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**IFG-Stockton Management, L.P. and International Union of Operating Engineers, Stationary Engineers Local 39, AFL-CIO. Case 32-CA-24926**

November 30, 2011

**DECISION AND ORDER**

BY CHAIRMAN PEARCE AND MEMBERS BECKER  
AND HAYES

On August 19, 2010, Administrative Law Judge Jay R. Pollack issued the attached decision. The Respondent and the Acting General Counsel filed exceptions, supporting briefs, and answering briefs.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions, as modified,<sup>1</sup> and to adopt the recommended Order as modified and set forth in full below.

**Background and Facts**

The Respondent managed and maintained the Stockton Arena (the Arena) in Stockton, California. International Union of Operating Engineers, Stationary Engineers Local 39, AFL-CIO (the Union) represented a bargaining unit of engineers employed by the Respondent at the Arena. There were two unit employees at the Arena at the time of the events. Those employees operated, maintained, and repaired the Arena's mechanical systems.

The Respondent and the Union were parties to a collective-bargaining agreement that was effective from January 1, 2007 to December 31, 2009. By mutual agreement, the parties extended the agreement to January 31, 2010.<sup>2</sup>

On January 22, the Respondent and the Union conducted their one (and only) bargaining session to negotiate a successor agreement. The Union presented 16 proposals to the Respondent at this meeting. Although the parties discussed the Union's proposals, the Respondent told the Union that it had no response to them and no

<sup>1</sup> The judge found that the Respondent violated the Act by subcontracting all bargaining unit work subsequent to its withdrawal of recognition from the Union and unilateral elimination of the bargaining unit as discussed below. The Respondent correctly points out that the complaint does not allege a subcontracting violation or seek a remedy for such a violation. We also observe that our Order will require the Respondent to restore the unit positions it eliminated and offer the affected employees reinstatement. In these circumstances, we find it unnecessary to pass on whether the Respondent independently violated the Act by its subcontracting.

<sup>2</sup> All dates here are in 2010, unless otherwise noted.

counterproposals of its own. The Respondent further stated that it did not see a need to move forward with negotiations and did not want a contract, because the Union had not provided properly trained employees.<sup>3</sup> At the hearing in this case, the Respondent's general manager, Charles Kemp, explained that walking away from the contract meant that the Respondent intended to end its bargaining relationship with the Union as of January 31. Kemp further testified that the Respondent's plan was to then terminate the two bargaining unit employees and subcontract the unit work.

On January 22, the Respondent placed unit employee Michael Valverde on administrative leave. By letter the same day, the Respondent's human resources manager, Christina Torres-Peters, advised Valverde that the Respondent had decided not to renew or extend its contract with the Union and instructed him "to refrain from making contact with any other IFG employees besides me."

On February 1, the Respondent informed unit employees Valverde and Brion Leri that their employment was terminated. Human Resources Manager Torres-Peters later testified that the discharge of the unit employees "was part of the Employer's plan to end this bargaining relationship with the Union."

By letter dated February 3, the Union demanded that the Respondent return to the bargaining table and negotiate a successor agreement. The Respondent did not respond to that letter, and no further bargaining occurred.

**Discussion**

1. The complaint alleges that the Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing recognition of the Union, by refusing to bargain, by unilaterally eliminating all bargaining unit positions, and by telling the Union that it would not bargain. As the judge found, the Respondent had a continuing obligation to recognize and bargain with the Union for a successor agreement.<sup>4</sup> Instead of complying with this obligation, however, the Respondent informed the Union that it did not intend to move forward with negotiations and did not want a successor agreement. Further, General Manager Kemp admitted that the Respondent intended to end its bargaining relationship at the conclusion of the predecessor contract on January 31. And, in fact, after the single

<sup>3</sup> The 2007-2009 bargaining agreement stated: "when new or additional engineers at the Stockton Arena are needed, the Employer shall notify the Union of the number and qualifications of additional engineers at the Stockton Arena which are needed so that the Union may have a reasonable opportunity to refer applicants."

<sup>4</sup> The Respondent did not file exceptions to the judge's finding that it failed to establish that the Union had lost majority support. Further, no exceptions were filed to the judge's finding that the Union's alleged referral of inadequately trained employees did not constitute an extraordinary circumstance justifying the Respondent's refusal to bargain.

bargaining session on January 22, the Respondent did not respond to the Union's demand to resume bargaining. In these circumstances, we find that the Respondent's refusal to bargain, unilateral elimination of all bargaining unit positions, and withdrawal of recognition violated Section 8(a)(5) and (1) of the Act. See *Finch, Pruyn & Co.*, 349 NLRB 270, 277 (2007), *enfd. mem.* 296 Fed.Appx. 83 (D.C. Cir. 2008) (unilateral elimination of unit jobs violates Sec. 8(a)(5)); *Levitz Furniture Co. of the Pacific*, 333 NLRB 717, 725 (2001) (absent actual loss of majority support, withdrawal of recognition violates Sec. 8(a)(5)).<sup>5</sup> We also find that the Respondent violated Section 8(a)(5) and (1) when it advised the Union on January 22 that it was terminating the agreement and was refusing to negotiate a successor agreement.<sup>6</sup>

2. The complaint also alleges, and we find, that the Respondent's elimination of all bargaining unit positions violated Section 8(a)(3) and (1). As described, Human Resources Manager Torres-Peters admitted that the Respondent's elimination of the only two unit employees was part of its plan to oust the Union. Plainly, this conduct violated Section 8(a)(3) and (1). See *KFMB Stations*, 349 NLRB 373, 373, 385–386 (2007), review denied sub nom. *AFTRA, San Diego Local v. NLRB*, 301 Fed.Appx. 730 (9th Cir. 2008) (unpublished).<sup>7</sup>

3. We also find merit in the complaint allegation that the Respondent violated Section 8(a)(3), (5), and (1) on January 22 when it placed unit employee Valverde on administrative leave. We agree with the judge that the Acting General Counsel established that Valverde's strong support for the Union was a motivating factor in the Respondent's decision. Further, as the judge found, the Respondent failed to prove that it would have taken the same action against Valverde absent his union activity. There is insufficient evidence to support the Respondent's contention that Valverde had a "volatile" temperament and that it was concerned that he might

<sup>5</sup> We find no merit to the Respondent's argument that the parties reached a good-faith bargaining impasse on January 22, thus permitting its unilateral action. As shown, the Respondent did not meaningfully negotiate with the Union regarding the latter's contract's proposals, nor did it respond to the Union's request to resume bargaining. In these circumstances, the record precludes a finding of a good-faith impasse. In any event, impasse would not have permitted the Respondent to withdraw recognition of the Union. See *Central Metallic Casket Co.*, 91 NLRB 572, 574 (1950).

<sup>6</sup> Member Hayes finds it unnecessary to pass on this allegation inasmuch as he believes that such a finding would be cumulative, and would not materially affect the remedy.

<sup>7</sup> Having found that the Respondent's elimination of all bargaining unit positions violated Sec. 8(a)(5), Member Hayes finds it unnecessary to pass on whether the same action violated Sec. 8(a)(3) because the additional finding would be cumulative and would not materially affect the remedy.

"flip the wrong switch" at the Arena if he stayed on the job until February 1. Indeed, General Manager Kemp could not identify any instance where Valverde "had previously done anything like that." Thus, we are left with the Respondent's bare assertions of concern, which we find insufficient to establish its affirmative defense. See *McKesson Drug Co.*, 337 NLRB 935, 937, 937 fn. 7 (2002) (employer must show that it acted on a reasonable, good-faith belief). As Valverde's placement on leave was intertwined with the Respondent's unlawful withdrawal of recognition and was implemented unilaterally, we find that this conduct also violated Section 8(a)(5) and (1). See *Mimbres Memorial Hospital & Nursing Home*, 342 NLRB 398, 402 (2004), *enfd.* 483 F.2d 683 (10th Cir. 2007).<sup>8</sup>

4. Last, the complaint alleges that the Respondent independently violated Section 8(a)(1) by directing an employee not to discuss collective bargaining and employment matters with other employees. As described, Human Resources Manager Torres-Peters's January 22 letter to Valverde announced the Respondent's decision not to renew or extend its contract with the Union and instructed Valverde "to refrain from making contact with any other IFG employees besides me." This statement could reasonably be understood to encompass discussions with other employees about working conditions, collective bargaining, and, in particular, the Respondent's withdrawal of recognition. Thus, we find that the Respondent restrained and coerced Valverde in the exercise of his Section 7 rights in violation of Section 8(a)(1). See *SKD Jonesville Division L.P.*, 340 NLRB 101, 102–103 (2003) (employer unlawfully warned employee that all work-related matters were to be discussed only with a supervisor).

#### CONCLUSIONS OF LAW

1. The 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. The Respondent violated Section 8(a)(3) and (1) of the Act by eliminating all bargaining unit positions and work and by placing Michael Valverde on administrative leave.

<sup>8</sup> The parties dispute whether Valverde's leave was paid or unpaid. We leave the resolution of that question to the compliance phase of this proceeding.

Member Hayes finds it unnecessary to pass on whether the Respondent's placement of Valverde on administrative leave violated Sec. 8(a)(5), as the Sec. 8(a)(3) and (1) finding and remedy, in which he joins, fully remedies the Respondent's unlawful conduct.

4. The Respondent violated Section 8(a)(5) and (1) of the Act by: withdrawing recognition of the Union; telling the Union that it would not bargain; refusing to bargain for a successor bargaining agreement; eliminating all bargaining unit positions and work; and placing Michael Valverde on administrative leave.

5. The Respondent violated Section 8(a)(1) of the Act by telling an employee not to discuss with other employees matters that reasonably could encompass collective-bargaining and employment-related concerns.

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

#### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent unlawfully eliminated all of the bargaining unit positions and work, we shall order the Respondent to reestablish and restore those bargaining unit positions and work as they existed prior to February 1, 2010, in order to return to the status quo before the Respondent's commission of unfair labor practices. *Carter & Sons Freightways*, 325 NLRB 433, 440-441 (1998) (restoration remedy is appropriate to return to status quo ante when employer has curtailed operations and discharged employees for discriminatory reasons); see also *Joy Recovery Technology Corp.*, 320 NLRB 356, 356 fn. 4, 370 (1995), enf. 134 F.3d 1307 (7th Cir. 1998) (restoration is appropriate to remedy 8(a)(3) and (5) violations).<sup>9</sup>

We shall also order the Respondent to offer full reinstatement to Michael Valverde and Brion Leri to the former positions that they held prior to their unlawful terminations, without prejudice to their seniority or any other rights and privileges previously enjoyed, and to make them whole for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful actions against them. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), enf. denied on other grounds 647 F.3d 1137 (D.C. Cir. 2011). The Respondent shall also be required to remove from its files any

<sup>9</sup> Member Hayes does not believe that a restoration remedy is appropriate here where the unfair labor practices are adequately remedied by ordering the Respondent to offer reinstatement and make-whole remedies to Valverde and Leri.

and all references to the unlawful discharges of Valverde and Leri and to notify them in writing that this has been done and that the unlawful actions will not be used against them in any way.<sup>10</sup>

Further, for the reasons set forth in *Caterair International*, 322 NLRB 64 (1996), we find that an affirmative bargaining order is warranted in this case as a remedy for the Respondent's unlawful withdrawal of recognition. We adhere to the view 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." *Id.* at 68. In several cases, however, the U.S. Court of Appeals for the District of Columbia Circuit has required that the Board justify, on the facts of each case, the imposition of such an order.<sup>11</sup> See, e.g., *Vincent Industrial Plastics v. NLRB*, 209 F.3d 727 (D.C. Cir. 2000); *Lee Lumber & Bldg. Material v. NLRB*, 117 F.3d 1454, 1462 (D.C. Cir. 1997); and *Exxel/Atmos v. NLRB*, 28 F.3d 1243, 1248 (D.C. Cir. 1994). In *Vincent*, *supra*, the court summarized its requirement that an affirmative bargaining order "must be justified by a reasoned analysis that includes an explicit balancing of three considerations: (1) the employees' Section 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." *Id.* at 738. Although we respectfully disagree with the court's requirement for the reasons set forth in *Caterair*, *supra*, we have examined the particular facts of this case, as the court requires, and find that a balancing of the three factors warrants an affirmative bargaining order.

(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—and ultimately their jobs—by the Respondent's withdrawal of recognition, refusal to continue bargaining with the Union, and elimination of the unit altogether. At the same

<sup>10</sup> The Acting General Counsel also seeks rescission of any subcontracts of bargaining unit work and an affirmative order directing the Respondent to hire new bargaining unit employees if either Valverde or Leri refuse the Respondent's offers of reinstatement. As noted, we are not finding a subcontracting violation, and thus we shall not order the rescission of any subcontracts. The parties may address those contracts in implementing the restoration remedy that will return bargaining unit positions and work to the unit. We will not speculatively order the Respondent to hire new employees contingent on current employees' possible responses to future reinstatement offers; we note, however, that the status quo ante included the existence of bargaining unit work.

<sup>11</sup> Member Hayes agrees with the D.C. Circuit that a case-by-case analysis is required to determine if an affirmative bargaining order is appropriate. He finds that imposing a bargaining order here is appropriate under that analysis.

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 because the duration of the order is no longer than is reasonably necessary to remedy the ill effects of the violations. To the extent such opposition may exist, moreover, it may be at least in part the product of the Respondent's unfair labor practices.

(2) An affirmative bargaining order also serves the policies of the Act by 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. On this point, we find it particularly significant that the Respondent admitted its desire to rid itself of the Union and took planned action to achieve that objective. An affirmative bargaining order also ensures that the Union will not be pressured by the Respondent's withdrawal of recognition to achieve immediate results at the bargaining table following the Board's resolution of its unfair labor practice charges and issuance of a cease-and-desist order.

(3) Finally, a cease-and-desist order, alone, would be inadequate to remedy the Respondent's refusal to bargain with the Union in these circumstances because it would permit a decertification petition to be filed before the Respondent has afforded the employees a reasonable time to regroup and bargain through their representative in an effort to reach a successor collective-bargaining agreement. Such a result would be particularly unfair in circumstances such as those here, where the Respondent undermined the Union's standing among the employees by making unilateral changes, declaring its intent not to bargain with the Union, and unlawfully eliminating the unit in its entirety. These unfair labor practices are likely to have a continuing negative effect on employees' support for the Union that cannot be adequately remedied by a cease-and-desist order alone.

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

#### ORDER

The Respondent, IFG-Stockton Management, L.P., Stockton, California, its officers, agents, successors, and assigns shall

##### 1. Cease and desist from

(a) Eliminating all bargaining unit positions and unit work without bargaining with the Union or because of employees' union affiliation and support.

(b) Placing employees on administrative leave without bargaining with the Union or because of employees' union affiliation and support.

(c) Withdrawing recognition from the Union, International Union of Operating Engineers, Stationary Engineers Local 39, AFL-CIO, as the exclusive bargaining representative in the bargaining unit described below.

(d) Telling the Union that it would not bargain for a collective-bargaining agreement and refusing to bargain.

(e) Telling employees not to discuss with other employees subjects that pertain to collective-bargaining and employment matters.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to 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 of employment and, if an understanding is reached, embody such understanding in a signed agreement. The appropriate bargaining unit is:

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

(b) Reestablish the bargaining unit positions and restore to the Respondent's engineers at the Stockton Arena the work they performed prior to the Respondent's unlawful withdrawal of recognition.

(c) 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 exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(d) Make Michael Valverde and Brion Leri whole for any loss of earnings and other benefits due to them under the terms of this Order, with interest, as described in the remedy section of this decision.

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges of Michael Valverde and Brion Leri, and to the unlawful placement of Valverde on administrative leave, and, within 3 days thereafter, notify them in writing that this

has been done and that the discipline will not be used 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 its Stockton, California facility, copies of the attached notice marked "Appendix."<sup>12</sup> 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. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means.<sup>13</sup> 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 22, 2010.

(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.

Dated, Washington, D.C. November 30, 2011

\_\_\_\_\_  
Mark Gaston Pearce, Chairman

<sup>12</sup> 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."

<sup>13</sup> For the reasons stated in his dissenting opinion in *J. Picini Flooring*, 356 NLRB No. 9 (2010), Member Hayes would not require electronic distribution of the notice.

\_\_\_\_\_  
Craig Becker, Member

\_\_\_\_\_  
Brian E. Hayes, Member

(SEAL) 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 all bargaining unit positions and unit work without bargaining with the Union or because of employees' union affiliation and support.

WE WILL NOT place employees on administrative leave without bargaining with the Union or because of employees' union affiliation and support

WE WILL NOT withdraw recognition from the Union, International Union of Operating Engineers, Stationary Engineers Local 39, AFL-CIO, as the exclusive bargaining representative in the bargaining unit described below.

WE WILL NOT tell the Union that we will not bargain for a collective-bargaining agreement and refuse to bargain

WE WILL NOT tell employees not to discuss with other employees subjects that pertain to collective-bargaining and employment matters.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights listed above.

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 of employment and, if an understanding is reached, embody such understanding in a signed agreement.

The appropriate bargaining unit is:

All engineers employed by the Employer at the Stockton Arena as described in and covered by “Section 1. . . Union Recognition” of the January 1, 2007 through December 31, 2009 collective bargaining agreement between the Respondent and the Union, excluding all other employees, guards, and supervisors as defined in the Act.

WE WILL reestablish the bargaining unit positions and restore to the Respondent’s engineers at the Stockton Arena the work they performed before our unlawful withdrawal of recognition.

WE WILL, within 14 days from the date of the Board’s Order, 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.

WE WILL make Michael Valverde and Brion Leri whole for any loss of earnings and other benefits due to them as a result of our unlawful conduct, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board’s Order, remove from our files any reference to the unlawful discharges of Michael Valverde and Brion Leri, and to the unlawful placement of Valverde on administrative leave, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the discharges and administrative leave will not be used against them in any way.

#### IFG-STOCKTON MANAGEMENT, L.P.

*Gary M. Connaughton, Esq.*, for the General Counsel.  
*Scott Malm, Esq. (Cassel, Malm, Fagundes), of Stockton, California*, for the Respondent.  
*Stuart Weinberg, Esq. (Weinberg, Roger & Rosenfeld), of Alameda, California*, 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<sup>1</sup> (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

<sup>1</sup> The name of the Respondent appears as corrected at the hearing.

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, from my observation of the demeanor of the witnesses<sup>2</sup>, 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 12 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

<sup>2</sup> The credibility resolutions here 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 Mfg. Co.*, 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings, 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.

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.

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 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 961 (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 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 antiunion 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 [846, 848] (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 *fn.* 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 February 1, 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:<sup>3</sup>

#### 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 under

standing in a signed agreement. The appropriate bargaining unit is:

All employees performing work described in and covered by "Section I. 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 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."<sup>4</sup> 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.

#### 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.

<sup>3</sup> 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.

<sup>4</sup> 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."

## 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 guaran-

teed 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, L.P.