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

**EL PASO ELECTRIC COMPANY**

**and** **Cases 28-CA-21111**
**28-CA-21217**
**28-CA-21309**

**INTERNATIONAL BROTHERHOOD**
**OF ELECTRICAL WORKERS,**
**LOCAL UNION 960, AFL-CIO**

# GENERAL COUNSEL'S STATEMENT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Counsel for the General Counsel (CGC) files the following exceptions to the Decision of Administrative Law Judge George Carson II (ALJ) [JD(ATL)–28–07] issued on September 21, 2007, in the above-captioned cases:

1. CGC excepts to the ALJ's findings and conclusions that former Respondent CEO Gary Hedrick, on October 24, 2007, did not "threaten loss of employment through subcontracting ... because ... [the employees] engaged in Union ... activities." (ALJD 7:29-31).

2. CGC excepts to the ALJ's findings and conclusions dismissing the allegations contained within ¶ 6(b) of the Complaint.

3. CGC excepts to the ALJ's findings and conclusions that Supervisor John Day's new requirement, promulgated in June 2006, that his employees report to him whenever they were unable to complete their work orders for the day and explain why they had been unable to do so "was not a 'material, substantial, and significant' change that would trigger a bargaining obligation." (ALJD 10:12-14)

4. CGC excepts to the ALJ's findings and conclusions that Charging Party International Brotherhood of Electrical Workers, Local Union 960 (AFL-CIO) was put on notice of new lunch and break-time rules for Las Cruces employees because Shop Steward Edward Trujillo attended a meeting in February 2006 at which this change was announced to him and his coworkers. (ALJD 8:5-16)

5. CGC excepts to the ALJ's findings and conclusions dismissing the allegations contained within ¶ 7(a) of the Complaint.

6. CGC excepts to the ALJ's findings and conclusions dismissing the allegations contained within ¶ 7(d)(3) of the Complaint.

7. CGC excepts to the ALJ's findings and conclusions that Supervisor Day's new requirement, promulgated in June 2006, that employees must make all "swaps" of work assignments before they left their reporting location in the morning "was not a 'material, substantial, and significant' change." (ALJD 10:25-26)

8. CGC excepts to the ALJ's findings and conclusions dismissing the allegations contained within ¶ 7(d)(4) of the Complaint.

Dated at Phoenix, Arizona this 18th day of October 2007.

Respectfully submitted,

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# COUNSEL FOR THE GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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## COUNSEL FOR THE GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

## I. INTRODUCTION

This matter is before the Board upon the General Counsel's Consolidated Complaint alleging that El Paso Electric Company (Respondent) violated §§ 8(a)(1) and (5) of the Act. Since 2003, Respondent, has repeatedly flouted its obligations under the Act by refusing to recognize its employees' right to bargain together collectively, including refusing for months to meet at reasonable times for bargaining with its employees' representative, the International Brotherhood of Electrical Workers, Local Union 960 (AFL-CIO) (Union), and implementing numerous unilateral changes to unit employees' terms and conditions of employment, resulting in discipline and discharge. On several occasions, Respondent has subjected one its most recently-organized work groups, its customer service representatives (CSRs), to especially harsh treatment to send a signal to its workforce about the consequences of choosing Union representation. This harsh treatment included unilaterally closing its Chelmont facility in February 2006, the site where most of its most pro-Union CSRs worked.

A hearing was held on July 31 and August 1, 2007, during which the parties presented their witnesses and documentary evidence. On September 21, 2007, Administrative Law Judge George Carson II (ALJ) issued a decision upholding in part and dismissing in part the Consolidated Complaint. See *El Paso Elec. Co.*, JD(ATL)-28-07.[1] In particular, the ALJ found that Respondent had illegally implemented new reporting requirements for its Las Cruces employees and, through its then-CEO Gary Hedrick, engaged in unlawful direct

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[1] References to the ALJ's decision in this matter, dated September 21, 2007, are designated as "ALJD." References to the transcript of the hearing in this proceeding are designated as "Tr." References to the decision and transcript are followed by the appropriate page number and as applicable, a colon and the line number(s).

dealing. The ALJ, however, dismissed allegations that Respondent: (a) by CEO Hedrick, threatened to subcontract away employees' jobs because of their Union activities; (b) implemented a new requirement that that Las Cruces employees report any incomplete work and explain why it had not been completed; (c) changed Las Cruces employees' lunch and break-time rules; and (d) implemented new restrictions on Las Cruces' employees' ability to exchange work assignments with each other. In doing so, the ALJ misconstrued the applicable law and misread the record.

## II. STATEMENT OF RELEVANT FACTS

Respondent is a public utility incorporated in the State of Texas, with a place of business in El Paso, where it generates and distributes electricity. Respondent operates facilities in El Paso, Texas, as well as Las Cruces, New Mexico. (ALJD at 2) The Union and Respondent have a long history of collective bargaining covering approximately one-third of Respondent's workforce, including its linemen, power plant, and substation personnel (the Historical Unit). (See *El Paso Elec. Co.*, JD(SF) 03-07 (Mar. 1, 2007) (McCarrick, J.) at 5) The Historical Unit has traditionally been covered by a three-year collective-bargaining agreement, the last of which expired in June 2006. (Id.) Beginning in 2003, the Union began organizing the unrepresented portions of Respondent's workforce. The Union was certified as the collective-bargaining representative of these employees on the following dates: Meter Readers/Collectors, October 10, 2003; Facilities Services, October 24, 2003; and Customer Service Representatives, August 30, 2004. (Id. at 5-8) In each case, the employees voted to be included in single bargaining unit along with the Historical Unit, pursuant to *Armour & Co.*, 401 NLRB 1333 (1942), and *The Globe Machine & Stamping Co.*, 3 NLRB 297 (1937). (Id.)

### A. Respondent's Prior Unfair Labor Practices

Respondent has been subject to multiple Board investigations and was the subject of prior unfair labor practice hearings held before ALJ Lana A. Parke in Cases 28-CA-19551 and 28-CA-20017, reported at *El Paso Elec. Co.*, JD(SF) 28-05 (Apr. 4, 2005), and ALJ John J. McCarrick in Cases 28-CA-20136, 28-CA-20141, 28-CA-20265, 28-CA-20464, 28-CA-20695, 28-CA-20765, and 28-CA-20766, reported at *El Paso Elec. Co.*, JD(SF) 03-07 (Mar. 1, 2007). In the first matter, ALJ Parke, a federal district court judge pursuant to § 10(j), and the Board, found that Respondent had violated the Act by unfairly disciplining a CSR for her Union and other protected activities and implementing unlawful unilateral changes the day after she and her fellow CSRs selected the Union as their collective-bargaining representative. (See *El Paso Elec. Co.*, JD(SF) 28-05; *Overstreet v. El Paso Electric Company*, No.3:05-CV-61, slip op. (W.D. Tex. Jun. 7, 2005); *El Paso Electric Co.* 350 NLRB No. 14, slip op. (June 29, 2007)).

Subsequently, in March 2007, ALJ McCarrick found that Respondent, despite having entered into two informal Board settlement agreements, had engaged in additional unfair labor practices between 2004 and 2006 by:

- failing to meet at reasonable times for bargaining;
- implementing numerous new unilateral changes, including changes to break times and monitoring of meter readers, disciplining meter readers pursuant to those charges;
- disciplining numerous employees pursuant to these new unilateral changes;
- unilaterally imposing a more onerous disciplinary system and disciplining numerous employees pursuant to that system;
- issuing an unwarranted negative evaluation to the *same* CSR who ALJ Parke had found was unfairly disciplined;

- threatening employees because they engaged in Union activities;
- creating an impression of surveillance;
- violating employees' *Weingarten* rights;
- denying an employee's request for leave to meet with a Board Agent in violation of Section 8(a)(1), (3), and (4);
- implementing unilateral changes to the manner in which Union representatives were informed of upcoming disciplinary meetings;
- implementing unilateral changes to Union access to Company resources, and issuing a negative appraisal to Union Business Manager Felipe Salazar based on the latter rule;
- refusing to furnish information; and
- unilaterally closing Chelmont, one of its CSR worksites, without notice or opportunity to bargain with the Union.

(See *El Paso Elec. Co.,* JD(SF) 03-07)

**B. The Record Facts Relevant to Exceptions**

As evidenced by the multiple unfair labor practice findings outlined above, Respondent's response to the "Globing" of its previously unrepresented workers was harsh and unequivocal. Between 2004 and 2006, Respondent took the position that it was not required to meet with the newly-represented groups as a single bargaining unit, and only acquiesced to do so under the terms of a Board settlement, which it later violated.

1. Hedrick's Direct Dealing and Threat

On the evening of October 24, 2006, 40 to 50 employees gathered in front of Respondent's downtown headquarters chanting and carrying picket signs. (ALJD at 13; Tr. 219-20, 240, 391-92) This group had gathered to picket during negotiations numerous times during the previous four months. (ALJD 13; Tr. 219-20) On this occasion, as the ALJ found, then-CEO Gary Hedrick appeared and engaged the protesters in a discussion about

"what their concerns were" and "to find out what [they] wanted." (ALJD at 13) Based on these discussions, Hedrick instructed his bargaining committee to formulate proposals designed to satisfy the employees' concerns, and did so, as the ALJ found, to the exclusion of the Union, their chosen bargaining representative.

While Hedrick was engaged with the protesting employees, members of the Union's bargaining committee received telephone calls alerting them to Hedrick's actions. (ALJD at 6) The committee members left the negotiations within the headquarters building to confront Hedrick. During this confrontation, bargaining committee member Linda Montes, who is also a CSR, accused Hedrick of reneging on a promise made during Respondent's anti-Union campaign leading up to the CSR's 2004 "Globe" election. The ALJ found that Montes told Hedrick that, "because of negotiations," Respondent now wanted to subcontract out jobs to save money. (ALJD 6-7) The ALJ credited testimony that Hedrick responded to her comment by stating that he would "get rid of any and all positions so that the board of directors and myself can earn more money." Id. Although not noted by the ALJ, the response of employees in the crowd to Hedrick's comment was telling: according to Rosanne Enriquez, a witness credited by the ALJ on the substance of the direct dealing allegations, the employees "went crazy" and tried to intervene in the conversation, but Hedrick refused to respond to them. (Tr. 242)

2. Respondent's Change to Las Cruces Employees' Lunch Break Rules

Respondent's operations include several Las Cruces, New Mexico-based line crews. These crews construct and maintain electrical lines in mostly rural areas. (Tr. 111) It is undisputed that, to service these areas, crew members are required to drive company vehicles to the job site; they are not permitted to use their own vehicles. (Tr. 112) It is also

undisputed that the parties' collective-bargaining agreement, which expired on June 15, 2006, provided that "an employee shall provide the employee's own meal to be eaten at the job location." (RX 3 at 33) According to long-time employees Alfredo Gardea, Donald Grubbs, and Huey Miles, prior to 2006, employees in Las Cruces stopped for lunch at restaurants near their job site, and sometimes picked up take-away meals from restaurants and brought them back to the jobsite, always using a company vehicle. (Tr. 77, 112, 127, 250-51) Prior to 2006, Respondent never instructed its crews that they could not drive to a restaurant in one of its vehicles. (Tr. 113, 127) On the contrary, the record demonstrates that the line crews' supervisors themselves ate with the crew in restaurants, up to the latter part of 2006. (Tr. 25-26; 113; 128)

This practice changed in 2006, when Vice President Hector Puente decided he no longer wanted employees using company vehicles to drive to restaurants for lunch. In February 2006, Puente announced, through Supervisor Danny Sanchez, that crews were no longer allowed to go to *any* restaurant for lunch. (Tr. 116, 128-29, 252, 355-56) The "no restaurant" rule has been more than a mere inconvenience for the line crew. At least one employee testified that, as a result of the rule, he is unable to visit a washroom during the day to check his blood and care for his diabetes. (Tr. 129)

Felipe Salazar has been the Union's Business Representative and chief officer of Local 960 for the past ten years. (2007 ALJD: 8) The record conclusively establishes that there was no discussion of this new rule with Salazar prior to its promulgation. (Tr. 63; 72-73) Art Trujillo, the Head Shop Steward in Las Cruces, however, was present when the new rule was announced. The record is devoid of any evidence that Head Shop Stewards such as

Trujillo were ever authorized to negotiate agreements regarding work rules, or that Trujillo communicated this change to Salazar.

3. Day's New Rules for Las Cruces Distribution Yard

On his first day as supervisor, John Day conducted a meeting with the crew of outside order workers and wire installers to share his expectations of them and what he considered their responsibilities to Respondent. (Tr. 13-14; GCX 2) The employees' prior supervisor, Jack Diehl, also attended the meeting. (Tr. 32) At the meeting, Diehl – who had supervised the crews for eight years – announced to the employees, "gentlemen, we are aware that there are going to be some changes coming down the pipeline." (Tr. 35, ll. 21-25; 36, l.1; 39-40) Day then told the employees that he would do everything he could to keep them "on the right track" and that he would require, among other things, that: (a) they were to leave the yard within 15 minutes after their morning meeting; and (b) they were not allowed to swap routes with each other once they had left the building. (Tr. 14-16; 26-27) Day made it clear that his rules would have consequences, informing employees that any violations could "come back to haunt them." (Tr. 16-17; GCX 2)

In July or August 2006, Day issued additional rules, in written form, and announced that these rules were what the employees would have to do "from now on." (Tr. 22, 130-31, 140) The memorandum he handed to employees and posted contained the following rules:

- Will be out of the yard in 15 minutes after being released to work. Any order exchanges will be done before leaving the building.
- Will complete all line orders assigned. If not able to complete orders, must notify Supervisor of the status of the work and why you can not complete orders.

(GCX 3; Tr. 21-22) There is no dispute that these rules constituted a change from prior practice. Diehl, the prior supervisor, had maintained no restrictions on employees' swapping work after leaving the building, nor had he required them to report or explain incomplete work orders. (Tr. 134, 352-53) Diehl had no hard-and-fast rule on when employees left the yard in the morning. (Tr. 132, 348, 354) Before issuing his new rules, Day admittedly did not discuss any of them with the Union. (Tr. 22-23)

## III. LEGAL ARGUMENT

### A. The ALJ Erred in Not Finding Hedrick's Statement to Union Protesters that He Would Outsource Any and All Jobs Constituted an Illegal Threat

The ALJ correctly found Hedrick's on the evening of October 24 to constitute direct dealing in violation of § 8(a)(5) of the Act. (ALJD 14-15) What the ALJ missed was the significance of the exchange between Hedrick and a member of the Union's bargaining committee who confronted him in the middle of his direct dealing with unit employees. In dismissing the allegation that Hedrick's statement that he would "get rid of any and all positions" constituted an unlawful threat, the ALJ sought to portray the statement as merely "stated in economic terms relating to 'all positions,'" and "not stated in terms of the CSRs having selected the Union as their collective bargaining representative." (ALJD 7)

The ALJ's analysis ignores the backdrop against which Hedrick's remarks were made. More specifically, Hedrick threatened to "get rid of any and all positions" shortly after Respondent unlawfully closed the Chelmont facility; made this threat in response to criticisms leveled by a CSR; and delivered the threats in front of a large group of Union protesters while committing other unfair labor practices. Under these circumstances, Hedrick's remarks clearly amount to an unlawful threat to outsource or subcontract work because employees elected to be represented by a union. See *MPG Transport, Ltd.*, 315 NLRB 489 n.1 (1994).

The ALJ's analysis is defective for the additional reason that it would require Hedrick to *expressly* link his plan to subcontract jobs with his employees' selection of the Union before finding a violation. Such a requirement would read the implied threat concept out of the law. The Board has consistently held that, when an employer responds to an employees' concerted pro-Union communications by stating that it will subcontract their jobs, the implied threat is clear. For example, in *Electronic Data Systems Corp.*, 305 NLRB 219, 238 (1991), the Board found an illegal threat where a manager who overheard a pro-Union conversation stated, "[y]ou better walk light because [a subcontractor] is trying to get your jobs anyway." Here, Hedrick's announced intention to outsource "any and all jobs" followed his being confronted, mid-direct dealing, by CSR Montes and other members of the Union's bargaining committee. Tellingly, when Montes accused him of wanting to subcontract out jobs "because of the negotiations," Hedrick did not deny this; his silence thus sent a powerful signal to the assembled employees about what their selection of the Union as bargaining representative had gained for them.

For these reasons, the Board should reverse the ALJ's finding that Hedrick's threat to subcontract out "any and all jobs" was not a threat in violation of § 8(a)(1) of the Act.

### B. The ALJ Erred in Finding that Notice to Steward Trujillo Triggered the Limitations Period

The ALJ dismissed as time-barred the allegation that "[i]n or about July ... the Respondent promulgated and implemented changes to its work rules, policies, and practices regarding employees' lunch breaks and use of the Respondent's vehicles" with respect to Respondent's Las Cruces employees. According to the ALJ, the Union was placed on notice of these changes when they were announced in May and June 2006, because Head Steward Trujillo was present when the changes were announced. Because the record is devoid of any

evidence that Trujillo relayed this information to the Union's Business Manager, Salazar, the ALJ's decision hinges solely on the notice to Trujillo as sufficient to trigger the § 10(b) period.

The ALJ's reliance on this notice is misplaced. The record fails to demonstrate that Head Shop Stewards were ever allowed to negotiate arrangements regarding employee lunch rules. See *Wometco-Lathrop Co.*, 225 NLRB 686 at 688 (burden is on the party advancing agency status to establish real or apparent authority). On the contrary, the record establishes that employee lunch rules had been the subject of negotiations handled by the Union's bargaining committee in the course of collective-bargaining negotiations. Under similar circumstances, the Board has refused to find that a steward's knowledge of the implementation of a rule that applied to employees outside the steward's "jurisdiction" (i.e., jobsite) constitutes knowledge for purposes of § 10(b). *Albertson's, Inc.*, 351 NLRB No. 21, slip op. (Sep. 29, 2007). As the Board has stated, implementation of such a rule:

> without application to a store based event or employee, is not of immediate or direct concern to the local steward in his or her role as agent of the Union and the steward would not be reasonably expected to report its issuance to his superiors in the Union. Therefore the Union is not reasonably or constructively put on notice of the existence of such a rule by the fact that stewards, in their role as store employees, are required to sign a copy of the rule thereby acknowledging that they have read it.

Id. at * 212.

Here, because the record indicates that the break-time rules were implemented by Vice President Puentes on a division-wide basis, the fact that Trujillo, along with his coworkers, was informed of this change in an employee meeting is insufficient, without application to any Las Cruces employee, to put the Union on notice of the change sufficient to trigger the

§ 10(b) period. Accordingly, the Board should reverse the ALJ's finding that this allegation is time-barred.

### C. The ALJ Erred in Finding that Supervisor Day's New Reporting Requirement Was Not "Material, Substantial, and Significant"

The record establishes that in July and August 2006, Day announced new work rules to the newly-represented line crew employees in Las Cruces, including a rule that required employees to report the status of their work. Significantly, the record also establishes that Day made it clear to employees that any violation of his announced rules would have serious consequences. The ALJ found that, "[p]rior to Day becoming supervisor, employees had not been required to call in to advise that they were going to be unable to finish a job. Diehl had maintained no such requirement; instead, he 'would usually ask them' if he needed to know." (ALJD at 10)

The ALJ dismissed the allegation that the implementation of this new rule did not violate the Act because there was no employee testimony as to "any inconvenience" caused by the new rule. As such, the ALJ concluded the change was not "material, substantial, and significant." Id. The ALJ's finding ignores the undisputed record. More specifically, the ALJ failed to acknowledge the admissions by Day and Diehl that the new rule required the employee to come forward and *explain* why they had been unable to complete their work, on each and every occasion which had never been required before. Requiring employees to affirmatively account for each and every shortfall in their work progress may reasonably be construed as a precursor to adverse action, or at a minimum, closer supervision and corrective action that would seem significant to a reasonable employee. The ALJ's finding also ignores long-established Board law, which provides that work rules which may potentially be enforced by discipline have an unquestionable effect on employees' job security and are,

therefore, a mandatory subject of bargaining. See, e.g., *Diamond Walnut Growers, Inc.*, 312 NLRB 61, 70 (1993) (announcement and posting of unilateral change in job requirement is unlawful even if the requirement was not actually imposed on employees). The ALJ's dismissal of this allegation, therefore, should be reversed.

### D. The ALJ Erred in Finding that Supervisor Day's New Restriction on Employees' Swapping Work Assignments Was Not "Material, Substantial, and Significant"

Finally, the ALJ erred by finding that Supervisor Day's prohibiting employees from swapping work assignments after they left the yard did not violate the Act. According to the ALJ, this change was not material, substantial, or significant because no employee testified as to its impact on working conditions

In reaching this conclusion, the ALJ disregarded the undisputed fact that employees had previously been allowed to exchange work assignments at any time, and that Day had already shortened the time in which employees were required to prepare their trucks and leave the yard. The ALJ also disregarded settled Board law that a revision to rules governing how employees are allowed to trade work assignments is, in fact, an unlawful unilateral change. *Blossom Nursing Center*, 299 NLRB 333, 337-38 (1990) (unilateral change where employer placed new restrictions upon the trading of hours; under new system, only quid pro quo trades of entire shifts were allowed, whereas under prior practice, an employee could trade only certain hours with another employee). Here, particularly in light of the shortened time employees were allowed to remain in the yard, the requirement that all "swaps" be performed within this time frame indeed presented a substantial limitation on employees' ability to swap work. The ALJ's determination to the contrary was in error, and should be reversed.

## IV. CONCLUSION

Based upon the above facts and legal analysis, Counsel for the General Counsel respectfully submits that the ALJ erred by failing to find that Respondent, through Hedrick, violated Section 8(a)(1) by threatening to subcontract any and all jobs in response to their Union activities; and violated Section 8(a)(5) by implementing a new requirement that its Las Cruces employees report any incomplete work and explain why it had not been completed, changing its Las Cruces' employees' lunch and break time rules, and implementing new restrictions on Las Cruces' employees' ability to exchange work assignments with each other. Counsel for the General Counsel asks that the Board find that Respondent engaged in these unfair labor practices and issue an appropriate order remedying them.

Dated at Phoenix, Arizona this 18th day of October 2007.

Respectfully submitted,

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CERTIFICATE OF SERVICE

**I hereby certify that COUNSEL FOR THE GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE and GENERAL COUNSEL'S STATEMENT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE in El Paso Electric Company, Cases 28-CA-21111, 28-CA-21217, and 28-CA-21309, was served by overnight delivery via Federal Express, on this 18th day of October 2007, on the following:**

***The original and seven copies on:***

Lester A. Heltzer, Executive Secretary
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