

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28**

UNITED STATES POSTAL SERVICE

And

**AMERICAN POSTAL WORKERS UNION,
LOCAL 380, AFL-CIO**

**Cases 28-CA-222265
28-CA-224055
28-CA-227057
28-CA-227485
28-CA-227490
28-CA-227628
28-CA-229633
28-CA-229647**

**GENERAL COUNSEL'S BRIEF
TO THE ADMINISTRATIVE LAW JUDGE**

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I. PROCEDURAL BACKGROUND

The Complaint and Notice of Hearing in this matter issued on September 7, 2018, consolidated on December 12, 2018, and further consolidated on January 30, 2019, by the Regional Director for Region 28 of the National Labor Relations Board (Board), alleges in Cases 28-CA-222265, 28-CA-224055, 28-CA-227057, 28-CA-227485, 28-CA-227490, 28-CA-227628, 28-CA-229633, and 28-CA-229647 that Respondent United States Postal Service (Respondent), has denied Charging Party Union, American Postal Workers Union, Local 380, affiliated with American Postal Workers Union, AFL-CIO (Union)'s Director of Education and Organization Daniel Diaz-Huerta's request for leave without pay because of his Union and Board activities and in order to discourage such activities in violation of Section 8(a)(3) and 8(a)(4) of the National Labor Relations Act (Act), shut down or failed to maintain fully operational fax machines at its Albuquerque postal stations because of Daniel Diaz-Huerta's

Union and Board activities and in order to discourage such activities and without first bargaining with the Union in violation of Section 8(a)(3), 8(a)(4) and 8(a)(5) of the Act, and has failed and refused to respond to requests for relevant information made by the Union, in violation of Section 8(a)(5) of the Act. Respondent filed its answers on September 21, 2018, December 26, 2018, and February 13, 2019, denying all of these allegations.

II. SUMMARY OF ISSUE

The legal issues presented are whether Respondent's denial of Daniel Diaz-Huerta's request for leave without pay violates Section 8(a)(3) and Section 8(a)(4) of the Act; whether Respondent's actions in shutting down or failing to maintain operational fax machines at its Academy, Highland, University, Kirtland Air Force Base, Rio Rancho, Richard Pino, Alameda, Cottonwood, Steve Schiff, North Valley Carrier Annex, and Five Points facilities violates Sections 8(a)(3), (4), and (5) of the Act; whether Respondent's failure to provide the Union with information requested on September 15, 2018 violates Section 8(a)(5) of the Act; and whether Respondent's delay in acknowledging and responding to the Union's requests for information violate Section 8(a)(5) of the Act.

III. STATEMENT OF FACTS

A. The Collective Bargaining Relationship

The Union¹ is the longstanding exclusive collective bargaining representative of postal clerks, maintenance employees, and plant employees employed by Respondent and has been consistently recognized by Respondent as the exclusive collective bargaining representative of

¹ The Union is affiliated with the American Postal Workers Union, AFL-CIO, which is the nationally recognized representative of the bargaining unit under the terms of the CBA. The National Union bargained for the CBA, which is a national agreement, enforced by the local unions affiliated with the National Union.

these employees in the Albuquerque Postal Installation² in a series of successive collective bargaining agreements. The parties have entered into a Collective Bargaining Agreement (CBA). (JX 1)³ Article 1 of the CBA recognizes the Union as the exclusive collective bargaining representative of the bargaining unit, and defines the bargaining unit as all maintenance employees, motor vehicle employees, postal clerks, mail equipment shops employees, material distribution centers employees, and operating services and facilities services employees, while excluding managerial and supervisory employees, professional employees, employees engaged in personnel work in other than a purely non-confidential clerical capacity, security guards as defined by Public Law 91-375, 1201(2), postal inspection service employees, rural letter carriers, mail handlers, and letter carriers. (JX 1 at 1-2)

The Grievance and Arbitration procedures are described in Article 15 of the parties' CBA, and require that at Step 1, the parties meet on a grievance within fourteen days after the grievant or the union becomes aware or should have become aware of the contractual violation. (JX 1 at 77) If the parties cannot reach an agreement at Step 1, the Union has ten days to advance the grievance to Step 2 after receiving the supervisor's Step 1 decision. (JX 1 at 78) At Step 2,

² The Albuquerque Postal Installation includes approximately 12 City Stations and 9 subunits and annex facilities, for a total of 21 facilities, including facilities located at 201 5th Street SW, Albuquerque, New Mexico (Downtown facility), 1135 Broadway Boulevard NE, Albuquerque, New Mexico (Main Office Carrier Annex facility), 6255 San Antonio Drive NE, Albuquerque, New Mexico (Academy facility), 110 Montano Road NE, Albuquerque, New Mexico (North Valley Carrier Annex facility), 4600 Paradise Boulevard NW (Pino facility), 2100 George Road SE (the Airport facility), 2505 Graceland Drive NE (Uptown facility), 424 Veranda Road NW (North Valley Finance facility), 13101 Lomas Boulevard NE Albuquerque New Mexico (Foothill facility), and 1050 Sunset Road SW, Albuquerque, New Mexico (Five Points facility), 9132 4th Street NW, Albuquerque, New Mexico (Alameda facility), 111 Alvarado Drive SE, Albuquerque, New Mexico (Highland facility), 115 Cornell Drive SE, Albuquerque, New Mexico (University facility), 2nd and F Streets SE, Albuquerque, New Mexico (Kirtland Air Force Base facility), 10701 Coors Blvd. NW #19, Albuquerque, New Mexico (Cottonwood facility), 9719 Candelaria NE, Albuquerque, New Mexico (Steve Schiff facility). (Tr. __:__, GCX 1(y))

³ Joint Exhibits shall be designated herein by JX along with the identifying number of the exhibit. General Counsel Exhibits shall be designated herein by GCX along with the identifying number of the exhibit. Respondent Exhibits shall be designated herein by RX along with the identifying number of the exhibit. References to the Transcript shall be designated by Tr., followed by the relevant page number and, where appropriate, the specific line numbers on that page.

the parties have seven days to meet on the grievance before the grievance becomes untimely. (JX 1 at 78) Full disclosure of each party's case must be made at Step 2, meaning that any information or evidence discovered by the Union after the parties have met at Step 2, regardless of its relevance to the grievance, cannot be considered even if the grievance remains unresolved and is advanced to Step 3. (JX 1 at 78-79)

The CBA provides a process by which bargaining unit employees may file grievances over any violation of the CBA, including violations of Articles 12, 19, and 37, relating to job abolishment, reversion, and excessing, Articles 30 and 37 relating to the cross-craft assignment of work, (JX 1)

B. The Parties' Historic Methods of Communication

The Union and Respondent have a longstanding collective bargaining relationship, which has historically involved a large volume of requests for information. The Union files more than one thousand requests for information each year. (Tr. 539:16) The majority of those requests on the city station side of the Albuquerque Postal Installation are made by Union Director of Education and Organization Daniel Diaz-Huerta (Huerta). (Tr. 540:2).

The Union trains its stewards on the submission and processing of requests for information, and since 2016 has specifically trained stewards on the benefits of submitting requests for information by fax rather than by email or hand delivery. (Tr. 537:19-539:12) From 2004 to present, Union officials generally, and Huerta specifically, have communicated with Respondent's managers and supervisors by fax. (Tr. 383:14-25) At his most active in 2017, Huerta sent as many as 60 faxes per week to Respondent's managers and supervisors. (Tr. 383:23-25). The faxes were generally requests for information. (Tr. 383:23-25)

Huerta testified that he is especially likely to communicate with managers at Highland Station, Main Office, Five Points Station, Richard Pino Station, Rio Rancho Station, and North Valley Carrier Annex. (Tr. 384:13-25)

Respondent has long maintained a contact sheet listing the phone number, physical address, and fax number for each of the postal stations in Albuquerque, and identifying the current managers and supervisors employed at each station. (GCX 35, GCX 36). Those lists are maintained by the Postmaster's Secretary, Evangeline Delgado. (Tr. 256:10-257:7) The Union relies on these documents to program its fax machine to send fax transmissions to each of the Albuquerque postal stations with the press of a button. (Tr. 462:1-4)

C. The Tenth Circuit Consent Orders

In the past twelve years, the General Counsel and Respondent have entered into four consent orders involving Respondent's Albuquerque Postal Installation. Each of these consent orders have imposed significant fines on Respondent for any prospective failures to provide the Union with relevant requested information. Each consent order has also required that Respondent create and maintain logs showing when requests for information are received, when a representative of Respondent replies to each request, and the nature of the response. Each order further required that Respondent post an official Board notice to employees and compensate the Union for any time actually spent pursuing requests for information or attempting to enforce the Respondent's statutory obligation to furnish the Union with requested information.

In 2013, Respondent and the General Counsel entered into the third of four recent consent orders related to Respondent's repeated violations of Section 8(a)(5) of the Act. (JX 7) Under the 2013 Consent Order, Respondent's managers and supervisors remained subject to individual fines of up to \$1,000 per violation. (JX 7) Respondent also remained subject to fines

of up to \$17,500 per prospective violation of the 2013 Consent Order, with additional fines of up to \$1,500 per day for each additional day that the Court found violations had continued. (JX 7) The Consent Order directed that these fines be levied after evaluating the number and severity of prospective violations. (JX 7)

The most recent consent order between Respondent and the General Counsel was entered in the Tenth Circuit in 2017. Under the 2017 Consent Order, Respondent was fined \$185,000 related to violations of the 2009 Consent Order and the 2013 Consent Order. (JX 8). The terms of the 2017 Consent Order also provided for the imposition of further fines in the event of prospective violations of the 2017 Consent Order. (JX 8) While the 2017 Consent Order does not include individual fines for postal managers and supervisors who commit repeated violations of Section 8(a)(5) of the Act or of the 2017 Consent Order, it does impose prospective fines of up to \$25,000 per violation with further fines of \$100 per day for each day the Court finds that the violations have continued. (JX 8)

Each of these consent orders required that Respondent distribute the order to its managers, supervisors, and acting supervisors in the Albuquerque Postal Installation. (JX 7, JX 8).

D. Daniel Diaz-Huerta's Union and Board Activities

Huerta was elected to the position of Union Director of Education and Organization in 2016. (Tr. 379:19, 383:15) As Director of Education and Organization, Huerta is responsible for representing bargaining unit employees in the grievance and arbitration process, speaking with prospective new members, meeting with postal management, conducting public outreach, and when appropriate bargaining with Respondent. (Tr. 379:19 – 380:22) In his capacity as Director of Education and Organization, Huerta has also filed more than 100 charges with Region 28 of

the Board. (Tr. 385:1-11) Each charge that Huerta files with the Board is served on Respondent, and each charge reflects his name, title, and signature. (*See e.g.*, GCX 1) Respondent logs each of these charges in a case management system, and identifies the individual or union official who filed the charge in its system. (JX 4) The log reflecting charges filed by Huerta specifically during the period from 2017 through the date of the hearing in this matter is 28 pages long. (JX 4)

Every city-station side manager and supervisor who testified in this case admitted to interacting with Huerta in his capacity as a Union official. (Tr. 31:3-14, Tr. 73:8-14, Tr. 80-81, 184:22-185:10, 214:5-12) Huerta's name also appears in every request for information log maintained by the Respondent. (GCX 37(a), GCX 37(b), GCX 37(c), GCX 37(d), GCX 37(e), GCX 37(f), GCX 37(g), GCX 37(h), GCX 37(i), GCX 37(j), GCX 37(k), GCX 37(l), GCX 37(m)) Many of these supervisors met with Huerta for the purposes of discussing ongoing grievances, processed information requests that Huerta submitted to Respondent on behalf of the Union, or processed Huerta's requests for 070 time or 084 Leave.

Postmaster Chris Yazzie (Yazzie) in particular acknowledged that Huerta is basically constantly engaged in Union activities, and spends between 30 and 40 hours each week on 070 Time or 084 Leave, and that Huerta has filed a significant number of charges with the Board. (Tr. 73:8-14) Yazzie was also careful to note that he believes Huerta files requests for information so that he can file Labor Charges and try to get the NLRB to rule to fine the Respondent. (Tr. 81:21-25) Huerta's direct supervisor, Supervisor Customer Services Gurdeep Mann (Mann) similarly commented that Huerta is "always off doing Union" and noted that it is inconvenient for him specifically when Huerta is receiving 070 Time or 084 Leave. (Tr. 168:16-22, 169:19-23, 201:21-202:20, 206:15-20)

Mann further testified that Huerta's presence at North Valley Finance has at times been so unpredictable that he was forced to scramble at the last minute to find coverage for Huerta's duties when last minute union obligations arose. (Tr. 199:23-200:25)

In the summer of 2018⁴, Respondent and the General Counsel were scheduled to participate in an unfair labor practices hearing, commencing on July 10, related to approximately thirty charges filed by the Union. The majority of those charges were filed by Huerta, who was an active participant in the General Counsel's trial preparations.

Throughout June 2018 Huerta received large volumes of 070 Time,⁵ and took large volumes of 084 Leave,⁶ for the purposes of conducting Union business and preparing for the upcoming unfair labor practices (ULP) hearing. (GCX 10, GCX 11) The North Valley Finance schedules and leave records from June 2018 reflect that Huerta was receiving approximately 40 hours of 070 Time and 084 leave per week at the beginning of June, and that Huerta continued to receive upwards of 30 hours per week of 070 time and 084 leave throughout June. (GCX 10, GCX 11) Huerta spent that time, the vast majority of his work week, meeting on grievances, filing information requests, and preparing for the ULP hearing scheduled for July 10.

E. Daniel Diaz-Huerta's Request for Leave Without Pay

Due to his Spanish and Jewish heritage, Huerta became eligible to apply for Spanish Citizenship in 2016, under a law passed to redress historic discrimination and persecution of Jews by the Spanish government. (GCX 4) Huerta intended to apply for Spanish citizenship with his mother, but delayed his application when his mother fell ill and passed away. (Tr.487-488)

⁴ All dates are in 2018 unless otherwise noted

⁵ 070 Time is official steward time, which permits Union officials to conduct Union business while being paid by Respondent as part of their regular work week. 070 time can also be denoted as 608 Time, Union, or UN on Respondent's documents. (Tr. 65-66, 68, 78-79, 173- 175, 177)

⁶ 084 Time is Leave Without Pay, for time for which the employee is going to be paid their regular hourly wage by the Union, rather than Respondent. This time is also used for official Union duties. (Tr. 173-177)

On March 8, Huerta met with then-Postmaster Daniel Corral (Corral) to discuss the procedure for taking leave without pay, and when would be a convenient time for Huerta to take a 5 week leave. After examining the leave roster, Postmaster Corral indicated that there were two windows of time that would be convenient – the end of July 2018 through August 2018, or after September 1, 2018. (Tr. 387:12-388:8)

On May 18, Huerta submitted a written request to Postmaster Corral for 5 weeks of leave without pay, so that he could go to Spain and get his Spanish citizenship. (Tr. 389:7-24, GCX 4, GCX 5)

On June 4 or 5, Huerta met with Postmaster Corral to discuss some grievances. (Tr. 391:16-20) At this meeting, Postmaster Corral indicated that he would meet with Huerta about his leave request on June 12, because Postmaster Corral would be leaving Albuquerque to return to Idaho and wanted to include the new Postmaster in the conversation, so that the new Postmaster could ultimately determine whether or not to grant Huerta's request. (Tr. 392:7-17)

On June 12, Huerta received a phone call from the Postmaster's secretary, Evangeline Delgado, indicating that Postmaster Corral was not available to meet that day after all, and that Huerta would have to reschedule the meeting for a number of grievances with the new Acting Postmaster, Yazzie. Delgado scheduled the meeting for 1 PM on Friday June 15, 2018. (Tr. 399:19-400:4). Huerta inquired about whether Postmaster Corral was going to sign his leave papers before leaving for Idaho. (Tr.400:5-7) Delgado put Huerta on hold to ask Postmaster Corral about Huerta's leave. (Tr. 400:8-9) When she returned, Delgado told Huerta that Postmaster Corral had decided to leave that for Yazzie. (Tr. 400:9-11)

On June 15, Huerta, Union President Ken Fajardo (Fajardo), and Postmaster Yazzie attended a Labor Management Meeting, after which they also met to discuss a number of

grievances. After the Labor Management portion of the meeting had concluded, Huerta asked Postmaster Yazzie about a number of pending grievances and outstanding information requests. (Tr. 55:8-56:4) Finally, Huerta asked about the leave request that Postmaster Corral had left for Postmaster Yazzie to approve. (Tr. 55:24-56:4) Yazzie took Huerta's request and a letter from Corral out of the desk and told Huerta that he would have a decision when they met on Monday June 18. (Tr. 55:24-56:4)

On June 18, Huerta attended a 9 AM meeting with Postmaster Yazzie, at which they discuss outstanding requests for information, and the upcoming July 10 ULP hearing. (Tr. 57:23-58:2) Huerta took the opportunity to raise several specific outstanding requests for information, and told Postmaster Yazzie that the problem with requests for information was serious and had resulted in the upcoming Board hearing. (Tr. 58:7-9, 397:23-398:9, 398:22-25) Huerta also stated that Postmaster Yazzie should expect to receive a subpoena for that hearing soon. (Tr. 398:25-399:1) Postmaster Yazzie immediately responded to that comment by saying "next," at which point Huerta asked about his request to take 5 weeks of leave without pay. (Tr. 399:2-3) Postmaster Yazzie took out the form, looked at it, and told Huerta that he was going to deny the request for leave, based on the needs of the service. (Tr. 58:22-59:11, Tr.399:6-9) Huerta asked if Postmaster Yazzie could approve a shorter leave of even two or three weeks, and Postmaster Yazzie refused, saying he didn't know who would be on vacation during that time. (Tr. 399:10-12). Postmaster Yazzie did not mark his decision on the PS Form 3971 request for leave without pay form until the end of the meeting. (Tr. 399:17-20)

At the time Postmaster Yazzie denied the request, there were no employees from North Valley listed on the leave roster for the weeks in September⁷ that Huerta had requested. (GCX 8, GCX 9). Throughout the summer of 2018 Huerta's direct supervisor, Mann, was regularly arranging for coverage of Huerta's regular bid job duties while Huerta was on either 070 Time or 084 Leave. (Tr. 64:1-4, Tr.173-180) Indeed, when asked both Postmaster Yazzie and DMO Ed Arvizo, with whom Yazzie claims to have discussed his decision, acknowledged reviewing Huerta's clock rings and leave balances in relation to Huerta's request for leave without pay. (Tr. 246:13-247:6) Huerta's Station Manager at North Valley, Keeran, even went so far as to observe that the unpredictability of Huerta's Union duties could create problems at North Valley because it limited her ability to plan coverage when Huerta had last minute Union obligations (Tr. 290:14-291:2)

The Union sought information from Respondent about the reasons for Postmaster Yazzie's decision to deny Huerta's request for leave without pay, and Respondent provided the Union with a letter explaining Postmaster Yazzie's decision. (GCX 12) In his letter, Postmaster Yazzie repeated the needs of the service as defined in the 2017 annual report to the United States Congress, and made no reference to the performance of Huerta's Union duties. (GCX 12, GCX 86, Tr. 76:21-78:2). Postmaster Yazzie was very clear that he does not view Union Time, 608 Time, 070 Time, or the performance of Union business to be among the needs of the service. (Tr.77-78) At the time of Huerta's request for leave without pay, Postmaster Yazzie acknowledges that even if Huerta were to work the maximum allowable overtime, he would only be spending 20 hours per week on his bid job, advancing the needs of the service identified in the 2017 annual report to the United States Congress. (Tr. 73:8-14)

⁷ Respondent's own reports show that the volume of mail is comparatively low in September, minimizing the need for coverage resulting from an extended leave. (GCX 2)

F. The Union's Fall 2018 Media Campaign

In the fall of 2018, the Union began actively soliciting attention from the New Mexico Congressional Delegation⁸ and from media outlets,⁹ in relation to the working conditions in the Albuquerque Postal Installation. This was a follow up to the Union's Stakeholder Report initiative, which began in the summer of 2018.

In August 2018, the Union published a series of Stakeholder Reports, authored primarily by Huerta, in which the Union detailed its concerns about the dilapidated conditions of Albuquerque postal facilities, workplace safety hazards, delayed mail, rodent infestations in postal facilities, and understaffing issues. (Tr. 82, GCX 22(a), GCX 22(b), GCX 22(c), GCX 22(d)) The Stakeholder Reports contained photographic evidence related to the Union's stated concerns about the postal facilities. (GCX 22(a), GCX 22(b), GCX 22(c), GCX 22(d)) Some reports also contained documents showing the Union's contact with the Board, and Respondent's history of refusing to furnish the Union with relevant requested information for the purposes of grievance processing. (GCX 22(a), GCX 22(b), GCX 22(c), GCX 22(d)) Several of these reports also published information that the Union had obtained through previous requests for information submitted to Respondent. (GCX 22(a), GCX 22(b), GCX 22(c), GCX 22(d), Tr. 411:24-412:2) The Union distributed these reports to Arizona New-Mexico District Manager John DiPeri, Union Western Area Coordinator Omar Gonzales, the Albuquerque Postal Inspector General's Office, Senator Tom Udall, Senator Martin Heinrich, and Congresswoman Michelle Lujan Grisham. (Tr. 412:6-11)

⁸ Station Managers and supervisors from Five Points, North Valley, Alameda, Steve Schiff, Highland, and Academy Stations, and the Plant and Distribution Center, personally observed Huerta and Fajardo touring Albuquerque Postal Facilities with staffers from Senator Heinrich and Senator Udall's offices.

⁹ Each of Respondent's managers and supervisors testified that they were aware of media coverage of the Union's stakeholder reports, and that they were made aware of news articles specifically quoting Huerta.

The Stakeholder Reports and the press and congressional response to them created a flurry of activity among Respondent's managers and supervisors attempting to limit the damage. (Tr. 82-84, GCX 81, GCX 82, GCX 83, GCX 84, GCX 87, GCX 88, GCX 89, GCX 90, GCX 91, GCX 92, GCX 95, GCX 97) Each time Union officials, and specifically Huerta, appeared in an interview or participated in a site visit with congressional staffers, a flood of emails hit Postmaster Yazzie's inbox, notifying him of Huerta's conduct, discussing the damage that the conduct could do to Respondent, noting frustration from the Arizona/New Mexico District Office at Huerta's activities, and discussing how Respondent could get site visits cancelled. (GCX 81, GCX 82, GCX 83, GCX 84, GCX 87, GCX 88, GCX 89, GCX 90, GCX 91, GCX 92, GCX 95, GCX 97)

During the period from August 23 through September 10, 2019, Huerta contacted the press or participated in interviews on no fewer than 9 occasions. (GCX 21, GCX 49, GCX 50, GCX 51, GCX 52, GCX 53, GCX 54, GCX 57, GCX 61, GCX 62) These press appearances occurred concurrently with outreach from New Mexico Senator Martin Heinrich and Congresswoman Michelle Lujan-Grisham's outreach to The Postmaster General and Postal Inspector General in relation to the Stakeholder Reports authored by Huerta. (GCX 55, GCX 56)

On September 7, several Union officials accompanied Field Representative Alex Eubank (Eubank) from Senator Martin Heinrich's office on site visits at Albuquerque postal facilities. (Tr. 88, Tr. 296:14-23, Tr. 297:4-10, Tr. 441:16-442:9, Tr. 567:9-14) Huerta, Fajardo, and Vice President Dennis Corriz visited North Valley Carrier Annex, Academy Station, Alameda Station, and Steve Schiff Station with Eubank. (Tr. 441:16-442:9, Tr. 567:9-14) During their visit to North Valley Carrier Annex, Huerta stopped at the Station Manager's desk to speak with Station Manager Melissa Keeran and submit a request for 40 hours per week of Union time. (Tr. 296:14-

23, Tr. 297:4-10, Tr. 443:1-3) When the group arrived at Academy Station, they were quickly stopped by Station Manager Gino Martinez (Martinez), who ordered them to leave the station immediately. (Tr. 445:19-446:12) Station Manager Martinez told Huerta and his companions to get out of the building and that he had to escort them out of the building and had instructions to get them out of the building. (Tr. 446:9-15) After the Union delegation and Eubank left Academy Station, Fajardo received a phone call from Postmaster Yazzie, during which Yazzie informed Fajardo that the party would not be allowed on the workroom floor at any postal station¹⁰. (Tr. 573:5-10) Steve Schiff Station Manager Andy Letterhos and Alameda Station Manager Beau David Meyers also promptly notified Postmaster Yazzie of their encounters with Huerta, Fajardo, Corriz, and Eubank on this date. GCX 93, GCX 94, GCX 96, GCX 98).

On September 9, Huerta gave an interview to Rebecca Atkins on Channel 13 related to delayed mail and a rodent infestation in the Albuquerque Postal Installation. (Tr. 84:6-19, Tr. 453-454GCX 61) In the interview, Huerta specifically referenced bats and rats falling out of the ceiling at Five Points Station. Huerta's interview aired on Channel 13 during the evening newscast the same day. (GCX 61) The interview also resulted in press inquiries directed at Respondent. (Tr. 84:6-19) Postmaster Yazzie was personally notified of these press inquiries. (Tr. 84:6-19)

On September 10, Huerta issued a press release on behalf of the Union, alleging further mismanagement of the Albuquerque Postal Installation. (GCX 62) Specifically, the press release claimed that Respondent had failed to address a bat infestation in Albuquerque postal facilities, permitted a crisis of delayed mail to develop, and failed to employ appropriate safety measures when transporting live animals, causing a postal employee to contract airborne salmonella

¹⁰ Fajardo also testified that Respondent has historically permitted Senators and their aids to visit postal facilities unannounced, and to speak with employees, as recently as 2007. (Tr. 573-574)

poisoning. On the same date, Huerta filed charges in Cases 28-CA-227057 and 28-CA-227058 with the Board. (JX 4) Later on the same date, Huerta told Keeran that she needed to arrange coverage for him at North Valley Finance because he was going to join District Manager Marty Chavez, Postmaster Yazzie, Plant Manager Mark Jones (Jones), Field Representative for Senator Udall Melissa Cavanaugh, Eubank, Fajardo, and Corriz for an investigative visit at Highland Station. (Tr. 454-455) The tour was arranged as a result of the Stakeholder Reports. (Tr. 87:5-8, Tr. 111-114). The Stakeholder Reports also prompted Respondent to perform significant maintenance activities in the Albuquerque Postal Installation, in anticipation of the September 10 tour. (Tr. 87:9-24)

G. The Fall 2018 Fax Machine Failures

On September 9, Huerta attempted to send requests for information to several Albuquerque Area Postal Stations. The requests to Airport, Five Points, Foothill, Old Albuquerque, Main Office, Downtown, Manzano, North Valley Finance, Steve Schiff, and Uptown Stations were all successfully transmitted. (GCX 58, GCX 59) The fax transmissions of requests to Academy, Highland, University, Kirtland Air Force Base, Rio Rancho, Richard Pino, Alameda, and Cottonwood Stations failed. (GCX 58, GCX 60) On the same date, Huerta successfully filed an unfair labor practices charge by sending a fax to the Albuquerque Resident Office. (Tr. 457:17-23)

On the morning of September 12, Huerta spoke with Steve Schiff Station Manager Andy Letterhos (Letterhos) about a pending request for information, and agreed to fax Station Manager Letterhos a copy of the type of report that Huerta was seeking. (Tr. 458:8-16) Huerta then asked Letterhos to send him a copy of the emergency placement letter for an employee Huerta was representing, and Letterhos agreed. (Tr. 458:8-16) Following their conversation, Huerta made

two attempts to fax the report in question to Letterhos. (Tr. 459-460 GCX 58, GCX 63) Both attempts failed. (Tr. 459-460, GCX 58, GCX 63) Later that morning, Huerta received a fax at the Union hall, containing a copy of the emergency placement letter that he had discussed with Letterhos. (GCX 32, GCX 58)

On September 15, at about 10:21 AM, Huerta attempted to submit a request for information to North Valley Carrier Annex by fax but the transmission failed at 10:40 AM. (GCX 58, GCX 67) Less than twenty minutes later, at 10:58 AM, Huerta submitted a request for information to Steve Schiff Station by fax, seeking the box section audit for 2018 – the same document that was the subject of Huerta’s September 12 conversation with Letterhos. (GCX 58, GCX 68) When Huerta attempted to submit another request for information to Steve Schiff Station ten minutes later, the transmission failed. (GCX 58, GCX 69)

Respondent does not have a system for inspecting and maintaining fax machines at Albuquerque city stations. (Tr. 41-42) Respondent’s Information Technology Specialist Perry Dotson (Dotson) testified that there is no routine maintenance schedule for the multi-function printers which Respondent uses for its fax machine needs at Albuquerque area postal stations. (Tr. 597:22-600:3) Dotson further testified that while many of Respondent’s fax logs show that there were a significant number of failures, he had no idea whether any maintenance had been conducted on the machines following those failures. (Tr. 597:22-600:3). Dotson pointed out that with respect to leased machines specifically, the contractor monitors whether the machines have gone offline on Respondent’s network, but he noted that it would be possible for the fax line to go down without the machine going “offline” on Respondent’s network. (Tr. 599:19-600:16) Specifically, Dotson noted that if someone were to remove the fax line from the machine, it

would remain on Respondent's network, and would not trigger an inquiry from the contractor.
(Tr. 599:22-600:6)

Furthermore, Dotson testified that while many of the fax machine logs do not reflect that the machines were shut down during the period in question, the logs would not record that the machine was powered down or offline if someone was to remove the fax line from the machine. (Tr. 595:22-596:14) If the fax line is removed from one of these multi-function printers, it completely disables the machine's fax capabilities, but leaves no record of the action on the machine's fax transmission logs. (Tr. 595:22-596:14). Dotson testified that all the fax logs show is whether the machine received incoming or outgoing calls. (Tr. 595:22-596:14).

When asked, not a single one of Respondent's managers recalled examining fax machine logs to determine whether or not transmissions were failing on a regular basis. Only Station Manager Keeran recalled calling for maintenance on a fax machine, and she acknowledged that there were a substantial number of failures before she became aware of the issue, and that it took several months for her to address the problem. (Tr. 301-303, GCX 43)) Keeran could not identify specifically when the problems with the North Valley Carrier Annex fax machine began.

H. The Union's July 5 Request for Information

On July 5, Union President Ken Fajardo submitted a request for information to Plant Manager Jones by email, seeking three types of documents related to a class action grievance on job reversions. (GCX 13, GCX 14) These documents were:

1. Daily run program generator (RPG) reports for Tour 1 automation pay location 171 for 2017 and 2018
2. Daily RPG reports for Tour 3 automation pay location 371 for 2017 and 2018

A written explanation for why the initial proposal to abolish/excess/revert out of automation was initially based on LDC 11 and was now being based on RPG reports (GCX 13)

Jones did not respond to Fajardo's email, nor did he contact Fajardo. While Jones was aware of the four Tenth Circuit Consent Orders related to Respondent's past failures to provide the Union with relevant information, and the serious fines that could be imposed on Respondent for failure to furnish the Union with relevant information in the future, he did not review or respond to the request for information for more than a month. (Tr. 106-107, Tr. 107:20-108:5) This was not the first time that President Fajardo had emailed Plant Manager Jones. (Tr. 121:11-14).

The Union requested this information to process a grievance related to job abolishments, which Respondent had argued were based on the requested RPG reports. (Tr. 561:4-13) The grievance was filed under Article 37.3.A.2 of the CBA, and the parties met at Step 1 on August 2. (GCX 77)

On August 1, during a labor-management relations meeting, DMO Casey Christopherson (Christopherson) handed Fajardo a letter answering the Union's question about why the Employer's explanation for the job reversions had changed and referred to RPG reports rather than LDC 11 reports. (GCX 78) Christopherson sent a second copy of that letter to Fajardo on August 3 by certified mail. (GCX 78, GCX 79) At that time, Christopherson enclosed a DVD containing the requested RPG reports. Fajardo received and signed for the certified letter and DVD on August 7. (GCX 79)

By the time Fajardo received Christopherson's letter and the DVD containing the RPG reports, he had already met on the underlying grievance at Step 1, although he had not yet received the requested information. (Tr. 566:11-16)

I. The Union's September 15 Request for Information

On September 15, Huerta submitted a request for information to Five Points Station, seeking the box section audit for 2018. (GCX 64) The request was submitted by fax and

transmitted successfully. (GCX 68) Huerta requested the information in relation to an ongoing grievance related to a class action grievance over the falsification of documents that led to the abolishment of jobs in the box sections at Respondent's Albuquerque postal facilities. (Tr. 462:7-9, GCX 65).

The Union never received any response to Huerta's September 15 request for information. (Tr. 463:16-21) Respondent never acknowledged this request for information, and consequently failed to raise any objections to the relevance of the information or the status of the grievance. (Tr. 463:16-21)

J. The Union's September 28 Request for Information

On September 28, Union Steward Sam Wood (Wood) submitted a request for information to Supervisor Mann. (Tr.190:14-21, Tr. 324:7-12) Mann signed the bottom of the document, indicating receipt of the request, Wood made a copy, for Mann to keep. (Tr.191:11-17, Tr. 324:16-21, GCX 18) Wood and Mann did not discuss the request for information in detail because Wood submits this request for information every 2 weeks as part of an ongoing grievance. After submitting the request for information, Wood clocked out for the day. (Tr. 324:21) Wood did not receive a response to this request for information on this date.

The request for information sought: (1) clock rings for city carrier Janelle from 09-15-18 through 09-28-19, (2) other job offers made to Janelle within her craft, (3) description of job duties for Janelle, (4) notification to APWU of light limited duty for Janelle, (5) Overtime Desired List (unless obtained in different RFI request), and (6) clock rings for OTDL clerks at NVCA from dates 09-15-18 through 09-28-18 (unless provided through different RFI request). (GCX 18) Wood requested this information in relation to an ongoing grievance over the

assignment of a city letter carrier with the first name Janelle to perform work in clerk craft. (Tr. 191: 18-20, Tr. 325:8-326:10, GCX 19, GCX 42)

On October 3, Wood received a copy of Janelle's clock rings and the overtime desired list and clock rings for OTDL clerks at North Valley Carrier Annex for the period of September 9, 2018 through September 28, 2018. (Tr. 326:18-327:8) Wood received no other information at this time. (Tr. 327:13-14)

On October 12, Wood met with Mann at Step 1 to discuss the grievance related to this request for information. (Tr. 325:8-326:10, GCX 42) In the grievance documents submitted to Mann at this meeting, Wood wrote that he still had not received the information requested pursuant to this request. (GCX 19) On the same date, Wood submitted a new request for information seeking the same 6 items requested on September 28, 2018, covering the period through October 12, 2018.

In late October, Steward Susan Naranjo met on the grievance related to this request for information at step 2, and received the offer of modified assignment for Janelle from Station Manager Melissa Keeran. (Tr. 359:22-360:24, GCX 46) Wood received a copy of that document from Naranjo after the Step 2 meeting. (Tr. 327:16-23)

On October 31, Wood submitted yet another request for information seeking the same six categories of information for the period 10-13-18 through 10-26-18. (GCX 20)

On November 5, Mann responded to Wood's October 31 request for information with the only modified duty job offer made to Gonzales and wrote that Gonzales was not working in clerk craft and that consequently the Union had not been notified of her modified duty assignment. (GCX 20, Tr: 329:4-21) Respondent made no further response to these requests for information.

K. The Union's October 1 Request for Information

On October 1, Union Steward Susan Naranjo (Naranjo) submitted three requests for information to Station Manager Sam Pantoja (Pantoja) by email. (Tr. 224 2-3, GCX 24) The portions of the request relevant to this matter sought: PS 3971 for all clerks FTR and PSE at the Five Points station for 09/15/2018 - 09/28/2018. (GCX 24) The Union requested this information for the purposes of processing an Article 1, 3, 7, 8, 13, 19, 30, and 37 grievance over the assignment of a light-limited-duty city letter carrier to work in clerk craft. (GCX 45) Naranjo notified Pantoja that his response to her request for information was incomplete on October 12, by email, but received no response. (GCX 27) Ultimately, Naranjo spoke with Postmaster Yazzie personally on October 26, at which time she raised her concerns about the missing item from her October 1 request for information. (Tr. 349:16-351:18) Yazzie assured her that he would take care of it, and Naranjo received an email from Pantoja late that afternoon inquiring about what information was still missing. (Tr. 351:16-18, GCX 28) Naranjo attempted to contact Pantoja at both of the phone numbers in his email, and at his office, but he was not available and the mailbox on his personal cell phone was full and she was unable to leave a message. (Tr: 352:6-16)

On October 29, her next working day, Naranjo responded to Pantoja's October 26 emails, and identified the missing information. (GCX 29) Pantoja replied and, rather than providing the information, stated that he needed copies of the request from October 12, and that he would resend the information responsive to the requests made on October 1 and 2. (GCX 30) Naranjo responded by forwarding her original email, and she specifically identified the missing TACS reports requested in the PSE request by the names of the employees listed on the schedule at Five Points Station. (GCX 30)

Manager Pantoja acknowledged that he was aware of his obligation to provide information to the Union, and that Respondent was subject to a Tenth Circuit Consent Order related to providing information to the Union. (Tr. 229:12-18). Pantoja also acknowledged that he was aware that the Union only had 14 days to meet at Step 1 of the grievance process, when he would expect to receive a request for information. (Tr. 223:8-15) Despite all of this, Pantoja testified that he had failed to check his email for several weeks while he was on annual leave and attending management training, and consequently allowed Naranjo's inquiries to go unanswered from October 12 through October 26. (Tr. 228:15-229:11)

IV. ARGUMENT

A. General Legal Principles

1. Discrimination Based on Union and Board Activities

To establish an 8(a)(3) violation, the charging party must show that the employer's actions were motivated by anti-union animus. *Berger Transfer & Storage Co.*, 678 F.2d at 691. Proof of the Employer's intent to discriminate, however, does not have to come from a single specific incident and may instead be presumed from evidence. *NLRB v. American Can Co.*, 658 F.2d 746, 754 (10th Cir.1981). Where there is discriminatory intent, however, that intent can be sufficient to establish that an otherwise ambiguous act is a violation of the Act. *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 227-228 (1963).

For the purposes of 8(a)(3), the Court has concluded that "union membership" includes actions taken by the Employer to discourage employees' participation in union activities or to discourage adhesion to union membership. *Radio Officers' Union v. N. L. R. B.*, 347 U.S. 17, 40 (1954). But, the Court has also found that Congress did not intend to make all actions that might tend to discourage union membership unlawful, only those actions which were motivated by

discriminatory animus. *See, American Ship Building Co. v. NLRB*, 380 U.S. 300, 311 (1965).

Where there is only circumstantial evidence of that discriminatory animus, intent must be inferred from context. *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 228 (1963).

Under Section 8(a)(4) of the Act, it is unlawful for an employer to take an adverse action against an employee for filing a charge with the National Labor Relations Board, or for providing an affidavit to the Board in the course of a Board investigation. *N. L. R. B. v. Scrivener*, 405 U.S. 117, 125(1972). Section 8(a)(4) is an acknowledgement of the reality that the Board cannot effectuate its role under the Act without the assistance of those individuals who file charges when their employers engage in unfair labor practices, thereby allowing the Board to investigate. *Gen. Servs., Inc.*, 229 NLRB 940, 941 (1977). In determining whether or not discrimination has occurred under Section 8(a)(4) the Board considers whether or not there is direct evidence of discrimination in the form of an admission or statements indicating animus, and also by the timing of the adverse action taken against an employee. *See, La Gloria Oil & Gas, supra* at 1124; *Toll Mfg. Co.*, 341 NLRB 832, 833 (2004); *Mid-W. Tel. Serv., Inc. & Wilfredo Placeres, Dustin Porter, Ben Fannin, & Michael Williams*, 358 NLRB 1326, 1343 (2012).

Under the burden shifting framework established in *NLRB v. WrightLine, A Div. of WrightLine, Inc.*, which applies to both Section 8(a)(3) and 8(a)(4) violations, where the General Counsel can make a prima facie showing that the conduct in question was motivated by discriminatory animus, the burden of production would then shift to the employer, to present credible evidence in their defense, showing that the Employer's actions were not motivated by discriminatory animus. *N.L.R.B. v. Wright Line, a Div. of Wright Line, Inc.*, 662 F.2d 899, 905 (1st Cir. 1981).

2. Unilateral Changes to Terms and Conditions of Employment

A unilateral change to the conditions of employment is a violation of section 8(a)(5) of the Act, because it constitutes an attempt to circumvent the duty to negotiate. *NLRB v. Katz*, 369 US 736, 743 (1962). Such attempts to circumvent the bargaining process frustrates the purpose of 8(a)(5) just as much as flat refusals to bargain. *Id.* A unilateral change by the employer obstructs and inhibits the discussion process in violation of section 8(a)(5). *NLRB v. Katz*, 369 US 736 (1962). Even if there is a legitimate business reason to implement a change, the Employer must still discuss it with the Union and bargain in good faith before making said change, if that change is subject to mandatory bargaining. *Fibreboard Paper Products v. NLRB* 379 U.S. 203, 214-15 (1964). The Board has historically taken a broad view of terms and conditions, defining limitations on “terms and conditions” rather than listing solitary subjects that fall within the definition of terms and conditions. *See generally, Allied Chemical & Alkalai Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Company, Chemical Division et al.*, 404 US 157 (1971) (holding that where the benefits or interests of third parties “vitaly affects the terms and conditions” of unit employees’ employment, they are subject to mandatory bargaining), *Ford Motor Co. v. NLRB*, 41 US 488 (1979) (holding that vending machine and cafeteria food and beverage prices and services were terms and conditions of employment and therefore subject to mandatory bargaining). Consequently, ‘terms and conditions of employment’ has been limited to only “issues that settle an aspect of the relationship between the employer and employees.” *Allied Chemical & Alkalai Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Company, Chemical Division et al.*, 404 US 157, 178 (1971); *See also, NLRB v. Wooster Division of Borg-Warner Corp.*, 356 US 342 (1958).

Longstanding past practices in particular are terms and conditions of employment and subject to mandatory bargaining, so long as they are neither random nor intermittent. Regular longstanding practices cannot be changed without notice to the bargaining unit's representative and an opportunity to bargain over any changes to those practices. *See, Sunoco, Inc.*, 349 NLRB 240, 244 (2007), citing *Granite City Steel Co.*, 167 NLRB 310, 315 (1967); *DMI Distrib. of Del.*, 334 NLRB 409, 411 (2001); *Exxon Shipping Co.*, 291 NLRB 489, 493 (1988). This right is triggered when a past practice occurs on such a regular and consistent basis that the parties could reasonably expect frequent recurrence of that practice. *Phila. Coca-Cola Bottling Co.*, 340 NLRB 349, 353-354 (2003). The right to bargain over regularly occurring past practices may be waived by the bargaining unit's representative but, to be effective, such a waiver must be clear and unequivocal. *E.I. Du Pont De Nemours, Louisville Works & Paper, Allied-Indus., Chem. & Energy Workers Int'l Union & Its Local 5-2002, (Usw) & Its Local 4-786*, 364 NLRB No. 113 slip op. at 4 (Aug. 26, 2016). *See also, Quality Health Servs. of P.R., Inc. d/b/a Hosp. San Cristobal & Unidad Laboeal De Enfermeras Y Empleados De La Salud*, 356 NLRB 699, 702 (2011); *Sunoco, Inc.*, 349 NLRB 240 (2007).

3. Requests for Relevant Information

An employer has a duty to furnish potentially relevant information to the union where that information would enable the union to perform its statutory duties. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 436 (1967). Relevance should be determined by a liberal "discovery-type standard." *NLRB v. Acme Industrial Co.*, 385 U.S. at 437. The duty to furnish information is not limited to the initial bargaining period, and carries through the term of the existing collective bargaining agreement. *NLRB v. Acme Industrial Co.*, 385 U.S. at 435-36. Information that would help the union determine how to proceed with a grievance or possible grievance is considered

relevant even if no grievance currently exists or if the information requested would clearly dispose of the grievance. *Ohio Power Co.* 216 NLRB 987, 991 (1975); *See also, Curtiss Wright Corporation v. NLRB*, 347 F.2d 61 (1965).

When an employer has lost, destroyed, or for any other reason cannot locate the requested document, they are still obligated at the very least to inform the Union of whether or not the requested information relates to bargaining unit members. *United States Postal Service* 361 NLRB 8 (2014). Furthermore, when the employer no longer has access to the requested information, the employer still has a duty to investigate alternative sources of that information and to obtain the information from an alternative source if such an alternative source is available. *Hospital Employees District 1199E (Johns Hopkins)*, 273 NLRB 319 (1984).

If an employer is not going to provide the requested information, the employer has a duty to adequately explain why they will not furnish the requesting labor organization with the requested information. *See, Regency Service Carts*, 345 NLRB 671, 673 (2005). *See also Spurlino Materials, LLC*, 355 NLRB 409 (2010), *enfd.* 190 LRRM 3345 (7th Cir. 2011). In evaluating whether an employer has adequately explained why information will not be provided, the Board looks at the totality of the circumstances. *Spurlino Materials, LLC*, 355 NLRB at 409. The employer has a comparable obligation to timely inform the requesting labor organization that requested information does not exist. *U.S. Postal Service*, 332 NLRB 635 (2000).

Employers have an obligation to respond to requests for information in a timely manner. *Woodland Clinic*, 331 NLRB 735 (2001); *See also, Shaw's Supermarkets, Inc.*, 339 NLRB 871 (2003). The timeliness of an employer's response is evaluated by examining the totality of the circumstances. *Spurlino Materials, LLC*, 355 NLRB at 409. An unreasonable delay in furnishing requested information is as much a violation of Section 8(a)(5) as an out right refusal to provide

the information. *Valley Inventory Service*, 295 NLRB 1163, 1166 (1989). The Board has found delays of varying lengths unlawful based on the complexity of the request, availability of information, and diligence with which the employers pursued the requested information. *See, e.g., Pan American Grain Co.*, 343 NLRB 318 (2004), *enfd.* in relevant part 432 F.3d 69 (1st Cir. 2005) (3 month delay unreasonable); *Woodland Clinic*, 331 NLRB 735, 737 (7-week delay unreasonable). *United States Postal Serv. & Nat'l Association of Letter Carriers, Branch 989, Affiliated with Nat'l Ass'n of Letter Carriers, Afl-Cio & Nat'l Ass'n of Letter Carriers, Sunline Branch 504, Affiliated with Nat'l Ass'n of Letter Carriers, Afl-Cio*, , 2015 WL 5934120 (Oct. 9, 2015) (7 day negligence in collecting request for information from fax machine unreasonable).

If an employer is concerned that a request may be unduly burdensome the Employer has an obligation to inform the Union and work towards a mutually agreeable accommodation within a reasonable time. *Mission Foods*, 345 NLRB 788, 789 (2005). The same is true where the employer has concerns about privacy or confidentiality with respect to the requested information. *See, The Finley Hosp. & Serv. Employees Int'l Union, Local 199*, 362 NLRB 915 (2015); *National Steel Corp.*, 335 NLRB 747, 748 (2001), *enfd.* 324 F.3d 928 (7th Cir. 2003).

B. Postmaster Yazzie Denied Huerta's Request for Leave Without Pay in the Middle of a Conversation About Ongoing Board Proceedings, Despite Evidence that Huerta was Spending Negligible Time Performing Work Related to the Needs of the Service

In this case, Yazzie's denial of Huerta's leave came in the midst of a meeting at which a number of labor relations matters were discussed and at which Huerta was present in his capacity as a Union official. During this meeting, Huerta had specifically drawn attention to his ongoing Union activities, the significant amounts of 070 Time he was receiving, his longstanding history of filing extensive requests for information, and history of filing unfair labor practices charges

when those requests for information went unanswered. Huerta also referred back to Union activities that occurred when Yazzie was serving as Manager of Customer Service Operations in Albuquerque in 2017. Huerta followed these references to his past Union activities with a statement that those requests for information, and Respondent's failure to fill them had resulted in Board charges, and ultimately in a hearing scheduled to take place less than a month after Yazzie's installation as Acting Postmaster in Albuquerque. Finally, Huerta told Yazzie that he was probably going to receive a subpoena to testify in that upcoming Board hearing.

It was only after all of this discussion of Huerta's Union and Board activities that Yazzie picked up Huerta's request for leave without pay, looked at it, and told Huerta that he was going to deny the request due to "needs of the service."

When asked about what specific needs of the service had prompted him to deny Huerta's request for leave without pay, Yazzie responded by outlining the services that Respondent performs for the public. Yazzie did not once refer to the performance of Union or Board activities as needs of the service which had served as the basis for his decision. And yet, Yazzie, also admitted that at the time he made the decision, he was aware that Huerta was receiving approximately 40 hours per week of either 070 or 084 time, all of which was spent performing Union duties or engaging in Board activities. These statements were further supported by Mann and Keeran, who both testified that in the summer of 2018 and into the fall of 2018, Huerta spent the majority of his working hours on 070 Time or 084 Leave, engaging in Union and Board activities. Respondent's own records show that Huerta was spending virtually no time performing his bid-job at the time that he made this request for leave without pay, and Respondent was already arranging for other employees to cover Huerta's regular bid-job duties at North Valley Finance during this time period.

Finally, Yazzie acknowledges that he reviewed the North Valley leave roster prior to making a decision about whether to deny Huerta's request for leave without pay, and that there were no other employees scheduled to take leave during that time period.

During the hearing, Respondent raised concerns that if they had to arrange coverage for Huerta's regular bid-job duties, it could create an overtime problem at North Valley. Yet by Yazzie's and Mann's own admissions, Respondent was already arranging such coverage at the time that Huerta made his leave request, and was frequently paying out Huerta's regular salary in addition to any funds required to cover overtime incurred by employees covering his bid-job duties. Had Respondent granted Huerta's request for leave without pay, Respondent might have incurred overtime for the coverage it was already arranging at North Valley, but Respondent would have saved the funds that are ordinarily spent on Huerta's wages for 070 Time, and would have had far more advance notice of Huerta's unavailability than if he was suddenly called away to meet on a grievance, or called in sick.

In light of these prospective savings, and Huerta's complete lack of participation in day to day operations at North Valley Finance, Respondent's justification that the needs of the service required Yazzie to deny Huerta's request for leave without pay is clearly pretextual. When considered in the context of the conversation in which Huerta and Yazzie were engaged at the time Yazzie denied this request for leave without pay, it is quite clear that Yazzie was motivated exclusively by Huerta's Union and Board activities, and the inconvenience that those activities had caused to Yazzie.

C. Respondent and the Union Have Established a Past Practice of Communicating by Fax Transmission

For approximately fifteen years, Union officials have communicated with Respondent by fax transmission, particularly for the purposes of submitting requests for information. In the year

2017 alone, Respondent frequently received as many as 60 requests for information per week by fax transmission. Respondent's own fax machine logs show that the majority of fax transmissions received at its Albuquerque postal stations are sent from the same fax number, 505-243-8611, the number associated with the Union hall.

Historically, Respondent has acknowledged the Union's propensity for communicating by fax transmission by providing the Union with a contact sheet listing the fax numbers for station managers at each of the Albuquerque Postal Stations. The most recent document upon which the Union relied in programming its fax machine was updated on May 14, suggesting that Respondent was still providing updated contact lists including fax numbers to the Union as recently as May 2018.

D. Respondent Implemented a Unilateral Change by Shutting Down or Failing to Maintain Operational Fax Machines

There is no factual dispute over the question of whether or not the Union attempted to send fax transmissions to Respondent's facilities on September 9, September 12, and September 15. The key in this case is why the transmissions failed.

Respondent's fax machine logs show that while the machines are routinely able to send fax transmissions successfully, a large number of the fax transmissions sent to Respondent's fax machines fail. Despite the large number of Board charges filed against Respondent in relation to failing fax machine transmissions, Respondent's managers and supervisors testified consistently that they do not regularly look at fax transmission logs or otherwise inspect the fax machines to establish that they are functioning properly. In fact, Respondent's managers and supervisors struggled to point to any instances in which they had sought any kind of maintenance for these machines.

Respondent's own Information Technology Specialist Perry Dotson testified that there is no regular schedule for conducting fax machine maintenance in the Albuquerque Postal Installation. Unlike Respondent's fax machines, the Union's fax machine is subject to regular maintenance making it unlikely that the Union's fax machine is the source of any technological problem that may be preventing the machines from communicating effectively.

Dotson further testified that Respondent's own fax logs do not record when a machine is shut down or when the fax line is removed from the machine, rendering it incapable of receiving fax transmissions. In the event that someone was to shut down the machine or unplug the fax line, the fax logs simply wouldn't show any transmissions until the machine was turned back on or the fax line was reconnected. In fact, even the monitoring system established by the Respondent's contractors would not register if someone removed the fax line from the machines, because that monitoring system only looks at whether the machine is connected to Respondent's network – a connection that is entirely separate from the machines' fax capabilities.

Once a practice of communicating by fax transmission was established, Respondent's failure to maintain fully operational fax machines by which the Union could contact Respondent amounts to a unilateral change. There is no evidence that Respondent attempted to bargain with the Union about eliminating fax transmissions as a line of communication prior to September 2018, and there is no evidence that the parties reached any kind of agreement about eliminating this means of communication. Instead there is evidence that Respondent has failed to take any steps to maintain machines that they had good reason to know were not operating properly, and that Respondent's managers and supervisors may have gone so far as to remove the fax line from machines in an attempt to avoid receiving requests for information from the Union.

E. Respondent Failed to Maintain Operational Fax Machines as a Form of Retaliation for Daniel Diaz-Huerta's Union and Board Activities

Huerta's Union and Board activities in 2017 and 2018 were quite extensive and well known to Respondent. In fact, all of Respondent's managers and supervisors acknowledged their awareness of his Union and Board activities. Huerta himself testified that he had sent thousands of faxes to Respondent seeking information, and had filed well over a hundred charges with the Board in relation to his requests for information and Respondent's failure to adequately respond to those requests. In the summer of 2018, Huerta used much of the information that he had acquired through these requests for information, along with photographs he took on site visits to Albuquerque postal stations and documents associated with the Board charges filed by the Union, and created a series of Stakeholder Reports which accused Respondent of failing to maintain safe working conditions, delaying the mail, violating the Act, and a variety of other misconduct. Huerta personally provided copies of these Stakeholder Reports to the offices of Senator Tom Udall, Senator Martin Heinrich, Congresswoman Michelle Lujan-Grisham, and Congressman Ben Ray Lujan. Huerta and Fajardo both also referenced the Stakeholder Reports in interviews with the press throughout the Fall of 2018.

The timing of the fax machine failures alleged in this complaint is highly suspicious – each fax failure occurred within a matter of days if not hours after Huerta and the Union engaged in protected activities which were designed to draw press attention and Congressional oversight to Respondent's Albuquerque Installation.

Throughout the Fall of 2018, the Union was engaged in a media campaign related to its stakeholder reports. This campaign was personally spearheaded by Huerta. On August 30, Huerta issued a press release which resulted in national press attention, congressional inquiries, and an Inspector General Inquiry. Huerta issued an additional press release on September 6,

which resulted in further interviews and local press coverage. On September 7, Huerta attempted to conduct a surprise inspection of a number of Albuquerque postal stations with the assistance of Alex Eubanks, an aide from Senator Heinrich's office, Fajardo, and Union Vice President Dennis Corriz. Huerta and his companions' presence was swiftly reported to Yazzie, and the entire delegation was swiftly removed from each postal facility that they visited, including the Academy, Steve Schiff, and Highland Stations.

The first story related to the September 6 press release aired on September 9, on local television channel 13, a network that many of Respondent's managers and supervisors admit to watching regularly. On the same date, Huerta's attempted to make a number of requests for information, seeking box section reports – a type of report that also appeared in the Stakeholder reports issued by the Union – by faxing these requests for information to each Albuquerque postal station. While about half of the fax transmissions were successful, the fax transmissions sent to Academy, Highland, University, Kirtland Air Force Base, Rio Rancho, Richard Pino, Alameda, and Cottonwood Stations all failed.

On September 10, Huerta issued yet another press release again drawing attention to allegations about rodent infestations, delayed mail, and salmonella tied to Albuquerque postal facilities. This resulted in further local news coverage, including several televised interviews of Union officers. On the same date, Huerta also notified Station Manager Keeran that he would be joining District Manager Marty Chavez, Postmaster Chris Yazzie, Plant Manager Mark Jones, Field Representative for Senator Udall Melissa Cavanaugh, Eubank, Fajardo, and Corriz for an investigative visit at the Main Office, Plant, and Highland Station that morning, and that Keeran would need to arrange for someone to cover his duties. This tour was the direct result of the

Stakeholder Reports and resulting press and Congressional attention. Finally, later in the day, Huerta successfully filed a new charge with the Board by fax transmission.

Two days later, on September 12, Huerta spoke by phone with Steve Schiff Station Manager Andy Letterhos, during their conversation, Huerta agreed to provide Letterhos with an example of the type of report he had requested in a recent request for information, and Letterhos agreed to send Huerta a copy of an emergency placement letter related to an ongoing grievance Huerta was handling. After hanging up the phone, Huerta made two attempts to fax the report to Letterhos just as they had discussed, but both attempts failed. When Letterhos attempted to send the emergency placement letter to the Union Hall by fax, however, the transmission was immediate and successful.

Just a few days later, Huerta experienced yet another fax transmission failure at Steve Schiff Station, again when he attempted to submit a request for information by fax. When Huerta attempted to send a second request for information to Steve Schiff Station later that morning, however, the transmission was successful, suggesting that the machine was not broken beyond repair. When Huerta went back to make a third request for information later in the day, the transmission was, again, unsuccessful. This intermittent functionality of the fax machine at Steve Schiff Station only a handful of days after Letterhos removed Huerta and his companions from the Steve Schiff facility during their surprise inspection, and in the midst of a flurry of media coverage of problems which included information of the type Huerta was seeking in these requests for information suggests that the failure to perform necessary maintenance after the first failure was likely deliberate, and motivated by Huerta's protected activities.

This string of fax machine failures or malfunctions in the days immediately following Huerta's activities with Eubanks, Senators Heinrich and Udall, and the local news media, suggest

that the failures and these activities are likely connected. This connection seems even more likely in light of daily public affairs email sent to Respondent's managers and supervisors notifying them of press coverage and the public nature of Huerta and Eubank's site visits, and the emails exchanged among Respondent's managers and supervisors about the inconvenience and harm to Respondent's reputation that the press and congressional attention was causing.

F. The Requested Information is Clearly Relevant to the Union's Grievance Processing Responsibilities

1. The July 5 Request for Information

On July 5, the Union submitted a request for information related to an ongoing grievance over job reversions, seeking the RPG report which Respondent had previously stated was the basis for its decision to revert a number of jobs at the Albuquerque Plant and Distribution Center. Such a report is clearly relevant to a grievance over Respondent's reversion of jobs. Its relevance is particularly clear in light of Respondent's own statements that the RPG report specifically formed the basis for its decision. Evaluating that basis would be essential to the Union's ability to develop and process a grievance over the reversion of these specific jobs.

2. The September 15 Request for Information

On September 15, the Union submitted a request for information to Steve Schiff Station Manager Andy Letterhos requesting a box-up time report for Steve Schiff Station, in relation to a grievance over the falsification of box up time reports which the Union alleges are being used to justify job abolishments. In a grievance dealing with potential falsification of documents, the documents that Respondent is apparently relying on as the basis for its decision are clearly relevant – it is not possible to evaluate the authenticity of a document without reviewing the document itself.

3. The September 28 Request for Information

The Union's September 28 Request for: (2) other job offers made to Janelle within craft, (3) description of job duties for Janelle, and (4) notification to APWU of light limited duty for Janelle, is clearly relevant to a grievance over the cross-craft assignment of clerk duties to city letter carrier Janelle. The Union had filed several previous requests for information and grievances related to the cross-craft assignment of clerk duties to Janelle, and so Respondent was well aware of the type of grievance that the Union was investigating when Wood submitted this request on September 28. In order to determine whether or not Janelle was being assigned clerk duties, or whether Janelle's assignment to perform clerk duties fell within the limited exception for light-limited-duty employees established in the CBA, the Union first needs to know what duties Janelle is performing, whether job offers were made to her within her own craft as required by the CBA, and to establish whether there was any attempt to notify the Union of her assignment as required by the CBA.

4. The October 1 Request for Information

The Union's October 1 request for clock rings for employees at Five Points Station is again clearly relevant to a grievance related to the possible cross-craft assignment of clerk duties to letter carriers and rural letter carriers, and to the possible remedy for such assignments. In the event that the wrongful cross-craft assignment of clerk work to city letter carriers or rural letter carriers resulted in fewer opportunities for overtime, or the denial of the opportunity for overtime work to clerks at Five Points Station, the Union could only establish the extent of that harm to Five Points clerks by looking at what hours those clerks actually worked, and then establishing how many hours of overtime would otherwise have been available to those employees. Such information is essential to evaluating possible remedies and ultimately settling a grievance.

G. Respondent Unlawfully Delayed In Responding to the Union's Requests for Information

1. The July 5 Request for Information

Plant Manager Mark Jones does not deny that he failed to respond to this request for information for well over a month. While Respondent will emphasize that they responded to the request for information within days after receiving the underlying charge in this case alleging that the Employer had failed to furnish this Union with this relevant information, the fact remains that Jones, knowing well how important it was that Respondent reply to requests for information in a timely manner, failed to check all of the folders in his email inbox, and consequently let this request go unanswered for weeks. In the context of the grievance and arbitration process in the parties' CBA, which requires the parties to meet after only 14 days, a delay of four weeks is clearly unlawful.

2. The September 28 Request for Information

Respondent ultimately did provide the requested information five weeks later, on November 5, in response to another request for the same information. Mann wrote on the other request for information that there were no other offers made, that Janelle was not working in clerk craft, and that Respondent was not required to notify the Union of this assignment. This information was not provided until after the Union had met on the grievance at Step 1 and Step 2. Consequently, had this information altered the Union's case significantly, the Union would not have been able to use the information in the grievance process due to the full disclosure requirement established in the parties' CBA, requiring a full disclosure of each party's case at Step 2. In the context of the grievance and arbitration process in the parties' CBA, which requires the parties to meet after only 14 days, a delay of five weeks is clearly unlawful.

3. The October 1 Request for Information

While the evidence shows that the information was ultimately provided to the Union on October 30, a full month after the request for information was submitted, it is clear that Respondent unnecessarily delayed in producing the information. Clock rings are readily available to all postal managers at the click of a button on a computer, and Pantoja admits that despite knowing that the Respondent is obligated by an order of the Tenth Circuit Court of Appeals to promptly provide requested information to the Union, he failed to check his email for several weeks while on annual leave and then attending management training, and did not make arrangements to notify the Union that he would not be checking email or to have someone else respond to requests for information or other time sensitive messages sent directly to him during that time period. Pantoja's negligence in this regard resulted in an unnecessary delay of more than two weeks in responding to the Union's request for information after the Union reached out about missing clock rings, and a four-week delay from the date that the request was originally submitted. In the context of the grievance and arbitration process in the parties' CBA, which requires the parties to meet after only 14 days, a delay of four weeks is clearly unlawful.

H. Respondent Refused to Furnish the Union with any Response to the September 15 Request for Information

The Union has not received this clearly relevant information, which is in and of itself a violation of Section 8(a)(5) of the Act. The evidence shows that the request was successfully transmitted to the Respondent by a means of communication frequently used by the Union and Steve Schiff Station Manager Andy Letterhos, and that Respondent failed to produce the information. In fact, Respondent failed to respond at all. While the Respondent may argue that the grievance is time barred and that it is therefore not obliged to produce the information for the Union, the Respondent failed to respond in any way, including to inquire as to the relevance of

this document or the timeliness of any grievance that might be raised in relation to this information. Respondent's failure to respond in any manner to this request for information is clearly a violation of Section 8(a)(5) of the Act.

V. Remedy

Counsel for the General Counsel respectfully seeks a remedial order requiring that the Respondent: grant Daniel Diaz-Huerta five weeks of leave without pay, maintain functional fax machines at its Albuquerque Postal Stations, and leave those fax machines turned on at all times, perform proper maintenance on fax machines when they are notified or have reason to believe that the fax machines are malfunctioning, furnish the Union with all requested information and post an official Board notice to employees at its Albuquerque, New Mexico facilities and on its LiteBlue intranet. The General Counsel further seeks all other relief as may be just and proper to remedy the unfair labor practices alleged.

Dated at Albuquerque, New Mexico, this 21st day of October 2019.

Respectfully submitted,

/s/ Katherine E. Leung

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(To be printed and posted on official Board notice form)

FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative to bargain with us on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT refuse to bargain in good faith with the American Postal Workers Union, AFLCIO, Local 380 (Union) as the exclusive collective-bargaining representative of our employees in the following appropriate unit:

All employees in the bargaining unit for which the American Postal Workers Union, AFL-CIO, has been recognized and certified at the national level, including Maintenance Employees, Motor Vehicle Employees, Postal Clerks, Special Delivery Messengers, Mail Equipment Shops Employees, Material Distribution Centers Employees, and Operating Services and Facilities Services Employees, and excluding managerial and supervisory personnel, professional employees, employees engaged in personnel work in other than purely nonconfidential clerical capacity, security guards as defined in Public Law 91-375, 1201(2), all Postal Inspection Service Employees, Letter Carriers, and all other employees.

WE WILL NOT fail and refuse to bargain in good faith with the Union by failing and refusing to provide it information that is necessary and relevant to its role as your bargaining representative.

WE WILL NOT unreasonably delay in providing the Union with requested information that is relevant and necessary to its role as the exclusive collective bargaining representative of the Unit employees.

WE WILL NOT unreasonably relay informing the Union that information requested that is relevant and necessary for the Union's performance of its duties as the exclusive collective bargaining representative of the Unit does not exist or that it was provided in response to an earlier information request.

WE WILL NOT refuse to meet and bargain in good faith with your Union any proposed changes in wages, hours and working conditions before putting such changes into effect.

WE WILL NOT make changes to the wages, hours, and other terms and conditions of employment of the Unit, without notifying the Union or affording the Union an opportunity to bargain with respect to its conduct or the effects of this conduct, by failing to maintain the facsimile machines at its Albuquerque area postal facilities.

WE WILL NOT shut down the fax machines because you have given an affidavit or participated in a Board proceeding.

WE WILL NOT fail to maintain operational fax machines because you have given an affidavit or participated in a Board proceeding.

WE WILL NOT deny your requests for leave without pay because of your union membership or support.

WE WILL NOT deny your requests for leave without pay because you have given an affidavit or participated in a Board proceeding.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

WE WILL provide the Union with the information it requested on July 5, 2018 seeking 1) Daily Run Program Generator (RPG) reports to Tour 1 Automation (Pay Loc 171) for leave years 2017, 2018, 2) Daily RPG reports for Tour 3 Automation (Pay Loc 371) for leave years 2017, 2018.

WE WILL provide the Union with the information it requested on September 15, 2018 seeking copy of the Five Points Station "Box Section Audit" of July 2018 no later than the close of business day of September 19, 2018.

WE WILL provide the Union with the information it requested on September 28, 2018 seeking (2) Other job offers made to Janelle within craft (3) Description of job duties for Janelle (4) Notification to APWU of light limited duty for Janelle

WE WILL provide the Union with the information it requested on October 1, 2018 seeking Ps 3971 for all clerks FTR and PSE at the Five Points station for 09/15/2018 - 09/28/2018.

WE WILL, if requested by the Union, bargain collectively with the Union as the exclusive representative of the employees in the Unit, with respect to any proposed changes to the wages, hours, and other terms and conditions of employment of employees in the Unit and the effects proposed changes on the wages, hours, and other terms and conditions of employment of employees in the Unit.

WE WILL upon reasonable notification by the Union that a fax machine at any Albuquerque area postal facility is inoperable, we will inspect the fax machine at issue and, if necessary, conduct maintenance of the fax machine so that it is operable, and we will notify the Union what steps Respondent has taken to ensure the fax machine is operable.

WE WILL grant Daniel Diaz-Huerta's request for five weeks of leave without pay, and **WE WILL** notify him in writing that we have done so.

United States Postal Service

(Employer)

Dated: _____

By: _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. We conduct secret-ballot elections to determine whether employees want union representation and we investigate and remedy unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below or you may call the Board's toll-free number 1-844-762-NLRB (1-844-762-6572). Hearing impaired callers who wish to speak to an Agency representative should contact the Federal Relay Service (link is external) by visiting its website at <https://www.federalrelay.us/tty> (link is external), calling one of its toll free numbers and asking its Communications Assistant to call our toll free number at 1-844-762-NLRB.

2600 North Central Avenue
Suite 1400
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Telephone: (602)640-2160
Hours of Operation: 8:15 a.m. to 4:45 p.m.

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

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the above Regional Office's Compliance Officer.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing General Counsel's Brief to the Administrative Law in *United States Postal Service*, Cases 28-CA-222265 et al, was e-filed and served by email as indicated below on this 21st day of October 2019:

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