**GFC Crane Consultants, Inc. *and* District No. 1-Pacific Coast District, Marine Engineers Beneficial Association, AFL–CIO.** Cases 12–CA–21302, 12–CA–21321, 12–CA–21496, and 12–CA–21537

August 29, 2008

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN

On April 4, 2002, Administrative Law Judge Pargen Robertson issued the attached decision. The Respondent filed exceptions and a supporting brief, an answering brief, and a reply brief; the General Counsel filed cross-exceptions, an answering brief, and a reply brief; and the Charging Party filed an answering brief to the Respondent's exceptions.

On September 30, 2006, the Board remanded the case to the judge for further consideration in light of the Board's decisions in *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006), *Croft Metals, Inc.*, 348 NLRB 717 (2006), and *Golden Crest Healthcare Center,* 348 NLRB 727 (2006).[1]

On February 9, 2007, Judge George Carson II (Judge Robertson had retired) issued the attached supplemental decision. The Respondent filed exceptions,[2] a supporting brief, and a reply brief. The General Counsel and the Charging Party each filed an answering brief.

The National Labor Relations Board has considered the decisions and the record in light of the exceptions[3] and briefs and has decided to affirm the judges' rulings, findings,[4] and conclusions[5] as modified herein and to adopt the recommended Order as modified[6] and set forth in full below.[7]

1. We agree with the judge, for the reasons set forth in his decision, that the Respondent's discharge of the port engineers and replacement of them with the crane maintenance technicians (CMTs) violated Section 8(a)(3) of the Act. In doing so, we particularly rely on the pretextual nature of the Respondent's asserted reasons for its actions, which reasons demonstrate the Respondent's animus towards its employees' protected union activity. According to the Respondent, the port engineers were discharged because (1) there was less work for them to perform because of a downturn in cargo, (2) the Respondent wanted to upgrade its work force by hiring a more skilled set of employees, the CMTs, and (3) the Union's unreasonable wage demands triggered a restructuring of operations. We find that the record does not support any of these contentions.

First, the Respondent's contention that there was less work for the port engineers is contradicted by the testi-

[1] 348 NLRB 871.

[2] The Respondent has excepted to some of the credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] In the absence of exceptions, we adopt the findings that the Respondent violated Sec. 8(a)(5) by refusing to arbitrate grievances and by "threatening" to implement changes in terms and conditions of employment; and violated Sec. 8(a)(1) by threatening employees that it no longer recognized the Union and was going to fill bargaining unit jobs with nonbargaining unit employees. These findings do not constitute precedent for other cases. *Colgate-Palmolive Co.*, 323 NLRB 515 fn. 1 (1997); see also *Anniston Yarn Mills*, 103 NLRB 1495 (1953).

The Respondent excepts to the finding that the Respondent violated Sec. 8(a)(1) by telling its employees that they had better talk to the Respondent's president if they wanted to keep their jobs while the parties were engaged in collective bargaining; and that they could continue to perform the same job but would have to leave the Union. The Respondent, however, presented no argument in support of these exceptions. Therefore, in accordance with Sec. 102.46(b)(2) of the Board's Rules and Regulations, we disregard these exceptions. See *Holsum de Puerto Rico, Inc.*, 344 NLRB 694, 694 fn. 1 (2005), enfd. 456 F.3d 265 (1st Cir. 2006).

[4] We adopt the finding that the Respondent violated Sec. 8(a)(5) when it laid off employee Jody Thomas. In light of this finding, we find it unnecessary to pass on the finding that the layoff violated Sec. 8(a)(3), as such a finding would not materially affect the remedy.

[5] We find it unnecessary to pass on the finding that the Respondent violated Sec. 8(a)(5) by unilaterally restructuring its operations. This finding is cumulative of the following violations, and would not materially affect the remedy: the unilateral reduction of unit employees, unilateral layoffs, refusal to meet and bargain without first receiving written proposals, the refusal to arbitrate grievances, the unilateral implementation of different terms and conditions of employment, the unilateral posting of the CMT position and interviewing of candidates, the withdrawal of recognition, the unilateral filling of CMT positions, and the unilateral discharge of employees. We have modified the Order and notice accordingly.

In adopting the finding that the Respondent violated Sec. 8(a)(5) by engaging in bad-faith bargaining, we rely on the fact that the Respondent, on January 23, 2001, unilaterally implemented changes in terms and conditions of employment when the parties were not at impasse. *Grosvenor Resort*, 336 NLRB 613, 617 (2001) ("Consistent with [*NLRB v. Katz*, 369 U.S. 736, 743 (1962)], the Board has long held that an employer's unilateral changes in mandatory conditions without bargaining to a lawful impasse indicates [sic] bad faith in bargaining.").

[6] We shall modify the recommended Order to more accurately reflect the violations found and shall substitute a new notice to conform its language to that set forth in the Order. We have also modified the Order to provide a remedy for the unilateral changes made on January 23, 2001, which was inadvertently omitted from the recommended Order.

[7] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

mony of Robert Flint, the director of operations for the port (and not an employee of the Respondent). Flint testified, without contradiction, that a downturn in cargo would not necessitate fewer port engineers because they would still be needed to perform preventive maintenance on the cranes.

Second, the Respondent's contention that it wanted to upgrade its work force is contradicted by the testimony of the Respondent's president, Gerry Charlton, who testified that he had hoped that the port engineers would fill the CMT positions. Further, Charlton told port engineer Timothy Herring that the jobs were the same. The record bears this out, as the CMTs had the same duties as the port engineers and there is no evidence of any differential in pay. Nor were the CMTs more efficient in performing the port engineers' duties; by July 2001, there were just as many CMTs as there were port engineers before the discharges.[8]

Third, the Respondent's contention that it restructured operations because of the Union's unreasonable wage demands also is not supported by the record (even assuming that this would be a legally cognizable defense). As the judge found, the Union's wage demands were not patently unreasonable. According to the credited testimony, the Union initially sought a wage increase of around 5 percent and reduced that demand at the November 7, 2000 bargaining session. Thus, the record shows that the Union demonstrated flexibility with its wage demands. Moreover, although the Respondent's chief negotiator, Thomas Wotring, testified that the restructuring was due, in part, to the Union's unreasonable wage demands, the Respondent introduced no evidence to corroborate this assertion.

Lastly, the explanation the Respondent gave to the port engineers for discharging them reveals pretext. The termination letters explained to the port engineers that they were being released because each had been given the opportunity to apply for a CMT position, but none had done so. However, the Respondent had never previously informed the port engineers that their failure to apply for a CMT position would jeopardize their continued employment. Thus, the Respondent's stated justification is contrived, and buttresses the conclusion that the Respondent harbored animus towards the employees' protected union activity. See *National Steel & Shipbuilding Co.*, 324 NLRB 1114, 1119 fn. 11 (1997) (a finding of pretext "supports the General Counsel's showing of discrimination and defeats any attempt by Respondent to show it would have acted the same way absent discrimination"); see also *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966).

2. We agree with the judge that an affirmative bargaining order is warranted in this case as a remedy for the Respondent's unlawful withdrawal of recognition from the Union. The Board has previously held that an affirmative bargaining order is "the traditional, appropriate remedy for an 8(a)(5) refusal to bargain with the lawful collective-bargaining representative of an appropriate unit of employees." *Caterair International,* 322 NLRB 64, 68 (1996); see also *Parkwood Developmental Center*, 347 NLRB 974, 976–977 (2006); *Alpha Associates*, 344 NLRB 782, 787 (2005).

In several cases, however, the United States Court of Appeals for the District of Columbia Circuit has required the Board to justify, based on the facts of each case, the imposition of an affirmative bargaining order. See, e.g., *Vincent Industrial Plastics, Inc. v. NLRB,* 209 F.3d 727 (D.C. Cir. 2000); *Lee Lumber & Building Material Corp. v. NLRB,* 117 F.3d 1454, 1462 (D.C. Cir. 1997); and *Exxel/Atmos, Inc. v. NLRB,* 28 F.3d 1243, 1248 (D.C. Cir. 1994). In *Vincent Industrial Plastics,* supra, the court stated that an affirmative bargaining order "must be justified by a reasoned analysis that includes an explicit balancing of three considerations: (1) the employees' § 7 rights; (2) whether other purposes of the Act override the rights of employees to choose their bargaining representatives; and (3) whether alternative remedies are adequate to remedy the violations of the Act." 209 F.3d at 738. Consistent with the court's requirement, we have examined the particular facts of this case and find that a balancing of the three factors warrants an affirmative bargaining order.[9]

(1) An affirmative bargaining order in this case vindicates the Section 7 rights of the unit employees who were denied the benefits of collective bargaining by the Respondent's unlawful withdrawal of recognition and its resulting refusal to bargain with the Union. The basis for Respondent's withdrawal—that the port engineers are supervisors—lacks merit, and the Respondent has proffered no other basis on which it lawfully could have

[8] Although employee Marc Aloisio testified that some CMTs possessed additional skills to operate a type of crane that was not present at the port, this testimony does not establish that the CMTs were more skilled than port engineers in the work actually assigned them.

[9] Chairman Schaumber does not agree with the view expressed in *Caterair International,* supra, that an affirmative bargaining order is "the traditional, appropriate remedy for an 8(a)(5) violation." He agrees with the United States Court of Appeals for the District of Columbia Circuit that a case-by-case analysis is required to determine if the remedy is appropriate. *Alpha Associates*, 344 NLRB 782, 787 fn. 14 (2005). He recognizes, however, that the view expressed in *Caterair International,* supra, represents extant Board law. *Flying Foods*, 345 NLRB 101, 109 fn. 23 (2005). Regardless of which view is applied to the instant case, Chairman Schaumber agrees that an affirmative bargaining order is warranted here.

withdrawn recognition. The Respondent's unlawful conduct demonstrated a disregard for the employees' Section 7 right to select union representation, and the Respondent's conduct would tend to unfairly undermine continuing support for the Union. This is particularly true given the Respondent's commission of several unfair labor practices prior to its withdrawal of recognition. By the time the Respondent had withdrawn recognition, it had also unilaterally laid off employee Jody Thomas, unilaterally implemented other changes to terms and conditions of employment, refused to bargain in good faith, and posted the notice to hire CMTs who would replace the unlawfully terminated unit members in the performance of unit work. Thus, the Respondent's disregard of employees' Section 7 rights is manifest, and an affirmative bargaining order is needed to compel the Respondent to respect those rights.

At the same time, an affirmative bargaining order, with its attendant bar to raising a question concerning the Union's continuing majority status for a reasonable time, does not unduly prejudice the Section 7 rights of employees who may oppose continued union representation. Thus, the order is not of indefinite duration but is for a reasonable period of time sufficient to allow good-faith bargaining that the Respondent's unlawful withdrawal of recognition cut short. It is only by restoring the status quo ante and requiring the Respondent to bargain with the Union for a reasonable period of time that the employees' Section 7 right to union representation will be vindicated. An affirmative bargaining order also will give employees an opportunity to fairly assess the Union's effectiveness as a bargaining representative and determine whether continued representation by the Union is in their best interests.

(2) An affirmative bargaining order also serves the Act's policies of fostering meaningful collective bargaining and industrial peace. It removes the Respondent's incentive to delay bargaining in the hope of discouraging support for the Union, and it ensures that the Union will not be pressured to achieve immediate results at the bargaining table—results that might not be in the employees' best interests. It fosters industrial peace by reinstating the Union to its rightful position as the bargaining representative chosen by a majority of the employees. Also, as mentioned, providing this temporary period of insulated bargaining will afford employees a fair opportunity to assess the Union's performance in an atmosphere free of the effects of the Respondent's unlawful withdrawal of recognition and refusal to bargain.

(3) The alternative remedy, of a cease-and-desist order alone, would be inadequate to remedy the Respondent's withdrawal of recognition and refusal to bargain with the Union because it would allow a challenge to the Union's majority status before the employees had a reasonable time to regroup and bargain with the Respondent through their chosen representative in an effort to reach a collective-bargaining agreement. Such a result would be especially unfair where the Respondent's unlawful refusal to recognize and bargain with the Union first occurred several years ago. Allowing a challenge to the Union's majority status before a reasonable period for bargaining has elapsed also would be unfair in light of the fact that the litigation of the Union's charges took several years and, as a result, the Union needs to reestablish its representative status with unit employees. Indeed, permitting a decertification petition to be filed immediately might very well allow the Respondent to profit from its own unlawful conduct. We find that these considerations outweigh the affirmative bargaining order's temporary suspension of the decertification rights of employees who might oppose continued union representation.

For all the foregoing reasons, we find that an affirmative bargaining order with its temporary decertification bar is necessary to fully remedy the violations in this case.

## ORDER

The National Labor Relations Board orders that the Respondent, GFC Crane Consultants, Inc., Fort Lauderdale, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Eliminating bargaining unit positions without notifying and bargaining with the Union, District No. 1-Pacific Coast District, Marine Engineers Beneficial Association, AFL–CIO (Union).

(b) Laying off port engineers without notifying and bargaining with the Union.

(c) Refusing to meet and bargain with District No. 1-Pacific Coast District, Marine Engineers Beneficial Association, AFL–CIO, its port engineer employees' exclusive collective-bargaining representative, unless the Union first submits its contract proposals in writing.

(d) Refusing to arbitrate grievances after request by the Union in accord with the grievance procedure as set forth in the parties' 1995 collective-bargaining agreement.

(e) Threatening to implement and unilaterally implementing different terms and conditions of employment for unit employees[10] although the parties had not bargained to impasse.

(f) Posting a notice of openings for and interviewing applicants including unit employees for job openings as

[10] Any reference to unit employees does not include the positions of senior port engineer or supervisory port engineer.

CMTs to perform port engineer bargaining unit work, even though CMTs were not bargaining unit employees, without notifying and bargaining with the Union.

(g) Withdrawing recognition from the Union as the bargaining unit employees' collective-bargaining representative.

(h) Requiring its employees to avoid supporting the Union.

(i) Discharging or otherwise discriminating against any employee for supporting the Union or any other labor organization.

(j) Threatening its employees that it no longer recognized the Union and was going to fill bargaining unit jobs with nonbargaining unit employees.

(k) Telling its employees that they had better talk to its president if they wanted to keep their jobs while the employer and the Union were engaged in collective bargaining.

(l) Telling its employees that they could continue to perform their same job but they would have to leave the Union.

(m) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the unilateral changes it made, including the reduction and lay off of unit employees, the implementation of different terms and conditions of employment for unit employees on January 23, 2001, the creation of the CMT position and posting of CMT job openings, and the filling of CMT positions; provided, however, that nothing in this Order shall be construed as requiring the Respondent to rescind any unilateral change that benefited the unit employees unless the Union requests such action.

(b) On request, bargain in good faith with the Union as the exclusive representative of the port engineer employees concerning wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(c) Within 14 days of this Order, offer full and immediate reinstatement to employees Jody Thomas, Michael Crehan, Timothy Herring, Peter Leahy, Randolph Veiga, and Scott Zinsius to their former jobs, or if those jobs no longer exist, to substantially equivalent positions without loss of seniority and benefits.

(d) Make Thomas, Crehan, Herring, Leahy, Veiga, and Zinsius whole for any loss of earnings and other benefits suffered as a result of the unlawful terminations, in the manner set forth in the remedy section of the judge's decision.

(e) Make whole employees for any loss of earnings and other benefits they may have suffered as a result of the unilateral changes implemented on January 23, 2001, in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971) with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(f) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges of Crehan, Herring, Leahy, Veiga, and Zinsius, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(g) Preserve and, within 14 days of a request or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its Port Everglades, Florida Midport and Southport facilities, copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 30, 2000.

(i) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.

## APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives 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 eliminate bargaining unit positions without notifying and bargaining with the Union, District No. 1-Pacific Coast District, Marine Engineers Beneficial Association, AFL–CIO (Union).

WE WILL NOT lay off port engineers without notifying and bargaining with the Union.

WE WILL NOT refuse to meet and bargain with District No. 1-Pacific Coast District, Marine Engineers Beneficial Association, AFL–CIO, our port engineer employees' exclusive collective-bargaining representative, unless the Union first submits contract proposals in writing.

WE WILL NOT refuse to arbitrate grievances after request by the Union in accord with the grievance procedure as set forth in the 1995 collective-bargaining agreement.

WE WILL NOT threaten to implement and unilaterally implement different terms and conditions of employment for our unit employees although the parties had not bargained to impasse.

WE WILL NOT post a notice of openings for and interview applicants including unit employees for job openings as CMTS to perform bargaining unit work even though CMTs are not bargaining unit employees without notifying and bargaining with the Union.

WE WILL NOT withdraw recognition from the Union as the bargaining unit employees' collective-bargaining representative.

WE WILL NOT require our employees to avoid supporting the Union.

WE WILL NOT discharge or otherwise discriminate against any employee for supporting the Union or any other labor organization.

WE WILL NOT threaten our employees that we no longer recognize the Union and are going to fill bargaining unit jobs with nonbargaining unit employees.

WE WILL NOT tell our employees that they had better talk to our president if they want to keep their jobs while we are engaged with the Union in collective bargaining.

WE WILL NOT tell our employees that they can continue to perform their same job but that they will have to leave the Union.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL rescind the unilateral changes we made, including the reduction and lay off of unit employees, the implementation of different terms and conditions of employment for unit employees, the creation of the CMT position and posting of CMT job openings, and the filling of CMT positions.

WE WILL on request and within 14 days thereafter, recognize and bargain with the Union in good faith as the exclusive representative of the port engineer employees at Port Everglades, concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL on request and within 14 days thereafter, reinstate all laid off and terminated port engineers and, if necessary, discharge employees hired to replace those port engineers.

WE WILL within 14 days of this Order, offer full and immediate reinstatement to employees Jody Thomas, Michael Crehan, Timothy Herring, Peter Leahy, Rudolph Veiga, and Scott Zinsius to their former jobs, or if those jobs no longer exist, to substantially equivalent positions without loss of seniority and benefits.

WE WILL make Thomas, Crehan, Herring, Leahy, Veiga, and Zinsius whole for any loss of earnings and other benefits suffered as a result of the unlawful terminations.

WE WILL make whole employees for any loss of earnings and other benefits they may have suffered as a result of the unilateral changes implemented on January 23, 2001.

WE WILL within 14 days from the date of this Order, remove from our files any reference to the unlawful discharges of Crehan, Herring, Leahy, Veiga, and Zinsius, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

GFC CRANE CONSULTANTS, INC.

*Suzy Kucera, Esq.,* for the General Counsel.

*John Mills Barr, Esq.* and *Mary D. Walsh, Esq.,* of Washington, D.C., for the Respondent.
*Richard J. Hirn, Esq.,* of Washington, D.C. for the Charging Party.

## DECISION

### STATEMENT OF THE CASE

PARGEN ROBERTSON, Administrative Law Judge. This case was heard in Tampa, Florida, on December 10 through 14, 2001. The charges were filed between February 2 and 22, 2001,[1] and an amended consolidated complaint issued on September 10, 2001.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by Respondent and the General Counsel, I make the following findings.

### I. JURISDICTION

GFC Crane Consultants, Inc., is a California corporation, with facilities located at the Midport and Southport locations at Port Everglades in Ft. Lauderdale, Florida, where it provides services affecting maintenance and repair of commercial gantry cranes pursuant to a contract or contracts with Broward County, Florida.[2] Respondent admitted that during the past 12 months, in conducting its business operations at Port Everglades, it derived gross revenues in excess of $1 million and provided services valued in excess of $50,000 directly to Broward County, an entity directly engaged in interstate commerce. I find that the admission and the record show that Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the National Labor Relations Act at all times material.

### II. LABOR ORGANIZATION

The parties stipulated that District No. 1-Pacific Coast District, Marine Engineers Beneficial Association, AFL–CIO (the Charging Party), is a labor organization as defined in Section 2(2) of the Act.

### III. RESPONDENT CONTENDED THE PORT ENGINEERS WERE SUPERVISORS

Until 2001, Respondent's work force at Port Everglades was made up of teams of a port engineer and one or two electricians. A supervisory port engineer, a senior port engineer, and Respondent's president supervised the teams.[3] Each team[4] of a port engineer and one or two electricians was assigned a crane and each team had two missions,—scheduled maintenance and cargo watch. Maintenance was considered preventive and the tasks included greasing crane parts, changing oil, performing all tasks required by warranty procedures and inspections. Each team performed scheduled inspections on monthly, 3-monthly, and 6-monthly bases. All members of the crew including the port engineer and the electrician(s) worked at the job at hand. While working on maintenance assignments, all port engineers did the same things as electricians which included greasing crane parts, changing oil, performing all tasks required by warranty procedures, and conducting inspections. Jody Thomas, Tim Herring, and Rudy Veiga[5] were some of those formerly employed by Respondent as port engineers. Veiga testified that he did not receive any special training from Respondent. Veiga learned as he went along with his job. The only training recalled by Veiga occurred in 1996 or 1997. At that time Respondent employed a consultant at Midport who gave a few days of instructions to the employees.

Scott Zinsios was a port engineer. He testified that the Southport uniforms were the same for electricians and engineers. The electricians for Midport wore blue or brown uniforms.

The teams performed cargo watches in addition to scheduled maintenance. Cargo watches included setting up the crane, doing preoperation testing and ensuring that each crane performed properly. A crew was responsible for the repair of broken cranes. Because of the potential high cost of downtime by a broken crane, rapid repair work was essential. In cases where a crane could not resume operations within a 15–30 minute timeframe, the port engineer was required to notify Port Everglades and the senior port engineer or the supervisory port engineer that there was a downtime situation. Supervisory port engineer, Mark Aloisio, had final authority regarding repairs. The senior port engineer or the supervisory port engineer or Gerald Charlton were available 24 hours each day for problems and were in daily contact with each team. The senior port engineer and the supervisory port engineer were assigned to day shifts. Port engineers worked three shifts including time each day when no admitted supervisors were on duty at the port.

Tim Herring was promoted to port engineer in 1995. Mark Aloisio was his supervisor when he last worked for Respondent. Herring[6] described his duties as overseeing the jobs. When the job involved a cargo watch, usually one or two cranes were assigned to a vessel. Herring described his cargo

[1] In view of Respondent's answer and documents received in evidence, I find the charges were filed on February 2 and 12, and May 1 and 22, 2001.

[2] The record shows that Broward County acted through Port Everglades and the entity representing Broward County is sometimes referred to as Port Everglades.

[3] Respondent's president was Gerald Charlton.

[4] Respondent submitted monthly invoices to Port Everglades that included wages of employees. Until December 2000, the invoices separated employees into two categories—supervisors and mechanics (GC Exh. 8). Beginning in mid-December and continuing until the week ending July 15, 2001, the invoices separated employees into "supervisors/technicians" and "mechanics." (GC Exh. 11, 12.) For the week ending July 10, 2001, Respondent submitted invoice 2001/28, and listed Aloisio, Armstrong, Holbert, Johnson, Konefal, Piciolo, Rodriguez, Simpson, and Titus as "supervisors/technicians." Invoice 2001/29 for the week ending July 15, 2001, also listed Aloisio, Armstrong, Holbert, Johnson, Konefal, Piciolo, Rodriguez, Simpson, and Titus but that invoice listed those employees under the heading "supervisors." Those nine employees continued to be listed under the "supervisors" heading until invoice 2001/32. That invoice for the week ending August 6, 2001, returned to listing Aloisio, Armstrong, Holbert, Johnson, Konefal, Piciolo, Rodriguez, Simpson, and Titus under the heading "supervisors/technicians."

[5] Veiga is now employed as the Union's director of special projects.

[6] Other port engineers testified about their job duties. For example Jody Thomas testified about his authority at transcript pages 405–408.

watch as being on standby and if anything happened to a crane, it was his team's responsibility to fix the crane. The crane maintenance electricians (CME) had a leadman. That leadman was Paul Titus shortly before Herring was terminated on February 1, 2001. Before that the electrician leadman was Richard Wilson.

Paul Titus testified that he is the lead CME. Titus was not familiar with the term port engineers. Instead he knew those employees as watch engineers or watch supervisors. Until 1999, teams included a watch engineer and two CMEs when they were changed to one engineer and one CME for watch while one CME, the lead CME and one engineer, formed the day gang. Titus testified there was a company policy that an engineer had to be present when there was a CME on the job. The engineer assigned work to the crew. Work was assigned through general discussions. Generally the crew was told of their work on the day before. Titus testified there was a "block maintenance board." On that board, "there was four or five, six different items. And it varied month to month, or some things that had to be done every month, some had to be done every three, every six months, or once, one or two things every year." Titus testified that if he was running late for work or if he needed to leave work early, he would contact the watch engineer for his crew. If he wanted a personal day off a week or so ahead, he would contact the senior port engineer. If a CME was sick he would call in and leave a message. Sometimes a crew worked late and it was the watch engineer that asked them to stay late. Titus recalled an incident where a watch engineer said that he did not believe a CME knew what he was doing on the job. He could not recall any occasion where a watch engineer sent a CME off the job. Titus testified that the watch engineer spent at least 50 percent of his time working with the crew. As to who told him what repairs to perform on the crane Titus testified, "Usually, they are minor damage, flippers and stuff of that nature. The watch supervisor *(i.e., port engineer)* would be aware of what stuff we were going to do, usually changing spring arms, minor damage. It would be approved by him just to get the parts and do it."

According to Paul Titus, cargo work was assigned to the whole watch and it was pretty much a group effort to handle the cargo watch. The engineer decided which members of the crew took up a particular position. In situations where a crane needed repair the port engineer was required to notify Port Everglades and the supervisory port engineer when downtime on a crane ran into the 15–30 minute period, and the supervisory port engineer decided whether to call in another crane.

Port engineers did some paperwork. Herring described the paperwork as including rental sheets for cargo operations and work orders. Whenever a team did a job, the port engineer described what occurred including listing the parts used on the job. Port engineers also completed inspection reports. During his last year at work, Herring and his team, did basically all inspections. He would turn in the inspection reports to Mark Aloisio. Herring's paperwork took up approximately 10 percent to 15 percent of his worktime.

Herring testified that port engineers did not have authority to hire, give warnings, grant oral warnings, transfer, grant suspension, grant promotions, grant raises in pay, or grant benefits. He never recommended hiring, oral or written warnings, transfer, and pay raise, or benefits, for any employee. Herring did not recall an incident of an electrician complaining to him about working conditions.

Tim Herring described one incident with an electrician named Arnold de la Cruz. In 1995, Herring asked de la Cruz to help move some parts from the county facility and de la Cruz refused to perform the work. Herring phoned Gerald Charlton and Charlton told him to get rid of de la Cruz. Herring told de la Cruz that Charlton had said that de la Cruz's services were no longer needed. Occasionally Gerald Charlton or the former senior port engineer asked Herring how a particular employee was performing. Herring replied what he thought about that employee's strong or weak points. The former senior port engineer asked Herring about Mark Aloisio's job performance at a time when Aloisio was an electrician on the crew with Herring. Aloisio was promoted despite Herring telling the senior port engineer that Aloisio was not ready for promotion. Herring told the former senior port engineer that Aloisio was not trained in the computer end of a crane.

The senior port engineer or supervisory port engineer made assignments on weekly work lists or on a board. Herring testified that he did not prepare schedules nor did he make work assignments other than routine assignments of tasks in furtherance of posted work assignments. He testified that CMEs knew their jobs and the work was routine work performed on monthly or 3-monthly bases. A work list was maintained on each crane showing such things as when the oil was to be changed and when the wires were to be greased. Herring would come in, pick up the work list, and make whatever assignments were necessary to perform the work. When Herring wanted to swap watches with another employee, he was required to get permission from the senior port engineer, the supervisory port engineer, or Gerald Charlton (GC Exh. 59–64). CMEs would need to first tell their port engineer, and then get it approved by the supervising port engineer.

### Credibility

I was impressed with the demeanor and testimony of Tim Herring, Rudy Veiga, Jody Thomas, and Scott Zinsios. I found their testimony was detailed and complete as to the duties and work of port engineers. Paul Titus also appeared to testify to the best of his ability. However, Herring, Veiga, Thomas, and Zinsios and not Titus, actually worked as port engineers. To the extent there were conflicts in their testimony, I credit the testimony of Tim Herring.

### Findings

Respondent argued that its port engineers were supervisors and, as such, not entitled to protection under the Act. It argued that port engineers "responsibly directed GFC's workforce during cargo operations, bore responsibility for activities that happened on their watch and were the senior company officials present at the worksite for most of the standard work week." Respondent argued that port engineers also had the authority to promote, evaluate, and discipline GFC employees or to effectively recommend such action; and port engineers demonstrated other indicia of supervisory action including higher wage rates, different uniforms, the way they were presented by GFC to

outside parties, and the way port engineers viewed themselves. The 1993 and 1995 collective-bargaining agreements include among the duties of the unit employees, "perform crane maintenance and repair; and other equipment maintenance and to supervise the Company's maintenance mechanics/electricians in performing the maintenance." (GC Exh. 5, art. 2, par. 6; GC Exh. 7, art. 2, par. 2.6.) The 1995 collective-bargaining agreement encourages "Port Engineers (CM) to participate in such programs to enhance their supervisory and engineering skills." (GC Exh. 5, art. 27.4(c); GC Exh. 7, art. 27.4.)

Respondent pointed to a recent Supreme Court opinion wherein the Board was overruled regarding its determination of supervisory status. That case involved the question of whether the issue of independent judgment should be treated differently when it involved "ordinary professional or technical judgment in directing less skilled employees to deliver services." [*NLRB v. Kentucky River Community Care, Inc.,* 121 S.Ct. 1861 (2001).] Registered nurses were the employees at issue. The Supreme Court considered that matter after a ruling by the Sixth United Circuit Court of Appeals [*Kentucky River Community Care, Inc. v. NLRB*, 193 F.3d 444 (6th Cir. 1999)], on October 4, 1999. It was during the time period after the Sixth Circuit ruled and before the Supreme Court ruled, that Respondent engaged in the activity alleged herein as unfair labor practices including its action in replacing some port engineers with crane maintenance technicians.

Nevertheless, the issue should not be confused. There may be a question regarding whether the port engineers exercised independent "judgment in directing less skilled employees to deliver services in accordance with employer-specified standards." However, that question should not be confused with similar questions regarding registered nurses. The port engineers were not professionals nor were they trained technicians. In *Kentucky River,* the Supreme Court held that the supervisor question should not be compromised simply because the alleged supervisors are professional or technical personnel. In other words, professional or technical employees should not be held to a different standard than any other alleged supervisor. Therefore, even if the port engineers qualified as professional or technical, the issue should remain whether they exercised independent judgment in directing the work of CMEs. That issue has been considered by the Board in a large number of cases including the recent ones of *Alter Barge Line, Inc*., 336 NLRB 1266 (2001), and *Ingram Barge Co.*, 336 NLRB 1155 (2001). Respondent argued that *Alter Barge* and *Ingram Barge* are similar to the instant situation. However, at issue in those cases were river boat pilots and the pilots unlike the port engineers, were fully responsible for the safety of the crew, the tug boats, and groups of barges that were often several hundred yards long, at times when the pilot was on duty. The pilots, again unlike the port engineers, were licensed wheelhouse officers. Pilots did not perform routine work that other members of the crew performed.

Counsel for the General Counsel argued that the test for determining whether an employee is a supervisor was set out in *Cooper/T. Smith, Inc. v. NLRB*, 325 NLRB No. 28 (not reported in Board volumes), enfd. 177 F.3d 1259 (11th Cir. 1999): (1) does the employee have the authority to engage in one of the 12 listed activities,[7] (2) does the exercise of that authority require the use of independent judgment, and (3) does the employee hold the authority in the interest of the employer.

I find the credited evidence failed to support Respondent's argument that port engineers "responsibly directed GFC's workforce during cargo operations, bore responsibility for activities that happened during their watch and were the senior company officials present at the worksite for most of the standard work week." Instead the record showed that port engineers performed the same work as other members of a crew and engaged in routine judgment in assigning each member of the crew to perform preassigned work. The port engineers did not exercise independent judgment. In the most pressing situation, —i.e., the determination of whether a down crane should be replaced by another crane,—the port engineer simply notified Port Everglades and the supervisory port engineer of the problem. It was the supervisory port engineer that made the decision of whether or not to call up a new crane to replace the one needing repair.

Contrary to Respondent's argument, the evidence proved that port engineers did not have authority to promote, evaluate, or discipline GFC employees or to effectively recommend such action. The port engineers were not shown to have "authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or adjust grievances, or effectively recommend such action." I find that the port engineers were not supervisors. Instead the port engineers were employees entitled to the protection of the Act including the right to engage in union activity.

## IV. CALENDAR OF EVENTS INCLUDING ALLEGED UNFAIR LABOR PRACTICES

Respondent and the Union have been parties to successive collective-bargaining agreements from 1993, until the most recent contract expired in 2000. The 1993 bargaining unit included senior port engineers, supervisory port engineers, port engineers, and assistant port engineers. During the 1993 contract, Respondent's bargaining unit actually included one senior port engineer, one supervisory port engineer, two port engineers, and no assistants.

The 1995 collective-bargaining agreement was effective from August 14, 1995, through August 13, 2000. The bargaining unit in that contract included all port engineers. The 1995 contract was extended from August 13 to September 13, 2000 (GC Exh. 32). In the fall of 2000, Respondent employed 7 port engineers in the bargaining unit. Those seven were Michael Crehan, Timothy Herring, Peter Leahy, Rudolph Veiga, Scott Zinsius, Jody Thomas, and Michael Galka and all seven were members of the Union. Respondent also employed supervisory port engineer, Mark Aloisio, and senior port engineer, Stanley Ciecierski. The parties stipulated that both Aloisio and Ciecierski were supervisors. In view of the full record I find that at

[7] The activities include authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or adjust grievances, or effectively recommend such action.

material times, "all port engineers" constituted an appropriate bargaining unit.

Several other employees worked at Midport and Southport at Port Everglades on the gantry cranes in the fall of 2000. All those employees were classified as crane maintenance electricians (CME). Three crane maintenance electricians worked at Respondent's Midport facility and nine crane maintenance electricians worked at its Southport facility. The CMEs employed by Respondent at Southport and the CMEs employed at Midport by a subcontractor,—Eller, Inc.—were represented by different labor organizations (i.e., Seafarers International Union and International Longshoremen's Association).

Respondent signed a new 5-year agreement with Broward County on April 13, 2000. Broward County signed the contract on May 2, 2000 (GC Exh. 4).

On May 16, 2000, the Union notified Respondent that it wished to negotiate a modification of the contract (GC Exh. 30). On May 30, Respondent notified the Union that it wished to terminate the contract (GC Exh. 31). The parties met informally before the first formal negotiation session. Paul Krupa, the chief negotiator for the Union, testified that Respondent owner, Gerald Charlton, made signals that he didn't know if he wanted to continue our relationship. Charlton was talking about other unions and he didn't need MEBA.

The first formal negotiation session was held on September 8. Thomas Wotring represented Respondent and Paul Krupa and Richard Hirn represented the Union. Respondent met with the Union for negotiations at various times from September into December 2000. Respondent submitted a written contract proposal (GC Exh. 33), which was dated September 8. The Union faxed Respondent a written proposal on September 27 (GC Exh. 34). The parties met in an October 6 negotiating session. Respondent made a proposal, which included a $2000 signing bonus for each employee and a 2-percent base wage increase each year for the 5-year term of the proposed contract (GC Exh. 35). The parties reached agreement on some issues.

The parties next met on October 17. The Union proposed reduction of its original proposed base wage rate by $1000. The parties held a November 7 bargaining session. The outstanding issues at the end of the November 7 meeting included wages, senior port engineer's grievance authority, overtime calculations, and seniority layoff provisions.

In regard to the alleged unfair labor practices, the General Counsel alleged that Respondent's conduct was unlawful (see captions below which are stated in bold):

**November 14 and December 8 and 15, 2000**

**Offered regressive collective bargaining proposals including decreased wage rates and removing work from the unit.**

**November 14 and December 15, 2000 and January 2 and 16, 2001**

**Refused to meet and bargain after request by the Union.**

**November 14 and December 19, 2000 and January 21, 2001**

**Prematurely declared impasse and threatened to implement its last proposal.**

**November 28, 2000 and January 2, 8 and 16, 2001**

**Insisted on written counterproposals from the Union before negotiating.**

**November, December 6 and 11, 2000**

**Assigned bargaining unit work to individuals outside the unit:**

**December 13, 2000**

**Laid off it employee Jody Thomas.**

**January 23, 2001**

**Implemented a retroactive 1.5% wage increase and changed other terms and conditions of employment.**

**January 24, 2001**

**Posted an announcement of a newly created position of crane maintenance technician.**

**Changed the port engineer job classification to position of crane maintenance technician.**

**Late January 2001**

**By Gerald F. Charlton:**

**Threatened unit employees that non-union employees would perform their work.**

**Threatened unit employees that there would be no payment of contractual benefits.**

**Threatened to discharge unit employees because of the union.**

**By Ed Conden:**

**Threatened employees with discharge because of the union.**

**January 29, 2001**

**Withdrew recognition of the Union.**

**February 1, 2001**

**Discharged all employees in the unit.**

**Continually assigned all bargaining unit work to crane maintenance technicians.**

**By Gerald F. Charlton:**

**Promised employees job opportunities if they abandoned their union membership.**

November 14

Respondent's chief negotiator wrote the Union's Paul Krupa on November 14, 2000 (GC Exh. 36):

> This is in response to our most recent negotiations session held in your office on Tuesday, November 7, 2000. As we discussed, despite numerous meetings and the best intentions from both sides, there appears to be no meaningful movement on the part of either party toward a new collective bargaining agreement. GFC has now operated for approximately 60 days without a contract and it is becoming increasingly obvious that the productivity and mo-

rale of our Union-represented supervisors is suffering. We believe that our current impasse will only continue to interfere with the performance of our work at Port Everglades.

With the understanding that we are taking the following course of action reluctantly, and only as a last resort, GFC hereby extends its best and final offer for a contract covering our MEBA-represented supervisors employed at Port Everglades. Should this offer be rejected by the Union, it is our intention to implement its terms effective at 12:01 a.m., November 27, 2000. We believe that this timeframe will provide the Union and the bargaining unit members with an opportunity to carefully consider our offer and make an informed decision.

With regards to our best and final offer, the terms of that offer as to all open items of November 7, 2000, is as follows:

(1) *Section 12.2*—Amend and delete the phrase "the Port engineer (CM) with the least seniority" and add "the "Company shall reduce the workforce based on qualifications, work performance and seniority." Delete second sentence.

(2) *Section 23.1*—Amend to delete automatic step increase. Change dates to new five-year contract. Increase base wage for the first year for each employee by 1.5% with additional increases for each year as follows: year two–3%; year three–3.5%; year four–3.5%; and year five–4%.

(3) *Section 24.1*—Amend first sentence by adding "unless such schedule is reduced due to reduced workloads, Port closings, weather or other circumstances beyond the Company's control."

Amend to delete existing second sentence and add new second and third sentences as follows: "Overtime will be paid at 1.5 times their regular hourly rate for every hour actually worked in excess of 40 hours in a calendar week (Monday through Sunday).

1. *Section 36.1*—Amend dates to reflect new five-year agreement. As to all other open items as of November 7, 2000, the Company's final proposal is that these items remain unchanged from the prior collective bargaining agreement. All changes agreed to by the parties in our pervious negotiations sessions will be recognized by the Company.

I trust that our position and our resolve is clear. If you have any questions, please contact me.

The Union, through its attorney, Richard J. Hirn, responded with a letter dated November 21, 2000 (GC Exh. 37). In that letter the Union stated its belief that the parties were not at impasse and pointed out:

> "The parties have met only a few times. There are many open issues. Many important issues have been discussed only briefly and have been tabled. The company's letter of November 14 contains new proposals that have not yet been discussed."

The Union letter listed several examples of items it asserted Respondent listed on November 14 that had not been discussed during negotiations. The letter continued:

> With regard to the key issue of wage rates, the company's November 14 proposal is ambiguous and contains either new or regressive elements that require further face-to-face discussion. On the one hand, it appears from Mr. Wotring's letter that the company is now offering to place all Port Engineers on the "first year" rather than the "start year" salary rate in return for waiving further step increases. This is good progress and needs to be explored further. If that was not Mr. Wotring's intent, the company's latest proposal is less than its last offer, which was a 2% initial wage increase, plus a $2,000 bonus, which was not mentioned in Mr. Wotring's letter. Simply stated, it is unclear from Mr. Wotring's letter what the company is now proposing on this crucial issue.
>
> For these reasons, it is clear to us that the parties are not at impasse. Therefore, any attempt by the company to unilaterally implement its last offer at this time would be illegal, and we urge that it not be done. The better—and only legal—course would be to schedule further negotiations sessions. By copy of this letter, I urge Mr. Wotring to call Mr. Krupa to arrange dates for such further meetings.

Respondent's negotiator, Wotring, responded by fax on November 22 (GC Exh. 38). Among other things Wotring argued that the Union had agreed to provide language regarding the role on the senior port engineer in grievance proceedings and specifically for contract sections 24.1 and 25.1, but had failed to do so. Wotring argued that the Company's position on layoffs had not changed since the outset of negotiations. Wotring went on to state:

> It has and continues to be the Company's position that the compensation and independence of our port engineers requires that they be held to a higher standard than are our other employees. Therefore, job performance and qualifications are at least as important as seniority. Again, there can be no confusion over either the meaning or intent of the Company's proposal of the Union's consistent and adamant rejection of that proposal.
>
> Finally, with regard to the wage issue, Mr. Hirn's professed confusion is at the same time both amusing and disingenuous. You know very well that you and Mr. Clements objected most strongly to the Company's proposal to pay a $2000 bonus for the first year of the contract with no increase to the basic wage. At our last session on November 7, 2000, in response to your objection, I said that the alternative for the first year would be the increase that the Company received from the County—specifically the 1.5% increase to the base wage. That is indeed set forth in our final offer. While Mr. Hirn can be confused as much as he likes, you know better.
>
> In the final analysis, there has been little if any movement from the Union on the core issues in these negotiations. To claim that the parties are not at impasse on these critical issues is merely posturing and legal maneuvering. Most of the items listed in Mr. Hirn's letter are either no

longer in dispute or are inconsequential. If the Union is prepared to make meaningful counterproposals on the core issues, please let me know no later than Sunday, November 26, 2000.

The Union's November 24 reply (GC Exh. 39) included the following:

> The union will be prepared to make meaningful counterproposals at our December 1, 2000 meeting.
>
> We intend to approach this negotiation session with an open mind and with hope that creative approaches will be found to satisfy both parties' needs on all these issues. We are dismayed that you have characterized the company's latest proposals as its "final" offer when there are unexplored avenues that may result in an ultimate contract that satisfies each parties needs and alleviates their fears and concerns.
>
> In summary, we will be prepared with our counterproposals on December 1, 2000 and we hope the company will be prepared to do the same.

November 28

Respondent's negotiator, Wotring, responded to the Union's November 24 letter (GC Exh. 39) on November 28 (GC Exh. 40):

> In anticipation of our scheduled negotiation session on December 1, 2000 and as a follow-up to my letter of November 24, 2000, I am encouraged by your intention to be prepared with counterproposals. Nevertheless, if we are to have any hope of making progress, the Union must be prepared to present those counterproposals in writing. As I have stated in previous correspondence, we have been promised written proposals on a number of items that have never been provided to us. Therefore, so that we do not continue to waste any more time and money, please let me know before Friday whether the Union is prepared to present written counterproposals on the following critical issues:
>
> 1. Wage increases and fringe benefit contributions;
> 2. Layoff procedures;
> 3. Overtime calculations; and
> 4. The role of the Senior Port Engineer in the grievance procedure.

November 30

Respondent wrote employee Jody Thomas (GC Exh. 13):

> This is to inform you that the company is reducing its labor force and restructuring its organization and composition of the workforce. Therefore, you are being laid off effective December 13, 2000.

December 8

The parties met for negotiations. Respondent advised the Union that it intended to restructure its work force and it was being forced to layoff one employee due to declining business. Respondent's negotiator, Wotring, testified that Respondent told the Union that *"the combination of their, their economic proposals which they had not moved off of since September and the ongoing dispute over the qualification of the people the Union wanted us to hire or that were already there, led GFC to believe that it had to sort of restructure, reorder, whatever words you want to use, Jerry* (Gerald Charlton) *used the word restructure, how the services were delivered to Port Everglades*" (Tr. 627). Wotring went on to testify that there was a problem from Respondent's point of view, of the competence of a number of the people (port engineers), the wage demands the Union was making and the cargo was down at Port Everglades, and that something had to give and there would be layoffs. The Union objected and asked to meet after it had time to consider Respondent's restructure plans. The Union's president told Respondent that job security and work jurisdiction were most important and the Union could reach agreement on money. The Union asked Respondent to reconsider its decision to lay off Jody Thomas in view of the recent discharge of Mike Galka. Respondent refused the Union's request.

December 13

Jody Thomas' layoff was effective on December 13. He worked as a port engineer at Midport. Respondent hired Thomas on September 8, 1999. He is a member of MEBA District 1 and has worked through the Union since 1985. His immediate supervisor was the senior port engineer, Stanley Ciecierski. As shown above, Thomas received a letter from Respondent's president, Gerald Charlton, dated November 30, 2000, advising him that he would be laid off on December 13, 2000. Thomas filed a grievance over his pending layoff. After receiving his layoff notice, Thomas also filed two grievances regarding nonunit employees performing bargaining unit work.

After receiving his notice of layoff, Thomas learned that another port engineer, Mike Galka, had been terminated around December 6 or 8. He went to Stanley Ciecierski and asked if he was still going to be laid off since Respondent was then short one port engineer. Ciecierski said that he had already spoken with Gerry and that Thomas was still going to be laid off. Thomas wrote in his grievance that Galka had been terminated. Respondent told both the Union and Thomas that Thomas' layoff would go ahead even though Galka had been terminated for cause. At the time of Thomas's layoff all the port engineers were members of the Union.

December 15

The Union's negotiator, Paul Krupa, testified that the parties met to negotiate on December 15. Respondent's negotiator, Wotring, testified that the parties had a short negotiating meeting on December 15. Krupa testified that Respondent mentioned the number of port engineers that would be left after they restructured the work force and that Respondent would pick up some technicians. The Union presented a written proposal in an effort to preserve the jurisdiction of bargaining unit work (GC Exh. 56):

> The requirement for a crane engineer is to provide technical expertise on the various systems associated with crane maintenance and operation including but not limited to electrical, electronic, mechanical, hydraulic and computer systems. He shall continue to function as a working

supervisor with respect to overseeing the proper operation and maintenance of the cranes and associated equipment.

It shall be the duty of the PE to direct the execution of duties of the CME and any and all other maintenance personnel. Accordingly, whenever there is work being performed by any maintenance personnel, there shall be at least one PE on duty. In addition, there shall be a PE on duty during cargo operations.

The Union asked for another meeting. The Respondent's negotiator, Wotring, walked out of the meeting. That was the last time the parties met for negotiations.

Respondent, through its president, Charlton, responded to Thomas' grievance over his layoff (GC Exh. 72) on December 18:

> This is in response to the grievance filed by you dated December 8, 2000, regarding your layoff. We have discussed this matter with your Messrs. O'Toole, Krupa, and Clements on two separate occasions. As we told them, the lack of cargo at Port Everglades has made it clear that the company cannot continue to employee [sic] the number of supervisory personnel that it has in the past. As you know, the Company has attempted to convince your MEBA representatives that layoffs should not be made solely on the basis of seniority, but our proposal has been consistently rejected by the Union. Therefore, as the most junior Port Engineer, you have been designated for layoff. While we sincerely regret having to take this step, there is no violation of the collective bargaining agreement. Your grievance is denied.

December 19

Respondent wrote the Union on December 19. The letter (GC Exh. 44), included, among other things, the following:

> I am out of patience. To be clear, your proposal of December 15 regarding work jurisdiction is rejected. The Company proposals of November 14, 2000 covering wages, fringe benefits, overtime calculation and layoff procedures are still on the table. All other Union proposals on open items are rejected. The Company requests that its final offer be presented promptly to the bargaining unit members for a ratification vote. Recognizing that this is an internal Union matter, the Company nevertheless believes that its employees desire an end to this process and should be given an opportunity to voice their opinions. Should our final offer be rejected, the Company reserves the right to implement the terms of its final offer.

The Union responded, also on December 19, to the effect that it was not stalling the negotiations. (GC Exh. 45.)

On December 22, the Union requested arbitration (GC Exh. 41):

> However, during the interim, company and union representatives had discussions about these grievances and, unfortunately, they were not resolved. On December 18, you issued a written denial of these grievances. This process did not strictly conform to the negotiated grievance procedure. Your answer of December 18 appears to be the final company response to the grievances, and therefore it appears appropriate for the union to demand arbitration at this juncture, and we hereby do so. As in the past the union will be represented by Richard Hirn for the purpose of selecting an arbitrator or arbitrators and scheduling the hearings, in accordance with article 32.1 of the agreement. In the event that you believe that the demand for arbitration is premature, this letter is to be considered a step 2 grievance filed on each of these issues. I am available for further discussions you believe may be warranted on this matter.

December 23

Respondent wrote the Union on December 23 (GC Exh. 46):

> Putting your letter of December 19 in the most charitable light possible, it is the most self-serving collection of half-truths I have seen in many years. You know that I asked if you had any further information other than the Segal document and you said no. If you have additional information, please mail it to me.
>
> I gather you are refusing to present our offer to the members for a vote. So be it. After consulting with my client, I will let you know whether and when we will implement the terms of our final offer.

December 28

The Union wrote Respondent on December 28 (GC Exh. 47):

> I note that, in your faxed letter of December 23, you reported, among other things, that your client may decide to implement your last offer. However, there is a lot to talk about.
>
> Although you objected to the magnitude of the increase in our medical contribution, you did not dispute the fact that medical rates are increasing at very high rates. I provided information to support that fact that was not generated in our offices. We want to provide whatever information you need to justify or verify that our medical projections are real and accurate. As I said earlier, this is confidential and proprietary information that should not be circulated but can be shared with you.
>
> The last time we met with Gerry he reported that he was restructuring his company. I have made efforts to understand how this impacts our jobs yet it remains unclear how our bargaining unit will be changed. The jurisdictional issues are very important and should not be dismissed by vaguely referring to restructuring.
>
> We are nowhere near impasse and I think we should be meeting to work out our differences. I suggest the following dates. Of course the location is open.
>
> Friday January 12, 2001
>
> Tuesday January 16, 2001
>
> Friday January 19, 2001
>
> I hope that we can utilize these dates to get together. I am in my office Friday December 29. Please call or fax so that we can meet.

January 2001

Gerald Charlton testified that Respondent finalized plans for restructuring in early 2001. Respondent's plans anticipated three or four crane maintenance technician (CMT) positions. Charlton testified that he created the CMT positions because he wanted personnel with more qualifications on the controls (Tr. 473).

January 2

Respondent wrote the Union on January 2 (GC Exh. 48):

> This is in response to your letter of December 28, 2000. As I said in an earlier letter, the Union has refused to make any substantive proposals on the critical issues. Your latest letter does nothing to change our view of your unwillingness or inability to bargain in good faith. We believe that any further meetings would simply be a waste of time and money. If the Union has concrete proposals to make on the core issues, please forward them to me in writing.

January 8

Respondent wrote the Union on January 8 (GC Exh. 49):

> I received your telephone messages from Friday 1/5/01 and this morning I returned the call lat [sic] approximately 1:30PM and left a message on your cell phone voice mail. If you are calling about negotiations I repeat my early request that if the Union has any proposals that they be put in writing. If you are calling concerning pending grievances, please call Sheldon Kline at Morgan Lewis.

January 16

Paul Krupa testified that he phoned Wotring around January 16 and, among other things, asked for another negotiating meeting. Wotring reiterated that he wanted to see any union proposals in writing before he would agree to any meeting.

January 21

Respondent wrote the Union on January 21 (GC Exh. 50):

> Please be advised that GFC will implement its final offer effective 12:01 a.m., January 23, 2001. The terms of the final offer are identical to those set out in my letter to you dated November 12, 2000 with the exception of section 31.2 which was agreed to in our session on December 1, 2000. In addition, as proposed in the December 1, 2000 meeting, the first year wage increase of 1.5% will be retroactive to the expiration of the previous agreement (August 14, 2000). I have attached a copy of my November 12, 2000 letter for your easy reference.
>
> As to all other items as of January 22, 2001, the Company's final proposal is that these items remain unchanged from the prior collective bargaining agreement. All changes agreed to by the parties in our previous negotiations sessions will be honored by the Company.

January 23

Respondent admitted in its answer that it implemented its final offer on January 23, which included a 1.5-percent increase in base pay retroactive for 1 year for the port engineers and a 3-percent increase in health benefits.

January 24

Respondent posted a notice to all GFC personnel from Gerry Charlton—president, regarding "Crane Maintenance Technician Positions:"

> Effective Tuesday, January 30, 2001, at 0800, those who wish to interview to become a Crane Maintenance Technician please sign up below for scheduled appointments with me or see me personally.

Gerald Charlton testified that on January 24, he anticipated the need for seven to nine CMTs.

January 29

Respondent wrote the Union (GC Exh. 51):

> Please be advised that effective immediately GFC Crane Consultants no longer recognizes District No. 1-PCD-MEBA as the collective bargaining representative for the supervisors employed by GFC at the Port Everglades facility in Broward County, Florida. All contributions due and owing to the MEBA benefit plans for hours worked to date will be made by the Company. Any union dues deducted but not yet remitted to the Union will be sent immediately.

Late January

Scott Zinsius testified that he interviewed for a CMT job during the week before February 1. Zinsius asked Charlton what the new job was about. Charlton described the CMT job and it sounded to Zinsius like the job of port engineer. He asked Charlton why he should take this new job when he already had a job doing the same thing. Charlton replied:

> I want to have these technicians able to go between Mid Port and South Port to handle responsibilities, you know at both ports, you know, if the crane has troubles, if we have troubles with drives, technical troubles.

Charlton said the benefits would be basically comparable to what Zinsius had at that time. Zinsius said the he had been doing the job that Charlton described, for 5 or 6 years. Charlton replied, *"[W]ell, I don't recognize the MEBA, at this point, and I'm going to fill these jobs to take these, to take these spots."* Zinsius asked if he still had a job and Charlton told him just to come in day-to-day.

About the same time, Ed Conden told Timothy Herring that Herring better talk with Charlton if he wanted to continue working for GFC. Herring testified that Condon told him that he should get a termination letter from Charlton. Herring did meet with Charlton and Charlton offered him a consultant position until another CMT position opened. Charlton told Herring that the CMT job was the same as his port engineer job but Herring would have to leave the Union and his medical and retirement benefits would be through Respondent's insurance. Herring rejected the offer because he would lose too much in the way of benefits, by leaving the Union.

February 1

On February 1, Respondent wrote all its port engineers (GC Exh. 14a–e):

> Due to a reduction in cargo and issues related to GFC Crane Consultants, Inc.'s ("GFC Crane") organizational structure, GFC Crane is reducing its labor force and restructuring the composition of its work force. Specifically, GFC Crane is eliminating the supervisory positions of Port Engineer, Supervisory Port Engineer and Senior Port Engineer. GFC Crane is hiring a limited number of Crane Maintenance Technicians ("CMT"), who will perform technical services with the crane Maintenance Electricians. As you know, all of GFC Crane's current employees have been given the opportunity to apply for a CMT position.
>
> GFC Crane appreciates that you interviewed for a CMT position. However, GFC Crane regrets to inform you that we do not have a position for you at this time. Therefore, as your supervisory position is being eliminated, you are being terminated effective February 1, 2001. A check for all monies owed to you will be mailed to your home by February 9, 2001.[8] (GC Exh. 14a–14e).

Respondent gave no prior notice of the terminations.

Respondent's invoices to Port Everglades show that at some time during the pay period that ended on February 5, 2001, it employed "supervisors/technicians" Aloisio, Crehan, Herring, L. Holbert, Leahy, Picciolo, Simpson, Veiga, and Zinsius. L. Holbert also worked as a "mechanic" during part of that pay period. The invoice for the week that ended February 12, 2001, shows that Respondent employed "supervisors/technicians" Aloisio, L. Holbert, Picciolo, and Simpson. The invoice for the week that ended February 19, 2001, shows that Respondent employed "supervisors/technicians" Aloisio, L. Holbert, S. Johnson, Picciolo, and Simpson. The invoice for the week that ended February 26, 2001, shows that Respondent employed "supervisors/technicians" Aloisio, L. Holbert, S. Johnson, Picciolo, Simpson, and P. Titus. There was an addition shown on the invoice for the week that ended March 19, 2001. That invoice shows that Respondent employed "supervisors/technicians" Aloisio, L. Holbert, S. Johnson, D. Konefal, Picciolo, Simpson, and P. Titus. There was another addition shown on the invoice for the week that ended April 2, 2001. That invoice shows that Respondent employed "supervisors/technicians" Aloisio, L. Holbert, S. Johnson, D. Konefal, Picciolo, H. Rodriguez, Simpson, and P. Titus. There was another addition shown on the invoice for the week that ended July 2, 2001. That invoice shows that Respondent employed "supervisors/technicians" Aloisio, C. Armstrong, L. Holbert, S. Johnson, D. Konefal, Picciolo, Simpson, and P. Titus.

The invoices show that Dan Picciolo worked for some time for Respondent as a mechanic before first appearing as supervisor/technician during the week that ended January 8, 2001. Ernest Simpson first appeared on the invoice for the week that ended on December 18, 2000. He was always listed as supervisor/technician.

Gerald Charlton testified that Respondent had nine port engineers including the senior and supervisory port engineers immediately before February 1, and that Respondent now employs[9] nine CMTs at Midport and Southport. The Midport CMTs are Dan Picciolo and Dave Konefal. The Southport CMTs are Stan Johnson, Dan Holbert, Earnest Simpson, Charles Armstrong, Heriberto Rodriguez, and Paul Titus.[10] Former CMEs Holbert, Konefal, and Rodriguez became CMTs in February, March, and May 2001. Charles Armstrong quit his job as a CME but was hired by Respondent as a CMT in June.

Supervisor Aloisio testified that CMTs perform the duties formerly performed by CMEs including troubleshooting crane controls, standing watch and fixing cranes but that some of the CMTs have more technical skills than some of the port engineers. However, Aloisio testified that the cranes on which those CMTs are more skilled do not exist at Midport or Southport. (Tr. 503, 504.)

Conclusions

An employer may commit an unfair labor practice under Section 8(a)(5), when it refuses to bargain in good faith with its employees' exclusive collective-bargaining representative. Here, there is no doubt as to the Union being the exclusive collective-bargaining representative of nonsupervisory employees,—the port engineers. Before this controversy the parties agreed to collective-bargaining contracts since 1993. When the 1995 contact expired in August and was extended a month until September 2000, all the unit employees were members of the Union. Respondent knew of its port engineers' support for the Union because, among other things, it routinely deducted union dues from those employees' pay and it routinely submitted benefit payments to the Union (e.g., GC Exh. 51). The question at issue involving the 8(a)(5) allegations is, did Respondent fail to engage in good-faith bargaining. Also, at issue, are questions regarding Section 8(a)(1) and (3).

In order to consider the outstanding bargaining question, I must look at the totality of the circumstances. [*Hotel Roanoke*, 293 NLRB 182, 184–185 (1989).]

The record shows that correspondence and other records whose authenticity is not in dispute establish much of the evidence regarding bargaining between the parties. There was some testimony in dispute and to the extent there are conflicts I have determined that the testimony of Paul Krupa was the most credible of all the witnesses. Krupa was a bargaining representative for the Union and he was present at all the meetings covered in his testimony. I make my credibility determination on

[8] This second paragraph was included in the letter written to Tim Herring but omitted from letters written to Mike Crehan, Peter Leahy, Scott Zinsius, and Rudy Veiga. In lieu of the paragraph in Herring's letter, the last paragraph in the letters to Crehan, Leahy, Zinsius, and Veiga, read, "As your supervisory position is being eliminated under GFC Crane's new structure and you have opted not to apply for a CMT position, you are being terminated effective February 1, 2001. A final paycheck will be mailed to your home by February 9, 2001. You are required to turn in your Port ID's and parking pass."

[9] As of December 2001.

[10] All the named eight CMTs plus Mark Aloisio are listed as "supervisors/technicians" on Respondent's invoices to Port Everglades.

the basis of the demeanor of the witnesses including Krupa, and the full record, which appears to support Krupa's testimony.

Krupa's testimony proved that Respondent's president told the Union before the 2000 negotiations started, during the fall of 1999, that he did not need it (i.e., the Union) and was looking at other unions. On May 16, 2000, the Union notified Respondent that it desired to negotiate a modified contract. Respondent replied on May 30 that it wanted to terminate the collective-bargaining agreement. At the first formal negotiation session on September 8, Respondent submitted a written proposal. Among other things, Respondent proposed changing the recognition clause from "these employees of" to "the supervisory Port Engineers employed by;" changing the probationary period from 90 to 120 days; changing the seniority clause from "the Port Engineers with the least seniority" to "the Company shall reduce the workforce based on qualifications, work performance and seniority"; changing the work jurisdiction clause to permit it to subcontract port engineers work when all port engineers are working and to determine the number of unit employees and assign unit work outside the bargaining unit when business conditions require; changing the wages provision of the contract to eliminate the automatic step increases; changing the work schedule clause to add "unless such schedule is reduced due to reduced work loads, Port closings, weather or other circumstances beyond the Company's control" and amending the hours provisions to permit overtime only for hours actually worked in excess of 40 per week; changing the grievance procedure clause to show that the response of the senior port engineer must be approved by "Company Management"; and changing the terms of the agreement to reflect a 5-year contract.

The Union faxed a written contract proposal to Respondent on September 27. (GC Exh. 34.)

At an October 6 negotiation session, Respondent proposed a $2000 signing bonus and agreed to a 2-percent base wage increase each year for the 5-year term of the contract. At an October 17 session, the Union proposed reducing its original base wage rate proposal by $1000. The parties met on November 7, and the outstanding issues following that meeting were wages, senior port engineer's grievance authority, overtime calculations, and seniority layoff provisions.[11] On November 14, Respondent wrote the Union and suggested the parties were at impasse. Respondent also submitted what it termed its "best and final offer," and threatened to implement that offer on November 27, 2000. (GC Exh. 36.)

The Union wrote on November 21, that the parties were not at impasse, pointed to issues including issues brought up first in Respondent's November 14 letter, which had not been discussed in negotiations and suggested that Respondent's November 14 initial wage offer of 1.5 percent was less than its original offer of 2 percent plus a $2000 signing bonus. (GC Exh. 37.) On November 22. Respondent faxed a letter to the Union. Respondent wrote, among other things, that the Union had objected to "the Company's proposal to pay a $2000 bonus for the first year of the contract with no increase to the basic wage"[12] (GC Exh. 38).

A question of Respondent's good faith arose when it submitted its "best and final offer" and suggested the parties were at impasse. As shown above, before that time Respondent's president had suggested that he did not need the Union and then Respondent submitted a written contract proposal. After that, Respondent made an offer to pay a $2000 signing bonus to its port engineers and it agreed to increase wages by 2 percent each year during a 5-year contract.[13] A little over a month after making that $2000 signing bonus offer, Respondent suggested the parties were at impasse. During the period between Respondent's September 8 written proposal and its suggestion of impasse, the Union among other things, submitted a written contract proposal on September 27 (GC Exh. 34) and an October 17 proposal that reduced its original wage increase proposal by $1000.

Respondent agreed that the main issues remaining after negotiations on November 7, were wages, senior port engineer's grievance authority, overtime calculations, and layoff provisions. In view of the above evidence I find that the parties were making progress in negotiations and were not at impasse on November 14, 2000. *Taft Broadcasting Co*., 163 NLRB 475, 478 (1967); *Marriott Corp., Marriott In-Flite Services,* 258 NLRB 755 (1981).

The Union argued the parties were not at impasse in a November 21 letter (GC Exh. 37), and it suggested issues including issues raised by Respondent for the first time in its November 14 letter, which remained to be negotiated. On November 22, Respondent complained that the Union had failed to supply it with language regarding the role of the senior port engineer in grievance proceedings and regarding contract sections 24.1 and 25.1. Respondent also argued in its November 22 letter (GC Exh. 38) that it had proposed a $2000 signing bonus with no increase in the basic wage.

The record shows that Respondent's November 22 assertions were incorrect. As shown above I credited the testimony of Paul Krupa. Krupa testified regarding the October 6 negotiations and as to the notations under article 23 of General Counsel's Exhibit 35. Those notations and Krupa's testimony shows that Respondent proposed a $2000 bonus. Then, as shown by notes on the next page of General Counsel's Exhibit 35, the parties agreed to a 2-percent base wage increase each year for the 5 years of the proposed contract. I find that Respondent proposed a $2000 bonus and the parties agreed to a 2-percent per year basic wage increase for each year of the 5-year proposed contract on October 6. On November 14, Respondent

[11] See also GC Exh. 38, where Respondent acknowledged that the main issues of disagreement at the beginning of the October 17 negotiations were "economics, principally wages and fringe benefit contributions, overtime for hours not worked, the layoff provision, and the role of the senior port engineer in the grievance procedure.

[12] Note Respondent's initial contract proposal did not include the $2000 bonus. However, as shown herein, the evidence showed that Respondent made an October 6 proposal, which included a $2000 signing bonus. Krupa's testimony and notes proved that the parties agreed to a 2-percent base wage increase for each year of the 5-year term of the contract.

[13] As to my determination that Respondent agreed to a 2-percent per year increase in base wages, I credit, as I did above, the testimony of Paul Krupa with consideration given to GC Exh. 34.

made a different proposal, which included a lower increase during the first year and no signing bonus. It proposed increases in basic wages of 1.5 percent, 3 percent, 3.5 percent, 3.5 percent and 4 percent for each year. (GC Exh. 36.)

On November 24, in answer to a letter from Respondent, the Union wrote that it was ready to negotiate with an open mind. (GC Exh. 39.) On November 28, Respondent refused to meet and negotiate unless the Union first submitted written counterproposals. (GC Exh. 40.)

On November 30, Respondent wrote employee and union member Jody Thomas that it was reducing its labor force, restructuring its organization and composition of the work force and laying off Thomas. (GC Exh. 13.) Thomas was to be laid off on December 13. Respondent did not notify the Union that it was reducing its labor force, restructuring its organization and composition of the work force and laying off Jody Thomas until the December 8 negotiation session. On December 8, Respondent told the Union the reduction in work force, restructure of its organization and composition of work force and layoff of Jody Thomas were necessary because *"the combination of their* (the Union)*, their economic proposals which they had not moved off of since September and the ongoing dispute over the qualification of the people the Union wanted us to hire or that were already there,*[14] *led GFC to believe that it had to sort of restructure, reorder, whatever words you want to use, Jerry* (Gerald Charlton) *used the word restructure, how the services were delivered to Port Everglades.*" (Tr. 627.)

As shown above, Respondent was incorrect in its assertion. After the Union submitted a written contract proposal on September 27, the Union proposed on October 17, a reduction of its original base wage increase proposal by $1000. On November 14, Respondent suggested the parties were at impasse and made several inconsistent comments to the Union regarding its base wage increase proposals. From October 17, when the Union proposed reduction in its base wage increase proposal, until Respondent's November 30 letter to Jody Thomas, negotiations were in a state of confusion brought on by Respondent's premature suggestion of impasse.

Thereafter on November 30, in its letter to Jody Thomas (GC Exh. 13), and again during negotiations on December 8, Respondent announced its decision to reduce the size of its work force, to restructure its organization and composition of work force and layoff of Jody Thomas. Moreover, Respondent blamed the Union for its unilateral actions by writing that it was being pressured to take those actions because of the Union's demands. Respondent asserted that it questioned the competence of a number of its port engineers. It also contended that the cargo was down at Port Everglades and that contributed to its need to layoff some people. In reaction to those comments the union president told Respondent that job security and work jurisdiction were most important and that the Union could reach agreement on money. [Cf. *Grinnell Fire Protection System Co*., 328 NLRB 585 (1999).]

The Union questioned the need to layoff Jody Thomas. Nevertheless, Respondent laid off Jody Thomas on December 13. The record shows that Respondent notified Thomas of his upcoming layoff on November 30, without notice or bargaining with the Union.

In addition to its 8(a)(5) allegations, the General Counsel alleged that the Thomas layoff constituted an 8(a)(1) and (3) violation. Section 8(a)(3) calls into question the *Wright Line*[15] test.

I shall first consider whether the General Counsel proved that Thomas's layoff was motivated by Respondent's antiunion animus. In consideration of that issue, the record shows that Respondent knew of Thomas' union activity along with that of all its port engineers and, as shown hereafter, Respondent demonstrated its antiunion animus by threatening its employees with discharge if they did not abandon the Union[16] and by engaging in bad faith bargaining before and after Thomas's layoff. Moreover, the timing of Thomas' layoff is suspect. He was laid off at the very time Respondent decided to reorganize its work force and eliminate some of its union employees. I find that the General Counsel proved that Respondent laid off Jody Thomas because of its union animus.

In further examination of this allegation, I shall consider whether Respondent proved it would have laid off Thomas in the absence of his union activities. Respondent contended in its letter to Thomas and in its December 8 statements to the Union, that Thomas was being laid off because it was reducing its work force and restructuring its organization and composition of the work force. As shown hereafter, that statement was not true. In truth the record shows that Respondent decided to restructure its work force in order to eliminate the Union. It sought to eliminate the Union by replacing union employees with employees that it considered outside the bargaining unit. Those employees were the CMTs (i.e., crane maintenance technicians). The contention that Thomas was laid off because of reorganization was weakened by another event. After Thomas was notified of his upcoming layoff, Respondent unexpectedly discharged another port engineer—Michael Galka—for cause. When the time arrived for Thomas to be laid off on December 13, Respondent found itself with one less port engineer than it

[14] There is no evidence showing the Union ever sought to negotiate over the qualifications of new or current employees. Even Respondent showed that was not an outstanding issue. Respondent's bargaining negotiator faxed a response to the Union's November 21 letter in which it stated "At the beginning of our session on October 17, 2000, we both acknowledged that the main areas of disagreement were economics, principally wages and fringe benefit contributions, overtime for hours not worked, the layoff provisions, and the role of the senior engineer in the grievance procedure." That language illustrated that port engineers' qualifications was not a main area of disagreement. Respondent's negotiator goes on in that same fax to state that the Company is concerned "that the compensation and independence of our port engineers requires that they be held to a higher standard than are our other employees." (GC Exh. 38.) That language may arguable show that Respondent was concerned with port engineers' qualifications but there was no showing that the Union ever sought lesser qualifications than those already possessed by the port engineers.

[15] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[16] At question here is Respondent's motivation or state of mind. Even though Respondent threatened employees with discharge if they did not abandon the Union until after Thomas was laid off, that fact illustrates Respondent's animus against the Union. See *Earthgrains Co.,* 334 NLRB 1131 (2001).

had in the Port Everglades work force at the time it notified Thomas he would be laid off. Nevertheless, Respondent persisted and released Thomas on December 13.

As shown above, after Respondent wrote Thomas and advised him of his upcoming layoff on November 30, Respondent said nothing to the Union until its December 8 negotiating session. Then, among other reasons for the layoff, Respondent told the Union that Thomas would be laid off due to declining business.[17] Subsequently, in denying Thomas's grievance, Gerald Charlton wrote, among other things, that he had told the Union that Thomas was laid off due to declining work (GC Exh. 72).

However, the Respondent's records call its contention of layoff due to declining work into serious question. For example, during the work period in which Respondent wrote Thomas of his upcoming layoff, Respondent employed seven nonsupervisory port engineers in the classification "supervisors/technicians." During the work period in which Thomas was actually laid off, Respondent hired an additional nonsupervisory employee in the classification "supervisors/technicians." That employee was Ernest Simpson who was hired as a CMT. It is inconsistent to argue on the one hand that Thomas was laid off due to declining business while, at the same time, employing someone else to perform the same job.[18] Moreover, as shown above, port engineers worked as part of a two- or three-man crew. If Thomas was laid off for declining work it makes no sense that other members of his crew were not laid off at the same time. In view of the entire record I am convinced that Respondent's asserted basis for the layoff of Jody Thomas was a pretext. I find that Respondent failed to prove that it would have laid off Jody Thomas in the absence of his union activity and I find that Respondent laid off Thomas in violation of Section 8(a)(1) and (3).

As to the allegation that Respondent violated Section 8(a)(5) by its layoff of Jody Thomas, I shall reconsider Respondent's own explanation for its layoff of Thomas. In its November 30 letter to Thomas, Respondent stated he was being laid off because it was restructuring its organization and composition of the work force. At that time Respondent had not notified the Union that it was restructuring its organization and composition of the work force. In fact Respondent did not make that announcement to the Union until December 8 at which time it had already initiated the restructuring plan by its letter to Thomas. An employer must notify and give its employees' bargaining representative an opportunity to bargain before unilaterally changing terms or conditions of employment. Respondent engaged in an 8(a)(5) violation when it notified Thomas of his upcoming layoff without first giving the Union an opportunity to bargain. Therefore, the layoff of Jody Thomas—being the fruit of the poison tree—constituted a violation of Section 8(a)(1) and (5).

[17] Respondent's negotiator testified that Thomas was laid off for a combination of the Union's economic proposals, which he alleged the Union had not moved from since September and an ongoing dispute over the qualifications of the people the Union wanted Respondent to hire.

[18] As shown herein, I credit the testimony including that of Tim Herring that illustrated the job of port engineer was the same as that of classified CMT.

Paul Krupa testified that Respondent announced the number of port engineers that would be left after the work force was restructured, during December 15 negotiations. Respondent announced that it would be hiring some technicians. The Union presented a written proposal regarding jurisdiction of unit work. (GC Exh. 56.) The Union asked for another negotiation session but Respondent's negotiator walked out of the meeting and the parties have not met since December 15.

Respondent rejected the Union's proposal of work jurisdiction (see GC Exh. 56) and all "other union proposals" on December 19; and Respondent requested that the Union present Respondent's contract proposal for a ratification vote. (GC Exh. 44.) On December 22, the Union requested arbitration or in the alternative, if Respondent felt the request was premature, to treat its letter as step 2 in the grievance procedure. (GC Exh. 41.) On December 23, Respondent wrote the Union that it would notify it when Respondent decided to implement its final offer. (GC Exh. 46.) On December 28, the Union requested additional negotiations including especially discussions about Respondent's plan for restructuring. The Union contended the parties were nowhere near impasse. (GC Exh. 47.)

Gerald Charlton testified that Respondent formalized plans for restructuring in early January 2001, and anticipated employing three or four CMTs. Charlton testified that he created those positions because he wanted personnel with more qualifications than the port engineers.

On January 2, Respondent wrote the Union that further meetings would be a waste of time. (GC Exh. 48.) Respondent left a phone message on January 8, that the Union must put any contract proposals in writing. (GC Exh. 49.) On or about January 16, the Union phoned and asked Respondent for a negotiation meeting. Respondent told the Union that it must first put its proposals in writing, before Respondent would agree to a meeting.

Respondent wrote the Union on January 21 that it would implement its final offer on January 23. Respondent wrote that its final offer included a first-year wage increase of 1.5 percent retroactive to the expiration of the previous contract and other terms set out in Respondent's November 12[19] letter to the Union. As to all other items Respondent asserted that its final offer was that those other items remain unchanged from the prior collective-bargaining agreement.

On January 23, Respondent implemented changes in working conditions including a retroactive 1.5-percent increase in base pay.

An employer may not lawfully make unilateral changes in working conditions without first bargaining to impasse. To qualify as impasse, there must be an actual impasse rather than a simple assertion by one of the parties that there is impasse. Here, the evidence proved the parties were not at impasse. Among other things, the record shows that Respondent first contended there was impasse at a time when the parties were making progress in negotiations and, in fact after Respondent suggested impasse, the Union proposed concessions to its earlier proposals.

[19] Perhaps Respondent was actually referring to its November 14 letter to the Union. (GC Exh. 36.)

Although employers are required to notify and offer to negotiate before making unilateral changes in working conditions, it is noteworthy, that Respondent first specified the terms of its "final offer" in its January 21 letter (GC Exh. 50). In other words, Respondent first set out its final offer in the letter advising the Union that it would implement its final offer in 2 days. Respondent wrote, among other things:

> As to all other items as of January 22, 2001, the Company's final proposal is that these items remain unchanged from the prior collective bargaining agreement. All changes agreed to by the parties in our previous negotiations sessions will be honored by the Company.

The Union did not have an opportunity to engage in meaningful negotiations after Respondent first specified the terms of its final offer on January 21, and implemented the changes on January 23. Additionally, it is apparent from the broad terms used in its January 21 letter that Respondent failed to articulate its final offer with specificity sufficient to permit the Union or the unit employees to understand precisely what the offer involved. For example, Respondent stated as "to all other open items." However, as shown in the various letters and during this hearing, the parties were not in agreement as to which were "open items." Moreover, Respondent failed to state with any clarity, which changes had been "agreed to by the parties in our previous negotiations sessions." Respondent's language is especially confusing in view of Respondent having rejected the Union's December 15 proposal and all other union proposals on open issues on December 19. (GC Exh. 44.)

A party to collective bargaining may not establish impasse by simply refusing to bargain and saying the parties are at impasse. Here, the record established that the Union remained open to negotiation but Respondent refused to bargain from December 15. The evidence showed the parties were not at impasse at any time during negotiations. See *U.S. Testing Co.*, 324 NLRB 854 (1997*); Beverly Farm Foundation, Inc.* 323 NLRB 787 (1997); *CJC Holdings, Inc*., 320 NLRB 1041 (1996); *Circuit Wise, Inc*., 309 NLRB 905, 919 (1992).

As to impasse, Respondent argued in its brief that it became clear during negotiations that the parties would never reach agreement on several critical issues and the most critical of those issues was wages. It argued that despite "repeated requests by the Company, the Union stuck to its original wage proposal, only slightly modified in mid-October, right to the end." Respondent went on to argue that the Union's wage proposal, "which by the Union's own testimony involved 100 percent of the Company's income from the Port for the Port Engineers' time,[20] was so unreasonable that there was little reason to negotiate about it, as it was impossible for the Company to even consider such a proposal."

Respondent's written contract offer (GC Exh. 33), proposed to amend the wages provision (art. 23) "to delete automatic step increases and to change dates to new five year contract." The Union submitted a written contract offer on September 27 (GC Exh. 34), and proposed the following minimum salary for port engineers:

| *YEARS OF SERVICE* | *MONTHLY* | *ANNUAL* |
|---|---|---|
| Start | 6,253.25 | 75,039 |
| 1st year | 6,456.50 | 77,478 |
| 2d year | 6,666.33 | 79,996 |
| 3d year | 6,883.00 | 82,596 |
| 4th year | 7,106.67 | 85,280 |

The Union's proposal called for annual increases in the above wages of 3 percent on July 11, 2001; and 3.5 percent, 3.5 percent, and 4 percent on July 11, 2002, 2003, and 2004.

On October 17, the Union proposed a reduction in its base wage rate proposal of $1000. After October 17, the parties met in negotiations on November 7, and Respondent wrote the Union on November 14. In that letter (GC Exh. 36), Respondent suggested the parties were at impasse and proposed its "best and final offer." In that best and final offer, Respondent proposed, among other things, deleting automatic step wage increases and increasing the base wage rates by 1.5 percent, 3 percent, 3.5 percent, 3.5 percent, and 4 percent in years 1 through 5. The Union wrote on November 27, and suggested that the parties were not at impasse. Moreover, the Union wrote that it was confused as to whether the best and final proposal as to wages, involved new or regressive elements. The Union pointed out the specific reasons why it was confused by Respondent's wage proposal and asked for further bargaining meetings. On November 22, Respondent faxed an explanation to the Union that included, among other things:

> Finally, with regard to the wage issue, Mr. Hirn's professed confusion is at the same time both amusing and disingenuous. You know very well that you and Mr. Clements objected most strongly to the Company's proposal to pay a $2000 bonus for the first year of the contract with no increase to the basic wage. At our last session on November 7, 2000, in response to your objection, I said that the alternative for the first year would be the increase that the Company received from the County—specifically the 1.5 percent increase to the base wage. That is indeed set forth in our final offer. While Mr. Hirn can be confused as much as he likes, you know better.

The Union replied on November 24, that it was prepared to make meaningful counterproposals at the December 1 negotiations. On November 28, Respondent wrote that the Union must first present its counterproposals in writing especially as to the issues of wages, layoff procedures, overtime calculations and the role of the senior port engineer in the grievance procedure.

[20] In accord with its agreement with Port Everglades, Respondent submitted weekly invoices to the Port, showing as to each employee the hours worked at regular time and as to overtime, the billing rates as to regular time and as to overtime, and the individual total wages for that week. (CP Exh. 1.) As an example of that invoice, for the week ended September 30, 2000—the week in which the Union submitted its written contract proposal—Respondent billed Port Everglades 40 regular hours for Port Engineer Leahy at $80.59 an hour for total weekly wage of $3,223.60. At that rate, if Leahy worked 52 weeks during the year, the total amount billed to Port Everglades for his wages would total $167,627. As shown above, the Union proposed annual wages ranging from $75,039 to $85,280.

On November 30, without first giving notice to the Union, Respondent wrote bargaining unit employee Jody Thomas that it was reducing its labor force and restructuring its organization and composition of the work force and Thomas would be laid off on December 13. Respondent told the Union of its plan to restructure and to layoff Jody Thomas, during December 8 negotiations. The union president told Respondent during those December 8 negotiations, that job security and work jurisdiction were most important and the Union could reach agreement on money. Thomas was laid off on December 13. On December 15, the parties met to negotiate. Respondent told the Union of its intention regarding retention of some of the port engineers after the restructuring. The Union presented a written work jurisdiction proposal. (GC Exh. 56.) Respondent walked out of the meeting and has not agreed to another negotiation meeting.

In consideration of the above evidence and the complete record, I find that the Union did not cause impasse in negotiations by insisting on an unreasonable wage increase and I reject Respondent's argument.

On January 24, Respondent posted a notice for interviews for the CMT position. Charlton testified that at that time he anticipated he would need seven to nine CMTs. Respondent gave no prior notice to the Union nor did it notify the Union of its decision to interview applicants for CMT positions. An employer may not unilaterally change terms and conditions of employment even though its collective-bargaining agreement has expired, without bargaining to impasse. *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 198 (1991); *NLRB v. Katz*, 369 U.S. 736 (1962); *White Oak Coal Co*., 295 NLRB 567 (1985); *Columbia Portland Cement Co*., 294 NLRB 410 (1989).

Respondent wrote the Union on January 29 that it no longer recognized the Union as exclusive bargaining agent of unit employees. (GC Exh. 51.) Respondent failed to show any justification for that action. An employer may not unilaterally withdraw recognition from its employees' collective-bargaining representative. [*McWhorter Trucking,* 273 NLRB 369 (1984); *Flex Plastics, Inc*., 262 NLRB 651, 657 (1982), enfd. 726 F.2d 272 (6th Cir. 1984); *Pinebrook Care Center, Inc*., 322 NLRB 740 (1996).]

Port engineers including Scott Zinsius and Tim Herring interviewed for the CMT positions. Charlton told Zinsius that he did not recognize the Union and he was going to fill the CMT positions to take the available jobs. Ed Conden told Tim Herring that Herring had better talk to Charlton if he wanted to continue working for GFC. When Herring met with Charlton, Charlton told him the CMT job was the same as Herring's port engineer job but Herring would have to leave the Union. I credit the testimony of Herring, as shown above, and I credit Scott Zinsius. Both Herring and Zinsius's testimony appeared to accord with other established evidence. I credit their testimony in view of my observation of the demeanor of all witnesses and especially that of Herring and Zinsius. Their testimony proved that Respondent, through its agents Charlton and Condon, told its employees they would have to abandon the Union to continue working for Respondent; and that its employee would do the same job he had performed as port engineer but he would have to leave the Union. Those comments constitute threats and coercion in violation of Section 8(a)(1) of the Act.

Respondent discharged all its port engineers on February 1 (GC Exh. 14a–14e), without prior notice to the Union.

As to the 8(a)(5) allegation regarding the discharges, the record shows that Respondent gave the Union no prior notice of the discharges. As shown above Respondent engaged in 8(a)(5) violations by unilaterally restructuring its bargaining unit work force. Respondent failed to notify of that plan and it failed to notify the Union whether that plan or any other plan, had anything to do with the discharges of the port engineers. Furthermore, Respondent gave the Union no notice of the reason for discharging the port engineers. I find Respondent acted in violation of Section 8(a)(1) and (5) by discharging the port engineers without notifying the Union and giving the Union an opportunity to bargain over the discharges and their causes.

The General Counsel alleged that Respondent's action in assigning bargaining unit work to CMTs; implementing a retroactive 1.5-percent pay increase; announcing the CMT positions; changing the port engineer classification to CMT; discharging port engineer employees Crehan, Herring, Leahy, Veiga, and Zinsius; and assigning all bargaining unit work to CMTs, constituted violations of Section 8(a)(1) and (3) of the Act. As shown above, Respondent knew of all its port engineers' union activity; and Respondent demonstrated antiunion animus. The timing of the alleged actions lends further support to the 8(a)(3) allegations. Additionally, among other things, Respondent threatened its employees that they would have to leave the Union to continue working for Respondent. I find that the General Counsel proved that Respondent was motivated by its union animus to take those allegedly unlawful actions. Respondent failed to show that it would have taken those actions in the absence of its port engineers' union activities. As shown above, Respondent's asserted reasons for Thomas' layoff were pretextual. For example, although it alleged that Jody Thomas was laid off due to a decline in work, it hired Ernest Simpson to perform the same job at approximately the same time it removed Thomas. Moreover, after it announced Thomas' layoff, it discharged another port engineer but Respondent nevertheless refused to reconsider and negotiate with the Union regarding Thomas' layoff. Respondent contends that it discharged its port engineers because it needed more technically efficient employees on the cranes. However, that assertion conflicts with other statements by Respondent to such an extent that Respondent's asserted basis for its alleged unlawful action, is not believable. As shown above, the evidence proved that Respondent did not actually layoff Jody Thomas because business was slow. Respondent added more confusion by alleging additional reasons for its removal of Jody Thomas and all the port engineers. Gerald Charlton testified that in December he anticipated a need for two or three CMTs. On December 15, Respondent told the Union of its plans to retain some port engineers after it's restructuring. In early January, Charlton anticipated hiring three or four CMTs because he wanted "personnel with more qualifications." On January 24, when Respondent posted notice for CMT positions, it anticipated it would need seven to nine CMTs. In late January, Gerald Charlton told Tim Herring that

the CMT position was the same as his port engineer job but that Herring would have to leave the Union.[21] However, Respondent never showed why it needed employees with more qualifications. Indeed Respondent's notice for CMTs and Charlton's comments, show that it felt the port engineers could perform the CMT jobs.

Supervisory port engineer, Mark Aloisio, testified that some of the CMTs were more qualified on some cranes. However, none of those particular cranes were located at Port Everglades. Additionally, Charlton told Tim Herring that if hired as a CMT, Herring would be performing the same job as he performed as port engineer. Moreover, Charlton never explained why his need for CMTs continued to increase in number, from early December until he discharged all the remaining port engineers. In view of all the above, and the full record, it is clear that Respondent's asserted reasons for discharging the port engineers and hiring CMTs was a pretext. Against that evidence and the evidence that Respondent was motivated to discharge the port engineers and replace them with CMTs, I find that Respondent actually discharged the port engineers and hired the CMTs because of the Union. Respondent failed to show that it would have discharged the port engineers or hired the CMTs in the absence of union activity. I find that the discharge of the port engineers and the replacement of the port engineers with CMTs constitutes action in violation of Section 8(a)(1) and (3).

## CONCLUSIONS OF LAW

1. By unilaterally reducing the number of unit employees, restructuring its organization and composition of the unit work force; laying off a unit employee; refusing to meet and negotiate with District No. 1-Pacific Coast District, Marine Engineers Beneficial Association, AFL–CIO, its port engineer employees' exclusive collective-bargaining representative, and refusing to meet and negotiate with the Union unless the Union first submits contract counterproposals in writing; by refusing to arbitrate grievances after request by the Union in accord with the grievance procedure as set forth in the parties' 1995 collective-bargaining agreement; by threatening to implement and unilaterally implementing different terms and conditions of employment for unit employees although the parties had not bargained to impasse; by formulating and unilaterally implementing restructure plans for work formerly performed by bargaining unit employees; by unilaterally posting a notice of openings for and interviewing applicants including unit employees for job CMT openings to perform bargaining unit work even though CMTs were not bargaining unit employees; by unilaterally withdrawing recognition from the Union as bargaining unit employees' collective-bargaining representative on January 29, 2001; by unilaterally filling CMT positions and requiring those employees to avoid supporting the Union; by unilaterally discharging port engineers Crehan, Herring, Leahy, Veiga, and Zinsius on February 1, 2001, GFC Crane Consultants, Inc. has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

2. By laying off its employee Jody Thomas; and discharging its employees Crehan, Herring, Leahy, Veiga, and Zinsius and hiring others including crane maintenance technicians or others to perform their work; GFC Crane Consultants, Inc. has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

3. By threatening its employees that it no longer recognized the Union and was going to fill bargaining unit jobs with nonbargaining unit employees; telling its employees that he had better talk to its president if he wanted to keep his job while the employer and the Union were engaged in collective bargaining; and by telling its employee that he could continue to perform his same job but he would have to leave the Union; GFC Crane Consultants, Inc. has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

## REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily laid off employee Jody Thomas and discriminatorily discharged employees Crehan, Herring, Leahy, Veiga, and Zinsius and hired others to replace them, it must offer Thomas, Crehan, Herring, Leahy, Veiga, and Zinsius full and immediate reinstatement, discharging others if necessary, and make Thomas, Crehan, Herring, Leahy, Veiga, and Zinsius whole for all loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[22]

## ORDER[23]

The Respondent, GFC Consultants, Inc., Fort Lauderdale, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally reducing the number of unit employees without notifying and bargaining with District No. 1-Pacific Coast District, Marine Engineers Beneficial Association, AFL–CIO (Union).

[21] As shown above, I was impressed with Herring's testimony. In view of the full record including my observation of the demeanor of the witnesses, I credit Herring's testimony.

[22] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[23] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(b) Unilaterally restructuring its organization and composition of the unit work force without notifying and negotiating with the Union.

(c) Unilaterally laying off a unit employee work force without notifying and negotiating with the Union.

(d) Unilaterally refusing to meet and negotiate with District No. 1-Pacific Coast District, Marine Engineers Beneficial Association, AFL–CIO, its port engineer employees' exclusive collective-bargaining representative, unless the Union first submits contract counterproposals in writing.

(e) Refusing to arbitrate grievances after request by the Union in accord with the grievance procedure as set forth in the parties' 1995 collective-bargaining agreement.

(f) Threatening to implement and unilaterally implementing different terms and conditions of employment for unit employees although the parties had not bargained to impasse.

(g) Formulating and unilaterally implementing restructure plans for work performed by bargaining unit employee's work force without notifying and negotiating with the Union.

(h) Unilaterally posting a notice of openings for and interviewing applicants including unit employees for job openings as CMTs to perform bargaining unit work even though CMTs were not bargaining unit employee's work force without notifying and negotiating with the Union.

(i) Unilaterally withdrawing recognition from the Union as bargaining unit employees' collective-bargaining representative on January 29, 2001.

(j) Unilaterally filling CMT positions and requiring those employees to avoid supporting the Union.

(k) Unilaterally discharging port engineers Crehan, Herring, Leahy, Veiga, and Zinsius on February 1, 2001 work force without notifying and negotiating with the Union.

(l) Laying off its employee Jody Thomas because of his union activities and without notifying and bargaining with the Union.

(m) Discharging its employees Crehan, Herring, Leahy, Veiga, and Zinsius and hiring others including crane maintenance technicians or others to perform their work, because of its employees' union activities and without notifying and bargaining with the Union.

(n) Threatening its employees that it no longer recognized the Union and was going to fill bargaining unit jobs with nonbargaining unit employees.

(o) Telling its employees that he had better talk to its president if he wanted to keep his job while the employer and the Union were engaged in collective bargaining.

(p) Telling its employee that he could continue to perform his same job but he would have to leave the Union.

(q) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request and within 14 days thereafter, recognize and bargain with the Union as the exclusive representative of the port engineer employees at Port Everglades excluding all supervisors, concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(b) On request and within 14 days thereafter, reinstate all laid off and terminated port engineers and, if necessary, discharge employees hired to replace those port engineers.

(c) Within 14 days of this Order, offer full and immediate reinstatement to employees Thomas, Crehan, Herring, Leahy, Veiga, and Zinsius to their former jobs, or if those jobs no longer exist, to substantially equivalent positions without loss of seniority or benefits.

(d) Within 14 days of this Order, make whole Thomas, Crehan, Herring, Leahy, Veiga, and Zinsius for all loss earnings and benefits.

(e) Within 14 days of this Order, remove from its files any reference to the unlawful layoff of Thomas and the unlawful discharges of Crehan, Herring, Leahy, Veiga, and Zinsius and within 3 days thereafter notify Thomas, Crehan, Herring, Leahy, Veiga, and Zinsius in writing that it has done so and that it will not use the layoff or discharges against them in any way.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at it's Port Everglades Midport and Southport locations copies of the attached notice marked "Appendix."[24] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 30, 2000.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[24] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

## APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives 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 threaten our employees that we no longer recognize the District No. 1-Pacific Coast District, Marine Engineers Beneficial Association, AFL–CIO, as the bargaining representative for all our port engineers excluding supervisors, at our Midport and Southport locations at Port Everglades and that we are going to fill bargaining unit jobs with nonbargaining unit employees.

WE WILL NOT tell our employee that he had better talk to the company president if he wanted to continue working with us while we are engaged in collective bargaining with the Union.

WE WILL NOT tell our employee that he could continue and perform his same job but he would have to leave the Union.

WE WILL NOT layoff and refuse to recall our employees because of their union activity.

WE WILL NOT layoff and refuse to recall our employees without first notifying and offering to bargain with the Union.

WE WILL NOT discharge and refuse to recall, our employees because of their union activities.

WE WILL NOT discharge and refuse to recall, our employees without first notifying and offering to bargain with the Union.

WE WILL NOT lay off Jody Thomas or discharge Michael Crehan, Timothy Herring, Peter Leahy, Rudolph Veiga, or Scott Zinsius because of their union activity and WE WILL offer Thomas, Crehan, Herring, Leahy, Veiga, and Zinsius full and immediate reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions without loss of pay, seniority, or benefits, discharging, if necessary, other employees hired to replace Thomas, Crehan, Herring, Leahy, Veiga, and Zinsius.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful layoff of Jody Thomas and unlawful discharge of Michael Crehan, Timothy Herring, Peter Leahy, Rudolph Veiga, and Scott Zinsius, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the layoff and discharges will not be used against them in any way.

WE WILL NOT unilaterally reduce the number of employees in the bargaining unit of port engineers at our Midport and Southport locations at Port Everglades, without first notifying and offering to bargain with the Union.

WE WILL NOT unilaterally restructure our organization and composition of the bargaining unit work force at our Midport and Southport locations at Port Everglades, without first notifying and offering to bargain with the Union.

WE WILL NOT refuse to meet and negotiate with the Union as our Midport and Southport port engineers at Port Everglades.

WE WILL NOT refuse to meet and negotiate with the Union as our Midport and Southport port engineers at Port Everglades unless the Union first makes collective-bargaining counterproposals in writing.

WE WILL NOT refuse to arbitrate grievances in accord with the procedure set out in our 1995 collective-bargaining agreement with the Union.

WE WILL NOT threaten to implement or unilaterally implement different terms and conditions of employment without first giving notice and an opportunity to bargain, to the Union, and bargaining in good faith until impasse is reached or until the parties agree to a collective-bargaining contract.

WE WILL NOT formulate and unilaterally implement restructure plans and composition of unit employees, without first notifying and offering to bargain in good faith until impasse is reached or until the parties agree to a collective-bargaining contract.

WE WILL NOT unilaterally post notice of openings for and interviewing applicants for CMT job openings at our Midport and Southport locations at Port Everglades without first notifying and offering to bargain in good faith, with the Union.

WE WILL NOT withdraw recognition of District No. 1-Pacific Coast District, Marine Engineers Beneficial Association, AFL–CIO.

WE WILL NOT unilaterally fill CMT positions at our Midport and Southport locations at Port Everglades, without giving notice and bargaining in good faith with the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit of port engineers at our Midport and Southport locations at Port Everglades in Ft. Lauderdale, Florida.

GFC CRANE CONSULTANTS, INC.

*Susy Kucera, Esq.,* for the General Counsel.
*Sheldon M. Kline, Thomas K. Wotring,* and *Justin Sher, Esqs.,* for the Respondent.
*Richard J. Hirn, Esq.,* for the Charging Party.

## SUPPLEMENTAL DECISION

GEORGE CARSON II, Administrative Law Judge. This case was heard by Administrative Law Judge Pargen Robertson on December 10 through 14, 2001, and he issued his Decision on April 4, 2002. On September 30, 2006, the Board, citing its decisions in *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006), *Croft Metals, Inc.*, 348 NLRB 717 (2006), and *Golden Crest Healthcare Center*, 348 NLRB 727 (2006), remanded this case, in which the supervisory status of port engineers was an issue,

"for further consideration in light of . . . [those decisions] including allowing the parties to file briefs on the issue and, if warranted, reopening the record to obtain evidence relevant to deciding the case under . . . [those decisions]." *GFC Crane Consultants, Inc.*, 348 NLRB 871 (2006). The Board directed that this case be assigned to another administrative law judge if Judge Robertson, who has retired from the Agency, was not available. It having been determined that Judge Robertson was not available, Associate Chief Administrative Law Judge William N. Cates assigned the case to me by Order dated November 22, 2006.

In a conference call with all parties on December 4, 2006, counsel for the General Counsel and counsel for the Charging Party stated their position that the record need not be reopened. Counsel for the Respondent stated his desire to present unspecified supplemental evidence. On December 22, 2006, I issued an Order setting the date for receipt of briefs for January 26, 2007, and inviting any party who desired to reopen the record to file a motion describing with particularity the evidence to be adduced and specifying in what respect the record was deficient. By letter dated January 3, 2007, counsel for the Respondent advised that he would not file a motion to reopen the record. I have reviewed the record made before Judge Robertson. Reopening the record has not been requested and is not warranted.

On the entire record, the above cited Board decisions, and after considering the briefs filed by all parties, I reaffirm the decision made by Judge Robertson.

## I. THE BOARD DECISIONS

In *Croft Metals, Inc.*, supra, the Board stated that, in *Oakwood Healthcare, Inc.*, supra, it had "refined the analysis to be applied in assessing supervisor status" and, with citation to the applicable portions of the *Oakwood Healthcare, Inc.*, decision, summarized the definitions for the terms "assign," "responsibly to direct," and "independent judgment" as follows:

> The authority to "assign" refers to "the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant over-all duties, i.e., tasks, to an employee. . . . In sum, to 'assign' for purposes of Section 2(11) refers to the . . . designation of significant overall duties to an employee, not to the . . . ad hoc instruction that the employee perform a discrete task." Id., slip op. at 4.
>
> The authority "responsibly to direct" is "not limited to department heads," but instead arises "[i]f a person on the shop floor has 'men under him,' and if that person decides 'what job shall be undertaken next or who shall do it,' . . . provided that the direction is both 'responsible' . . . and carried out with independent judgment." Id., slip op. at 6. "[F]or direction to be 'responsible,' the person performing the oversight must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed are not performed properly." Id., slip op. at 7. "Thus, to establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps." Id., slip op. at 7.
>
> "[T]o exercise 'independent judgment,' an individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data." Id. at 8. "[A] judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement." Id. slip op. at 8. "On the other hand, the mere existence of company policies does not eliminate independent judgment from decision-making if the policies allow for discretionary choices." Id., slip op. at 8 (citations omitted). Explaining the definition of independent judgment in relation to the authority to assign, the Board stated that "[t]he authority to effect an assignment . . . must be independent [free of the control of others], it must involve a judgment [forming an opinion or evaluation by discerning and comparing data], and the judgment must involve a degree of discretion that rises above the 'routine or clerical.'" Id., slip op. at 8 (citations omitted).

## II. FACTS AND ANALYSIS

The Respondent, pursuant to a contract with Broward County, Florida, provides maintenance services upon cranes used to unload containerized cargo from ships at Port Everglades. The initial decision herein discusses the testimony given at the hearing and need not be repeated. As set out in the initial decision, it is uncontested that Respondent's president, Gerald Charlton, the senior port engineer, and the supervisory port engineer are statutory supervisors. The port engineers were assigned to shifts, called watches, with one or two crane maintenance electricians, referred to as CMEs. The teams of a port engineer and CMEs were assigned specific cranes for which they had two missions, "scheduled maintenance and cargo watch." *GFC Crane Consultants, Inc.*, supra at 872.

Judge Robertson found, contrary to the Respondent's arguments, that port engineers "did not have authority to promote, evaluate, or discipline . . . or to effectively recommend such action" or that they "responsibly directed" employees. The decision concludes that port engineers did not have "authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action." Id. at 874. Consistent with the Board's remand, I address only the issues of assignment, responsible direction, and independent judgment as refined by the Board in *Oakwood Healthcare, Inc.*

The relevant time for the inquiry relating to the supervisory status of port engineers is the year 2000. The Respondent's operations evolved during the period between 1995 and 2000, and documents were issued throughout that time period that prescribed the procedures that port engineers were to follow. Prior to 1997, there had been no preoperational checklist regarding the status of cranes being made ready for service. On

January 28, 1997, Dale Hoover, who was senior port engineer at that time, issued a preoperational checklist. In early 1998, port engineer Tim Herring had understood that he had the discretion to call other personnel to assist with a problem, and did so. On February 10, 1998, senior port engineer Hoover issued a warning to Herring in which he informed him that he did "not now, or have ever have had, authority to call out other personnel to assist you. That authority is mine and Charlton's alone. It has been standing policy to call myself when additional personnel are required and when there is an operational decision that needs to be made." Mark Aloisio became supervisory port engineer in September of 1999. Following his appointment, the Respondent reduced manning on nights and weekends when no cargo was being unloaded and the cranes were not in operation and instituted a "block maintenance program" prescribing the frequency with which specific maintenance items were to be performed.

During a cargo watch, the assigned team would, using the preoperational checklist, ensure that the crane was operating properly and then stand by to make necessary repairs if the crane broke down. Written instructions directed the port engineer to contact the senior port engineer or supervisory port engineer if a crane was out of operation for more than 30 minutes. Port engineer Rudy Veiga testified that "eventually, it became 15 minutes," and supervisory port engineer, Aloisio, confirmed that "towards the end," i.e., prior to the discharge of the port engineers, "it was the 15-minute mark." As already noted, on February 10, 1998, port engineer Herring was warned and informed by the senior port engineer that it was "standing policy to call myself . . . when there is an operational decision that needs to be made." Even though acknowledged supervisors were not present on site at night or on weekends, "management . . . [was] available after hours," and port engineers contacted them in compliance with the Respondent's policies. See *Golden Crest Healthcare Center*, supra at fn. 10.

Maintenance work consisted of scheduled maintenance and repairs, including tasks such as greasing cable wires, changing oil, "anything that needed to be done" to keep the cranes in good working order. Scheduled maintenance was performed monthly or less often depending upon the maintenance item as set out in the "block maintenance program." Regular inspections of the cranes disclosed items that needed attention and were noted on a list given to the senior port engineer or supervisory port engineer who approved what work was to be performed. A list of tasks to be performed was approved by the senior port engineer or supervisory port engineer each week and given to the port engineers. Initially the lists were handwritten as reflected by various exhibits. After institution of the "block maintenance program," the tasks were posted on a board and checked off as they were completed.

Port engineers, as found in the initial decision, did the same work as the CMEs. To quote port engineer Tim Herring, who estimated that he spent from 10 to 15 percent of his time filling out paperwork, "[I]t was all routine work." "I got out there and worked with the electricians [CMEs], whatever the job happened to be." Port engineer Rudy Veiga, who physically worked from 65 to 70 percent of the time, explained that the work performed by the team was not "divided between us [the port engineers] and the CMEs. We would do it together." He pointed out that it was "routine, . . . these are all repetitive type jobs." When, upon seeing on the list that wire ropes needed to be greased, Viega would go to the breakroom and say, "[C]ome on guys, we've got to grease the wire ropes." Lead CME Paul Titus, a witness for the Respondent, admitted that Veiga spent at least 50 percent of his time physically working. Port engineer Vincent Dobbin confirmed that "[w]e would do routine tasks all the time."

Although the port engineer would prioritize the tasks to be performed, lead CME Titus confirmed that the CMEs would make suggestions "constantly." This collegial working relationship among team members was confirmed by President Charlton who acknowledged that the port engineers and CMEs would "work together as a team." Port engineer Scott Zinsius noted that, if a job were going too slowly, he might "join in on the job," but that it could "go the other way," giving the example of a CME taking over an oil change on a diesel engine from him. CME Andrew Balash, after finishing a specified task, would "just go continue" performing the "other things on the list." The decision regarding the priority of tasks to be performed could also be a function of time. As port engineer Jody Thomas pointed out, the team "would not start an 8 hour job if there were only 2 hours left on the shift."

With regard to authority to assign, there is no evidence that the port engineers designated CMEs to a place other than their assigned crane, their assigned shift, or the duties associated with their position as CMEs. Any shift change had to be approved by the senior port engineer or supervisory port engineer, as did all overtime except when a cargo watch continued beyond the end of a normal shift, in which case standing instructions required the employees to remain until the ship was unloaded and the cranes ceased operating.

With regard to the authority responsibly to direct, the Board requires both direction and accountability. With regard to direction, "it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary." Direction is established by showing that the putative supervisor determines "what job shall be undertaken next or who shall do it." The authority to take corrective action obviously falls below the threshold of formal discipline, since the authority to discipline, assuming independent judgment in that regard, would, standing alone, establish supervisory authority. Thus, from the list that he received from his superiors, a port engineer's deciding the order in which he and the CMEs working with him were going to undertake the tasks, explaining the correct manner in which to perform a task, and giving verbal reminders regarding safety rules or established procedures would fulfill the first requirement of responsible direction. The foregoing interpretation is consistent with the holding in *Croft Metals, Inc.*, supra at 722, in which the Board found that moving employees to different tasks, correcting improper performance, and making decisions about the order in which work was to be performed, constituted "direction."

The second requirement, and an essential requirement of responsible direction, is accountability. In *Golden Crest Healthcare Center*, supra at fn. 11, the Board pointed out that a find-

ing of responsible direction requires both evidence of direction and accountability, "when there is no showing of 'direction,' the Board need not reach the issue of 'accountability,' just as when there is no showing of 'accountably,' the Board need not reach the issue of 'direction.'"

There is no evidence that port engineers were held accountable for their actions in directing CMEs. Although port engineers were disciplined for their conduct, as in *Golden Crest Healthcare Center*, there is no evidence that any port engineer "has experienced any material consequences to . . . [his] terms and conditions of employment, either positive or negative, as a result of . . . [his] performance in directing . . . [CMEs]." Id. at 731.

The Respondent, in its brief, citing three instances of discipline to port engineers, argues that they were held responsible for the work of the CMEs. The documentary evidence does not support the argument. The port engineers were cited for their own derelictions. Port engineer Mike Galka was discharged following a crane collision. Contrary to the assertion that "management held the Port Engineer accountable for the CME's deficient work," the Respondent's written response dated January 19, 2001, to a grievance filed by the Union refers to Galka's placing "the blame on one of the electricians is not only disingenuous but also cowardly. In the end, there is no escaping the fact that he deliberately bypassed the collision avoidance system which was the direct and proximate cause of the accident." Port engineer Peter Leahy was cited on August 29, 2000, when it was discovered that a gantry drive motor had been improperly wired. A memo from the senior port engineer notes that he should have made sure the job was done right but did not do so because he "did not gantry full stick." A letter to Leahy from President Charlton dated August 30, 2000, regarding this incident states that he did not "fully test the gantry motor." Although claiming that the Respondent held port engineer Scott Zinsius responsible when a crane collided with a tanker truck, "even though he was not operating the crane," the letter to Zinsius dated December 29, 1998, points out that he was the responsible engineer on watch and that it was his "responsibility to notify the [Broward County] Port Engineer . . . [and] Senior Port Engineer" as stated in a memorandum and that he, Zinsius, should make "no mistake . . . regarding notification to authorities reporting damage."

With regard to independent judgment, even if a putative supervisor is found "responsibly to direct" because he or she both directs and is held accountable, there is no finding of supervisory status if that responsible direction is not exercised with independent judgment. Independent judgment is action that is "free of the control of others." Thus, for responsible direction to be independent, it cannot be "dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement." *Oakwood Healthcare, Inc.*, supra at 693. In *Croft Metals*, although finding that the lead persons therein both directed employees and were "held accountable for the job performance of the employees assigned to them," the Board determined that the lead persons were not supervisors because the employees "generally perform the same job or repetitive tasks on a regular basis and, once trained in their positions, require minimal guidance." Directions were "routine." Id. at 722.

The port engineers in this case did not exercise independent judgment. Even if the discipline noted above were to be construed as somehow holding port engineers responsible for actions of the CMEs, those documents refute any claim of independent judgment since they show that the port engineers did not follow proper procedures. The lists that determined the maintenance work that teams performed were approved by the senior port engineer or supervisory port engineer. The employees worked together as a team, and the work they performed was routine and repetitive. On cargo watches, a preoperational checklist determined whether a crane was ready for use. If a crane broke down, the team of a port engineer and CMEs would immediately try to get the crane operational, but the port engineer was required to contact the senior port engineer or supervisory port engineer when down time exceeded 30, later reduced to 15, minutes. Rather than exercising independent judgment, port engineers were to contact their superiors "when there is an operational decision that needs to be made."

The Respondent argues that port engineers "decided, free from the control of management, whether . . . [a] malfunctioning crane should be fixed or replaced." The foregoing is inconsistent with both the required notification to the senior port engineer or supervisory port engineer when down time occurred as well as the standing policy to call "when there is an operational decision that needs to be made." It is also contrary to the finding in the initial decision that the "port engineer simply notified Port Everglades and the supervisory port engineer of the problem." *GFC Crane Consultants, Inc.*, supra at 877. Furthermore, as pointed out in the brief of the Charging Party, citing *Chevron U.S.A.*, 309 NLRB 59, 68 (1992), "[i]t is the authority over employees, not the control of equipment, that is relevant" in determining supervisory status.

In *Oakwood Healthcare, Inc.*, supra, the Board noted that "for an individual 'responsibly to direct' . . . with 'independent judgment,' that individual would need to exercise 'significant discretion and judgment in directing' others." Id. at fn. 38. The foregoing is consistent with the Board's holding that "[p]roof of independent judgment . . . entails the submission of concrete evidence showing how assignment decisions are made. The assignment of tasks in accordance with an Employer's set practice, pattern or parameters, or based on such obvious factors as whether an employee's workload is light, does not require a sufficient exercise of independent judgment to satisfy the statutory definition." *Franklin Home Health Agency*, 337 NLRB 826, 830 (2002), citing *Express Messenger Systems*, 301 NLRB 651, 654 (1991), and *Bay Area-Los Angeles Express*, 275 NLRB 1063, 1075 (1985). In this case, as in *Croft Metals Inc.*, supra at 722, any directions given by port engineers would not rise above the routine or clerical that the Act specifically states do not confer supervisory status. As recognized by the Supreme Court, in *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 713 (2000). "[m]any nominally supervisory functions may be performed without the 'exercis[e of] such a degree of . . . judgment or discretion . . . as would warrant a finding' of supervisory status under the Act. *Weyerhaeuser Timber Co.*, 85 NLRB 1170, 1173 (1949)."

The burden of establishing supervisory status is upon the party asserting that status. The Respondent has not met that burden. The evidence in this case does not establish that port engineers assign, responsibly direct, or exercise independent judgment.

### III. CONCLUSION OF LAW

Having considered the record in view of the "refined . . . analysis to be applied in assessing supervisor status" prescribed in *Oakwood Healthcare, Inc.*, and the briefs filed by all parties, I find that the port engineers are not supervisors as defined in the Act. Accordingly, I issue the following recommended[1]

[Recommended Order omitted from publication.]

[1] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.