

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32**

IFG-STOCKTON MANGMENT, L.P.

and

Case 32-CA-24926

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

**ACTING GENERAL COUNSEL'S EXCEPTIONS TO
THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

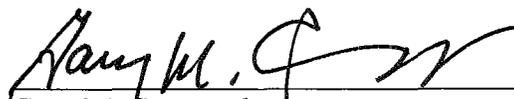
On August 19, 2010, Administrative Law Judge Jay R. Pollack, herein called the Judge, issued his Decision in this matter, finding that Respondent violated Section 8(a)(3) and (5) of the Act by certain acts and conduct. However, the Judge failed to find that certain other acts and conduct by Respondent also alleged to be unlawful similarly violated the Act, despite his own factual findings that fully support these additional allegations. Furthermore, the Judge failed to order Respondent to restore the status quo ante by restoring bargaining unit work as part of the remedy for its unfair labor practices. Accordingly, Counsel for the Acting General Counsel hereby files the following exceptions to the Judge's findings, conclusions of law, recommended remedy and recommended order.

<u>No.</u>	<u>Page</u>	<u>Line</u>	<u>Exception</u>
1.	6	4-5	To the Judge's finding that Respondent placed Michael Valverde on paid rather than unpaid administrative leave on January 22, 2010.

2.			To the Judge's failure to find that Respondent violated Section 8(a)(5), in addition to Section 8(a)(3), by placing Michael Valverde on administrative leave on January 22, 2010.
3.			To the Judge's failure to find that Respondent violated Section 8(a)(1) of the Act by telling Michael Valverde on January 22, 2010 "You are asked to refrain from making any contact with any other IFG employees."
4.			To the Judge's failure to find Respondent violated Section 8(a)(3) and (5) of the Act by eliminating all of its bargaining unit positions on February 1, 2010 by terminating bargaining unit employees Michael Valverde and Brion Leri on that day.
5.			To the Judge's failure to find that Respondent violated Section 8(a)(5) of the Act by informing the Union on January 22, 2010 that it had no bargaining proposals, that it did not see a need to move forward with negotiations and that it was "walking away" from the extended collective bargaining agreement when it expired on January 31, 2010.
6.			To the Judge's failure to find that Respondent violated Section 8(a)(5) of the Act by effectively withdrawing recognition from the Union upon the expiration of the extended collective bargaining agreement.
7.			To the Judge's failure to include language in his recommended remedy directing Respondent to restore the status quo ante by restoring bargaining unit work, which would include, among other things, rescinding any subcontracts of bargaining unit work entered into by Respondent and by hiring new bargaining unit employees if either Michael Valverde or Brion Leri refuse Respondent's offer of reinstatement.
8.			To the Judge's failure to include in his recommended order the requirement that Respondent take the affirmative action of restoring the status quo ante by restoring bargaining unit work, which would include, among other things, rescinding any subcontracts of bargaining unit work and by hiring new bargaining unit employees if either Michael Valverde or Brion Leri refuse Respondent's offer of reinstatement.

DATED AT Oakland, California this 16th day of September 2010.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Gary M. Connaughton", written over a horizontal line.

Gary M. Connaughton
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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

INTERNATIONAL FACILITIES GROUP
STOCKTON MANAGEMENT L.P.

and

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

Case 32-CA-24926

DATE OF MAILING: September 16, 2010

**AFFIDAVIT OF SERVICE OF ACTING GENERAL COUNSEL'S EXCEPTIONS TO
THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) by postpaid mail upon the following persons, addressed to them at the following addresses:

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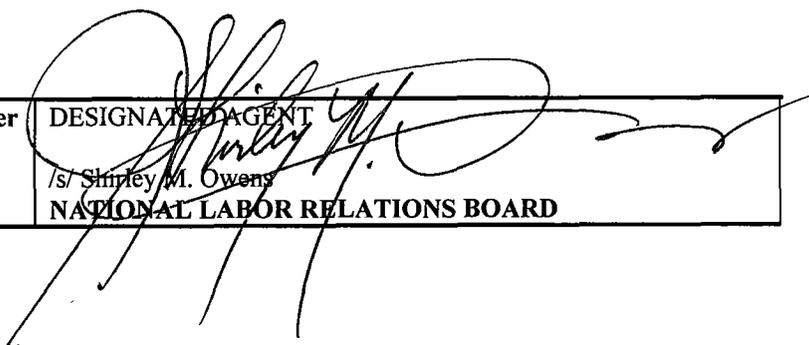
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Subscribed and sworn to before me this 16th day of September
2010.

DESIGNATED AGENT

/s/ Shirley M. Owens

NATIONAL LABOR RELATIONS BOARD



**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32**

IFG-STOCKTON MANAGEMENT, L.P.

and

Case 32-CA-24926

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

**ACTING GENERAL COUNSEL'S BRIEF IN
SUPPORT OF EXCEPTIONS TO THE DECISION
OF THE ADMINISTRATIVE LAW JUDGE**

1. Preliminary Statement

On August 19, 2010,¹ Administrative Law Judge Jay R. Pollack, herein called the Judge, issued his Decision in this matter, finding that Respondent had violated Section 8(a)(3) and (5) of the Act by certain acts and conduct. However, the Judge failed to find that certain other acts and conduct by Respondent also alleged to be unlawful similarly violated the Act, despite his own factual findings that fully support these additional allegations. Furthermore, the Judge failed to order Respondent to restore the status quo ante by restoring bargaining unit work as part of the remedy for its unfair labor practices. Counsel for the Acting General Counsel has taken exceptions to the Judge's Decision with respect to these matters, and this brief is submitted in support of those exceptions.

¹ All dates are 2010 unless otherwise indicated.

2. The Judge's Findings of Fact²

Respondent is engaged in the business of managing and maintaining buildings and facilities, including the Stockton Arena located in Stockton, California. Since at least January 1, 2007, Respondent has had a collective-bargaining relationship with the Union covering a bargaining unit of Respondent's engineers employed at the Stockton Arena. The first collective-bargaining agreement between the parties, herein called the Agreement, was effective by its terms from January 1, 2007 through December 31, 2009. Although the size of the bargaining unit varied during the life of the Agreement, there had been two bargaining unit employees for an extended period of time prior to January 31, with the two bargaining unit members as of the latter date being Michael Valverde and Brion Leri. (ALJD 2:8-28)

In late October 2009, Respondent's counsel sent the Union a letter notifying it that Respondent intended to "terminate" the parties' collective-bargaining agreement upon its expiration. The 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 the contract is to be observed during the bargaining up to the last day of the contract." Union Representative Steven Thomas responded that the Union intended to bargain for a successor agreement. When the parties were unable to meet prior to the expiration of the Agreement on December 31, 2009, the parties agreed to extend the Agreement through midnight January 31. (ALJD 2:30-42)

² References to the Judge's Decision are listed as "ALJD _ : _." "Tr." refers to cites in the official transcript; "GC" refers to the General Counsel's exhibits; "R" refers to Respondent's exhibits.

On January 22, the parties met in the presence of a federal mediator for their first and only bargaining session for a successor agreement. During this session, Respondent's counsel, Scott Malm, repeatedly told the Union that Respondent did not want a contract because of alleged competency issues with some of the employees referred to Respondent by the Union.³ The Union responded that it was there to bargain a successor agreement, and it distributed copies of 16 bargaining proposals. Malm stated that Respondent had no counter proposals because Respondent "did not see a need to move forward with the negotiations." In the face of Respondent's insistence that it did not want a contract, the mediator called for a break in the session so he could meet separately with Respondent's representatives. During this meeting, Respondent's representatives informed the mediator that Respondent intended to "walk away" from the contract, and the mediator agreed to inform the Union of this intention. (ALJD 3:1-21)

Following their meeting with the mediator, Respondent's representatives, Malm, Kemp, Benoit and Torres-Peters, discussed among themselves how they were going to implement Respondent's decision to terminate its relationship with the Union. They decided that the two unit employees, Brion Leri and Michael Valverde, would be notified that they were being let go because Respondent no longer had an agreement with the Union. Respondent's representatives also decided to immediately place Valverde on administrative leave because they feared that Valverde, who Respondent knew to be a

³ The Judge does not identify Malm as Respondent's chief spokesperson during this meeting who made these statements, but it is undisputed that Respondent's chief spokesperson was attorney Scott Malm. (Tr. 41) In addition to Malm, Respondent was represented at this meeting by General Manager Charles Kemp, Operations Manager Lawrence Benoit, and Human Resources Manager Christina Torres-Peters. (ALJD 19:20-25, 20:1-5)

strong Union supporter, might get upset when he learned that Respondent was terminating its relationship with the Union. (ALJD 3:23-29)

After this meeting, Human Resources Manager Christina Torres-Peters notified Valverde by telephone and letter that he had been placed on administrative leave until January 31 and that Respondent had “opted” not to renew the collective-bargaining agreement once it expired on January 31. Torres-Peters also told Valverde, “You are asked to refrain from making any contact with any other IFG employees.” (ALJD 3:23-29)⁴

Although the Judge stated, in the “Analysis and conclusions” section of his decision that Respondent placed Valverde on paid administrative leave, the evidence established that Valverde was placed, in part, on unpaid leave. (ALJD 6: 4-5) Thus, Valverde’s wage statement for the pay period January 27 through February 9, which covers three days of his administrative leave, shows him being paid only for his accrued vacation hours and not receiving any other pay. (GC 19; R 1)

On February 1, pursuant to its plan to terminate its relationship with the Union, Respondent terminated its two bargaining unit employees, Brion Leri and Michael Valverde. (GC 16, 17) The Judge found that Respondent did not give the Union prior notice or an opportunity to bargain over its termination of its unit employees. The Judge also found that Respondent subcontracted out the bargaining unit work and later rehired Leri to supervise the employees of the subcontractors. Although the Union sent Respondent a letter on February 3 demanding that Respondent return to the bargaining

⁴ Although the Judge does not identify who contacted Valverde on behalf of Respondent that day, it is undisputed that Human Resources Manager Christina Torres-Peters was the person who contacted Valverde that day. (Tr. 46, 65)

table, Respondent did not respond to the Union's letter, and no further bargaining took place. (ALJD 3:36-41)

3. Argument

A. **The Judge Erred by Failing to Find That Respondent Violated Section 8(a)(5) of the Act by Placing Michael Valverde on Unpaid Administrative Leave**

Although the Judge found that Respondent violated Section 8(a)(3) of the Act by placing Michael Valverde on administrative leave on January 22, his findings fell short in two respects: First, the Judge erred by failing to find, as alleged in the complaint, that Respondent's placing of Valverde on administrative leave also violated Section 8(a)(5) of the Act. Second, the Judge erroneously found that Valverde was placed on paid administrative leave when, in fact, as the record showed, part of that leave was unpaid.⁵

Respondent's placement of Valverde on administrative leave on January 22 violated Section 8(a)(5) of the Act because it was done without first notifying and providing the Union an opportunity to bargain over this matter. Although the Judge did not make a factual finding that Respondent placed Valverde on administrative leave without first notifying and providing the Union an opportunity to bargain over this matter, the undisputed evidence establishes that Respondent gave the Union neither notice nor an opportunity to bargain over this matter.⁶ Furthermore, nothing in the parties' extended collective-bargaining agreement appears to cover the situation of

⁵ The complaint originally alleged that Respondent violated Section 8(a)(3) and (5) of the Act by placing Valverde on "paid" administrative leave but that allegation was later amended at the commencement of the unfair labor practice hearing to delete the word "paid." (Tr. 8)

⁶ Union representative Steven Thomas testified without challenge that Respondent placed Valverde on administrative leave without first notifying the Union and providing it an opportunity to bargain. (Tr. 33-34)

employees being put on administrative leave, and there is no evidence that Respondent had any established past practice of placing employees on administrative leave. Further, the evidence indicates that Respondent's decision to put Valverde on administrative leave was entirely discretionary and based totally on Kemp's speculative belief that Valverde might get upset and do something untoward once he found out that Respondent was not going to renew or extend its contract with the Union.⁷ Finally, as discussed *infra*, since it appears that at least a portion of Valverde's administrative leave was unpaid, it clearly had a substantial and material impact on his working conditions. In all of these circumstances, Respondent's placement of Valverde on administrative leave was a mandatory subject of bargaining, and its failure to notify and bargain with the Union over this matter violated Section 8(a)(5) of the Act. Accordingly, the Judge erred by failing to so find.⁸

B. The Judge Erred by Finding that Respondent Placed Michael Valverde on Paid Administrative Leave

Contrary to the Judge's stated conclusion that Valverde was placed on paid administrative leave on January 22, the documentary evidence introduced at hearing reveals that at least part of that leave was unpaid. Indeed, the Judge expressed concern at the hearing that Respondent's own records so indicated. (Tr. 80) Thus, Valverde's wage statement for the pay period January 27 through February 9, which covers three days of his administrative leave, shows him being paid only for his accrued vacation hours and

⁷ In reaching his conclusion that Respondent violated 8(a)(3) of the Act by placing Valverde on administrative leave, the Judge found that Kemp's speculations were without objective support. (ALJD 6:12-13)

⁸ Indeed, if Respondent had notified and bargained with the Union over its intention to place Valverde on administrative leave, such bargaining could have avoided the uncertainty about whether Valverde's leave was to be paid, in whole or in part.

not receiving any other pay. (GC 19; R 1) Accordingly, the Board is urged to find, consistent with the foregoing, that Valverde was not paid his regular wages for at least three days of his administrative leave.

C. The Judge Erred by Failing to Find That Respondent Violated 8(a)(1) of the Act by Telling Michael Valverde on January 22 to Refrain from Making Any Contact with Any Other IFG Employees

The complaint alleges that Respondent, acting through Human Resources Manager Christina Torres-Peters, violated Section 8(a)(1) by directing an employee on January 22 to not have any discussions with other employees about collective-bargaining matters or about his employment status. The Judge found that on January 22, Torres-Peters notified Valverde by telephone and letter that he was being placed on administrative leave until January 31, that Respondent had “opted” not to renew its contract with the Union when it expired on January 31, and that “You are asked to refrain from making any contact with any other IFG employees.” (ALJD 3:31-34)⁹ That latter instruction, combined as it was with Valverde’s also being advised that Respondent was, in effect, withdrawing recognition from the Union and placing him on administrative leave, was sufficient to cast that instruction as one that, if ignored by Valverde, would be at his peril. Accordingly, the Judge erred by failing to find that Respondent violated Section 8(a)(1) of the Act by requesting that Valverde refrain from making contract with any other IFG employees.

⁹ Although the Judge did not attribute this “request” to any particular manager, it is undisputed that Respondent’s Human Resources Manager, Christina Torres-Peters, made this “request” in a letter to Valverde sent on January 22. (Tr. 65; GC 15)

D. The Judge Erred by Failing to Find that Respondent Violated Section 8(a)(3) and (5) of the Act by Terminating Michael Valverde and Brion Leri and thereby Eliminating All of Its Bargaining Unit Positions

The Complaint alleges that on February 1, Respondent violated Section 8(a)(3) of and (5) of the Act by eliminating all of its bargaining unit positions. As noted above, the Judge found that for an extended period of time prior to February 1, there were only two bargaining unit employees, Michael Valverde and Brion Leri. The Judge also found that on February 1, Respondent, as part of its plan to sever its relationship with the Union, terminated both Valverde and Leri. Finally, the Judge found that Respondent terminated these two employees without first giving the Union notice or an opportunity to bargain over their terminations or the resulting complete elimination of the entire bargaining unit. Finally, the record fully supports these factual findings of the Judge and their clear implication that the terminations were motivated by improper union considerations and implemented unilaterally and therefore unlawful on both bases.¹⁰

Despite these factual findings, the Judge, in his analysis of the issues, failed to specifically find or conclude that Respondent's termination of Valverde and Leri violated Section 8(a)(3) and (5) of the Act. However, this failure appears to be wholly inadvertent, since later in his decision, the Judge indicates that he had in fact concluded that these terminations were unlawful. Thus, the Judge, in his recommended remedy,

¹⁰ In this regard, Respondent's human resources manager, Torres-Peters, admitted that the termination of Valverde and Leri was part of and in implementation of Respondent's larger plan to completely sever its bargaining relationship with the Union. (Tr. 67) In addition, Respondent General Manager Kemp's testimony establishes that Respondent believed that because Valverde and Leri had been employed under the Union contract, i.e., because they were "contractually with the Union," they had to be terminated in order for Respondent to make a clean break from the Union. (Tr. 48-49) This evidence fully indicates that improper union considerations underlay Respondent's decision to terminate Valverde and Leri.

In addition, the Judge properly rejected Respondent's defense that the Union's failure to provide it with trained or qualified employees somehow justified its unilateral implementation of its decision to subcontract all of the bargaining unit work. (ALJD 4:37-40)

states, “Respondent having unlawfully laid off employees Valverde and Leri, must offer them reinstatement and make them whole for any loss of earnings and benefits . . .” (ALJD 6:40-44), and, in his recommended order, the Judge states that Respondent should cease and desist from “laying off employees, without bargaining in good faith with the Union or in order to discourage union activities and Union membership.” While it is unclear why the Judge characterized Valverde’s and Leri’s February 1 terminations as layoffs in these two sections, particularly since Respondent’s February 1 letters to them explicitly characterized their separation from employment as “terminations” (GC 16, 17), it is nevertheless clear that the Judge, as a substantive matter, found these terminations to be violative of both Sections 8(a)(3) and (5) of the Act. Accordingly, the Board is urged to make the appropriate findings and conclusions with respect to these matters.

E. The Judge Erred by Failing to Find that Respondent Violated Section 8(a)(5) on January 22 by Refusing to Negotiate a Successor Agreement

The complaint alleges that Respondent violated Section 8(a)(5) of the Act by informing the Union on January 22 that it was terminating the Agreement upon its expiration and that it was refusing to negotiate a successor agreement. The Judge found that during the parties’ sole January 22 bargaining session, Respondent’s representative repeatedly stated that Respondent did not want a contract, told the Union that it did not have any counter proposals to the Union’s bargaining proposals because it did not see a need to move forward with negotiations, and had the federal mediator tell the Union that it was walking away from the Union contract. (ALJD 3:1-21) These statements of Respondent, and its complete refusal to engage in any meaningful bargaining during the January 22 bargaining session, fully support the complaint’s allegations that on January

22 Respondent refused to negotiate a successor collective-bargaining agreement. Despite making the above findings, the Judge inexplicably failed to reach any conclusions of law with respect to this conduct of Respondent and failed to address this matter in his proposed remedy or recommended order. Accordingly, the Board is requested to remedy these deficiencies in the Judge's decision.

F. The Judge Erred by Failing to Find That Respondent Violated Section 8(a)(5) of the Act by Withdrawing Recognition From the Union upon the Expiration of the Extended Collective-Bargaining Agreement

The complaint alleges that Respondent violated Section 8(a)(5) by effectively withdrawing recognition from the Union upon the expiration of the extended Agreement. Although the Judge failed to make a specific finding regarding this allegation, it appears that this failure may have been inadvertent, because in his proposed order, he ordered that Respondent cease and desist from "Withdrawing recognition from the Union as the exclusive collective-bargaining representative of Respondent's [bargaining unit] employee." (ALJD 7:20-21) Moreover, the Judge's factual findings fully support this allegation.

Thus, as the Judge found, Respondent decided in October 2009 to replace bargaining unit employees with outside contractors upon the expiration of the Agreement. Thereafter, Respondent implemented this decision in a step-by-step fashion by (1) Respondent's bald statement to the Union at the January 22 bargaining session that it did not want another contract and that it had no proposals or counter proposals to make to the Union because it did not see the need to move forward with negotiations; (2) Respondent's decision made the same day to immediately put Michael Valverde on

administrative leave and to thereafter terminate him and Brion Leri on February 1 and the subsequent unilateral implementation of those decisions; and (3) Respondent's refusal to respond to the Union's February 3 letter requesting the resumption of bargaining. Accordingly, Respondent's above conduct, as found by the Judge, culminated in an effective withdrawal of recognition from the Union in violation of Section 8(a)(5), as alleged in the complaint. Accordingly, Board is requested to (1) find that Respondent violated Section 8(a)(5) of the Act by withdrawing recognition from the Union and, (2) issue an appropriate order with respect to this unlawful conduct.

G. The Judge Erred by Failing to Order Respondent to Restore the Status Quo Ante

It is well established that the appropriate remedy for an employer's discriminatory and/or unilateral elimination of all bargaining unit work by terminating all unit employees and/or by the subcontracting of bargaining unit work should include an order requiring the employer to restore the status quo ante.¹¹ Here, although the Judge made factual findings fully supportive of the conclusion that Respondent violated 8(a)(3) and (5) by terminating all bargaining unit positions and effectively eliminating the entire bargaining unit, he did not order Respondent to restore the status quo ante. In these circumstances, Counsel for the General Counsel urges that the Board expand and clarify the Judge's order to include a restoration remedy specifically requiring Respondent to (1) rescind any subcontracts entered into for the performance of bargaining unit work; (2) reinstate Valverde and Leri to their former bargaining unit positions; and (3) if either Valverde or Leri decline reinstatement to their former bargaining unit positions, hire new

¹¹ *Joy Recovery Technology Corp.*, 320 NLRB 356 (1995); *"Automatic" Sprinkler Corp.*, 319 NLRB 401, 402 (1995); *Lear Siegler, Inc.*, 295 NLRB 857, 861 (1989).

bargaining unit employees to perform their work, all pending good faith bargaining with the Union for a successor collective-bargaining agreement.

4. Conclusion

For the reasons set forth above, it is respectfully requested that the Board find merit to the General Counsel's exceptions and find that Respondent violated Section 8(a)(1), (3) and (5) as alleged herein, and that it modify the Judge's findings of fact, conclusions of law, proposed remedy and recommended order in the manner set forth herein.

DATED AT Oakland, California this 16th day of September 2010.

Respectfully submitted,



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BEFORE THE NATIONAL LABOR RELATIONS BOARD

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Subscribed and sworn to before me this 16th day of September
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DESIGNATED AGENT

Stanley M. Owens
/s/ Stanley M. Owens

NATIONAL LABOR RELATIONS BOARD