UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

IFG-STOCKTON MANAGEMENT, L.P.

and Case 32-CA-24926

INTERNATIONAL UNION OF
OPERATING ENGINEERS, STATIONARY
ENGINEERS LOCAL 39, AFL-CIO

Gary M. Connaughton, Esq., Oakland, CA,
for the General Counsel.

Scott Malm, Esq. (Cassel, Malm, Fagundes)
Stockton, CA, for the Respondent.

Stuart Weinberg, *Esq.,* (*Weinberg, Roger & Rosenfeld*)
Alameda, CA, for the Union.

DECISION

Statement of the Case

Jay R. Pollack, Administrative Law Judge. I heard this case in trial at Oakland, California, on June 21, 2010. On January 28, 2010, the International Union of Operating Engineers, Stationary Engineers Local 39, AFL-CIO, (the Union) filed the charge in Case 32-CA-24926 alleging that IFG-Stockton Management LP[1] (Respondent) committed certain violations of Section 8(a)(5), (3) and (1) of the National Labor Relations Act (the Act). On March 31, 2010, the Union filed the first amended charge. On March 31, 2010, the Regional Director for Region 32 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing against Respondent, alleging that Respondent violated Section 8(a)(5), (3) and (1) of the Act. Respondent filed a timely answer to the complaint, denying all wrongdoing.

The parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. Upon the entire record,

[1] The name of the Respondent appears as corrected at the hearing.

from my observation of the demeanor of the witnesses[2], and having considered the posthearing briefs of the parties, I make the following.

Findings of Fact

I. Jurisdiction

The Respondent is a limited partnership, with an office and principal place of business in Stockton, California, where it has been engaged in the business of managing and maintaining buildings and facilities In the twelve months prior to issuance of the complaint, Respondent, in conducting its business operations, derived gross revenues in excess of $50,000 from the City of Stockton, California. Further, Respondent purchased and received goods and services valued in excess of $50,000 directly from points outside the State of California. Accordingly, the Respondent admits and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

Respondent is engaged in the management and maintenance of commercial buildings and facilities, including the Stockton Arena in Stockton, California. The Union represented a bargaining unit of Respondent's employees at the Stockton Arena The collective bargaining agreement between the parties was effective by its terms from January 1, 2007 through December 31, 2009. Although the size of the bargaining unit varied during the term of the bargaining agreement, there were two bargaining unit employees for an extended period of time prior to January 31, 2010.

In early October 2009, the Union sent Respondent a letter reopening the bargaining agreement for purposes of bargaining for a successor bargaining agreement. In that same month, Charles Kemp, Respondent's general manager, decided to replace Respondent's bargaining unit employees with outside contractors because of issues he had with the work competence of employees supplied by the Union. In late October, Respondent's counsel sent the Union a letter notifying the Union that Respondent intended to "terminate" the bargaining agreement upon its expiration. Counsel's letter noted that Respondent 's "intent to terminate the contract is a subject of bargaining and offers to meet and confer with [the Union] for the purpose of negotiating a new or modified contract and that contract is to be observed during the bargaining up to the last day of the contract." The Union, by Steven Thomas, business representative, responded that the Union intended to bargain a successor agreement. Because the parties were unable to meet prior to December 31, 2009, the parties agreed to extend the bargaining agreement until midnight January 31, 2010.

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[2] The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Manufacturing Company*, 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings herein, their testimony has been discredited, either as having been in conflict with credited documentary or testimonial evidence or because it was in and of itself incredible and unworthy of belief.

On January 22, 2010, the parties met in the presence of a Federal Mediator, for their first and only bargaining session for a successor bargaining agreement. The Union stated that it was there to bargain for a successor agreement. Respondent stated that it did not want a contract; that the bargaining agreement was not working for Respondent because the Union had not provided Respondent with properly trained employees. Thomas answered Respondent's claims that the Union had failed to provide properly trained employees by stating that the Union only had the right to refer applicants and, that it was Respondent's responsibility to make sure it hired qualified employees.

Thomas distributed copies of the Union's 16 bargaining proposals. The parties discussed the Union's proposals. Respondent stated that it had no counter proposals because it did not see a need to move forward with negotiations. After Respondent insisted that it did not want a contract, the mediator called for a break in the session so that he could meet with Respondent separately.

In its meeting with the mediator, Respondent again stated its intent to walk away from the contract. The mediator stated that Respondent could: (1) accept the Union's proposals; (2) attempt to change to change job descriptions and titles (the mediator suggested the Union would never agree to this); or (3) proceed without a contract and await the Union's reaction. Respondent stated that it would walk away from the contract and the mediator agreed to inform the Union.

After meeting with the mediator, Respondent's representatives discussed how to implement its decision to terminate its relationship with the Union. Respondent decided that it would notify its two unit employees that they would be let go because Respondent no longer had an agreement with the Union. Respondent decided to place employee Michael Valverde on paid administrative leave. Valverde was put on administrative leave because Respondent feared that Valverde might get upset once he learned that Respondent was walking away from the Union. Respondent admitted that it knew Valverde was a strong Union supporter.

Valverde was notified by telephone and letter that he was placed on administrative leave until January 31, 2010 and that Respondent had "opted" not to renew the contract which expired on January 31, 2010. In addition Valverde was told "You are asked to refrain from making any contact with any other IFG employees."

On February 1, 2010, Respondent terminated its two bargaining unit employees, Valverde and Brion Leri. Respondent subcontracted out the bargaining unit work and later rehired Leri to supervise the employees of the subcontractors. Respondent did not give notice to or bargain with the Union over these terminations. On February 3, Thomas sent Respondent a letter demanding that Respondent return to the bargaining table. Respondent did not respond and no further bargaining took place.

Respondent presented evidence from Brion Leri. After being terminated on February 1, Leri was rehired by Respondent to supervise the employees of subcontractors used by Respondent. Leri testified that he expressed dissatisfaction with the employees on several occasions. After being informed that Respondent was no longer affiliated with the Union, Leri expressed concern over the Union and his job status. However, Leri did not testify that he ever stated that he did not want the Union to represent him.

III. Analysis and conclusions

A. The Respondent Was Obligated to Bargain

The general rule is that when parties are engaged in negotiations for a new agreement, an employer's obligation to refrain from unilateral changes encompasses a duty to refrain from implementation unless and until an overall impasse has been reached on bargaining for the agreement as a whole. *Pleasantview Nursing Home,* 335 NLRB 96 (2001)*;* citing *Bottom Line Enterprises*, 302 NLRB 373 (1991). In *Bottom Line Enterprise,* the Board recognized only two exceptions to that general rule: when a union engages in bargaining delay tactics and "when economic exigencies compel prompt action, 335 NLRB at 374

The Board has limited the economic considerations which would trigger the *Bottom Line* exception to "extraordinary events which are an unforeseen occurrence, having a major economic effect [requiring] the company to take immediate action." *Hankins Lumber Co.*, 316 NLRB 837, 838 (1995). In *RBE Electronics*, 320 NLRB 80, 81 (1995) the Board made it clear that "[a]bsent a dire financial emergency, economic events such as . . . operation at a competitive disadvantage . . . do not justify unilateral action." citing *Triple A Fire Protection*, 315 NLRB 409, 414 (1994).

However, in *RBE Electronics*, the Board also found that there may be other economic exigencies that, although not sufficiently compelling to excuse bargaining altogether, should be encompassed within the exigency exception. In those cases, the employer will "satisfy its statutory obligation by providing [the union] with adequate notice and an opportunity to bargain over the changes it proposes to respond to the exigency and by bargaining to impasse over the particular matter. In such time sensitive circumstances, however, bargaining, to be in good faith, need not be protracted." *Pleasantview Nursing Home*, supra, citing *RBE Electronics* and Naperville *Ready Mix, Inc.*, 329 NLRB 174, 182–184 (1999).

In *Pleasantview Nursing Home* the Board reiterated that the exception will be limited only to those exigencies in which time is of the essence and which demand prompt action. Thus, the Board will require an employer to show a need that the particular action proposed be implemented promptly. Consistent with the requirement that an employer prove that its proposed changes were "compelled," the employer must also show that the exigency was caused by external events, was beyond its control, or was not reasonably foreseeable. Id.

Applying these principles here, it is clear that the Respondent's claim of inadequately trained employees is not the type of "extraordinary event" that justifies unilateral action without bargaining. Although Respondent could decide to subcontract the unit work, it first had to offer the Union the opportunity to bargain over the decision and the effects of the decision.

There was no reason why Respondent could not give the Union notice and an opportunity to bargain over its decision to subcontract the work and the effects of such a decision.

In the instant case the parties met on only one occasion. Respondent indicated its desire to end the relationship. It offered no proposals or counter proposals. There was no discussion concerning a plan for subcontracting or the effects of Respondent's decision to subcontract the work.

Respondent argues that the Union did not have majority support. It is axiomatic that an employer's obligation to bargain with the Section 9(a) representative of its' bargaining unit

employees continues after the expiration of a collective bargaining agreement unless or until it is shown that the union has lost majority support. *Levitz Furniture Co.,* 333 NLRB 717 (2001). Absent a showing that the union lost majority support, an employer violates Section 8(a)(5) of the Act if it refuses to recognize and bargain in good faith with an incumbent union once a collective bargaining agreement expires.

The Board has held that the burden is on the employer to prove by a preponderance of objective evidence that the union had in fact lost majority support at the time the employer withdrew recognition. *Levitz, supra,*at 725. The evidence presented by Leri does not establish that the Union had lost majority support at the time of Respondent's refusal to bargain.

Further, Respondent argues that there is a bargaining unit of only one employee. However, the evidence establishes that the appointment of Leri to supervise subcontractors was part-and-parcel of the decision to subcontract the bargaining unit work. Therefore, to allow this defense would be to permit Respondent to profit from its own wrongdoing. As stated earlier, Respondent could subcontract the work, but it first was obligated to bargain with the Union over the decision and the effects of that decision.

As I have found that on January 22, 2020, no lawful impasse existed, Respondent's implementation of its decision to subcontract the bargaining unit work, without the agreement of the Union, was violative of Section 8(a)(1) and (5) of the Act.

B. Paid Leave for Valverde

In cases involving dual motivation, the Board employs the test set forth in *Wright Line, A Division of Wright Line, Inc.,* 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.,* 462 U.S. 393, 399-403 (1983). Initially, the General Counsel must establish by a preponderance of the credible evidence that anti-union sentiment was a "motivating factor" for the discipline or discharge. This means that General Counsel must prove that the employee was engaged in protected activity, that the employer knew the employee was engaged in protected activity, and that the protected activity was a motivating reason for the employer's action. *Wright Line, supra,* 251 NLRB at 1090. Unlawful motivation may be found based upon direct evidence of employer animus toward the protected activity. *Robert Orr/Sysco Food Services,* 343 NLRB 1183 (2004). Alternatively, proof of discriminatory motivation may be based on circumstantial evidence, as described in *Robert Orr/Sysco Food Services,* supra:

> To support an inference of unlawful motivation, the Board looks to such factors as inconsistencies between the proffered reasons for the discipline and other actions of the employer, disparate treatment of certain employees compared to other employees with similar work records or offenses, deviations from past practice, and proximity in time of the discipline to the union activity. *Embassy Vacation Resorts,* 340 NLRB No. 94, slip op. at 3 (2003).

If the General Counsel has satisfied the initial burden, the burden of persuasion shifts to Respondent to show by a preponderance of the credible evidence that it would have taken the same action even in the absence of the employee's protected activity. If Respondent advances reasons which are found to be false, an inference that the true motive is an unlawful one may be warranted. *Shattuck Denn Mining Corp. v. NLRB,* 362 F.2d 466, 470 (9th Cir. 1966); *Limestone Apparel Corp.,* 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982). However, Respondent's defense does not fail simply because not all the evidence supports its defense or because some evidence tends to refute it. *Merrilat Industries,* 307 NLRB 1301, 1303 (1992).

Ultimately, the General Counsel retains the burden of proving discrimination. *Wright Line,* supra*,* 251 NLRB at 1088, n. 11.

In the instant case, Respondent placed Valverde on paid administrative leave due to its belief that Valverde would be upset by Respondent's withdrawal of recognition of the Union. Respondent admitted that Valverde was a strong Union supporter. Further, Respondent requested Valverde not to make any contact with any employees of Respondent. Under the circumstances, I find that General Counsel has established that Valverde was placed on paid leave because he was a strong Union supporter and because Respondent did not want him to have contact with other employees.

I find Respondent's evidence that Valverde was "volatile at times", without objective support, insufficient to establish that it would have taken this action in the absence of Valverde's Union support. Accordingly, I find that Respondent violated Section 8(a)(3) and (1) of the Act in placing Valverde on paid leave.

Conclusions of Law

1. Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally subcontracting bargaining unit work on February1, 2010.

4. Respondent violated Section 8(a)(3) and (1) by placing employee Michael Valverde on administrative leave on January 22, 2010.

5. Respondent's conduct above are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found Respondent engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative action to effectuate the purposes and policies of the Act.

Respondent having unlawfully laid off employees Valverde and Leri, must offer them reinstatement and make them whole for any 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:[3]

ORDER

The Respondent, IFG-Stockton Management, LP, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Refusing to bargain collectively by unilaterally subcontracting the bargaining unit work.

(b) Placing employees on paid administrative leave because of their union sympathies.

(c) Laying off employees, without bargaining in good faith with the Union or in order to discourage union activities and union membership.

(d) Withdrawing recognition from the Union as the exclusive collective-bargaining representative of Respondent's employees in the unit described below.

(e) Refusing to meet and bargain with the Union as the exclusive collective-bargaining representative of Respondent's employees in the appropriate bargaining unit with respect to rates of pay, hours of employment, and other terms and conditions of employment.

(f) 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) Upon request, meet and bargain with the Union as the exclusive collective-bargaining representative of its employees in the appropriate bargaining unit described below with respect to rates of pay, hours of employment, and other terms and conditions, and if an understanding is reached, embody such understanding in a signed agreement. The appropriate bargaining unit is:

> All employees performing work described in and covered by "Section1. Union Recognition" of the January 1, 2007 through December 31, 2009 collective bargaining agreement between Respondent and the Union, excluding all other employees, guards and supervisors as defined in the Act.

(b) Within 14 days from the date of this Order, offer Michael Valverde and Brion Leri full reinstatement to their former jobs or, if those jobs no longer exists, to substantially

[3] 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.

equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed but for their unlawful discharges.

(c) Make Valverde and Leri whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the Remedy section of the decision.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Stockton, California copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 32, 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 January 23, 2010.

(f) Within 21 days after service by the Region, file with the Regional Director for Region 32, a sworn certification of a responsible official on a form provided by Region 32 attesting to the steps the Respondent has taken to comply herewith.

Dated, Washington, D.C., August 19, 2010.

_____
Jay R. Pollack
Administrative Law Judge

[4] 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 refuse to bargain collectively by unilaterally subcontracting the bargaining unit work.

WE WILL NOT place employees on paid administrative leave because of their union sympathies.

WE WILL NOT lay off employees, without bargaining in good faith with the Union or in order to discourage union activities and union membership.

WE WILL NOT withdraw recognition from the Union as the exclusive collective bargaining representative of Respondent's employees in the unit described below.

WE WILL NOT refuse to meet and bargain with the Union as the exclusive collective bargaining representative of Respondent's employees in the appropriate bargaining unit with respect to rates of pay, hours of employment, and other terms and conditions of employment.

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

WE WILL upon request, meet and bargain with the Union as the exclusive collective bargaining representative of our employees in the appropriate bargaining unit described below with respect to rates of pay, hours of employment, and other terms and conditions, and if an understanding is reached, embody such understanding in a signed agreement. The appropriate bargaining unit is:

All employees performing work described in and covered by "Section 1. Union Recognition" of the January 1, 2007 through December 31, 2009 collective bargaining agreement between Respondent and the Union, excluding all other employees, guards and supervisors as defined in the Act.

WE WILL offer Michael Valverde and Brion Leri full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed but for their unlawful discharges.

WE WILL Make Valverde and Brion Leri whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, with interest.

IFG-Stockton Management, LP

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

1301 Clay Street, Federal Building, Room 300N, Oakland, CA 94612-5211
(510) 637-3300, Hours: 8:30 a.m. to 5 p.m.

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

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (510) 637-3270.

THIS NOTICE AND THE DECISION IN THIS MATTER ARE PUBLIC DOCUMENTS

Any interested individual who wishes to request a copy of this Notice or a complete copy of the Decision of which this Notice is a part may do so by contacting the Board's Offices at the address and telephone number appearing immediately above.