

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

**INTERNATIONAL FACILITIES GROUP
STOCKTON MANAGEMENT LP**

and

Case 32-CA-24926

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

**RESPONDENT'S EXCEPTIONS
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

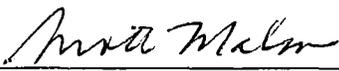
Respondent submits the following exceptions to the August 19, 2010 decision of Administrative Law Judge Jay R. Pollack.

No.	Page	Line	Findings subject to Exceptions
1	4	39-40	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.
2	4	42-44	There is 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.
3	4	47	It [Respondent] offered no proposals or counter proposals.
4	4	48-49	There was no discussion concerning a plan for subcontracting or the effects of Respondent's decision to subcontract the work.
5	5	19	As I have found that on January 22, 2010, no lawful impasse existed...
6	5	19-21	...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.

7	6	7-10	Under the circumstances, I find that General Counsel has established that Valverde was placed on leave because he was a strong Union supporter and because Respondent did not want him to have contact with other employees.
8	6	12-15	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.

Date: September 16, 2010

CASSEL MALM FAGUNDES, LLP

By: 

SCOTT MALM

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4 NATIONAL LABOR RELATIONS BOARD
5 CASE NO. 32-CA-24926

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ORDER SECTION

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
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**INTERNATIONAL FACILITIES GROUP
STOCKTON MANAGEMENT LP**

and

Case 32-CA-24926

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

**RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

I. SUMMARY OF ARGUMENT.

By its express, negotiated terms, the Collective Bargaining Agreement authorizes the Respondent to subcontract unit work without first offering the Union the opportunity to bargain about the decision or the effects of the decision. The Respondent's lawful exercise of its bargained-for contractual rights cannot constitute a violation of Section 8(a)(1)(5) of the Act, nor a violation of any other provision of the Act. In any event, this allegation was waived when it was not brought in the Complaint which was the subject of the hearing. (General Counsel's Exhibit #1: Complaint paragraph 11.) Further, the Complaint does not ask for any remedy related to Respondent's decision to contract out bargaining unit work and/or the effects of that desire. (General Counsel's Exhibit #1: Complaint, Prayer, at pages 6-7.)

By its express, negotiated terms, the Collective Bargaining Agreement authorizes the Respondent to schedule the time of the Union employees, without first offering the Union the

opportunity to bargain about the decision or the effects of the decision. The Respondent's lawful exercise of its bargained-for contractual rights cannot constitute a violation of Section 8(a)(3)(1) of the Act, nor a violation of any other provision of the Act. General Counsel had the burden of proof (Federal Rules of Evidence, Rule 301) but did not present any evidence that the placement of Mr. Valverde on paid administrative leave violated the plain language of the contract. Mr. Valverde was paid for his services, per the contract, until it expired.

The finding that Respondent did not offer proposals or counter proposals is not supported by the evidence.

In light of the intransigence of the union, the evidence does not support a finding that no lawful impasse existed.

II. GENERAL COUNSEL WAIVED THE ISSUE OF SUBCONTRACTING UNIT WORK BY FAILING TO ALLEGE IT IN THE COMPLAINT WHICH WAS THE SUBJECT OF THE ADMINISTRATIVE LAW PROCEEDING.

The Complaint did not go to hearing on the accusation against Respondent for "...failing to give notice and an opportunity to bargain over the decision to contract out bargaining unit work and the effects of that desire..." (General Counsel's Exhibit # 1.) This allegation was waived when it was not brought in the Complaint which was the subject of the hearing. (General Counsel's Exhibit #1: Complaint paragraph 11.) Further, the Complaint does not ask for any remedy (such as rescission of subcontracts with innocent third parties, whose interests were not represented at the hearing) related to Respondent's decision to contract out bargaining unit work and/or the effects of that desire. (General Counsel's Exhibit #1: Complaint, Prayer, at pages 6-7.)

All evidence on the issue of contracting out bargaining unit work was irrelevant and cannot be the basis of a lawful finding, because the issue of contracting out bargaining unit work was not properly at issue. There was no amendment offered to the Complaint although General Counsel did make an oral motion to amend the Complaint on the issue of paid versus unpaid administrative leave. Respondent was entitled to rely on the allegations of the Complaint at the hearing and was not required to guess that General Counsel was trying an issue not properly joined for adjudication. It is axiomatic that Respondent's due process rights may not be circumvented by General Counsel misleading Respondent regarding the issues to be tried, and for which Respondent could face liability.

III. THE COLLECTIVE BARGAINING AGREEMENT EXPRESSLY AUTHORIZES RESPONDENT TO SUBCONTRACT UNIT WORK WITHOUT FIRST OFFERING TO BARGAIN ABOUT THE DECISION OR THE EFFECTS OF THE DECISION.

The finding that Respondent's implementation of its decision to subcontract bargaining unit without the agreement of the union was violative of Section 8(a)(1) and (5) of the Act is wrong for two reasons: (1) The finding is not supported by the language of the collective bargaining agreement and (2) the finding is not supported by the uncontested evidence as to when subcontracting was first implemented.

At Section 4 Duties of Engineers subpart (d), the express, negotiated terms of the Collective Bargaining Agreement provide:

Nothing herein shall prohibit Employer, in its sole discretion, from retaining outside contractors to perform and of the duties of engineers at the Stockton Arena described in section 4 (a) pertaining to: (1) large construction projects, or (2) large mechanical installations, or (3) maintenance of equipment during the manufacturer's warranty period, or (4) specialized work which by its nature is cost prohibitive for engineers at the Stockton Arena to perform, or (5) due to proprietary protections, or (6) the cost of

specialized equipment. (*Emphasis added.*) General Counsel's Exhibit #2.

At Section 4 Duties of Engineers subpart (e), the express negotiated terms of the Collective Bargaining Agreement provide:

Nothing herein shall prohibit Employer, in its sole discretion, from retaining outside contractors to perform work at the Stockton Arena in circumstances of: (1) emergencies, or (2) where specialized equipment is involved, or (3) where events booked at the Stockton Arena require or request to use their own employees or contractors to facilitate the event, or (4) where in the Employer's judgment engineers employed at the Stockton Arena who are subject to this Agreement do not have sufficient skill levels to safely perform specific tasks. (*Emphasis added.*) General Counsel's Exhibit #2.

Respondent had used outside contractors on a regular basis for some time prior the end of the contract, because the union could not provide adequately trained persons and Respondent expected to continue this practice after the end of the contract. (Official Report of Proceedings, page 55, lines 19-25.) The decision to use outside contractors was not implemented in connection with bargaining or the ending of the contract; the practice pre-dated both the bargaining and the ending of the contract. General Counsel did not present any evidence that the union had ever filed a grievance against Respondent for its past practice of using outside contractors to do work the union employees could not do. General Counsel did not present any evidence that the use of subcontracts was improper under the terms of the collective bargaining agreement. General Counsel may not rely on any evidence of contracting bargaining unit work in support of an unfair labor practice, and in any event, General Counsel did not carry the burden of proof that such alleged conduct was an unfair labor practice. (Federal Rules of Evidence, Rule 301.)

IV. THE COLLECTIVE BARGAINING AGREEMENT EXPRESSLY AUTHORIZES RESPONDENT TO SCHEDULE THE TIME OF UNION EMPLOYEES.

At Section 4 Duties of Engineers subpart (a), the express negotiated terms of the Collective Bargaining Agreement provide:

“The engineers at the Stockton Arena covered by this Agreement shall, **if and when called upon**, perform any or all of the following skilled and technical duties...” (Emphasis added.) General Counsel’s Exhibit #2.

The contract provision “*if and when called upon*” allows Respondent to act in its own best interests in the matter of employee scheduling and assignment of employee duties. (See Section VI, below.) The express terms of the contract authorized assigning Mr. Valverde to stay home at full pay. Since there was no negative effect (i.e., loss of earnings, etc.) it cannot be said that scheduling Mr. Valverde to stay home at full pay was anything other than a windfall to Mr. Valverde. General Counsel had the burden of proof (Federal Rules of Evidence, Rule 301) but did not present any evidence that the placement of Mr. Valverde on paid administrative leave violated the plain language of the contract or violated any Section of the Act.

Ms. Torres-Peters was called by the General Counsel as a witness in the General Counsel’s case-in-chief, but when she was asked on cross-examination: “So Mr. Valverde was paid the same amount as if he had actually worked 80 hours” her answer was: “That is correct.” (Official Report of Proceedings, page 78, lines 4-6.) General Counsel’s subsequent attempt to impeach his own witness was a failure. Her lack of familiarity with the payroll documentation does not contradict her sworn testimony that Mr. Valverde was paid in full. On direct examination of his own witness by General Counsel, and without a hearsay objection from any party, the Official Report of Proceedings, page 67, lines 18-22 records Ms. Torres-Peters’

response to General Counsel question was:

Now, do you know for a fact that he [Mr. Valverde] was paid for the time period between—

Yes, I do know this. I confirmed with our bookkeeper—payroll—who manages all of the hours and any pay relevant to all leave and regular payroll.

Later on, the Official Report of Proceedings, page 69, lines 8-9 records Ms.

Torres-Peters' further testimony: *But I have the actual payroll information that I asked for when I confirmed. At Official Report of Proceedings, page 70, lines 21-23, Ms. Torres-Peters testified: So as I explained to Michael, it would be as if he was at work. He would get the same pay—there was nothing deducted.*

General Counsel presented no evidence to contradict Ms. Torres-Peters' testimony. Mr. Valverde was present in the hearing room during the entire proceeding and was available to testify to contradict the evidence from Ms. Torres-Peters if, in fact, Mr. Valverde had not been fully and correctly paid. General Counsel did not call Mr. Valverde to testify because he knew the testimony of Ms. Torres-Peters was accurate. General Counsel did not prove any actual loss (shortage of pay) on the part of Mr. Valverde.

V. RESPONDENT PRESENTED PROPOSALS DURING BARGAINING AND THERE WAS A LAWFUL IMPASSE.

Although Respondent did not make written proposals to the union, Respondent did make a verbal counter proposal to the union. (Official Report of Proceedings, page 42, lines 13-25, page 43, line 1.) Respondent's informal proposal, and chief concern for a viable contract, was the union's past failure to provide properly trained individuals which the union must rectify. (Official Report of Proceedings, page 23, lines 15-22, page 24, lines 13-16.) This concern was

the subject of discussion and the union did not deny the allegation of its failure to provide properly trained individuals, but dodged the issue by asserting that it had training facilities and that Mr. Valverde had attended classes and that anyone could take training (Official Report of Proceedings, page 23, lines 24-25, page 24, lines 1-6) and then blamed the union's failure to provide properly trained individuals on the Respondent (because the union agreed to Respondent's original contract proposals and had not accepted the union's original BOMA form contract). (Official Report of Proceedings, page 24, lines 17-25, page 25, lines 1-7.)

Respondent's concerns and informal proposal for change then became the subject of extended intervention discussion led by Mr. Schaffer, the federal mediator. (Official Report of Proceedings, page 26, lines 1-25.) The issue was not whether it was "...the Union's duty to hire people for the Employer, just to refer them...." (Official Report of Proceedings, page 27, lines 12-14.) but rather the issue was the union's *failure to provide properly trained individuals*. At no time did the union deny its failure to provide properly trained individuals and at no time did the union indicate its willingness to discuss Respondent's chief concern. (General Counsel's Exhibit #11 and #14.) The issue was not the availability of training or even the participation of Mr. Valverde in classes, but rather the union's actual "failure to provide properly trained individuals." The evidence does not support the finding that the Respondent "offered no proposals or counter proposals" but only that the proposals were not in writing; they were certainly the subject of discussion.

The union's bargaining position gave Respondent three options: (1) Respondent could accept the union proposals, as they were presented, (2) Respondent could engage in a futile effort to change job descriptions and titles, or (3) reject the union's proposals and proceed without a

contract. (Official Report of Proceedings, page 52, lines 19-25, page 53, lines 1-12.)

The evidence shows that there was a genuine exhaustion of productive discussion and unwillingness by both sides to compromise any further in order to reach an agreement, on the issue in question. The practical result of the union's intransigence was to create a lawful impasse, even though there was only one meeting. (Dixon Distrib. Co., 211 NLRB 241.)

VI. IT WAS UNDISPUTED AND UNCONTRADICTED THAT MR. VALVERDE HAD A VOLATILE PERSONALITY AND WAS LIKELY TO DAMAGE RESPONDENT'S FACILITY.

The use by the Administrative Law Judge of "without objective support" as the grounds for determining the insufficiency of the "Respondent's evidence" that Mr. Valverde was "volatile at times" is without legal support. Federal Rules of Evidence, Rules 601 and 602 require a witness to be competent and to have personal knowledge. It is uncertain what the Administrative Law Judge had in mind when he used the additional requirement of "objective support" for the evidence of Mr. Valverde's volatility. There was no testimony contradicting Mr. Valverde's volatility. In the absence of any contradictory evidence, Respondent was not required to "double prove" or "triple prove" Mr. Valverde's volatility as an explanation for not wanting him on site. The credibility of Mr. Kemp was never called into question (see Federal Rules of Evidence, Rule 608). Both Mr. Weinberg and General Counsel had the opportunity to attack the credibility of Mr. Kemp, even though Mr. Kemp was called as witness in the General Counsel's case in chief and testified under subpoena (see Federal Rules of Evidence, Rule 607) but neither did so.

Mr. Weinberg, counsel for Local 39, elicited testimony from Mr. Kemp that Mr. Valverde had a volatile personality; that Mr. Kemp was afraid that if upset, Mr. Valverde could do harm to the facility; that under the circumstances, Mr. Kemp "just had to protect the interests of the

facility.” (Official Report of Proceedings, page 57, lines 13-20.) Mr. Weinberg then attempted to challenge Mr. Kemp with his pre-hearing affidavit but the result was Mr. Weinberg established that Mr. Kemp “feared what Mike would do when he found out we were not renewing the contract.” (Official Report of Proceedings, page 57, lines 23-25, page 58, lines 1-2, *emphasis added*.) Mr. Weinberg actually highlighted and emphasized that Mr. Kemp was afraid of what Mr. Valverde “would do when he [Valverde] found out [Respondent was] not renewing the contract” and not just what he [Valverde] *could do*. (Official Report of Proceedings, page 57, lines 23-25, page 58, lines 1-2.) Thereafter, neither Mr. Weinberg nor General Counsel produced any evidence which undermined or contradicted Mr. Kemp’s good faith belief that Mr. Valverde’s volatile personality was likely motivate him to damage the facility, thereby justifying placing Mr. Valverde on paid administrative leave. The risk of harm by Mr. Valverde was undisputed and there is no legal requirement for “objective support” the failure of which impairs the sufficiency of the testimony. Accordingly, the finding that Mr. Valverde was placed on paid administrative leave was because of his union support is not supportable by the actual evidence.

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VII. CONCLUSION.

For the reasons set forth above Respondent requests that the Board find merit to the Respondent's exceptions and that it modify the Judge's findings of fact, conclusions of law, and the proposed remedies and recommended order consistent the Respondent's exceptions.

Date: September 16, 2010

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