Union's request, EPE finally agreed to meet on January 16, 2004. The Union's negotiators were all EPE employees, including union business agent, Felipe Salazar, who served as the Union's chief spokesman. EPE's team was headed by Director of Supply Chain Management Paul Garcia and included in-house Assistant General Counsel, Sylvia Porter, both of whom did most of the talking for EPE. (D&O 10, 21; Tr. 1133, 1136-37, GCX 29-31.)

During the first meeting on January 16, Salazar requested that the parties negotiate as they had in the past, meeting on consecutive workdays until an agreement was reached and paying the Union's employee negotiation team normal

wages for each workday missed due to negotiations. Garcia refused. (D&O 21-22; Tr. 1131-32, 1138, 1662-63.) EPE agreed only to abbreviated single-day sessions, weeks or even months apart and cancelled various scheduled meetings. EPE refused Salazar's repeated requests for more frequent meetings held on consecutive days, or for bargaining on weekends and weekday evenings because the union negotiators could not afford to miss work. Instead, EPE often proposed Monday meeting dates, which they knew posed a scheduling conflict for Salazar. Moreover, Salazar proposed adding the new units to the extant agreement, consistent with the vote to include those groups in the historical unit, and Salazar based the Union's proposals on the extant agreement. EPE, however, insisted on bargaining for three separate agreements. Ultimately, the parties met only seven times in nine months, during which time they were unable to reach agreement on a single bargaining issue. (D&O 21-22; Tr. 1139-43, 1147-56, 1158-60, 1712-15, 1720, GCX 29-31, GCX 54, RX 51 p. 1.)

C. On August 24, 2004, the Union Wins an Election Among the Customer Service Representatives; EPE's Previous Bargaining Position Hardens; and EPE Commits Numerous Unfair Labor Practices During the Next 12 Months, Bringing Negotiations to a Standstill

In the early summer 2004, the Union began an organizing effort among EPE's 66 CSRs. Thirty of them worked in an El Paso Call Center, and the rest were spread among a walk-in service in Las Cruces, New Mexico, a service in the

Chelmont section of El Paso, and four smaller walk-in centers in remote areas in Texas and New Mexico. On August 20, 2004, the CSRs voted for union representation and inclusion in the historical unit. (D&O 10-11; GCX 47.)

The very next day, Call Center Assistant Supervisor Garcia told the 10 CSRs who worked at the Chelmont facility that they could no longer take their lunch breaks in pairs, but had to take them one at a time. EPE also announced a more severe disciplinary policy for cash-register overages and shortages. When asked the reason for these new policies, Garcia replied that the CSRs had Sira Fanely, an outspoken spokeswoman for unionization, to thank for them. In the earlier proceeding noted above, the Board found that the implementation of these unilateral changes violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)). *See El Paso Electric Co.*, 350 NLRB 151, 166-67 (2007), *enforced*, 272 F. App'x 381 (5th Cir. 2008).

When the parties met on August 30, 2004, the day the Union's CSR election victory was certified, EPE continued insisting that it would not bargain for a single contract, but only for separate contracts. Like other meetings, it only lasted 10-20 minutes. On September 20, 2004 when the parties met again, Garcia insisted that EPE wanted separate contracts, and would submit separate proposals for each contract when the parties met next. Salazar demanded one contract consistent with

the election results and the Board's certification of a single bargaining unit. (D&O 22; Tr. 1163-65.)

Nine days later, as the Board and this Court found, EPE violated Section 8(a)(3) and (1) of the Act when it retaliated against CSR Sira Fanely by issuing her an unwarranted reprimand for antiunion reasons. *See* 350 NLRB at 153-54, 165-66, *enforced*, 272 F. App'x at 383-85. On December 29, 2004, EPE retaliated against Sira Fanely for a second time in three months by giving her an unwarranted negative annual evaluation, and consequently denying her a raise and bonus, in retaliation for Fanely's protected conduct as an advocate for workplace issues among the CSRs at the Chelmont facility. (D&O 15-17; Tr. 242-43, 268-76, GCX 9, GCX 27.)

Throughout the prior October and November, EPE proposed two Monday meeting dates, which Salazar refused because of his previously stated Monday conflict. On December 2, 2004, Salazar telephoned Garcia and proposed a comprehensive schedule for negotiating an agreement: the Union would meet throughout January, provided that weekday meetings began at 5:00 p.m., and proposed multiple monthly sessions on selected dates through June, if necessary. Garcia was unwilling to meet on evenings or weekends, or to consider bargaining for anything other than separate contracts. (D&O 22; Tr. 1166, GCX 55.)

In early January 2005, Salazar telephoned Garcia and said that the Union wanted to include the CSRs in bargaining; again Garcia refused. With the federal district court's issuance of a temporary injunction against EPE pursuant to Section 10(j) of the Act on June 7, 2005, *see* n.2, *supra*, and an informal settlement agreement on August 8, 2005 (which the Board subsequently set aside because of EPE's additional unfair labor practices), EPE finally agreed to meet more frequently and bargain for a single contract. (D&O 22; Tr. 20-22, GCX1(L), GCX 2.)

D. In March and April 2005, Union Representative Salazar Requests Information Necessary for the Performance of His Responsibilities; EPE Waits Months to Comply with the Information Request

In March and April 2005, Salazar twice requested that EPE's union liaison, Labor Relations Specialist Manuel Hernandez, supply him with a current contact list for the union-represented meter readers, collectors, facilities employees, and CSRs. Additionally, on April 26, Salazar asked Hernandez for information pertinent to a company investigation of employee Delma Gonzalez. (D&O 30; GCX 36.)

On May 2, Hernandez refused to comply with the request for the contact list, stating that EPE was concerned union officials might use the information for political purposes in upcoming internal union elections and that some employees might object. Salazar promptly filed an unfair labor practice charge against EPE.

Pursuant to the subsequently-revoked settlement, EPE furnished the list of bargaining unit employees on June 20. The information on the investigation—notably a summary report after the investigation had been closed—was belatedly furnished on August 2. (D&O 9 n.2, 30-31; Tr. 166-68.)

E. In March 2005, EPE Unilaterally Changes a Longstanding Policy of Permitting its El Paso Meter Readers to Skip their Breaks to Finish Work Early

Meter readers working in the El Paso area report to the dispatch facility at 7:00 a.m. They pick up their route assignments, a corresponding hand-held computer (data caps), and their truck. They drive out to where their assigned route begins, walk the route laid out on their data caps, and take reading with the data caps. The data caps transfer the read times and other information into a mainframe computer that generates a printable spreadsheet of each employee's read times and other information. (D&O 23; Tr. 727-28, 858-60, 1358.)

The employees are allotted 15-minute morning and afternoon breaks, and 30 minutes for lunch. EPE's longstanding practice permitted employees to skip their breaks entirely to finish early and use the saved time as they wished. Supervisor Greg Gonzales, who ran the operation, had no ability to monitor what employees did during break times or where they went; he did not care as long as their routes were finished. The meter readers often aggregated their breaks to take care of personal business that took them away from their assigned route. In such cases,

they would let Gonzales know that they were leaving their route to conduct personal business; Gonzales' only concern was that the employees completed their work. (D&O 23-24; Tr. 855-57, 981, 1335-37, 1344-45, 1358-59, 1391-92, 1394-95.)

Sometime in March 2005, Gonzalez convened a morning meeting before work to speak to the approximately 30 El Paso meter readers about management's concern that routes contain enough stops so it would take the average meter reader five and one-half hours to complete, a number Gonzalez admitted was difficult to compute given the number of variables. Gonzalez told the meter readers that henceforth they "had to" take their breaks as intended, in the morning and afternoon, with lunch around noon; and they had to do so because management was evaluating whether to lengthen routes.

The employees had never before been given such a directive, and EPE did not give the Union prior notice or an opportunity to bargain about this change. While Gonzalez did not use the word "required" when informing the meter readers what management expected of them with regard to breaks, "everyone" took what he said as an order, not a suggestion. The employees complied with it for a "couple of months" and then "it kind of died out." The timing of the employees' return to their earlier practice of taking breaks when they wanted coincided with

the later-revoked July 2005 settlement agreement, in which EPE agreed to rescind the changes to its break policy. (D&O 23-24; Tr. 855, 874-75, GCX 2.)

F. In the Ensuing Three Months, EPE Unilaterally Imposes Several Restrictions on Salazar's Ability to Carry Out his Union Functions, Threatens Salazar Not to Ignore the New Restrictions, and Places Salazar Under Surveillance

EPE was obligated under the parties' extant agreement to have a union representative present at any disciplinary interview. Management's established practice was to contact Salazar on his cell phone about scheduled interviews so that Salazar could arrange for a union steward's presence. Salazar's job as a laboratory technician required him to spend about 90 percent of the workday in the field, and the cell phone was the only way to contact him during such times. (D&O 25; Tr. 116, 120, 564, 1068-71.)

In the spring of 2005, Hernandez stopped this practice without notifying Salazar and instead began sending notices of impending disciplinary meetings exclusively to Salazar's email, to which Salazar did not have access while in the field. Salazar asked Hernandez to return to the established practice, but Hernandez refused, continuing this new email practice for several months. (D&O 25-26; Tr. 116, 119, 123-25, 1068-73, 1720, GCX 75.)

Salazar's union responsibilities required him to deal with other union officials, union stewards, various company representatives, and other company employees during the workday. After his field work was completed, Salazar

would return to the office he shared with other lab technicians for the remainder of the workday. There, he had long been free to use the fax machine, computers, and telephones on union business. Salazar and others used the same equipment for personal matters as well. In July 2005, Supervisor William Westfall told Salazar that he could no longer use the equipment for union business and stated that Salazar was spending too much time on such matters. Westfall did not say that Salazar's union business interfered with his work responsibilities. For months afterward, Westfall would routinely come to the lab technicians' office when Salazar was present and make notes if Salazar conducted union business on the office equipment he had forbidden Salazar to use. (D&O 18-19, 25; Tr. 564-67, 1057-59, 1065-67.)

G. In January 2006, EPE Decides to Close its Chelmont Service Center and Transfer Its CSRs to Other Facilities; It Announces the Decision as a *Fait Accompli* and Affords the Union No Opportunity to Bargain About the Decision's Effects

In January 2006, Company Vice President Kerry Lore made a decision to close the Chelmont Service Center, to open a number of pay locations in Chelmont to be staffed by an outside contractor, and to transfer the facility's CSRs elsewhere. She got quick approval from EPE's president. She admittedly sought no input from the Union in making this decision. (D&O 19, 27; Tr. 195-96, 538, 543-49.)

Early on February 1, Lore informed Rose Lowe, the supervisor of EPE's walk-in service centers, about the decision and asked Lowe to decide where each

Chelmont CSR should be transferred. She instructed Lowe to tell Labor Relations Specialist Hernandez to inform Salazar of the impending closure. (D&O 19, 27; Tr. 178-79, 195-96, 547.) At 8:30 a.m., Hernandez met with Salazar, and informed him that EPE was closing the Chelmont facility. Hernandez said that the building had to be vacated on March 1, and that the employees would be transferred to the Call Center, except for Veronica Vargas and Rosalba Vargas, whom EPE was sending to the walk-in centers in Fabens, Texas and Anthony, New Mexico, both of which required considerable commutes. (D&O 19, 29; Tr. 145-53, 1075-76, 1201, 1691.)

Salazar was shocked and noted there had been no discussion or negotiations about the closure. Hernandez responded, "Felipe, this is not up for discussion. I am just notifying you on what we are doing and that is it." (Tr. 1076.) Salazar expressed concern about the distance that Veronica and Rosalba would have to travel and asked why they could not go to the Call Center with the others, but Hernandez "just plucked [him] off." Salazar threatened to file a charge and Hernandez told him to "do whatever you have to do." (D&O 19, 28-29; Tr. 1204-05, 1076-78, 1691.)

About an hour later, Lore and Lowe met with the Chelmont CSRs. Lore announced that the Chelmont facility was closing. Rosalba Vargas asked what was going to happen to the CSRs, and Lore said they would be reassigned effective

March 1. Supervisor Lowe then announced that all the CSRs were going to the Call Center, except for Rosalba Vargas and Veronica Vargas, who were being assigned to the small and remote facilities mentioned above. Rosalba Vargas asked how she was going to get to the office in New Mexico. Other CSRs asked how they were going to pay for parking at the Call Center in downtown El Paso. Lowe told them they were responsible for this expense. Veronica Vargas asked if she was going to be paid mileage to travel to the Fabens office, as she had previously been when she provided temporary coverage there. Lowe replied that she would not. Fanely asked whether their vacations would be honored by their new managers. Lowe replied that they would be. (D&O 19, 28; Tr. 178-79, 552-53, 730-34, 779-81.)

The Call Center had markedly different employment conditions than the walk-in Chelmont facility. Call Center CSRs are monitored at all times: in order to leave their work stations, they must enter a code into their computer that explains where they are going (e.g. lunch, restroom break), tardiness is monitored by log-in times to their computers, customer interactions are randomly monitored and evaluation forms filled out. The Chelmont facility does not have the same monitoring. While parking is free in Chelmont, at the Call Center it is $2.50 per day. At the Call Center, only three people are allowed vacation at a given time; there was no such rule at Chelmont. At Chelmont, employees regularly worked

from 7:45 to 4:45, but Call Center CSRs are required to work later shifts one to two days per week. (D&O 20; Tr. 146-70, 409-10, 611-18, GCX 25, 26.)

Salazar telephoned Hernandez twice in February to discuss specific issues related to the closing. During their first conversation, Salazar informed Hernandez that a problem had arisen over the scheduled vacations for two transferring CSRs. Although the employees' vacations had already been approved, the approval had been withdrawn ostensibly because the employee's vacations would interfere with training. Hernandez agreed to look into it. Salazar asked again about seniority and whether Veronica Vargas and Rosalba Vargas could be sent to the Call Center. Hernandez replied that Salazar should check with Veronica and Rosalba. Salazar later did, and they told him that they decided to acquiesce in EPE's decision. (D&O 20, 28; Tr. 1080-82, 1201-04, 1310-11, 1314.)

Salazar tried to discuss the important issue of training at the Call Center with Hernandez. He explained that the Chelmont CSRs were concerned because they were only getting three weeks of training, compared to the three months training received by other Call Center employees. The Chelmont CSRs were afraid that they might make mistakes about procedures and rules and be disciplined for them—a concern not unwarranted given the ongoing events at the Call Center. Hernandez replied that management had decided three weeks was enough and "they just better catch on." The two spoke again during February and Salazar

repeated the employees' concerns about inadequate training. Hernandez reiterated, "they better catch on. That is it. They were just going to give them three weeks." (ER 20, 28-29; Tr. 1308-09, 1314-17.)

H. EPE Unilaterally Adopts a More Stringent Disciplinary Policy Over Tardiness and Absenteeism Issues at its Call Center; Supervisor Elizabeth Carrasco Threatens CSR Linda Montes that She and Others Might Be Disciplined Under this New Policy; Carrasco Disciplines Six CSRs Under this Policy, All Without Notice to the Union

Performance improvement plans ("PIPs") are part of a disciplinary scheme that can lead to an adverse action, up to and including termination. The PIPs placed employees on probation by giving them notice that their performance was unacceptable and, unless changed in the stated period, would result in discipline. Prior to February 2006, EPE had never issued PIPs over attendance issues at the Call Center. (D&O 26; Tr. 406-07, 1452-55.)

Since she began running the day-to-day operations at the Call Center in 2001, Supervisor Carrasco saw tardiness and absenteeism as a serious problem. Carrasco pressed the Human Resources ("HR") department for authority to place employees on PIPs for tardiness and absenteeism issues. HR did not agree that attendance matters should be addressed that way, and refused to authorize Carrasco to use them. In late 2005, she and the manager of Call Center operations, Eduardo Valdez, met with consultant Jeff Izes, who had been studying the Call Center. Izes determined that there were problems with the average number of calls the CSRs

were handling. Carrasco raised her concerns about attendance issues. Izes recommended EPE closely monitor CSRs' calls and adherence to work schedules. (D&O 26 & n.40; 380-85, 405-07, 1454, GCX 60.)

Thereafter, the HR department reversed itself and authorized Carrasco's use of PIPs to address tardiness and absenteeism. Carrasco also changed the tardiness policy in 2004, so that two minutes rather than seven minutes was considered late. (Tr. 1468, 1470-74.) On January 9, Linda Montes, a 15-year veteran Call Center CSR, received her annual evaluation from Carrasco. She warned Montes that she intended to start putting employees on performance improvement plans for tardiness and attendance problems. Carrasco explained that employees would be given a period to improve, or be disciplined or even terminated. Carrasco then told Montes, who had never heard the term "performance improvement plan" during her 15 years at the Call Center, that Montes had better "be careful" because, while she had no absences, she did have some tardiness issues. (D&O 29-30; Tr. 1468, 1473-74.)

Thereafter, between February 8 and 17, Carrasco issued PIPs to six employees. Specifically, Delma Gonzalez and Antonya Watson were placed on six-month PIPs; Lucy Flores, Pat Cruz, Stephanie Alarcon, and Mary Perryman were placed on three-month PIPs. Each PIP identified the problem the employee had—absenteeism, tardiness, or both—and ended with the same warning: "at the

end of the [specified period], I will evaluate your performance. Failure to meet or comply with . . . expectations will result in further disciplinary action up to and including termination." The Union received no advance notice of this new use of PIPs or an opportunity to bargain. (D&O 30; Tr. 408-11, 414-15, 1456, GCX 13, GCX 14, GCX 16.)

I. On February 20, 2006, Carrasco Disciplines Three CSRs for Violating a Policy—Forbidding Call Center CSRs from Working on Another CSR's Account—that Did Not Exist Before the Discipline Was Meted Out

As part of their job duties, CSRs may help customers unable to pay their bill, by granting an extension of time to pay or arranging a deferred payment plan. CSRs had the discretion to grant customers a 10-day extension after they received a first 10-day notice that their service would be shut off if past due payments were not made within that time. CSRs did not need prior authorization for granting such extensions. (Tr. 421-30.)

CSRs, however, were not permitted to "work on personal account, relatives or friends," according to a handout distributed at CSR orientation. There is no written prohibition against a CSR working on another CSR's account, either in the CSRs' manual or any other company document. No manager, other than Carrasco, testified that such a policy even existed, much less that employees at the Call Center had been apprised of it. (D&O 27; Tr. 426-30, 456, 794-96, 819, 895-96, 1483-88, RX 15.)

On or about February 20, Carrasco issued CSR Maria Davila a written warning for violating this alleged policy after Davila mentioned during a conversation with a team leader that she had voided a collection for coworker Delma Gonzalez after Gonzalez stated that she was going to make a payment. The warning advised that Davila had "voided a collection account of one of your coworkers and removed any existing remarks relating to the void." That same day, Maria Perryman and Delma Gonzalez were issued suspensions of one and two days, respectively, for having violated this same policy because, Carrasco claimed, she had only learned of their violations—Perryman had granted Gonzalez an extension, while Gonzalez had voided a collection for Perryman—that day. Each was given a document to sign; each refused to sign. (D&O 27; Tr. 435-36, 438-42, GCX 17.)

EPE had never disciplined a single other CSR for violating this policy, even though Carrasco claimed it had existed during her five and a half years at the Call Center. She admitted that the Union had been given no notice or an opportunity to bargain before announcing the policy as the grounds for disciplining the three employees. (D&O 27; Tr. 440-42.)

J. On March 13, 2006, EPE Deprives Meter Reader William Power the Presence of a Union Representative at a Scheduled Disciplinary Meeting

On February 6, 2006, Las Cruces Meter Reader William Power reported to his supervisor that he had lost a two-way radio. He was given time to look for it, and a week later, on March 13, facility manager Debra Duran told Power that there would be a disciplinary meeting at 3:00 p.m. that afternoon. The purpose of the meeting was to get Power's side of the story, which Duran admitted might have resulted in his exoneration or lessening the penalty. Power arranged for a steward to be present, but Hernandez had misinformed the steward that the meeting began at 3:15 p.m. (D&O 14; Tr. 34, 39-45, 48, 136, 911-13.)

Duran knew Power had arranged for union representation. Nevertheless, Duran began the meeting promptly at 3:00 p.m., even though the union steward had not yet arrived. After ascertaining that Power had not found the radio, Duran told Power that he was being suspended for two days. Power stated that he had been preoccupied by family matters, did not want to be known as accident prone, and would accept the penalty without protest. She handed Power a typewritten completed disciplinary form. Power signed. The meeting lasted 10 minutes. (D&O 14; Tr. 50-58, 911-16.)

When Union Steward David Stout arrived, Power and Duran were leaving the meeting room. Stout learned that Power had been suspended for two days, and

demanded that the meeting be reconvened. Duran ultimately agreed, although she told Stout that the decision had already been made. Stout argued that the discipline was excessive because Power was an exemplary employee and that the radio might have been stolen and might yet be found. Duran agreed Power was an exemplary employee but insisted that it was too late, the suspension had been issued, and she was not going to change her mind. Stout tried to get Duran to agree to reconsider if the radio turned out to be stolen—which later proved to be the case—but Duran refused, stating "what's done is done." (D&O 14; Tr. 58-61, 917-18, 949-52, 956-57, 961.)

K. On May 26, 2006, EPE Discharges Employee Mario Navarro in Part Because He Violated EPE's Unilaterally-Imposed Policy Prohibiting Meter Readers From Skipping Breaks and Finishing Work Early

On the evening of May 15, 2006, Navarro's supervisor, Greg Gonzales, investigated an unauthorized reconnect of service. Upon investigation, Gonzales learned that employee Mario Navarro was moving to a home where service had been disconnected at the previous occupant's request; that, on May 12, Navarro placed an order with customer service for the reconnection of service to the house; and that EPE issued an order to restart service on May 15. Company printouts showed that, on May 15, Navarro skipped his breaks, completed his route by 12:30 p.m., and performed the reconnect later that day. (D&O 15, 34; Tr. 1333-35, 1341-44, 1372-74, RX 31-33.)

Gonzales examined service technician Shirley Acosta's report which stated that, when she arrived at the house shortly after 5:00 p.m., she encountered a man in a company uniform with the name Mario embossed on it; that Mario asked if she was there to restart electric service and, when she answered "yes," Mario said he had already done it because he had a technician on his roof working on the air conditioning unit. Acosta checked the meter, which had not been resealed, she disconnected the meter from the socket connected to the service line, verified that the meter had not been tampered with, replaced the meter, and sealed it with an appropriately-colored grey seal. Acosta asked Mario if the house was his, and he responded that it was. (D&O 14-15, 34; RX 34.)

Upon Gonzales' recommendation, Navarro was discharged for leaving his meter-reading route on personal business, even though he had done so after completing his route and skipping his breaks, and for cutting into the line and reconnecting service on his own account. Gonzales admitted that meter readers were allowed to aggregate their breaks and he had allowed them to take their trucks out of their work areas during work hours and he made no attempt to find out where they actually went. (D&O 14-15, 34; Tr. 1333-47, 1395.)

L. On August 21, 2006, EPE Removes a Union Bulletin Board from a Facility in Las Cruces without Bargaining with the Union

The extant agreement covering the historical unit provided that EPE would provide space for posting union bulletin boards in the departments where the

Union represented employees. After the Union was certified as the representative of meter readers, collectors, and facilities service employees, the practice was extended to those newly-organized employees, including the workplace in Las Cruces, New Mexico. On August 21, 2006, Las Cruces Supervisor Duran took the Las Cruces union bulletin board down and placed it on the union steward's chair at the facility. She later told the same union steward that no bulletin board was to be posted at the Solano facility. EPE gave the Union no notice or opportunity to bargain about this unilateral change in policy. (D&O 2, 32; Tr. 1495-1502, GCX 62.)

M. In August 2006, Without Bargaining with the Union, EPE Changes an Established Practice of Providing Las Cruces Meter Readers with a Twice-Yearly Boot Allowance

Prior to August 2006, the meter readers and collectors working in Las Cruces received a boot allowance twice a year, usually in January and July. According to established practice, the employees would receive an email from management that it was time for them to turn in their boot receipts; the employees would then purchase new boots and turn in the receipts for reimbursement. On August 21, 2006, Las Cruces Supervisor Duran posted the following message on the bulletin board she used for communicating with the meter reader/collector group: "I will only authorize boot replacements after I see they are needed. Come see me. DD." (D&O 33; Tr. 1492-95, 1728, 1742, 1746, GCX 61.)

II. THE BOARD'S CONCLUSIONS AND ORDER

Based on the foregoing,[3] the Board, in agreement with the administrative law judge, found that EPE violated the Act in numerous ways. Specfically, EPE violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by:

> (a) Refusing to meet at reasonable times and places, and bargain in good faith, with the Union as the representative of a unit comprising the meter reader/collectors department, facilities department, and CSRs who had voted to join the historical unit in the elections held in October 2003 and August 2004;
>
> (b) Refusing to bargain with the Union in good faith regarding the effects of the closing of EPE's Chelmont facility;
>
> (c) Refusing to supply the Union with requested information that was necessary and relevant to the Union's performance of its duties; and
>
> (d) Unilaterally changing terms and conditions of employment of unit employees without notice to, or bargaining with, the Union by:
>
> - Changing its policy concerning when meter readers may take break and lunchtimes and discharging meter reader Mario Navarro in part pursuant to that changed policy;
>
> - More strictly enforcing its tardiness and absenteeism policy and issuing performance improvement plans to six CSRs pursuant to that changed policy;
>
> - Changing employees' access to telecommunications resources to conduct union business;

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[3] The Board dismissed the judge's finding that EPE violated the Act by denying employee William Powell's request for emergency leave to speak with a Board agent. (D&O 1-2.) The Board reversed, severed, and remanded for further fact-finding, analysis, and reconsideration the judge's finding that EPE's decision to close its Chelmont facility and transfer the employees elsewhere constituted a mandatory subject for bargaining. (D&O 3-4.)

- Changing the manner of informing the Union of employee disciplinary meetings from cell phone to email;

- Changing its policy concerning CSRs' permission to work on coworkers' accounts and issuing a written warning to CSR Maria Davilia and suspending CSRs Delma Gonzalez and Mary Perryman to enforce that changed policy;

- Changing its boot allowance policy for its meter readers and collectors;

- 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&O 1, 2, 4-6, 12-17,18-31, 33-34.)

The Board, in agreement with its administrative law judge, further found that EPE violated Section 8(a)(1) and (3) of the Act by issuing an unfavorable performance appraisals, denying raises and bonuses, or otherwise discriminating against CSR Sira Fanely for engaging in protected concerted activity. (D&O 15-17, 18.)

The Board, in agreement with its administrative law judge, further found that EPE violated Section 8(a)(1) of the Act by:

(a) denying the right of employee William Power to be represented by the Union in investigatory meetings that could reasonably have lead to his discipline;

(b) maintaining a rule prohibiting employees from engaging in union activities on company time;

(c) threatening employee Linda Montes that she and her coworkers faced more onerous working conditions or discharge as a means of enforcing a unilaterally-imposed rule change dealing with absences and tardiness;

(d) threatening union president/business agent and company employee Felipe Salazar with discipline for using company telecommunications resources for union activities;

(e) engaging in surveillance of Salazar's union activities.

(D&O 1-8, 11-13, 13-14, 18,.)

The Board's Order requires EPE to cease and desist from the unfair labor practices found, and from, "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." Affirmatively, the Board's Order requires EPE to meet at reasonable times and places with the Union and bargain in good faith, including with respect to the effects of its decision to close its Chelmont facility, and, if requested by the Union, to 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. (D&O 4-5.) The Board's Order also requires EPE to offer Mario Navarro reinstatement, and to make Navarro, Sira Fanely, Mary Perryman, and Delma Gonzalez whole for any loss of earnings and other benefits incurred as a result of the unfair labor practices committed against them; and to remove from its files any reference to the unlawful acts perpetrated against Navarro, Fanely, Gonzalez, Perryman, Maria Davila, Antonya Watson, Lucy Flores, Pat Cruz, and

Stephanie Alarcon, as well as the July 2005 midyear appraisal of Felipe Salazar; and to post an appropriate notice in both English and Spanish at its facilities in Texas and New Mexico. (D&O 4-8.)

SUMMARY OF ARGUMENT

1. Applying settled principles, the Board is entitled to summary enforcement of its uncontested findings of numerous statutory violations and of the corresponding portions of its remedial order. *See Sara Lee Bakery Group, Inc. v. NLRB*, 514 F.3d 422, 429 (5th Cir. 2008).

2. After the Union won the right to represent CSRs and meter readers/collectors, EPE embarked on a series of unilateral changes affecting those work groups' terms of employment. These changes, undisputedly implemented without notifying or bargaining with the Union, wrought material and substantial alterations to the employees' conditions of employment. As such, EPE's failure to bargain with the Union violated Section 8(a)(5) and (1) of the Act. *See NLRB v. Katz*, 369 U.S. 736, 743 (1962).

a. First, among the CSRs, Supervisor Carrasco implemented a new system of discipline for absences and tardiness that began with a probationary period and promised disciplinary measures up to, and including, termination for failure to improve. Carrasco also unilaterally expanded the list of prohibited practices and disciplined employees for working on coworkers' accounts. There is no record

support for EPE's claim that these changes merely implemented existing practices. To the contrary, the employees' testimony, and even the testimony of EPE manager Valdez, amply supports the finding that these changes were an abrupt departure from past practice and materially affected the employees' conditions of employment.

b. EPE implemented unilateral changes to the meter readers' break and lunch time policy. It is undisputed that, until March 2005, employees were able to take their breaks in any combination they wished. Many of them combined their breaks and lunch period and took them together at the end of the day when the heat of the day was the worst. Others preferred to take their breaks at the start of their route. In March 2005, Supervisor Gonzales announced that employees were to take their breaks in order, one in the morning, one in the afternoon, with lunch in the middle of the shift. The judge expressly credited employee Camacho's testimony that Gonzales made this announcement to the employees and they followed his instructions for a few months, essentially until the Union reached the later-revoked settlement agreement with EPE.

Following the implementation of the new break policy, EPE discharged Mario Navarro for aggragating his breaks, leaving his route, and making an unauthorized connection of electrical power at his new home. Navarro had put in a ticket for reconnecting service and told the EPE employee who came to connect

service that he had done it earlier because he had a technician working on his roof. The consistent, credited testimony is that Navarro was discharged in part for combining his breaks and leaving his route, a practice no longer allowed under the unilaterally changed break policy. Where, as here, an employee's discharge results from an unlawful unilateral change, the Board has found the adverse action violates Section 8(a)(5) of the Act.

c. EPE altered the boot allowance policy for its meter readers, which had previously provided for a pro forma approval of new boots twice yearly. Supervisor Duran unilaterally changed the policy for meter readers in El Paso by requiring that they come to her to show her their boots before buying a new pair. This change in the allowance policy was a material and substantial change in an existing benefit, and EPE's failure to bargain about it violated Section 8(a)(5) and (1) of the Act.

3. Following the closure of the Chelmont facility, EPE steadfastly refused to bargain with the Union over the effects of a decision to cease operations. This requirement entails entering into discussions with an open mind and a sincere intention to reach an agreement, as well as an obligation to conduct negotiations in a meaningful manner and at a meaningful time. *See First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 681-82 (1981); *NLRB v. Seaport Printing & Ad Specialties, Inc*., 589 F.3d 812, 815 (5th Cir. 2009). Instead, an hour before EPE announced to

its Chelmont CSRs that the facility was closing and they were being assigned elsewhere, EPE's union liaison Hernandez announced to Union representative Salazar EPE's plans. In the following weeks, Hernandez refused to negotiate with Salazar about training or other issues. Instead, he adopted a take-it-or-leave-it attitude and resolved only those issues that EPE decided it was willing to consider. EPE's approach does not constitute bargaining and its claim that the exchanges between Salazar and Hernandez constitute bargaining is simply unsupported by the record evidence. Accordingly, EPE's failure to negotiate with the Union over the effects of its decision to close the Chelmont facility violated Section 8(a)(5).

ARGUMENT

I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF NUMEROUS UNFAIR LABOR PRACTICE FINDINGS NOT CONTESTED BEFORE THE COURT

This Court has made clear that where an employer does not challenge in its opening brief the Board's findings regarding a violation of the Act, those unchallenged issues are waived on appeal, and the Board is entitled to summary enforcement of the portions of its order based on these unchallenged findings. *See Sara Lee Bakery Group, Inc. v. NLRB*, 514 F.3d 422, 429 (5th Cir. 2008); *California Gas Transport, Inc. v. NLRB*, 507 F.3d 847, 853 n.3 (5th Cir. 2007); *see generally* Fed. R. App. P. 28(a)(9)(A) (A petitioner's brief must contain "the [petitioner's] contentions and the reasons for them, with citations to the authorities and parts of the record on which the [petitioner] relies.").

In its opening brief, EPE has failed to challenge most of the Board's findings. Specifically, EPE concedes that it acted unlawfully and undermined the bargaining process and the union's ability to function by refusing to meet at reasonable times in contract negotiations (D&O 21-23); by unilaterally preventing union business agent Salazar from using office communications equipment for union business, threatening Salazar with reprisals if he did and monitoring his office activities (D&O 12-13, 26); by unilaterally switching to an ineffective means of providing Salazar with notice of impending disciplinary meetings (D&O 25-26); by delaying

for months compliance with Salazar's request for information necessary for carrying out his union functions (D&O 30-31); by maintaining an overbroad rule preventing all union activities "on company time" without prior approval of a company supervisor (D&O 11-12); and by unilaterally removing a union bulletin board from a remote facility to impede communications with unit members at that facility (D&O 2-3). EPE also does not dispute that it acted unlawfully by depriving an employee of his right to have a union representative present at a disciplinary meeting (D&O 2 n.5, 14) and by retaliating against CSR Fanely for her protected advocacy on behalf of employee interests (D&O 15-18).

Accordingly, the Board is entitled to summary enforcement of those portions of its remedial order. Moreover, it is well settled that EPE's "uncontested violations 'do not disappear by not being mentioned in a brief. They remain, lending their aroma to the context in which the [remaining] issues are considered.'" *United States Marine Corp. v. NLRB*, 944 F.2d 1305, 1314-15 (7th Cir. 1991) (quoting *NLRB v. Clark Manor Nursing Home Corp.*, 671 F.2d 657, 660 (1st Cir. 1982)). Here, the numerous uncontested violations provide a telling backdrop from which to assess EPE's remaining violations.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT EPE VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY UNILATERALLY IMPLEMENTING CHANGES TO WORK RULES AND BENEFITS WITHOUT BARGAINING AND DISCIPLINING EMPLOYEES BASED ON THOSE UNLAWFUL RULES

Following the expansion of the historical unit and during the period when EPE was, now undisputedly, refusing to bargain with the Union, it implemented a series of unilateral changes to the employment terms of two of the newly-represented groups, CSRs and meter readers/collectors. These changes significantly and materially changed the employees' work conditions, and EPE's failure to notify or bargain with the Union over these changes constituted a clear breach of its statutory duty.

A. General Principles and Standard of Review

An employer violates its bargaining obligation under Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) if it changes employees' terms and conditions of employment without bargaining with the employees' established bargaining representative.[4] *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991) (citing *NLRB v. Katz*, 369 U.S. 736, 743 (1962)). *Accord Strand Theatre of*

[4] An employer who violates Section 8(a)(5) also commits a "derivative" violation of Section 8(a)(1), which makes it unlawful for an employer "to interfere with, restrain, or coerce employees in the exercise" of their rights under the Act. 29 U.S.C. § 158(a)(1). *Sara Lee Bakery, Inc.*, 514 F.3d 422, 426 n.3 (5th Cir. 2008) (citing *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983)).

Shreveport Corp. v. NLRB, 493 F.3d 515, 520-21 (5th Cir. 2007). As applicable here, an employer violates its bargaining obligation when it unilaterally implements new work rules and subjects employees to discipline pursuant to those new rules;[5] alters an existing employee benefit without first bargaining with the union;[6] or changes from lax enforcement of a policy to more stringent enforcement.[7] An employer's refusal to bargain over such changes "is a circumvention of the duty to negotiate which frustrates the objectives of § 8(a)(5) much as does a flat refusal." *Katz*, 369 U.S. at 743. *Accord A.H. Belo Corp. (WFAA-TV) v. NLRB*, 411 F.2d 959, 971 (5th Cir. 1969).

The threshold and often determinative question in unilateral change cases is whether the change represents a "significant, material, and substantial" alteration of the status quo sufficient to qualify as a mandatory bargaining subject. *See Murphy Diesel Co.*, 184 NLRB 757, 762-63 (1970), *enforced*, 454 F.2d 303 (7th Cir. 1971). This question is a mixed question of fact and judgment that implicates the Board's expertise. This Court reviews "the NLRB's legal conclusions *de novo;*

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[5] *Murphy Diesel Co.*, 184 NLRB 757, 762-63 (1970), *enforced*, 454 F.2d 303 (7th Cir. 1971).

[6] *Appalachian Power Co.*, 250 NLRB 228, 229-30 (1980), *enforced mem.* 660 F.2d 488 (4th Cir. 1981).

[7] *Scepter, Inc. v. NLRB*, 280 F.3d 1053, 1055-57 (D.C. Cir. 2002); *Hyatt v. NLRB*, 939 F.2d 361, 373-74 (6th Cir. 1991).

however if the NLRB gives a 'reasonably defensible' construction of a statute, [the Court] will affirm that decision." *Sara Lee Bakery, Inc.*, 514 F.3d 422, 428 (5th Cir. 2008) (citing *Asarco, Inc. v. NLRB*, 86 F.3d 1401, 1406 (5th Cir. 1996)). Furthermore, this Court has long recognized that questions of credibility are left to the trier of fact. The Court "do[es] not make credibility determinations or reweigh the evidence." *NLRB v. Allied Aviation Fueling of Dallas LP*, 490 F.3d 374, 378 (5th Cir. 2007). The resolution of credibility questions is not to be disturbed on review unless those credibility determinations are shown to be "'inherently unreasonable or self-contradictory.'" *Central Freight Lines, Inc. v. NLRB*, 666 F.2d 238, 239 (5th Cir. 1981) (quoting *NLRB v. Proler Corp.*, 635 F.2d 351, 355 (5th Cir. 1981)).

The Board's factual findings are subject to review under a substantial evidence standard under Section 10(e) of the Act, 29 U.S.C. § 160(e). As this Court has repeatedly observed, "[t]he Supreme Court has defined substantial evidence as 'more than a scintilla. It means such evidence as a reasonable mind would accept to support a conclusion.'" *Sara Lee Bakery, Inc.*, 514 F.3d at 428 (attributions and internal quotation marks omitted).

B. EPE Unlawfully Implemented a More Onerous Disciplinary Procedure for CSRs at the Call Center, Placing Six CSRs on PIPs Without Affording the Union an Opportunity to Bargain about the New Disciplinary Procedure

The Board has long held that an employer that unilaterally revises its policy governing a traditional ground for discharge such as tardiness and absenteeism, and the methods by which it enforces the policy, violates Section 8(a)(5) and (1) of the Act. *See Murphy Diesel Company*, 184 NLRB 757, 762-63 (1970) (more stringent enforcement of rules involving tardiness and absenteeism unlawful), *enforced*, 454 F.2d 303, 307 (7th Cir. 1971). Here, EPE's issuance of PIPs for tardiness and absenteeism was a sharp departure from its prior policy. Supervisor Carrasco told CSR Linda Montes that she planned to more strictly monitor CSRs and document their absences and tardiness, and she warned Montes to be careful. Thereafter, Carrasco issued PIPs to six CSRs.

The record is replete with evidence that the Call Center had not used PIPs to address tardiness or absenteeism among its employees prior to February 2006 when Carrasco dramatically changed the policy. Carrasco admitted that she had asked for the authority to use PIPs to address what she perceived as tardiness and absenteeism problems since 2002, but the HR department rebuffed her entreaties for several years. The Call Center's manager, Eduardo Valdez, testified that no PIP had been issued at the Center since he began in 2002, until Carrasco issued them in 2006. Indeed, CSR Montes had worked at the Call Center for 15 years and

was unfamiliar with the term "performance improvement plan." Thus, substantial evidence supports the Board's finding that EPE's institution of PIPs to punish tardiness and absenteeism was a new policy over which EPE should have bargained. Moreover, EPE's issuance of PIPs against six CSRs was similarly unlawful, given that EPE failed to bargain for them.

The face of the PIP documents made it clear beyond purview that they constituted disciplinary action that affected employees' working conditions, and were therefore subject to bargaining. Each PIP identified the employee's particular problem—absenteeism, tardiness, or both—and ended with the same warning: "at the end of the [specified period], I will evaluate your performance. Failure to meet or comply with . . . expectations will result in further disciplinary action up to and including termination." (ER 30; GCX 13, GCX 14, Tr. 405-18, 1454-56.) As such, EPE's audacious claim (Br. 36) that the PIPs were merely "a reminder of these obligations [of punctuality and attendance] and were not discipline" is completely unfounded. It is difficult to comprehend how placing employees on probation for several months, with the looming threat of discipline including termination, does not constitute disciplinary action. Likewise, because the PIP expressly states that failure to comply with the stated expectations "will result in further disciplinary action," EPE's assertion (Br. 36) that the PIPs' implementation

was not bargainable because it did not "affect CSR compensation or result in a change in working conditions" strains credulity.

There is no record support for EPE's claim (Br. 36-37) that the PIPs were not a change but were consistent with "prior pronouncements." EPE failed to produce a single document demonstrating either that a PIP, or any form of meaningful discipline, had been imposed on a CSR who was excessively absent or late before Carassco's action.

EPE's reliance on Rudy Romero's discipline is similarly misplaced. Romero, a Team Leader—not a CSR—in the Call Center, was issued a "90 Day Work Development Plan" after several meetings and a "fact finding inquiry by outside counsel." (GCX 15.) EPE counseled him, among other things, about his failure to take escalated calls, his unwillingness to answer CSRs' questions, and his unresponsiveness to the CSRs' needs. There is simply no comparison: the discipline was not a PIP; Romero was not a CSR; the offenses are unrelated.

Next, EPE's claim (Br. 35-36) that this was merely a reinforcement of its existing attendance policies finds no support in *The Trading Post, Inc.*, 224 NLRB 980, 983 (1976). There, the Board found that the employer did not implement new rules or revise standards on productivity, and, importantly, in sharp contrast to this case, no new penalties were imposed in that case. Here, the imposition of a new, written method of discipline constituted "a significant, substantial and meaningful"

change in working conditions and therefore a mandatory subject of bargaining. *See NLRB v. Amoco Chemicals Corp.*, 529 F.2d 427, 431 (5th Cir. 1976) ("Amoco's institution of more severe disciplinary procedures required prior notification and consultation with the newly elected Union."). Since EPE admittedly failed to bargain with the Union, the Board reasonably concluded that EPE's unilateral implementation of this new system of discipline violated Section 8(a)(5) and (1) of the Act. *See Livingston Pipe & Tube Company v. NLRB*, 987 F.2d 422, 428-29 (7th Cir. 1993) (the employer's discharge or suspension of three employees for tardiness and absenteeism "represented a sharp break with past practices" and "thus represented the unilateral implementation of a new term or condition of employment in violation of Section 8(a)(5) of the Act").[8]

[8] It is unclear if EPE is challenging the Board's well-supported finding that Carrasco violated Section 8(a)(1) of the Act by threatening Call Center employee Linda Montes with the use of PIPs to punish Call Center employees who failed to adhere to the standards for schedule adherence. To the extent EPE does not challenge this violation, this Court should summarily enforce the Board's Order as to this violation. See pp. 33-34, *supra*. Montes credibly testified that Carrasco told her "we were going to be held accountable, we were going to be put on probation, and if that meant to terminate [CSRs], that's what's going to happen." Threatening to enforce a unilaterally-imposed, stricter scheme of discipline scheme, such as occurred here, plainly violates Section 8(a)(1) of the Act.

C. EPE Unilaterally Imposed a Policy Restricting CSRs from Working on Coworkers' Accounts and Unlawfully Imposed Discipline on Three CSRs Pursuant to that Policy, Without Notifying or Bargaining with the Union

Substantial evidence supports the Board's finding that EPE did not have a written or verbal policy prohibiting CSRs from working on coworkers' accounts. Yet, despite the lack of such a policy, Supervisor Carrasco issued suspensions to two CSRs and a warning to a third alleging that the employees had violated "Company and departmental policies" by doing so. This change in the employees' conditions of employment warranted notice and bargaining with the Union, and EPE violated the Act by failing to do either.

It is undisputed (Br. 17) that the CSRs had discretion to work out payment arrangements with customers. *See* page 20, *supra*. Notwithstanding this discretion, the CSRs were required to observe certain conflict-of-interest rules. EPE had a written policy that appeared in a list supplied to employees during orientation that stated: "Do not work on personal account, relatives or friends." The CSRs testified that they had received and understood this policy.

There is not a scintilla of evidence that EPE had a written policy prohibiting employees from working on "coworkers' accounts." Indeed, Carrasco testified, "It's not written down per se." (Tr. 434.) Carrasco then admitted that, before her action, not a single CSR had been disciplined for violating the policy she claimed existed for the 5 ½ years she had worked at the Call Center. (Tr. 440-42.)

Carrasco further limited the "policy" by stating that it would not prevent a CSR from granting an extension to a coworker who was a lineman or a meter reader, cabining the prohibition only to a CSR working on another CSR's account. (Tr. 429-30.)

Moreover, the judge expressly discredited (D&O 27) Carrasco's testimony that she and trainer Pat Rivera explained the prohibition on servicing coworkers' accounts verbally to CSRs during orientation. EPE failed to produce Rivera, or any other Call Center manager or team leader, as a supporting witness. Virtually all of the CSRs testified that, although they could not work on personal accounts or those of relatives or friends, they were not prohibited from working on accounts of coworkers.[9] In fact, many stated that they had done so. (Tr. 794-96, 819, 895-96, 1483-88.) Although EPE placed into evidence prior discipline of CSRs for working on their own accounts, or those of a son or girlfriend, it offered no documentary evidence that a CSR was ever disciplined for working on a coworker's account prior to Carrasco's February 20, 2006 adverse action against the three CSRs. In the face of this overwhelming evidence that no such policy existed, the Board reasonably found that EPE's unilateral expansion of the list of

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[9] EPE mischaracterizes (Br. 38) Fanely's testimony as stating that she was told not to work on coworkers' accounts. Fanely testified (Tr. 716-18) that she had been trained when she started many years earlier as a cashier (not a CSR) not to work on anyone's account.

prohibited policies, and the issuance of suspensions and a warning based on the changed policy, constituted a material, significant, and substantial change to employees conditions of employment and therefore, EPE violated the Act by failing to notify and bargain with the Union. Accordingly, EPE's imposition of discipline on the CSRs based on the new prohibition was also unlawful.

EPE's argument (Br. 38) attacks the judge's finding that Carrasco's testimony was not credible. However, as discussed above, credibility determinations are given weight by this Court, especially where as here, the judge explained his finding (D&O 27). *See Dynasteel Corp. v. NLRB*, 476 F.3d 253, 257 (5th Cir. 2007).

EPE's claim (Br. 38) that Davila "felt obligated" to speak with her Team Leader because she and others "knew" that accessing coworkers' accounts was wrong is rank speculation. To the contrary, Carrasco testified that EPE inadvertently discovered Davila's work for another CSR during a discussion with her team leader, who then raised it to Carrasco. There is no evidence about the context of the discussion in which the information arose. Moreover, all three employees refused to sign the disciplinary document, belying any claim of knowingly wrong conduct.

EPE's twin argument (Br. 39) that the employees' conduct was "unequivocally wrong" regardless of whether EPE unilaterally changed its policy

is nonsensical. In the absence of a policy prohibiting the employees from working on other CSRs' accounts, nothing is wrong with them doing so. In fact, the evidence demonstrates that prior to Carrasco's implementation of discipline for such conduct, the CSRs had worked on each other's accounts without any repercussions. Accordingly, *Anheuser-Busch, Inc*., 342 NLRB 560, 561 (2004), cited by EPE, has no application here. In that case, the Board found no nexus between the unilateral change (installation of cameras) and the reason for the discharge (employee's misconduct, including smoking marijuana on the job), and the employer was therefore privileged to discharge the employee notwithstanding the unlawful unilateral conduct. In stark contrast here, the employees' conduct presents no independent basis for discipline beyond EPE's unilaterally-imposed policy.[10]

[10] Finally, the judge properly rejected EPE's implied argument that the coworkers were friends (Br. 19), and, therefore, the discipline was consistent with the existing rule. To the contrary, the judge found the claim to be "a belated effort to justify the discipline on grounds not stated in the disciplinary letters." (D&O 27.) Indeed, this attempted justification simply proves what EPE seeks to deny, that the existing policy did not prohibit CSRs from working on other CSR's accounts.

D. EPE Changed its Policy Regarding Break and Lunch Periods for the Meter Readers Without Notifying or Bargaining with the Union and Thereafter Discharged Mario Navarro in Part For Violating This New Policy

1. EPE Unlawfully Eliminated Meter Readers' Freedom To Take their Breaks When They Chose

The Board reasonably found, based on the credited and corroborated testimony of meter reader Cesar Camacho, that, in March 2005, EPE effected a significant change in its policy concerning when and how the meter readers could take their breaks. Because EPE never gave notice or an opportunity to bargain to the Union about the change, its actions violated Section 8(a)(5) and (1) of the Act.

It is undisputed (Br. 12) that, until March 2005, meter readers and collectors were given two 15-minute breaks and a 30-minute lunch hour that they could use whenever they wanted. Some employees consolidated their breaks and took them at the end of their route; others took them at the beginning of the route or broke them up as it suited their needs. That policy changed in March 2005, when Supervisor Gonzales convened a meeting of the meter readers to discuss productivity. He announced that the meter readers had to start taking their breaks "in the morning, one in the afternoon, and then, a break for mid-day." (D&O 24; Tr. 855-56.) As Camacho's testimony made plain, this announcement represented a sharp departure from past practice concerning breaks, which was "to use them at the end of the day," to "work straight through and then go to lunch at the end."

(D&O 23-24; Tr. 855-56.) Camacho explained that this flexibility allowed meter readers to complete their work before their breaks because "at the end of the …day, it is hot." (Tr. 855-56.) Camacho was clear that management had never issued a directive like this before. According to his credited testimony, the employees followed Gonzales' orders for a few months before it "died out," and the employees returned to the old policy of combining breaks at the end of the day. (D&O 24; Tr. 875, 881, GCX 2.) This unilateral change in when employees could take lunch and breaks constitutes a material, substantial and significant change in the employees' conditions of employment. *See Pepsi-Cola Bottling Co. of Fayetteville*, 330 NLRB 900, 903 (2000) (lunch and break times constitute terms and conditions of employment subject to mandatory bargaining), *enforced in relevant part*, 24 F. App'x 104, 116 (4th Cir. 2001).

EPE's contention (Br. 32) that it did not alter the status quo is directly contradicted by the credited testimony. Specifically, EPE distorts Camacho's testimony by claiming that Camacho testified that the meter readers were not "required" to take breaks in any order and he did not alter the manner he took breaks. As discussed, however, Camacho stated that he and others changed their pattern after Gonzales' directive. Under cross-examination, in response to whether Gonzales stated that employees were "required" to take breaks this way, Camacho answered, "No, not required but kind of enforced like. We did it for a while but

then it kind of died off." (Tr. 874.) EPE's reliance (Br. 32) on Galindo's testimony to the contrary is misplaced because the judge expressly discredited his testimony, stating that "his memory is not trustworthy." (D&O 24.)

After listening to all the testimony, the judge credited Camacho's testimony and found that EPE had unlawfully changed the break and lunch policy for meter readers and that the employees followed EPE's directive for a few months, likely until the July 2005 settlement agreement. The judge made the basis for his credibility finding clear, stating:

> Camacho's testimony was given in an honest and straight-forward manner. He was consistent and his memory needed no refreshing. His testimony was detailed and his demeanor gave no impression of hostility toward [EPE]. His testimony that employees followed Gonzale[s]' 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 [EPE] entered into in July 2005 in which it agreed to rescind changes to its break policy. I credit him.

(D&O 24.) The judge's credibility determination is well-reasoned and fully explained and therefore entitled to acceptance by this Court. *See Dynasteel Corp. v. NLRB*, 476 F.3d 253, 257 (5th Cir. 2007).

EPE's argument (Br. 32-33) that the Board based its finding of the change in break policy "entirely" on the unfair labor practice related to Navarro's discharge is factually incorrect. As discussed, the judge concluded that Camacho's credited evidence was sufficient to support the violation. The judge found Camacho's testimony was fortified by the fact that EPE later discharged Mario Navarro at least

in part for leaving work early after consolidating his breaks. However, the judge, affirmed by the Board, independently analyzed the change in break time policy separately from Navarro's discharge (discussed below) and concluded that in March 2005, Gonzales instituted a change in the break rules.

2. EPE Unlawfully Discharged Mario Navarro Pursuant to Its Unilateral Change in Break Policy

EPE discharged Mario Navarro for leaving his route early and reconnecting his electric service, both without permission. After examining the evidence, the judge found (D&O 34) that Gonzales admitted that EPE terminated Mario Navarro, at least in part because he violated the rule prohibiting meter readers from combining their breaks and lunch and then left his route —a rule which, as discussed above, was a unilateral change from past practice. Because Navarro's discharge was one resulting directly from a unilateral change, it violated Section 8(a)(5) of the Act. *See San Miguel Hospital Corp.*, 355 NLRB No. 43, 2010 WL 2360588 at *13 (2010) (applying test of *Great Western Produce*, 299 NLRB 1004, 1005 (1990), to determine that, because unilaterally imposed fitness test was indisputably "a factor in the discipline or discharge," the discharge violates Section 8(a)(5)).

EPE claims (Br. 34) that Gonzales discharged Navarro because he violated two company rules by reconnecting service on a house he was about to occupy and by taking his truck outside his assigned work area for personal use. However,

Gonzales' claims regarding these two rules quickly unraveled as he testified. First, Gonzales contended that Navarro's most serious infraction was the unauthorized reconnection of service to the dwelling that he was scheduled to move into that evening. Yet, Gonzales admitted that the rule was designed to protect against theft, which was not an issue in Navarro's case as he had prearranged for a reconnection on that day and Navarro readily admitted to the technician that he had only connected the service earlier so workmen could access his air conditioning unit.

Second, Gonzales claimed that Navarro had taken a company truck outside his assigned work area on personal business. But Gonzales admitted that he knew other meter readers had taken a company truck out of an assigned work area, and he knew of no one but Navarro who had been terminated for it. Gonzales conceded that it was not uncommon for him to authorize meter readers to take a company truck during the day for any number of personal reasons, including going home to take care of something. (Tr. 1344.) He readily conceded that he did not keep track of employees. (Tr. 1359.) Instead, Gonzales' concern, frequently reiterated, was that the work got done. In fact, Navarro had fully completed his route by 12:30 p.m. by not taking his breaks or lunch.

In the end, Gonzales admitted that Navarro's failure to take his breaks throughout the day pursuant to EPE's unlawful policy was his fatal error. When

asked, "the problem here is he didn't do it on his lunch hour, he waited until the end of the day?," Gonzales answered "Right." (Tr. 1345-47.) With that admission, Gonzales completed the picture, by giving the same answer to the following: "So, sitting here right now, your guys could be anywhere. As long as they get those readings done properly, you're not sure exactly when one of them is running home to do something." Gonzales answered, "Right." (Tr. 1345-47.)

On this evidence, the Board reasonably found no practice of requiring employees to request permission to leave their work area, that Gonzales admitted that no employees had ever been terminated for leaving a route early, nor did he monitor where the meter readers were during their routes so long as they completed their routes. As such, Gonzales' testimony not only fully corroborated Camacho's but also proved that EPE discharged Navarro under its unlawfully-implemented break policy, and violated Section 8(a)(5) and (1) of the Act. Thus, EPE's assertion (Br. 34) that, assuming *arguendo* it made changes in break rules, that these rules "were not a factor in [Navarro's] discharge" flies in the face of the testimonial evidence of its own supervisor.

Moreover, as the Board noted (D&O 34), EPE's reliance on *Essex Valley Visiting Nurses Association*, 343 NLRB 817, 819 (2004), is misplaced. In *Essex*, the Board explained that when an employer unilaterally changes a term or condition of employment, "a discharge resulting directly from that unilateral

change may also violate Section 8(a)(5)." *Id.* However, in examining the nexus between the discharge and the unilateral change in that case, the Board found an insufficient link between the two actions. *See id.* at 819-20 (nurses who unilaterally transferred to a field office were discharged for incompetence, not because of the transfer). In sharp contrast here, Navarro was discharged for leaving work early after having combined his break and lunch period as EPE permitted him to do before the unilateral change in break policy.[11] Gonzales admitted that Navarro was terminated for leaving his route early and he would have been okay had he used his lunch time to conduct his personal business. Because Navarro was discharged, in part, because he violated the unilaterally imposed break rule, his discharge violates the Act.

E. EPE Changed the Procedures for the Meter Readers and Collectors' Boot Allowance Policy at Las Cruces Without Notifying or Bargaining with the Union

It is undisputed that EPE's boot-allowance policy for its meter readers and collectors provided that employees were allowed reimbursement for a pair

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[11] EPE's reliance (Br. 34) on *Boland Marine*, 225 NLRB 824, 825 (1976), *enforced*, 562 F.2d 1259 (5th Cir. 1977), is similarly misplaced. In that case, the employer unilaterally implemented safety and work conduct rules and thereafter disciplined employees based entirely on the unilaterally imposed new rules. Accordingly, there was no need to examine whether, as here, the new rules were a factor in the adverse action.

of work boots twice annually, generally in January and July. Substantial evidence supports the Board's finding that, in practice, twice a year employees would receive an email or a message from field analyst Art Sanchez (who served as the employees' informal go-between with management) telling employees to turn in boot receipts by the end of the week. After receiving the message, the employees would purchase their boots from the supplier and submit the receipt to Supervisor Duran for reimbursement. That practice of automatic approval changed on August 21, 2006, when Duran posted a message that stated: "I will only authorize boot replacements after I see they are needed. Come see me. D.D." (GCX 61.) As found by the judge, and demonstrated by her testimony, Duran admitted that this was a change in her practice, because for the first time she was requiring employees to demonstrate the need for the new boots. (D&O 33; Tr. 1746, 1748.) Because clothing allowances constitute mandatory subjects of bargaining, EPE's change unilateral change in its practice violated Section 8(a)(5) of the Act. *Pine Brook Care Center*, 322 NLRB 740, 748 (1996).

EPE's argument (Br. 40-41) that Duran always personally approved the boot allowance misstates the prior practice. In the past, twice a year Duran gave an automatic and pro forma approval, only requiring employees turn in their boot receipts. In sharp contrast, in July 2006, she required a personal

inspection of boots before approving the purchase of new boots. Duran's testimony admits this change. Therefore, EPE's claim (Br. 41) that the judge relied exclusively on Hallsted's testimony that EPE changed its practice and ignored Duran's testimony to the contrary is simply wrong. Indeed, when asked whether she had ever previously told employees that boot replacements would only be authorized after she saw they were physically needed, Duran responded "not in that manner, no." (Tr. 1746.) Rather, in the past, Duran had allowed an employee to purchase two pairs of boots at the same time, and could not recall an instance when she inspected boots and then turned the employee down. As the judge found, the requirement of a boot inspection was an unlawful unilateral change in the past practice regarding the boot allowance.

III. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT EPE REFUSED TO ENGAGE IN GOOD FAITH BARGAINING WITH THE UNION OVER THE EFFECTS OF ITS DECISION TO CLOSE THE CHELMONT FACILITY

A. General Principles and Standard of Review

Because Section 8(d) of the Act (29 U.S.C. § 158(d)) requires bargaining only over "wages, hours, and other terms and conditions of employment," an employer is under no statutory obligation to negotiate over business judgments that

lie at the core of entrepreneurial control of an enterprise.[12] *See First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 681-82 (1981). Nevertheless, it is settled that the employer must bargain over the "effects" of such management decisions, even though the decision itself may not be subject to mandatory bargaining.[13] *Id*. at 677 n.15, 681-82. *Accord NLRB v. Seaport Printing & Ad Specialties, Inc*., 589 F.3d 812, 815 (5th Cir. 2009). As the Supreme Court has observed: "under § 8(a)(5), bargaining over the effects of a decision must be conducted in a meaningful manner and at a meaningful time." *First Nat'l Maint. Corp.*, 452 U.S. at 681-82. Accordingly, failure to engage in effects bargaining constitutes a violation of Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)).

Substantial evidence supports the Board's conclusion that EPE failed to satisfy this statutory bargaining obligation, instead presenting the Union with a *fait accompli* concerning all aspects of the Chelmont facility's closure and the transfer of the CSRs. In reviewing the Board's ultimate resolution of whether any meaningful bargaining occurred, the Court must remain mindful that, "in the whole complex of industrial relations few issues are less suited to appellate judicial

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[12] The Board severed and remanded to the judge the issue of whether EPE violated Section 8(a)(5) of the Act by failing to bargain over the decision to close its Chelmont facility. (D&O 3-4.) Accordingly, this issue is not before this Court.

[13] There was no backpay relief order with respect to EPE's "effects bargaining" violation, although the Board often issues specially tailored make whole relief in such cases. (D&O 3 n.8, 4-5.)

appraisal than evaluation of bargaining processes or better suited to the expert experience of a board which deals constantly with such problems." *Teamsters Local Union No. 639 v. NLRB*, 924 F.2d 1078, 1083 (D.C. Cir. 1991) (citations and quotation marks omitted).

More broadly, as discussed above, this Court reviews the Board's legal conclusions *de novo* and its factual findings under a substantial evidence standard. *Seaport Printing & Ad Specialties*, 589 F.3d at 815-16 (additional citations omitted). *See also* 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) (a court may not "displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo.").

B. EPE Did Not Engage in Effects Bargaining with the Union But Instead Presented the Union with a *Fait Accompli* Regarding the Closure of the Chelmont Facility and the Fate of the Chelmont CSRs

The record fully supports the Board's finding that EPE did not engage in any effects bargaining over the decision to close the Chelmont facility. EPE notified union representative Salazar only a few hours before the employees that Chelmont would be closing and where CSRs were reassigned. When he protested that there had been no negotiations, Hernandez told him clearly that it was "not up for discussion," and he was simply informing Salazar about EPE's plans. When Salazar pressed him on issues involving the closure, Hernandez refused to discuss

it. When Salazar protested, asked about the new commuting distance for some CSRs, and expressed his disbelief, Hernandez responded that "the decision has been made, Felipe." (Tr. 1077, 1201-05.) A shocked Salazar told Hernandez that he would have to file a charge; Hernandez told him to go ahead.

The Company's lack of good faith bargaining was demonstrated, at the most fundamental level, by its refusal to acknowledge that it had any bargaining duty at all. In the weeks following Hernandez's announcement, Salazar tried to represent the CSRs to the best of his ability, but he was forced to accept whatever EPE offered without any negotiation. For example, Salazar sought to get additional training for the CSRs who were moving from the Chelmont facility to the more technologically advanced Call Center, where three months training—not three weeks—was the norm. Hernandez refused to negotiate additional training and belittled the CSRs' need for more, stating that the CSRs were only getting three weeks training so they "just better pay attention and catch on." (Tr. 1309, 1315.) Likewise, when two CSRs had trouble getting their vacation at the Call Center, Salazar could only request that Hernandez check on the situation and fulfill the unilateral promise EPE made to the few CSRs who had already gotten preapproval for their vacation. In short, as found by the Board, EPE presented the decision and its ramifications as a *fait accompli*, and there was never any negotiation between the parties over the effects.

This Court has long held that "[a]n employer must at least inform the union of its proposed actions under circumstances which afford a reasonable opportunity for counter arguments or proposals." *NLRB v. Citizens Hotel Co.*, 326 F.2d 501, 505 (5th Cir.1964). An employer's failure to give the union an opportunity to bargain about the effects of a partial closure decision, effectively "denigrate[s] the [u]nion and the viability of the process of collective bargaining itself, in the eyes of the unit employees." *Vico Products Co. v. NLRB*, 333 F.3d 198, 208 (D.C. Cir. 2003). Here, EPE never gave the Union an opportunity to engage in bargaining over anything related to the closing. The Union might have sought trade-offs in parking, employee's schedules and hours, training, vacation time, travel costs, or a variety of other issues resulting from the Chelmont closing.

Remarkably, EPE asserts (Br. 39, 40) there is "no evidence" that EPE refused to bargain and that "the Union bargained over the effects of the closure." As discussed, these claims are flatly contradicted by the record evidence showing that Hernandez pointedly refused to discuss changes in the employees' reassignment or the available training. *See* discussion at pp. 14-18, *supra*. Salazar bluntly denied that Hernandez had "proposed" the reassignment of individuals. (Tr. 1076, 1201, 1202-05, 1314.) Indeed, EPE's claims of proposals and bargaining are no more believable than Hernandez's testimony that, when Salazar was first told of the closing of Chelmont, Salazar did not seem concerned at all.

(Tr. 155.) Likewise, EPE's own words belie any claim that the parties engaged in bargaining. As EPE paternalistically states (Br. 40), any concerns Salazar may have had "were resolved by EPE." Indeed, there is ample evidence that EPE unilaterally resolved any questions Salazar raised as EPE saw fit, without fulfilling its bargaining obligation. *See Seaport Printing & Ad Specialties*, 589 F.3d at 816; *Citizens Hotel Co.*, 326 F.2d at 505. EPE's failure to engage in effects bargaining over matters that were important to the affected employees constituted a clear violation of the Act.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter judgment denying EPE's petition for review and enforcing the Board's Order in full.

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May 2011

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

EL PASO ELECTRIC COMPANY	*	
	*	
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	*	
v.	*	
	*	Board Case No.
NATIONAL LABOR RELATIONS BOARD	*	28-CA-20136, et al.
	*	
Respondent/Cross-Petitioner	*	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 13,735 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2003.

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Dated at Washington, DC
this 26th day of May, 2011

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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	*	
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	*	
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CERTIFICATE OF SERVICE

I hereby certify that on May 26, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

I certify the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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