The Wackenhut Corporation *and* International Union Security, Police and Fire Professionals of America (SPFPA). Cases 12–CA–23294, 12–CA–23295, and 12–CA–23407

August 27, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On September 7, 2004, Administrative Law Judge Michael A. Marcionese issued the attached decision. The Respondent, the Charging Party, and the General Counsel filed exceptions and briefs in support of their exceptions. The Respondent and the General Counsel filed answering briefs, and the General Counsel filed a reply brief to the Respondent's answering brief.

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,[1] and conclusions only to the extent consistent with this Decision and Order and to adopt the recommended order as modified below.

Introduction

The fundamental issue presented is whether the Respondent's unilateral elimination of bargaining unit positions and transfer of bargaining unit work outside the unit were lawful because they were allegedly mandated by the contract bid specifications of a third party. In deciding this issue, we draw a distinction between the Respondent's subjective interpretation of the specifications and what the specifications, on their face, actually required. Because we find that the specifications did not require the Respondent to take the actions at issue, we find that the Respondent cannot rely on them as a defense for its actions.

Factual Background

The relevant facts, as set forth more fully in the judge's decision, are as follows.

The Respondent, The Wackenhut Corporation, provides guard and security services to clients nationwide, including nuclear powerplants. The facility at issue in this case is a nuclear power plant operated by Florida Power & Light (FPL) at Turkey Point in Miami-Dade County, Florida.

FPL owns several thousand acres at Turkey Point, referred to as the owner-controlled area (OCA). Within the OCA is a protected area (PA), secured by a fence and intrusion detection devices. These devices are monitored and controlled from the Central Alarm Station (CAS) and the Secondary Alarm Station (SAS), both of which are housed in a hardened building within a "vital area" that also contains the reactor itself.

The Respondent has held two consecutive contracts with FPL to provide security services at Turkey Point. The first contract, with extensions, ran from 1998 to August 31, 2003. The second contract began on September 1, 2003. The events at issue in the instant case center on changes implemented by the Respondent at the beginning of the second contract.

A. Conditions Under the Initial FPL Contract

Prior to September 1, 2003,[2] the Respondent employed four categories of employees at Turkey Point: captains, lieutenants, sergeants, and security officers. In July 1999, following a Board-conducted election, the Union was certified as the representative of the Respondent's security officers at Turkey Point. The category "security officer" included CAS/SAS operators, unarmed security officers (also referred to as watchmen), and part-time security officers. Before the election, the parties had stipulated that the Respondent did not oppose the inclusion of the CAS/SAS operators in the bargaining unit.

In November 2002, the Union filed a representation petition seeking to represent the sergeants at Turkey Point. The Respondent opposed the petition, asserting that the sergeants were statutory supervisors. Following a hearing, the Regional Director issued a decision and direction of election, finding that the Respondent's sergeants were not supervisors under the Act. The Respondent requested review of the Regional Director's decision and, on February 12, the Board issued an order denying the request on the basis that the Respondent had not raised any substantive issues warranting review.[3]

During the preelection period, the Respondent explicitly and repeatedly expressed its view that the duties performed by the sergeants were supervisory in nature and that such duties were incompatible with union representation. The Respondent communicated this position to the sergeants through written memos and at meetings. Following a mail-ballot election, the Union was certified on March 4 as the representative of Respondent's sergeants at Turkey Point.

At the time of the certification, the collective-bargaining agreement covering the security officers was

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

[2] All dates are in 2003, unless otherwise indicated.

[3] Member Schaumber dissented from the Board's denial of review.

due to expire on April 3. The parties began their negotiations involving this unit on March 4 and 5, and met again on April 15 and 16. At these meetings, the Union repeatedly sought to include the sergeants in the existing security officer bargaining unit. The Respondent explicitly rejected this proposal whenever it was raised.

At the first negotiating session, the Respondent presented its proposals, including a proposal to remove the CAS/SAS operators from the security officer unit. The Union rejected this proposal.

B. The New FPL Bid Specifications

On May 28, FPL issued a request for proposals with bid specifications for a new security contract to replace the 1998 agreement between FPL and the Respondent.

The bid specifications contained the following "staffing" provision:

> Contractor will provide security force personnel in accordance with the organization structure defined by the company in Attachment A to this Nuclear Site Security Specification.
>
> Contractor supervisors will be defined as non-bargaining personnel. Additionally, all personnel assigned to operate CAS/SAS functions shall be supervisors. . . .

Attachment A to the bid specifications identified the positions and the number of persons in each position that FPL expected its security contractor to provide. Under the heading "Operations-Supervision," FPL specified one lead supervisor and five shift supervisors per shift. Under "Operations-Non-Supervisor," FPL specified 76 armed security officers and 27 part-time armed officers. FPL further required that there be four shifts per day and that "All Shift Supervisors will be trained and certified to perform duties as assigned within the CAS/SAS, OCA and PA."[4]

The Respondent's Subsequent Actions

On June 30, the Respondent submitted its bid to FPL. On July 1, Robert Bitner, the Respondent's director of nuclear operations, informed the Respondent's lead negotiator Guy Wegener about the FPL bid specifications. Bitner advised Wegener that, should the Respondent be awarded the new contract, the operations at Turkey Point would change in three ways: "1) Elimination of the part-time program;[5] 2) CAS/SAS operators will be supervisors; and 3) Elimination of the sergeants."

The Union and the Respondent resumed collective bargaining on July 15. At a July 16 bargaining session, Wegener informed the Union of the FPL bid specifications, indicating FPL's alleged requirement that all CAS/SAS operators be supervisors and that the specifications did not call for the staffing of sergeants. In response, the Union told the Respondent that it would not agree to the Respondent's proposal concerning the CAS/SAS operators. The Union suggested that the Respondent could address the sergeant staffing issue by calling the sergeants "working supervisors" or "leads," as was the practice at other non-FPL sites at which the Respondent provided security. The Respondent indicated that it was open to discussing that idea.

At a negotiating session held on July 17, the Respondent announced that it was posting new supervisory positions, and that one of the requirements for the new positions was the ability to operate CAS/SAS. On July 22, the Union sent a letter to Respondent, protesting that the new supervisory positions were created with the intent to "staff the entire CAS/SAS operation with Lieutenants, and covertly eliminate the Sergeant's classification." Nevertheless, the Respondent began filling the new lieutenant positions and, in all, 15 employees were promoted from the unit into the new supervisory positions. In August, FPL awarded the new security services contract to the Respondent and, on August 26, FPL and the Respondent entered into the new contract. The contract contained the staffing language contained in the bid specifications, and Appendix C to the contract set forth a wage schedule. The wage schedule includes a classification of "Armed Officer/Lead Guard" below lieutenant on the wage structure.

Beginning on September 1, all CAS/SAS operations were performed by lieutenants, and those former CAS/SAS operators who had not become lieutenants were reassigned by the Respondent to field duties, with no reduction in pay or benefits. In addition, the five former sergeants who did not seek one of the new supervisory positions were demoted to security officers on September 1, with a reduction in pay.

The Respondent and the Union held their final bargaining sessions on September 4 and 5. The Union reiterated its rejection of the Respondent's proposal to remove references to the CAS/SAS operators from the contract. In addition, the Respondent rejected the Union's proposal to reinstate the sergeants under the title of "lead officers," asserting that FPL's bid specifications did not provide for lead officers. When the parties concluded their meeting on September 5, no agreement had been reached with respect to the sergeants or the CAS/SAS operations.

As a result of the changes implemented on September 1, the Respondent no longer employs any sergeants. As

[4] There is no evidence in the record that representatives of FPL conspired with representatives of the Respondent in drafting the bid specifications for the new contract.

[5] This matter is not involved in this case.

a result, the sergeants' bargaining unit has been eliminated. In addition, the CAS/SAS duties that were previously performed by the CAS/SAS operators are now performed by lieutenants, including those former CAS/SAS operators who were promoted in August.

The Judge's Decision

The judge found, inter alia, that the Respondent violated Section 8(a)(5) and (1) by eliminating the sergeant position. The judge found that, by eliminating the sergeant position and transferring the sergeants' duties to lieutenants, the Respondent unlawfully altered the scope of the sergeants' bargaining unit.[6]

The judge rejected the Respondent's assertion that its elimination of the sergeant position was mandated by the FPL bid specifications and, therefore, did not violate the Act. The judge reasoned that, because the FPL bid specifications were silent as to the status of sergeants and because the Respondent-FPL contract included a bargaining unit classification of "armed officer/lead guard," the Respondent could have maintained the sergeant position without jeopardizing its contract with FPL.

The judge also found that, because the FPL bid specifications did not mandate the elimination of the sergeant position, the Respondent's reliance on the FPL bid specifications was a pretext. The judge found that the Respondent's decision to eliminate the sergeant position was actually based on antiunion animus and therefore violated Section 8(a)(3) and (1).

In addition, the judge found that the Respondent did not violate Section 8(a)(5) and (1) by announcing and implementing the elimination of the bargaining-unit CAS/SAS operator positions and by creating supervisory positions to perform the same functions.

In reaching this decision, the judge first found that the newly created CAS/SAS-operating lieutenants and the former bargaining-unit CAS/SAS operators performed essentially the same functions. Both sets of employees monitored the intrusion detection and other security devices from the CAS/SAS buildings, dispatched security officers to respond to alarms, and printed out computer reports for their supervisors or FPL personnel. The judge rejected the Respondent's contention that the new CAS/SAS lieutenants were statutory supervisors because they had the authority to discipline security officers, finding that there was no evidence that the new lieutenants actually exercised the alleged authority.

Based on these findings, the judge found that the Respondent's elimination of the bargaining-unit CAS/SAS operator position and creation of the new CAS/SAS-operating lieutenant position constituted a change in the scope of the security officers' unit, and that, therefore, the Respondent would ordinarily have violated the Act by making such a change without first obtaining the Union's consent. In the alternative, the judge found that the Respondent's transfer of the CAS/SAS functions out of the bargaining-unit was unlawful because the Respondent did not afford the Union an opportunity to bargain about the transfer and because the parties were not at impasse.

Despite these findings, however, the judge concluded that the Respondent did not violate Section 8(a)(5) and (1) of the Act by eliminating the bargaining-unit CAS/SAS operator positions, because its actions were mandated by the FPL bid specifications. The judge reasoned that, because the bid specifications required any contractor performing the Turkey Point work to staff the CAS and SAS with nonunit supervisors, the Respondent could not maintain the CAS/SAS operator positions as unit positions. Based on the requirements of the bid specifications, the judge found that the Respondent's decision to eliminate the bargaining-unit CAS/SAS operator positions was not amenable to bargaining and that therefore, under *First National Maintenance*, 452 U.S. 666 (1981), the Respondent did not violate Section 8(a)(5) and (1) by announcing and unilaterally implementing its decision to eliminate those positions and to reassign the CAS/SAS duties to nonunit employees.

Analysis

A. The Elimination of the Sergeant Positions

To begin, we conclude that, by eliminating the sergeant position and removing the sergeants' duties from the bargaining unit, the Respondent has unilaterally transferred all of the work from the unit. It is well established that "once a specific job has been included within the scope of a bargaining unit by either Board action or consent of the parties, the employer cannot unilaterally remove or modify that positions without first securing the consent of the union or the Board." *Hill-Rom Co. v. NLRB*, 957 F.2d 454, 457 (7th Cir. 1992); accord: *United Technologies Corp.,* 292 NLRB 248 (1989), enfd. 884 F.2d 1569 (2d Cir. 1989); *Bay Shipbuilding Corp.*, 263 NLRB 1133 (1982), enfd. 721 F.2d 187 (7th Cir. 1983). Here, as the judge found, the Respondent eliminated the sergeant positions and transferred the sergeants' job duties to the nonunit lieutenants without securing the consent of the Union or seeking the approval of the Board.[7]

[6] In point of fact, the Respondent's actions resulted in the complete elimination of the sergeants' bargaining unit.

[7] Our concurring colleague would find that there was no alteration of the scope of the sergeants' unit, but simply a transfer of work out of the unit. In our view, however, the Respondent has not transferred a portion of the sergeants' duties out of the sergeants' unit, but rather elimi-

The Respondent, however, contends that its unilateral change of the scope of the sergeants' bargaining unit was mandated by the FPL bid specifications and, therefore, did not violate the Act. The Respondent's argument is based on a line of cases holding that employers are not required to bargain over certain "core entrepreneurial" decisions. See, e.g., *First National Maintenance v. NLRB*, 452 U.S. 666 (1981); *Dorsey Trailers v. NLRB*, 134 F.3d 125, 133 (3d Cir. 1998). We find the Respondent's argument unavailing because we agree with the judge that the Respondent has not established that the elimination of the sergeant positions was mandated by the FPL bid specifications.

The Respondent notes that: the staffing requirements set forth in the FPL bid specifications were limited to three categories ("lead shift supervisors," "shift supervisors," and "armed security officers"); the bid specifications defined supervisors as "non-bargaining personnel"; and the sergeants are not "armed security officers." Thus, it is argued that FPL's specifications mandated the elimination of Respondent's bargaining unit sergeant positions.

Respondent's contention, however, is based on its own subjective interpretation of the bid specifications; the bid specifications themselves do not refer to the sergeant positions. Further, as the judge found, the contract between FPL and the Respondent expressly allows for a job classification of "Armed Officer/Lead Guard," and there is evidence that the Respondent had employed sergeants under such a job title at other locations. Finally, the Respondent has not introduced any evidence indicating that its interpretation of the bid specifications—that FPL would not allow the employment of bargaining-unit sergeants—was based on conversations with FPL personnel or reflected any extrinsic evidence as to FPL's intentions. Accordingly, because we find that the Respondent has failed to establish that the bid specifications, which do not mention the sergeants, mandated its elimination of the sergeant positions, we reject the Respondent's attempt to justify its elimination of the sergeant positions on this basis.

We also reject the Respondent's assertion that its elimination of the sergeant positions was lawful because the parties had reached impasse on the issue.[8] At the parties' July 16 negotiating session, the Union raised the idea that the sergeants could be retained under the new FPL contract by reclassifying them as working supervisors, or leads. At that time, the Respondent's representative indicated that he was open to discussing that idea. In fact, the Respondent did not explicitly reject the Union's proposal on that issue until September 5, after it had already eliminated the sergeant positions. Accordingly, we find that the parties had not reached an impasse on the elimination of the sergeant positions at the time of implementation.

Having found that the Respondent's elimination of the sergeant position violated Section 8(a)(5) and (1) of the Act, we find it unnecessary to pass on the judge's finding that the Respondent's action also violated Section 8(a)(3) and (1) of the Act. Because the remedy imposed for the Respondent's unlawful elimination of the sergeants' bargaining unit under Section 8(a)(5) and (1) is a restoration to the status quo ante, see *Bay Shipbuilding*, 263 NLRB at 1133, a finding of an 8(a)(3) and (1) violation would not alter or add to the remedy.

B. The Removal of CAS/SAS Operators from the Bargaining Unit

Contrary to the judge, we find that the Respondent violated Section 8(a)(5) and (1) of the Act by eliminating the CAS/SAS operators from the bargaining unit and by reclassifying the CAS/SAS operators as nonunit lieutenants. In reversing the judge on this issue, we again focus on the difference between the Respondent's actions and the actual requirements set forth in the FPL bid specifications.

The FPL bid specifications required that the Respondent staff the CAS/SAS operations with "supervisors" who are "non-bargaining personnel." This requirement is open to two possible interpretations: that the Respondent must staff the CAS/SAS operations with individuals who functioned as supervisors as that term is defined by the National Labor Relations Act (and who, therefore, were exempt from the protections of the Act); or that the Respondent must staff the CAS/SAS operations with individuals who, although not exempt under the Act, were prohibited from being in a bargaining unit. The only lawful interpretation of the bid specifications is the former; employers cannot lawfully require that employees, whether their own or their contractors', who are otherwise entitled to the protections of the Act be prohibited from joining bargaining units.[9] The Respondent's re-

nated the sergeant position and, therefore, the bargaining unit, altogether.

[8] The issue of impasse is not relevant where an employer has made a unilateral change of the bargaining unit, because such changes are not mandatory subjects of bargaining. See, e.g., *Hill-Rom Co.,* 957 F.2d at 457; *United Technologies*, 292 NLRB at 249 fn. 8 & fn. 9. The issue of impasse is relevant, however, under the judge's alternative transfer of unit work analysis. See, e.g., *Regal Cinemas, Inc.,* 334 NLRB 304 (2001), enfd. 317 F.3d 300 (D.C. Cir. 2003); *Hampton House*, 317 NLRB 1005 (1995).

[9] We can find no authority for allowing private entities unilaterally to deny individuals their statutory protections, nor do we believe that such a result can be reconciled with the fundamental policies of the

sponse to this requirement for "non-bargaining" unit supervisors does not clarify the ambiguity in the FPL specifications. If, in fact, FPL intended that, by creating the new lieutenant positions, the CAS/SAS functions would in fact be performed only by statutory supervisors, that is not what actually occurred.[10] As we now explain, the Respondent has not established that the new lieutenants assigned to perform CAS/SAS operations possessed or exercised statutory supervisory authority. Thus, we conclude that the Respondent cannot now rely on the FPL bid specifications as a justification for its otherwise unlawful elimination of the CAS/SAS positions from the bargaining unit.

It is well established that, in order to support a finding that an employee is a supervisor under the Act, the employer must demonstrate that the employee possesses at least one of the indicia specified in Section 2(11) of the Act: that the individual has the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action. See *NLRB v. Kentucky River Community Care, Inc.,* 532 U.S. 706, 710 (2001). Further, such statutory indicia must be exercised with independent judgment on behalf of management and not simply in a routine manner. See, e.g., *Airline Commercial Barge Line Co.,* 337 NLRB 1070 (2002). Because the burden of proof is on the proponent of supervisory status, a lack of evidence is construed against that party, here, the Respondent. *Kentucky River* at 710–712; see also *Elmhurst Extended Care Facilities*, 329 NLRB 535, 535 fn. 8 (1999).

There is no contention that the new lieutenants hire, transfer, suspend, lay off, recall, promote, discharge, or reward employees or effectively recommend such actions. Rather, the Respondent's contention that the new CAS/SAS-operating lieutenants are statutory supervisors is limited to its assertion that they have supervisory authority to direct and discipline the security officers.

We find, however, that the Respondent failed to meet its burden to establish that the new lieutenants exercised supervisory authority in directing or disciplining employees as defined under the Act. To begin, the Respondent did not produce evidence establishing that the new lieutenants used independent judgment in directing the security officers. The record establishes that the new CAS/SAS-operating lieutenants, like the former CAS/SAS operators, acted in a routine manner in dispatching security officers in response to alarms. Furthermore, the Respondent did not establish that the new lieutenants exercised independent judgment in disciplining the security officers. In support of its contention, the Respondent produced several disciplinary forms that were completed by lieutenants. One set of forms indicated that the employee was being issued a "verbal counseling." These forms cited the employees for offenses such as arriving late for work, failing to empty a garbage receptacle, and leaving the employee's area of responsibility. The second set of forms indicated that the employee was being issued a "written counseling." These forms cited the employees for offenses including a second offense of being late for work, and for leaving the employee's post to go home sick without first contacting the captain on duty.[11]

Significantly, all of the forms submitted by Respondent consistently cited to specific, enumerated regulations.[12] Although these regulations were not themselves submitted as evidence, it is clear from the context of the forms that the regulations mandated the type of discipline to be issued in each particular instance. Where employees follow detailed orders or regulations issued by the employer, they do not exercise truly independent judgment within the meaning of Section 2(11) of the Act. See *International Transportation Service,* 344 NLRB No. 22, slip op. at 6 (2005) (citing *NLRB v. Kentucky River Community Care,* 532 U.S. 706 (2001)).

Furthermore, the Respondent failed to call as witnesses any of the lieutenants who signed the forms. Therefore, the record does not definitively establish what role they

Act. We stress that FPL had every legal right to mandate in its bid specification that the CAS/SAS operations be performed by statutory supervisors. But the Respondent could not rely on this lawful requirement to justify its implementation of FPL's mandate in an unlawful manner. Thus, we find that FPL's requirement cannot insulate the Respondent from being found to have unlawfully denied its employees the rights granted under Sec. 7. What our colleague misses is that the Respondent's unlawful implementation of FPL's requirement—assigning work to statutory employees but requiring that they be nonunit employees and unrepresented—is what gives rise to the duty to bargain here. Further, Member Schaumber notes that a respondent would have no obligation to bargain over the assignment of work to true statutory supervisors, if mandated by its customer.

[10] As noted supra, there is no evidence that the Respondent conspired with FPL in creating the bid specifications. Further, there is no evidence regarding the meaning ascribed to this specification by FPL, nor any evidence regarding FPL's awareness of or reaction to the Respondent's staffing of the new CAS/SAS lieutenant positions with employees who did not meet the statutory definition of "supervisor."

[11] As the judge noted (fn. 20), in this instance the employee contacted his lieutenant before leaving his post; thereafter, he was disciplined for failing to notify the captain or someone higher in the chain of command before leaving.

[12] On the disciplinary forms, these regulations were referred to as either "NSD polic[ies]" or "NSD procedure[s]." The record does not establish the meaning of the acronym "NSD," nor does the record contain any testimony concerning these regulations.

played in the issuance of the forms.[13] In addition, the Respondent established only that the submitted documents were signed by lieutenants; the Respondent did not establish that any of the forms had been submitted by any of the newly created CAS/SAS-operating lieutenants who are at issue here.

For all these reasons, the Respondent has failed to meet its burden to prove that the new CAS/SAS-operating lieutenants were statutory supervisors. As a result, the Respondent cannot rely on the FPL bid specifications as a justification for its elimination of the CAS/SAS operators from the bargaining unit. As discussed above in connection with the elimination of the sergeant positions, an employer violates the Act when it unilaterally removes a position from a bargaining unit, without first securing the consent of the bargaining representative or the Board. Here, it is undisputed that the CAS/SAS operator position was included in the security officer bargaining unit and that the Respondent unilaterally removed that position from the unit and reclassified the CAS/SAS operators as nonunit lieutenants. Because, for the reasons set forth above, the Respondent cannot use the FPL bid specifications to justify its actions, the Respondent's unilateral action violated Section 8(a)(5) and (1) of the Act.

To remedy this violation, we shall order the Respondent to restore the position of CAS/SAS operator as a bargaining unit position as it existed at the Turkey Point facility prior to September 1, 2003.[14]

ORDER

The National Labor Relations Board adopts the recommended order of the administrative law judge as modified below and orders that The Wackenhut Corporation, Palm Beach Gardens, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following after paragraph 2(d) and reletter the subsequent paragraphs.

"(e) Restore the position of CAS/SAS operator as a bargaining unit position as it existed at the Turkey Point facility prior to September 1, 2003, and offer the CAS and SAS operators reinstatement to their former positions at the Turkey point facility with the same wages, benefits and other terms and conditions that existed prior to September 1, 2003.

(f) Make whole the CAS and SAS operators for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful actions and, to the extent that CAS and SAS operators lost coverage for various benefits provided under the collective-bargaining agreement, reimburse them for any expenses incurred as a result of their noncoverage."

2. Substitute the attached notice for that of the administrative law judge.

CHAIRMAN BATTISTA, concurring in part, and dissenting in part.

I agree with the result reached by my colleagues as to the sergeants, but I do not agree with all of their rationale. I do not agree with the result as to the CAS/SAS employees.

As to the sergeants, my colleagues conclude that the Respondent changed the bargaining unit, that such a change can only be accomplished with the consent of the Union, and that such consent was not given. My colleagues' alternative rationale is that the Respondent transferred work out of the unit, that such a transfer can only be accomplished after bargaining to an impasse, and that impasse was not reached. I adopt the latter rationale. In my view, the unit description has not been altered. Rather, the Respondent has taken unit work and transferred it to nonunit employees.[1]

Since this work transfer was done prior to impasse, the issue is whether the transfer was a mandatory subject of bargaining. There are two contentions in this regard. First, the Respondent contends that the subject matter is a nonmandatory subject under *First National Maintenance v. NLRB*, 452 U.S. 666 (1981). I think that a transfer of work to nonunit employees of the same employer is clearly distinguishable from the partial closing in *First National Maintenance*.

Secondly, the Respondent contends that the transfer was required by FPL. I disagree. As to the sergeant unit, the FPL contract specifically refers to attachment C. That attachment lists "armed officers/lead guard" as a position. The Respondent and the Union could have bargained about reclassifying the sergeants so as to conform to the position, thereby permitting their work to remain in the unit.

With respect to the CAS/SAS function, I believe that the FPL required that this function be performed by nonbargaining unit personnel. The FPL specification required that CAS/SAS functions "shall be supervisors,"

[13] At the representation proceeding pertaining to the sergeants, one of the sergeants testified that, although he had signed a verbal warning form, the form had in fact been completed by a captain.

[14] Our order does not preclude the Respondent from taking lawful actions in an attempt to comply with the FPL bid specifications, such as bargaining with the Union over the inclusion of the CAS/SAS operator position in the bargaining unit or filing a UC petition.

[1] Such as transfer of unit work can be accomplished after bargaining. For example, where an employer wishes to subcontract all maintenance work from a production and maintenance unit, he can do so after bargain to impasse. Under my colleagues' view, he could not do it without union consent.

and that such supervisors will be "non-bargaining personnel". Although it is not clear that the FPL used "the term "supervisor" in its 2(11) sense, it is clear that FPL dictated these functions performed by nonunit personnel.[2] Thus, the decision was that of FPL, not that of the Respondent. The Respondent had no control over the decision. Accordingly, there was no decision about which the Respondent was required to bargain. I therefore find no violation of Section 8(a)(5).[3]

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 fail and refuse to bargain collectively in good faith with International Union Security, Police and Fire Professionals of America (the Union) concerning the wages, hours, and other terms and conditions of employment of our employees in the following unit:

> All sergeants performing guard duties as defined in Section 9(b)(3) of the National Labor Relations Act, as amended, employed by us at our Turkey Point Nuclear Power Plant at Florida City, Florida, excluding all office clerical employees, professional employees, supervisors as defined in the Act, and all other employees.

WE WILL NOT unilaterally and without the consent of the Union alter the scope of any certified or recognized bargaining unit by removing or eliminating job classifications.

WE WILL NOT fail and refuse to furnish the Union in a timely manner any information requested that is relevant to and necessary for the Union in the performance of its statutory representative duties.

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

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit described above.

WE WILL restore the position of sergeant as it existed at the Turkey Point facility prior to September 1, 2003.

WE WILL restore the position of CAS/SAS operator as a bargaining unit position, as it existed at the Turkey Point facility prior to September 1, 2003.

WE WILL offer Brian Baxley, Robert Koontz, Henry Marquez, William Myers, and Juan Ortiz reinstatement to their former position as sergeants at the Turkey Point facility with the same wages, benefits, and other terms and conditions of employment that existed prior to September 1, 2003.

WE WILL make the employees named above, as well as any affected CAS and SAS operators, whole for any loss of earnings and other benefits resulting from the unlawful elimination of their positions, plus interest.

THE WACKENHUT CORPORATION

Shelley B. Plass, Esq., for the General Counsel.
James C. Crosland, Esq. and *David C. Miller, Esq.*, for the Respondent.
Rachel Helton, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL A. MARCIONESE, Administrative Law Judge. I heard this case in Miami, Florida, on March 15–18, 2004. International Union Security, Police and Fire Professionals of America (SPFPA or the Union) filed the charges in Cases 12–CA–23294 and 12–CA–23295 on August 20, 2003, and the

[2] My colleagues seek to avoid the clear language of the specification by saying that FPL could not have so intended because that would have been unlawful. I disagree. In doing so, I rely upon the clear language of the specification. I do not reach the issue of whether an employer violates the Act by conditioning the doing of business with another employer on union considerations. See *Plumbers Local 447 (Malbaff Landscape)*, 172 NLRB 128, 129 (1968). There is no allegation that the Respondent colluded with FPL in formulating the job specifications.

[3] My colleagues concede that FPL had a right to require that its customer (the Respondent) perform the CAS/SAS operations with supervisors. And, yet, my colleagues somehow find that the Respondent had a duty to bargain about that very decision, a decision made by someone else (FPL). Although my colleagues say that the Respondent implemented the FPL decision "in an unlawful manner," the only violation asserted here is the Respondent's failure to bargain about the decision. Although the Respondent may have had to bargain about the effects, the decision itself was that of FPL a matter that was clearly beyond the control of the Respondent.

My colleagues say that the FPL requirement that the work be performed by nonunit members "is what gives rise to the duty to bargain here." My colleagues have missed the point. I do not challenge the proposition that there is a duty to bargain about a decision to assign unit work to nonunit employees. My point is that the decision here was made by FPL, not by the Respondent.

charge in Case 12–CA–23407 on September 18, 2003.[1] The Union amended all three charges on October 22. The Union further amended the charge in Case 12–CA–23295 on November 24 and December 18. Based upon these charges and amended charges, the Regional Director, on behalf of the Board's General Counsel, issued an order consolidating cases, consolidated complaint and notice of hearing on December 31. The complaint, as amended on March 5, 2004, alleges that the Respondent, The Wackenhut Corporation, violated Section 8(a)(1), (3), and (5) of the Act.

The complaint specifically alleges that the Respondent eliminated the job classification of sergeant, in violation of Section 8(a)(1) and (3), because its employees in that position had selected the Union to be their bargaining representative. This conduct, together with the Respondent's elimination of the union-represented positions of Central Alarm System (CAS) and Secondary Alarm System (SAS) operators, and the reassignment of work previously done by the sergeants and CAS and SAS operators to nonunit employees, is also alleged to violate Section 8(a)(1) and (5) of the Act under two alternate theories. The General Counsel alleges in the first instance that these changes affecting unit employees were done unilaterally without affording the Union notice and an opportunity to bargain regarding the changes. The General Counsel alleges, alternatively, that the changes amounted to a unilateral alteration in the scope of the units represented by the Union which was accomplished without the Union's consent. Finally, the complaint alleges that the Respondent violated Section 8(a)(1) and (5) by failing to timely furnish the Union with information it requested that was relevant to and necessary for the performance of the Union's statutory functions.

The Respondent filed its answer to the consolidated complaint on January 12, 2004, denying that it committed the alleged unfair labor practices. The Respondent, in its answer, asserted that the duties previously performed by sergeants and CAS/SAS operators were "subsumed in duties performed by lieutenants," that the lieutenants were supervisors within the meaning of the Act, and that its actions were taken pursuant to "client requirements."

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

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, located in Palm Beach Gardens, Florida, provides guard and security services to clients throughout the United States, including Florida Power & Light (FPL). The facility at issue in this proceeding is a nuclear power plant operated by FPL at Turkey Point in Miami-Dade County, Florida. The Respondent annually purchases and receives at its Florida facilities goods and materials valued in excess of $50,000 directly from points located outside the State of Florida. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Evidence

The Respondent has provided security services to FPL at its nuclear power plants, on and off, for a number of years. In 1998, the Respondent was awarded a contract to provide guards at the Turkey Point plant after a competitive bidding process.[2] The Respondent replaced another contractor, Security Bureau, Inc., which had won the contract away from the Respondent in 1991. When the Respondent took over the security functions at Turkey Point in 1998, it retained the SBI work force, replacing only the site manager. The 1998 contract was for a 3-year term with two annual renewal options, at FPL's sole discretion, which were exercised. In 2003, as the last renewal period was ending, FPL put its security contract out for bid again. That bidding process and its outcome ultimately resulted in the unfair labor practice charges at issue here.

FPL owns several thousand acres at Turkey Point, referred to as the owner controlled area or OCA. Within this area is a protected area (PA) secured by a fence and intrusion detection devices. These devices are monitored and controlled from the Central Alarm Station (CAS) and the Secondary Alarm Station (SAS) that are housed in a hardened building within the vital area. The vital area also contains the power block, consisting of the reactor, the cooling pumps, and other aspects of the power production process.

Robert Bitner is the Respondent's current director of nuclear operations, a position he has held since April 28. Before that, he was the Respondent's project manager at Turkey Point since the 1998 contract commenced on September 1, 1998. In his current position, Bitner is responsible for all three FPL sites covered by the contract. Bitner was replaced as project manager at Turkey Point by Luis Fernandez, formerly a shift supervisor and captain at that facility. The project manager is the Respondent's highest-ranking management official on-site.

The Respondent provides security at 30 nuclear power plants throughout the United States, which are operated by a number of utility companies. The employees at 26 of those sites are represented by unions, including the Charging Party. The Charging Party represents the Respondent's employees at 14 nuclear sites, including all three covered by the Respondent's contract with FPL. Guy Wegener has been the Respondent's vice president of labor relations since February 1998 and is principally responsible for negotiating collective-bargaining agreements at the unionized facilities.

Before the September 1 effective date of the Respondent's current contract with FPL, the Respondent's guard force at Turkey Point consisted of 4 captains, 11 lieutenants, 8 sergeants, and 88 security officers, which included CAS and SAS operators, unarmed security officers (also referred to as watchmen), and part-time security officers (referred to as NRTs). The

[1] All dates are in 2003, unless otherwise indicated.

[2] The contract in fact covers three nuclear facilities: Turkey Point, St. Lucie, Florida, and Seabrook, New Hampshire. The latter facility is a nonregulated site owned by a FPL subsidiary, FPL Energy.

Respondent's employees were scheduled on one of four shifts, referred to as team A, team B, team C, and team D. Each team consisted of a captain, four lieutenants, two sergeants, three security officers, and one shift supervisor.

The Union initially organized the Respondent's security officers at the Turkey Point facility in 1998–1999. Following a Board-conducted election, the Union was certified on July 8, 1999, as the 9(a) representative of the following unit of employees (unit A):

> All full-time and regular part-time security officers, central alarm system operators and secondary alarm system operators performing guard duties as defined in Section 9(b)(3) of the National Labor Relations Act, as amended, who are employed by the Employer at the Turkey Point Nuclear Power Plant, Miami, Florida; excluding all other employees, temporary employees, office clerical employees, professional employees and supervisors as defined in the Act.

The parties stipulated that the Respondent did not oppose the inclusion of the CAS and SAS operators in the bargaining unit during the representation proceeding which led to the Union's certification.[3]

Following the Union's certification, the parties negotiated their first collective-bargaining agreement, which was effective for the period of April 4, 2000, through April 3, 2003. On March 14, the parties entered into a written agreement to extend the collective-bargaining agreement "until such time as a replacement agreement has been ratified." This agreement further provided that there would be no strikes or lockout during the contract extension and that any agreement on wages would be made retroactive to April 4, 2003. Either party had the right to terminate the extension upon 14 days' written notice. The alleged unfair labor practices at issue in this proceeding occurred while the parties were negotiating a new agreement. As of the date of the hearing, no agreement had been reached and neither party had exercised its option to terminate the extension agreement.

In fall 2002, the Union filed a unit clarification petition seeking to include sergeants in the existing bargaining unit of security officers. The Union ultimately withdrew that petition and filed a representation petition, on November 26, 2002, seeking to represent a unit of full-time and regular part-time sergeants employed at Turkey Point. There is no dispute that the Respondent vigorously opposed this petition, based on its belief that the sergeants were statutory supervisors. After a hearing was held on this issue, the Board's Regional Director issued a decision and direction of election, on January 10, finding that the Respondent's sergeants were not supervisors within the meaning of the Act. The Respondent requested review of the Regional Director's decision and, on February 12, the Board issued an order denying the request on the basis that the Respondent had not raised any substantial issues warranting review.[4] A mail-ballot election was conducted among the Respondent's sergeants, resulting in a vote of 5–3 in favor of representation by the Union. There were no challenged ballots and no objections were filed. On March 4, the Union was certified as the 9(a) representative of the following unit (unit B):

> All sergeants performing guard duties as defined in Section 9(b)(3) of the National Labor Relations Act, as amended, employed by the Wackenhut Corporation at Turkey Point Nuclear Power Plant at Florida City, Florida, excluding all office clerical employees, professional employees, supervisors as defined in the Act, and all other employees.

The General Counsel offered evidence that the employer took the position, in the preelection campaign, that the sergeants were supervisors and would always be supervisors in the eyes of the Respondent, notwithstanding the Board's decision to the contrary. The Respondent communicated this position to the sergeants by written memos and at meetings. In the first memo, dated January 21, from Bitner to the sergeants, Bitner uses the recent NLRB ruling on the status of sergeants as an opportunity to "revisit expectations concerning your duties as security sergeant at Turkey Point Nuclear Station." Bitner attached a copy of their position description[5] and advised the sergeants as follows:

> It is my expectation, and the expectation of Wackenhut Nuclear Services, that you will perform your duties as sergeant in accordance with expectations identified in the position description referenced above. If you feel that you cannot or you refuse to perform the expected duties please notify me immediately.

The job description referenced in Bitner's memo includes among the sergeants' duties, inter alia, the responsibility to

> Ensure Security Personnel perform in accordance with applicable procedure, policies, guidelines, and directives of the client and the Wackenhut Corporation.
>
> Daily inspect and supervise the job performance of subordinate Security Officers on duty to assure proper conduct, discipline, and efficient performance.
>
> Report violations of security rules, regulations, policies, or site procedures to the Power Block and RCA Lieutenant.
>
> Evaluate Security Officers under his/her direction and submit these evaluations for review.

Two other memos distributed to the sergeants during the preelection campaign were signed by Wegener. Wegener's first memo, dated January 28, informed the sergeants that the Respondent's "first line supervisors/sergeants are *not in unions, any unions*" (emphasis in original). Wegener then advised the sergeants as follows:

[3] The Union designated its affiliated Local 610 to be the day-to-day representative of the security officers at Turkey Point. The parties have stipulated that Local 610 is a labor organization within the meaning of the Act.

[4] Member Schaumber dissented. In its order, the Board also noted that no party had requested a self-determination election to add the sergeants to the current unit of security officers.

[5] The job description referenced in Bitner's memo appears to be the same one offered in evidence at the representation case hearing as part of Emp. Exh. 46.

> The reason for sergeants not being union members is simply that a vast majority consider themselves members of management and function as supervisors on a day-to-day basis. We believe that our sergeants are part of the management team, and are important to the success of the mission at each of our client's facilities.
>
> It has been rumored that if the Union is successful in organizing the Turkey Point sergeants, that they will become part of the security officer union. It is the Employer's position that if the Union succeeds in its attempt to organize the sergeants, that they will not be included in the security officers contract. This position is supported by the testimony of the Union's own attorney, Mr. Mark Heinen, as well as the Direction of Election, Page 3,
>
> > Although the Petitioner (Union) has represented the Employer's security officers since July 8, 1999, it does not seek to include the petitioned for sergeants in the unit of security officers.

Wegener then stated the Respondent's intention to recognize the sergeants as a separate bargaining unit, if they voted in favor of representation. He concluded the memo by expressing the Respondent's "hope that the sergeants will unanimously reject" the Union's attempt to organize them.

> On February 3, Wegener issued another memo to the sergeants, which reads as follows:
>
> I am rarely surprised, but always disappointed at the depths some people will go to, to mislead their fellow employees.
>
> The NLRB recently decided that the Turkey Point Sergeants were not supervisors; and therefore, could vote on becoming a union member or not. If they had ruled you were supervisors, there would be no vote. That is the truth!
>
> The Company continues to consider you as our first line supervision. The NLRB has ruled that you are entitled to vote for a Union. And therein lies the problem. While we expect you to function as supervisors, if you are unable to direct the security force and to administer discipline as needed, then the question becomes what role will the sergeants play if the Union is voted in. These are difficult issues which need to be addressed. And not by Nelson Martin.

Martin has been the president of Local 610, representing the security officers, since 1999. Wegener closed his memo by asking the sergeants to vote "no."

Former sergeants Brian Baxley and Juan Ortiz testified regarding a meeting held by Bitner after the Union had withdrawn the UC petition and before the RC petition was filed. Baxley recalled that Bitner told the sergeants that they would not be permitted to organize because of the duties they performed. Ortiz recalled that Bitner told the sergeants that the Union had turned its back on them, apparently in reference to the petition having been withdrawn. Ortiz recalled further that Bitner told the sergeants that they had 24 hours to make a decision whether they wanted to remain sergeants or turn in their chevrons and become security officers. According to Ortiz, Bitner said that the Respondent had certain expectations of them and that they were all considered supervisors. Bitner also told the sergeants, after referring to the time and effort the Respondent had already expended, that the Respondent would fight the Union's petition because it did not want the sergeants to be organized. It is not clear from the testimony whether Baxley and Ortiz were at the same meeting or were testifying about different meetings.

Three other former sergeants testified regarding meetings they attended, before the election, at which Bitner made statements similar to those recalled by Ortiz. William Douglas Myers testified that, at the meeting that he recalled, Bitner distributed copies of the decision, with portions highlighted, and a job description. He recalled Bitner telling the sergeants that they would always be supervisors in the Respondent's eyes. He also recalled Bitner giving the sergeants an ultimatum, i.e., that they had to decide if they wanted to be part of the Union and, if they did, they would have to resign their sergeant's position. Myers also recalled being given 24 hours to make this decision.[6] Henry Marquez recalled Bitner telling the sergeants at a meeting he attended that Bitner did not agree with them being unionized and, if they wanted the Union, they had the opportunity to step down and become a security officer. Marquez recalled that Bitner gave them 24 or 48 hours to decide. Finally, Robert Koontz testified that Bitner told the sergeants, at the meeting he recalled, that they should turn in their resignations if they couldn't be a supervisor.[7]

Bitner, who testified as an adverse witness for the General Counsel as well as a witness for the Respondent, was not asked any questions about these meetings. Thus, the testimony of the five former sergeants stands unrebutted. The Respondent argues that, because the testimony of these witnesses "varied widely," their credibility is questionable. I disagree. All five witnesses were still employed by the Respondent at the time of the hearing, albeit as security officers rather than sergeants as a result of the Respondent's action at issue in this proceeding. The Board has long noted the inherent credibility of employees who testify against their current employer. See *Flexsteel Industries,* 316 NLRB 745 (1995); *Georgia Rug Mill,* 131 NLRB 1304, 1305 fn. 2 (1961), enfd. as modified 308 F.2d 89 (5th Cir. 1962). Moreover, the variation in the testimony is more likely attributable to the passage of time and the varied individual perspectives of the witnesses than to any deliberate attempt to fabricate testimony. The statements attributed to Bitner by these witnesses are consistent with the positions expressed by Bitner and Wegener in the memos. The Respondent essentially concedes this latter point when it argues that the statements attested to by the General Counsel's witnesses and those expressed in the memos conveyed nothing more than the Respon-

[6] Myers was the only former sergeant to also testify regarding a postelection meeting. According to Myers, after Bitner informed the employees of the results of the election, he told them that there would be tough roads ahead and that they would always be supervisors in Respondent's eyes.

[7] Koontz also testified that he had a one-on-one meeting with Bitner in his office during which Bitner pointed to a stack of papers and talked about how much it had cost the Respondent to fight the Union's petition.

dent's belief that the duties performed by the sergeants were supervisory in nature and that such duties were incompatible with union representation.

As noted above, the most recent collective-bargaining agreement covering the security officers in unit A was set to expire on April 3. Sometime in January, Local 610 President Martin wrote Wegener to request negotiations for a new contract. The parties' first negotiation session was a 2-day meeting on March 4 and 5. Gerry Hartlage, the Union's regional vice president, served as chief spokesman for the Union.[8] Martin and several security officers served as the Union's negotiating committee. Also present at the first meeting on March 4 was Sergeant Baxley, representing the sergeants in the newly-organized unit B.[9] Wegener served as the Respondent's chief spokesman. Bitner, who was still the project manager at Turkey Point, and Fernandez, who was a captain at that time, were also present for the Respondent. On March 4, the Union presented its noneconomic proposals, which had been prepared by Martin. Among them was a proposal to change article II, the recognition clause, to include sergeants in the existing unit. There is no dispute that the Respondent rejected this proposal, with Wegener telling the Union that the Respondent wanted to negotiate separately for the sergeants. Martin testified that Wegener and Hartlage then had a lengthy discussion over the issue, which escalated to shouting and the use of profanities. At one point, according to Martin, Wegener said that the Respondent had spent $80,000 litigating the sergeants' position and that money had to come from somewhere. Hartlage asked Wegener to repeat this statement, which Wegener did, while Hartlage wrote it down. Hartlage then read back what he had written and Wegener agreed that it was accurate.[10] Although the Union filed an unfair labor practice charge over Wegener's statement, it subsequently withdrew the charge and no unfair labor practice has been alleged with respect to this statement.

The parties continued to discuss the Union's proposals at this first series of meetings and, late on the first day, the Respondent presented its proposals. In the Respondent's proposal for Article II, there was no mention of sergeants, but there was a proposal to delete the CAS and SAS operators from the bargaining unit. The Respondent further proposed deleting all references to the CAS and SAS from the contract. The reason given for this proposed change was that the Respondent wanted Turkey Point to be consistent with the other two FPL facilities where such positions are excluded from collective-bargaining units. The Union told the Respondent that it wasn't interested in removing these positions from the unit. The parties continued discussing their respective proposals over the remainder of this 2-day session, reaching some tentative agreements. The parties adhered to their respective proposals regarding the composition of the unit. The parties agreed to meet again on April 15 and 16.[11] There is no dispute that the Union did not request meetings to begin negotiations for a separate unit of sergeants. Martin testified that it was his belief that such negotiations would occur, if necessary, after the security officers agreement was resolved because there would be no need for separate negotiations if the Respondent ultimately agreed to the Union's proposal to include the sergeants with the security officers in one contract.

Baxley, who was present on March 4, did not attend the March 5 session. According to Martin and Baxley, this was the result of the Respondent having falsely accused Baxley of lying by calling out sick to attend the meeting. Baxley in fact had arranged to switch his schedule so he could attend the negotiations. Baxley did not attend any further bargaining sessions until after the change at issue here went into effect on September 1. Baxley testified that he did not attend the intervening negotiations because the Respondent's accusation made him feel unwelcome at the table. The Respondent did not dispute the testimony of Baxley and Martin and did not attempt to show any misconduct by Baxley with respect to his attendance at negotiations on March 4. There is no dispute that no one from the Respondent ever apologized to Baxley or otherwise acknowledged to the Union that its accusations regarding Baxley were erroneous.

The parties met, as scheduled, on April 15 and 16. They continued discussing their respective contract proposals, reaching some additional tentative agreements. There is no dispute that the only discussion of the Union's proposal to include sergeants and the Respondent's proposal to remove CAS and SAS operators from the unit was reiteration of each side's rejection of the other's proposal in the course of reviewing outstanding issues. The parties did not meet again for negotiations until July 16 and 17. In the meantime, the events giving rise to this proceeding came to fruition.

On April 24, Martin wrote Bitner a letter requesting a seniority list of the current sergeants. He received no response. On June 24, Martin made two additional written requests for information, this time addressed to George Cornell, who was acting project manager during Fernandez' vacation.[12] In the first, Martin requested the mailing address for a number of security officers, information regarding the part-time or full-time status of some of these security officers, and the mailing address and seniority date of six named sergeants. In the second request, Martin asked for the attendance record, records showing hours worked during specified periods of time and doctors' notes provided by two employees, one a security officer and the other a sergeant. In the second request, Martin stated that he needed this information to fulfill the Union's contract admini-

[8] Hartlage's name is misspelled in the transcript as "Hartledge." I correct this typographical error.

[9] As described above, the Union had recently prevailed in the mail ballot election. The Board's certification of the Union as the sergeants' representative issued, coincidentally, on March 4.

[10] Hartlage, who retired for medical reasons in June, did not testify in these proceedings. Wegener acknowledged that he told the Union's committee, during the first meeting, about how much the Respondent had spent in the representation case. According to Wegener, he provided this information at Hartlage's suggestion after having expressed his angst about this in a prenegotiation telephone conversation with Hartlage.

[11] As previously noted, the parties agreed to extend the contract on March 14 until such time as a new agreement was reached or either party gave written notice of termination.

[12] Fernandez had replaced Bitner as project manager at the end of April.

stration responsibilities. Martin testified that he sought this information to investigate potential grievances involving the two named employees. According to Martin, the Respondent only provided the information requested in these two letters that related to the security officers. No information regarding the sergeants was provided. Martin testified that he had a conversation with Cornell, sometime after he made these requests but before July 8, in which he asked about the information. Martin testified that Cornell responded, "[Y]ou know how they are about giving you information." Cornell did not testify in this proceeding.

On July 8, Martin sent a "Second Request for Information" to Fernandez reiterating the Union's request for the information sought in the April 24 and June 24 letters that had not yet been provided, including all the information related to sergeants. According to Martin, Fernandez provided a response the same day with respect to the information requested that concerned security officers. Martin still was not provided with the seniority list and mailing addresses of the sergeants or the attendance information for the one sergeant with a potential grievance. Martin testified that he spoke to Fernandez about this omission. According to Martin, Fernandez told him that Martin had no jurisdiction over the sergeants. The Respondent did provide some information regarding the sergeants to Baxley. Baxley testified that he received from Bitner an April 10 letter responding to a request from the Union for information regarding employees who had received incentive awards. Baxley gave this letter to Martin. Although Martin had requested this information for sergeants and security officers, Bitner provided Martin with only the information regarding security officers who had received awards. Bitner gave Baxley the list of sergeants receiving such awards. Baxley testified that this is the only information he ever received from the Respondent. There is no dispute that the Respondent ultimately provided all the information requested by the Union, on October 2, after unfair labor practice charges had been filed.

Bitner did not testify regarding the Union's requests for information. Fernandez testified that he gave the Union whatever information they requested as promptly as he could. The Respondent offered into evidence documents showing that, in 2003, the Respondent routinely provided the Union, upon request, with information as it related to the security officers. With respect to Martin's April 24 request for a seniority list for sergeants, Fernandez testified that he became the project manager shortly after the date of this letter and that he was not aware of the request until the unfair labor practice charge was filed alleging that the Respondent had failed to provide information.[13] Fernandez claimed further that the Respondent had provided a sergeants' seniority list to Baxley, who had been identified at negotiations as a representative of the sergeants. However, Fernandez admitted that he did not personally give the list to Baxley and could not confirm whether it was in fact given to him. Fernandez testified further that he spoke to Martin about his July 8 letter in early to mid-September while the two were meeting on other matters. According to Fernandez, Martin told him that he no longer needed the information. Fernandez testified that this was the first time that Martin spoke to him about these information requests, "as far as [he] could recall." It was shortly after this conversation that Fernandez became aware of the unfair labor practice charge alleging the refusal to furnish information. Fernandez' October 2 letter, which accompanied the information that the Union had sought since April 24, indicates that Fernandez meeting with Martin occurred on October 1.

Martin acknowledged, on cross-examination, that he declined the information when Fernandez attempted to give it to him in October. According to Martin, he told Fernandez that the only reason he was providing this information to the Union was because a charge had been filed. Fernandez' attempt to furnish the information also occurred after the Respondent had implemented the changes at issue here. According to Martin, he asked Fernandez, during this meeting, if the Respondent was putting the sergeants back in the bargaining unit. When Fernandez said no, Martin told him he wouldn't need the information.

Martin also testified that in May, during the hiatus in negotiations, he attempted to give Fernandez dues-checkoff authorizations signed by five of the sergeants in the recently certified unit. According to Martin, Fernandez said that the sergeants could not be part of Local 610. When Martin replied that the Respondent could not tell the Union where its members should be placed for representation purposes, Fernandez took the cards and said he would look into it. On cross-examination, Martin acknowledged learning, after this incident, that the sergeants could not have dues checked off because there was no collective-bargaining agreement in effect covering them at the time.

Also during the hiatus in bargaining, FPL issued a request for proposals with bid specifications for a new security contract to replace the 1998 agreement between FPL and the Respondent. The bid specifications, which FPL issued on May 28, included, inter alia, the following requirements:

> Staffing
>
> Contractor will provide security force personnel in accordance with the organization structure defined by the company in Attachment A to this Nuclear Site Security Specification.
>
> Contractor supervisors will be defined as non-bargaining personnel. Additionally, all personnel assigned to operate CAS/SAS functions shall be supervisors. In an emergency, a security force position may be filled by any Security Personnel if the individual possesses the qualifications which are equal to, or greater than, the requirements of the position. Contractor, upon authorization by the Company, can pre-qualify personnel for upgrade positions.

Attachment A to the specifications identified the positions and the number of persons in each position that FPL expected its security contractor to provide. Under the heading "Operations-Supervision," FPL specified one lead shift supervisor and five shift supervisors per shift. Under "Operations-Non-Supervisor," FPL specified 76 armed security officers and 27 part-time armed officers per shift. FPL further required that "All Shift Supervisors will be trained and certified to perform duties as

[13] The charge at issue was filed by the Union on September 18.

assigned within the CAS/SAS, OCA and PA" and that there would be four shifts.

On June 30, the Respondent submitted a bid to FPL that complied with the bid specification. According to Bitner and Richard Maier, FPL's manager of nuclear security, two other security companies submitted bids in response to FPL's request for proposals. Maier, who is the lead contract administrator for FPL, testified that all three bids had similar staffing provisions that mirrored the requirements of the bid specification. FPL awarded the contract to the Respondent in August. The new contract, entered into on August 26, was also for a 3-year term with two annual renewal options at FPL's sole discretion. Appendix C to the contract essentially incorporates the May 28 bid specifications, including the provisions quoted above. A wage schedule that appears in appendix C does include a classification of "Armed Officer/Lead Guard" below lieutenant on the organizational structure. Bitner testified that the Respondent did not use such a classification at Turkey Point.

There is no dispute that the individuals who monitor the CAS and SAS at St. Lucie, where the Union also represents the Respondent's security officers, are nonunit employees. Richard Johns, FPL's security manager at Turkey Point since August 2003, who previously held the position of FPL security supervisor and also worked for the Respondent in positions from security officer to captain, testified that he first became aware of interest within FPL in making the CAS/SAS operators supervisors several years ago. Johns had submitted a proposed budget to his supervisors in 2001 or 2002 showing what it would cost to make such a change. According to Johns, his proposal was not acted upon at that time. In 2003, Maier informed Johns of FPL's new bid specification, including the provision mandating that CAS and SAS operators be nonunit supervisors. Although Johns testified that he had discussions with Bittner and the other bidders regarding the bid specifications, he could not recall the specifics of these discussions. There is no evidence in the record that representatives of FPL and the Respondent conspired with respect to the draft of the bid specifications as they relate to the CAS and SAS positions. The bid specifications and the contract that was executed by the Respondent and FPL does not specifically mention sergeants.

On July 1, Bitner sent a memo to Wegener, the Respondent's chief negotiator, about the FPL contract bid. Bitner advised Wegener that FPL's bid specifications would "impact our current organization at Turkey Point should [the Respondent] be awarded the contract" in three ways:

> Elimination of the part-time program
> CAS/SAS operators will be supervisors
> Elimination of the sergeants

Bitner noted that these changes would not impact operations at either the St. Lucie or Seabrook plants. Wegener received this memo and was aware of the Respondent's bid before the parties' next negotiations on July 16.

At the July 15 and 16 negotiation session, Michael Swartz replaced Hartlage, who had retired, as the Union's chief spokesman. Wegener continued to act as the Respondent's chief spokesman. On July 15, the parties continued discussing the outstanding proposals, reviewing the status of each. There was no change in either parties' position regarding the sergeants and the CAS/SAS operators. The parties did reach tentative agreement on some revisions to the seniority provision that had been proposed by the Union. The Respondent rejected two proposed changes to the seniority provision addressing security officers bidding on sergeant's positions and filling in for absent sergeants.

There is no dispute that Wegener told the Union about the FPL bid specifications at the July 16 meeting. Swartz testified that Wegener told the Union that the Respondent's contract with FPL was worth millions of dollars to the Respondent and that they had to accomplish certain things in negotiations with the Union if they wanted to keep the contract with FPL. According to Swartz, Wegener identified three concerns FPL had that impacted the unit. The first issue was the use of part-time employees, which the client wanted reduced. The second item cited by Wegener was that FPL wanted supervisors operating the CAS and SAS in order to be consistent with its other locations. Finally, with respect to the sergeants, Wegener told the Union that the Respondent had received a black eye from the client when the NLRB determined they were not supervisors. Wegener again mentioned the amount of money the Respondent had spent fighting this issue. Swartz told Wegener that the Respondent would have to get past this at some point and move forward to deal with the Union. Swartz also suggested that the parties could address FPL's concerns by calling the sergeants working supervisors or leads, which was a practice Swartz was familiar with at other facilities, including other non-FPL sites at which the Respondent provided security. Wegener indicated he was open to discussing the idea. During a break in the meeting, Swartz contacted the International Union and advised them of Wegener's comments. After the break, he informed Wegener that he was instructed to tell the Respondent not only no, but "hell no," to the Respondent's proposal regarding the CAS/SAS positions. Swartz also requested a copy of the FPL bid specifications to verify Wegener's claims and Wegener told him he would provide this. Swartz also asked Wegener if the client, FPL, should be at the bargaining table in light of these demands and Wegener replied that was not necessary. Swartz testified that Wegener also told the Union that, effective September 1, the Respondent would be eliminating part-time positions at Turkey Point.[14] According to Swartz, Wegener did not mention any other changes that the Respondent planned to make on that date.

Martin, who also testified regarding the July 16 meeting, recalled the meeting somewhat differently. Martin recalled that Wegener told the Union that FPL's bid specifications specifically required that the CAS and SAS be operated by supervisors instead of unit employees. Martin testified that the Respondent did not tell the Union how they planned to meet this requirement. Martin also recalled that Wegener told the Union that the FPL contract was very important to the Respondent, and that Turkey Point, together with the other two sites, was worth about $87 million to the Respondent. According to Martin, Wegener then asked the Union to cooperate with the Re-

[14] There is no allegation in the complaint regarding the Respondent's elimination of part-time positions.

spondent in getting the contract. Martin replied that the Union was willing to cooperate with the Respondent and Swartz added that the Union would rather deal with someone they knew than someone they didn't know. Swartz had not mentioned such an exchange in his testimony. Martin did confirm that Swartz asked Wegener for a copy of the bid specs and that Wegener said he would mail it to him. Although Martin recalled that Swartz and Wegener had a lengthy discussion about the bid specifications, he claimed that he was unable to recall anything further that was said. Martin did not mention, for example, Wegener's comment about the "black eye" that Respondent received as a result of the Board's ruling regarding the sergeants' status. According to Martin, Wegener did not say anything about the sergeants at this meeting.

Wegener testified that he actually informed the Union of the FPL bid specifications before the July 16 meeting, during a telephone conversation with Hartlage shortly after he received Bitner's July 1 memo. Wegener called Hartlage because he was aware of his medical problems and he wanted to see how he was doing and also to determine if he would continue to handle negotiations for the Union. In the course of this conversation, Wegener told Hartlage that a couple of the issues the parties had been dealing with in negotiations were addressed in the FPL bid specs. Wegener testified that he specifically mentioned that FPL was requiring that all supervisors be nonunit personnel and that the CAS and SAS was to be staffed by supervisors. Wegener told Hartlage that it was apparent to him that this meant the Respondent would no longer employ sergeants at Turkey Point. Wegener recalled that Hartlage replied that this would certainly make negotiations interesting. Wegener testified that he also told Hartlage that the Respondent planned to eliminate the part-time contingent at Turkey Point.

Wegener corroborated the General Counsel's witnesses that he officially informed the Union about the bid specifications and their impact on negotiations at the July 16 meeting. In contrast to the recollections of Martin and Swartz, Wegener testified that he specifically told the Union's committee that the Respondent planned to eliminate part-time security officers, to eliminate the CAS and SAS operators from the unit and to delete sergeants. He confirmed that Swartz asked for a copy of the bid specification, which Wegener agreed to provide, and that Swartz proposed using "lead employees" instead of supervisors to staff these positions. Wegener recalled Swartz asking if the client, FPL, had considered this concept. According to Wegener, he told Swartz he didn't know but he would look into it. Although Wegener did not testify to any further specific response from Swartz, he recalled that his response was "thoughtful," rather than an adamant rejection such as, "no, you can't do that." Wegener testified that the Union took a caucus after his presentation regarding the bid specs and that, when negotiations resumed, the parties continued discussing their respective contract proposals without any further mention of the proposed elimination of the sergeants and the CAS/SAS operators. The Respondent offered Wegener's notes as corroboration of his testimony.[15] The Respondent also asked James Hurley about this meeting. Hurley, who was the Respondent's Director of Labor Relations and corporate counsel at the time, testified after reviewing his notes of the meeting. According to Hurley, his notes reflect that Wegener told the Union:

> 1. Part-time (NRT) program will be eliminated by Sept. 1, 2003; due to client bid spec.
> 2. CAS/SAS—moved to supervisor position per bid specs; client wants this to be uniform at all sites—T.P. is only site w/CAS/SAS in bargaining unit
> 3. Sergeants position will be eliminated at T.P., St. Lucie + Seabrook b/c of client bid specs—NLRB decided T.P. sergeants are not supervisors + client wants supervisors[.]

Hurley acknowledged that there was additional discussion not reflected in his notes but displayed poor recall of the meeting beyond what was in his notes.

There is no dispute that, toward the end of the July 16 session, the Respondent presented a document to the Union containing its "offer to settle non-economic terms." The first item on this document is the Respondent's proposal to remove all references to CAS/SAS operators from the collective-bargaining agreement. There is no dispute that, by the end of the July 16 session, the Union had not changed its position rejecting this proposal. The second item reads:

> Union's proposal to add Sergeants to the Agreement has been rendered moot due to new Client bid specifications applicable to the site.

While acknowledging receipt of this document, Martin claimed that he did not interpret this proposal to mean that the Respondent intended to eliminate the position altogether. According to Martin, he understood this to mean that the Union's proposal to include sergeants in the existing unit was considered moot by the Respondent, a position with which he disagreed.

On July 17, the day after this meeting, the Respondent announced at briefing meetings at the start of each shift that it was posting new supervisor positions and that anyone interested should fill out a "special request form." A July 17 memo from Fernandez to the security officers regarding the supervisor openings was posted about the same time. This memo specifically advised the employees that one of the requirements for the position was qualification to operate the CAS/SAS. Several guards who were at the briefings asked questions about the new positions, including how many positions would be up for bid, without getting an answer from their respective captain. According to the General Counsel's witnesses, this announcement was repeated at each daily briefing for about one week, in accordance with the Respondent's customary practice regarding such openings. Fernandez' memo indicated that security officers who were interested in this position should submit their request by July 28.

Martin informed Swartz of this announcement soon after he learned about it. Swartz told Martin to contact the Union's legal department to get advice regarding how to respond to this issue. On July 22, pursuant to instructions he received, Martin sent the Respondent what he referred to as a cease and desist letter. The letter states, in pertinent part:

[15] In fact, Wegener testified about this meeting using these notes.

> The opening of an unspecified number of Supervisory positions, at the pay rate of $17.73 an hour is intended to increase the number of Lieutenants, since that is the entry level for a Lieutenant.
>
> The requirement that these Supervisors must be trained and certified as CAS/SAS operators, coupled with the Company's insertion at negotiations regarding CAS/SAS staffing, clearly implies that the Company's true intent for offering Supervisor positions at this time is to staff the entire CAS/SAS operation with Lieutenants, and covertly eliminate the Sergeant's classification.
>
> For these reasons Local 610 demands that the Company *cease and desist* this campaign immediately.

(Emphasis in original.) Martin did not receive a response to this letter so he wrote again to Fernandez on July 31, demanding a response as soon as possible to his cease and desist letter.

The Respondent replied to Martin's letters by a letter dated August 1 that was signed by Hurley. Martin testified that he received this letter a few days after August 1. In this letter, Hurley wrote as follows:

> As you will recall, during our face-to-face collective-bargaining negotiations on July 16, 2003 in Miami, Florida, the Company notified the Union that its client, FPL, had reopened the bidding process for security services at each of its three nuclear sites, including Turkey Point. At that same meeting, the Company also specifically disclosed to the Union that the new bid specifications included: (i) the elimination of the Sergeant position; (ii) the requirement that the CAS/SAS positions be staffed only with supervisor-level employees; and (iii) the elimination of the part-time program.
>
> At no time during the meeting did the Union express any sentiment other than an understanding of the change in client requirements. As a result, we are astounded by your allegations of "covert" activity on the Company's behalf.
>
> Please note that the bid specifications apply to all potential vendors. These specifications will be implemented by the successful bidder on September 1, 2003. A copy of the bid specifications will be sent to Mike Swartz, SPFPA International today.
>
> In the event we are the successful bidder, we are prepared to negotiate with respect to the impact of the new specifications on the bargaining unit. Perhaps our next scheduled meeting, in early September, would be the most appropriate forum for this discussion. Please advise.

Hurly mailed a copy of this letter to Swartz with a copy of the FPL bid specs. He did not include the bid specs with his letter to Martin. Martin testified that this letter was the first time the Respondent clearly stated that it was going to eliminate the sergeant and CAS/SAS positions effective September 1.

On August 4, Martin sent another letter to the Respondent, addressed to Hurley, to correct what he believed were inaccuracies in Hurley's letter. Martin wrote as follows:

> . . . I must point out that the negotiating committee recalls, at the collective bargaining negotiations on July 16, 2003, the Company *only* notified us that FPL's bid specifications called for the CAS/SAS operation to be handled by Supervisors. Your *initial* (3-4-03) proposals requested that all references to CAS/SAS be removed form (sic) the Agreement. Mr. Hartlage responded on March 4th unmistakably clear—we are *NOT* interested in removing the CAS/SAS Operator's from the Agreement. Mr. Swartz notified you again on July 16, 2003, that the International Union's President, Mr. David Hickey, was not interested in removing CAS/SAS from the Agreement.
>
> . . . .
>
> The Company absolutely *DID NOT* notify us that the elimination of the Sergeant's (classification) was also allied to FPL's bid specifications. Although we believe the Company never had any intentions to recognize the NLRB's certification of the Sergeants, it wasn't until your letter of August 1, 2003, that for the *first time* you *mentioned* your intent to eliminate the Sergeant's. (What you didn't say is that their duties will be assumed by the Supervisors).
>
> You wrote, "At no time during the meeting did the Union express any sentiments other than an understanding of the change in client requirements." Well, that's because the CAS/SAS issue was *not new* to us on July 16th. The elimination of the Sergeant's was *never mentioned*, and the elimination of the part-time program is a Company prerogative *totally unrelated* to collective bargaining. Astoundingly, these reasons do not warrant sentiments to be expressed by the Union.

(Emphases in original.) Martin testified without contradiction that he received no response to this letter. There is no dispute that, notwithstanding Hurley's offer to bargain regarding the impact of these changes, neither Martin, nor Swartz, ever formally requested effects bargaining.

There is no dispute that the Respondent commenced the process of filling the new supervisor positions soon after the posting of July 17. Employees who applied for these positions underwent training and testing during the month of August. Martin testified, without contradiction, that several applicants had difficulty passing the test to become CAS/SAS certified until the Respondent lowered the standard. One of the General Counsel's witnesses, security officer and former CAS/SAS operator Rene Rosello, recalled being advised at a briefing in early August that the Respondent was still seeking applicants for the new position and that the requirement of CAS/SAS certification had been dropped. There is no dispute that the new supervisors, who assumed their duties when the Respondent's new contract went into effect on September 1, were paid an hourly rate of $17.73. The new rate represented a significant increase from the promoted employees' previous rate of pay as security officers or sergeants. In all, 15 employees were promoted from the unit into supervisor positions. There is also no dispute that these new supervisors assumed operation of the CAS/SAS on September 1 and that the security officers who previously performed that function were reassigned to field duties without any reduction in pay.

Several witnesses testified for the General Counsel regarding conversations they had with representatives of the Respondent

concerning the job posting. Edward Daniels, a security officer who was a CAS/SAS operator for 5 years before September 1, applied for one of the new supervisor positions but withdrew his request because of his support for the Union.[16] Daniels testified that, toward the end of August, he met with Fernandez to clarify what his position would be after September 1. Bitner was also present. According to Daniels, Fernandez told him he would no longer be working on the computer, i.e. operating the CAS/SAS, but would have to work in the field. Bitner told Daniels he was making a mistake by not applying for a supervisor position, expressing the opinion that Daniels was good on the computer and would make a good supervisor.[17] Daniels replied that he could not in good conscience become a supervisor because of the way the Respondent had gone about it. Bitner told Daniels that it was a business decision and then asked Daniels to explain his comment. Daniels told Bitner that he felt that the Respondent was trying to break the Union because the sergeants and almost all of the CAS/SAS operators were in the Union. Daniels did not testify to any response by Bitner or Fernandez to this statement. Neither Bitner nor Fernandez rebutted Daniels testimony.

Former Sergeants Baxley, Ortiz, Myers, and Koontz testified that they were each called into the office shortly before September 1 and told by Bitner or Fernandez that they would no longer be sergeants effective September 1. Baxley testified that he was given the choice of becoming a security officer or resigning. The other sergeants testified that they were simply told they would become security officers on September 1. Bitner also testified that he asked Bitner if he could remain on the same team and that Bitner replied that he didn't have a problem with that but that the Union might. According to Baxley, Bitner mentioned that the contract provided that employees lose seniority if promoted to a supervisor's position, suggesting that Baxley had lost his unit seniority when he became a sergeant. In fact, the most-recent collective-bargaining agreement contains no such provision and there is no evidence that the Union opposed former sergeants retaining their seniority or Team assignment after their September demotion. Myers testified that he had applied for one of the new positions and was called into the office while his application was pending. Myers testified that he asked Fernandez and Bitner why this was happening. According to Myers, Bitner replied that it had to do with the NLRB ruling. Bitner also told Myers that, under the FPL bid specifications, there would no longer be a need for sergeants. Myers testified that he decided to withdraw his request for consideration for one of the new positions when he learned from another sergeant that he would probably have to go on the night shift if he was selected. Myers testified that he confirmed this with Fernandez during the meeting in the office.[18] It is undisputed that the five sergeants who did not seek one of the posted positions were demoted to security officers on September 1, with a reduction in pay.

By the time the parties met again for contract negotiations on September 4 and 5, the Respondent had implemented the changes at issue here and the Union had filed the initial unfair labor practice charge in this proceeding. Swartz was still the Union's chief spokesman. He was joined in negotiations by Martin and a committee of employees. Former sergeant Baxley returned to the negotiations for the September 5 session. Although Wegener began this session as the Respondent's spokesman, he had to leave to attend to other matters and was replaced as spokesman by Hurley for the September 5 meeting. According to the General Counsel's witnesses, most of this 2-day session was spent discussing the Respondent's proposals regarding the Union's bulletin board. The Respondent had initially proposed eliminating the bulletin boards because of concerns it had with some matters that had been posted there. The Respondent apparently felt the Union was not adhering to the contract's requirement that any postings be submitted to the project manager before being posted. After extensive discussion of the issue, the parties reached a tentative agreement on this item by mid-afternoon on September 5. The Respondent's witnesses acknowledged that the bulletin board issue consumed a significant amount of time during these two meetings.

There is no dispute that the parties, as they had done at all previous sessions, spent some time reviewing all outstanding issues to determine where they stood on each item. In the course of this housekeeping, the Union reiterated its rejection of the Respondent's proposal to remove references to the CAS/SAS from the contract. There was no further discussion of this issue at these meetings. With respect to the sergeants, witnesses for the General Counsel recalled that Swartz asked the Respondent who was now doing the work previously performed by sergeants. Swartz and Wegener then had a discussion regarding job titles, with Swartz telling Wegener that it's not the title of the job but the duties performed that's important. Martin, who had to review his notes to recall what happened at the meeting, testified that he made a proposal during the September 5 meeting that the Respondent reinstate the sergeants but give them the title of lead officers. According to Martin, the Respondent rejected this proposal with Hurley telling the Union that the bid specifications did not provide for lead officers. Hurley also told the Union that the position of sergeant had been omitted from these specifications.

Wegener testified that the parties spent a considerable amount of time at the beginning of the September 4 session discussing the Union's knowledge of that portion of the bid specifications addressing the elimination of the sergeants. According to Wegener, the reason for this discussion was to respond to Martin's accusation in the correspondence discussed above that the Respondent had "covertly" moved to eliminate these positions. Hurley's notes corroborate Wegener that such a discussion took place on September 4, before the parties turned to the bulletin board issue. There is no dispute that, on September 5, the parties exchanged documents purporting to show where each side stood on all outstanding noneconomic issues. These documents confirm that the Union had not retreated from its rejection of the Respondent's proposal to remove references

[16] Daniels was a member of the Union's executive board.

[17] Daniels testified that two supervisors, Captains McCloud and Rodriguez, made similar comments, individually and during a daily briefing in front of the team.

[18] Marquez, the sergeant who initially told Myers that he would probably have to work nights, corroborated this testimony.

to the CAS/SAS from the contract and that the Respondent adhered to its view that the Union's proposal to add sergeants to the contract was moot due to the intervention of the FPL bid specifications. Handwriting on theses documents placed by Martin and Hurley respectively shows that the latter issue was still an open issue when the parties adjourned on September 5.

When the parties concluded their meeting on September 5, no agreement had been reached with respect to the sergeants, the CAS/SAS operation, or an overall agreement. Nor were any further negotiation sessions scheduled. According to Martin, Hurley told the Union that there was no need to meet further because of the pending unfair labor practice charge. Martin's testimony in this regard was not corroborated by any other witness. Although Swartz recalled that Hurley said "something about unfair labor practice charges," he could not provide the specifics of the conversation. Hurley denied making the statement attributed to him by Martin. Hurley also denied that the subject of unfair labor practice charges was even discussed at the meeting. Hurley's notes, however, include the following reference on the first page:

Discuss ULP charges—All

Hurley explained that this portion of the notes was written before the meeting to serve as an agenda for discussion.

As of the close of the hearing in this matter, the parties had not met for contract negotiations since September 5 and were still operating under the terms of the contract extension executed on March 14.

As a result of the changes implemented by the Respondent on the September 1 effective date of its new contract with FPL, the Respondent now employs 88 full-time security officers who are represented by the Union, 24 lieutenants and 4 captains. The Respondent no longer employs any sergeants in the recently-certified unit B. There is essentially no dispute that the duties previously performed by the sergeants are now performed by the lieutenants, including those who were promoted in August in response to the posting discussed above. It is also essentially undisputed that the CAS/SAS duties that were previously performed by several security officers are now performed by lieutenants, including former security officers who were promoted in August. The only difference asserted by the Respondent before and after September 1 is that those now monitoring the CAS/SAS and now performing the duties previously performed by sergeants are statutory supervisors, as required under the Respondent's new contract with FPL.

The parties agreed at the hearing that they would rely upon the evidence in the record of the representation case to establish the duties and responsibilities of the sergeants before September 1. Based on this agreement, no new evidence was offered at the hearing before me regarding the supervisory status of sergeants. Based on the evidence in the representation proceeding, the Board's Regional Director found that the sergeants were not supervisors within the meaning of the Act, regardless of how the Respondent, the Union, or even the employees perceived them.[19] This finding was based on an absence of evidence that the sergeants exercised any independent judgment in carrying out their apparent supervisory duties of assigning and inspecting the work of the security officers, responsibly directing them, issuing discipline and hearing and adjusting complaints and grievances. In reaching this result, the Regional Director noted that whatever discretion the sergeants had was severely restricted by the Security Force Instruction (SFI) mandated by FPL and by the Respondent's internal standard operating procedures. Moreover, in reaching these conclusions, the Regional Director properly placed the burden on the Respondent as the party asserting supervisory status. See *NLRB v. Kentucky River Community Care, Inc.,* 532 U.S. 706, 710–712 (2001). Because the Regional Director's findings and conclusions have been adopted by the Board and because there is no new evidence in the record that would contravene those findings and conclusions, I shall adhere to them in deciding this case.

In the hearing before me, the General Counsel offered testimony from security officers who previously performed the CAS/SAS duties and others who had been sergeants before September 1 to the effect that they perceived no change in the manner in which the new supervisors/lieutenants have performed this work since September 1. With respect to the CAS/SAS, for example, the new supervisors continue to monitor the intrusion detection and other security devices from the CAS/SAS buildings, dispatching security officers to respond to alarms, and running reports off the computer for their supervisors or for FPL personnel. Because the General Counsel's witnesses conceded that sergeants and lieutenants always performed essentially the same functions, the only difference perceived by the General Counsel's witnesses is that there are more lieutenants than there were before and that more of them are working in the CAS/SAS.

The Respondent offered its own evidence to show that the lieutenants and newly promoted supervisors who are performing the work previously performed by unit employees are statutory supervisors. Project Manager Fernandez testified that lieutenants "supervise the security officers in their area" and have the authority and are expected to issue discipline as needed. The Respondent placed in evidence copies of 11 "Employee Verbal Counseling" forms that were issued to security officers between September 2003 and February 2004. Each of these forms is signed by a lieutenant on the line designated for a supervisor's signature. All but three involved attendance issues, e.g. being late for work, and were written in what appeared to be boilerplate language. The Respondent also placed in evidence 14 "Employee Written Counseling" forms issued to security officers during the same period, also signed by lieutenants as the supervisor. All but two involved attendance issues. The nonattendance-related verbal and written counseling forms involved incidents such as an officer being out of his assigned area, failing to follow the supervisor's instructions, failing to properly perform a fire watch rove and leaving a post without

[19] As found by the Regional Director, the sergeants performed generally the same functions as the lieutenants and filled in for lieutenants when they were absent. Martin testified in this proceeding that before the petition was filed to represent the sergeants he considered sergeants and lieutenants to have the same authority and considered them to be supervisors.

proper authorization.[20] According to Fernandez, the lieutenants involved did not have to consult with any other supervisors before issuing these disciplinary forms, which became part of the employee's personnel file and constituted steps in the Respondent's progressive discipline system.

The Respondent also placed in evidence copies of three "Daily Fire Watch Rove Field Check" forms completed by lieutenants since September 1. These forms document deficiencies found by the lieutenant during a field check of security officers who were performing fire watch roves. According to Fernandez, lieutenants are expected to complete at least one fire watch rove field check per shift and it is common for them to note deficiencies and recommend corrective action. The deficiencies noted on the forms in evidence all involved failing to follow written procedures for carrying out a fire watch rove, procedures that were not established by the supervisor who prepared the report. All three forms also are signed by the shift captain on a line designated for "shift supervisor review." As noted above, one of the written counseling forms involved a failure to perform a fire watch rove properly.

Fernandez testified further that the lieutenants conduct regular security drills for their team as a method of developing and improving security responses and performance. According to Fernandez, each team usually runs about 15–30 such drills a month and the lieutenants create their own scenarios for each drill following guidelines established by the Respondent. Fernandez testified further that the lieutenant/supervisor reviews the performance of the security officers during the drill and corrects any deficiencies found. There is no evidence of any discipline having resulted from these drills. Fernandez also testified that, although the captains make the daily post assignments for the security officers, the lieutenants have the authority to change these assignments to respond to changes during a shift. According to Fernandez, the lieutenant would notify the captain that he was changing an officers assignment but he would not need the captain's approval unless the change impacted another area outside the lieutenant's supervision. The duties and responsibilities about which Fernandez testified are also reflected in a new job description for the position of Security Supervisor (Shift Supervisor) that was prepared on August 20. This job description is similar to the sergeant's job description that was in evidence at the representation case hearing, although language has been added to suggest that the incumbent exercises independent judgment and discretion in carrying out these duties.

B. Analysis and Conclusions

1. Did the Respondent violate Section 8(a)(5) by altering the scope of the bargaining units or unilaterally removing work from the units?

The evidence in the record, as described above, reveals very little dispute regarding the facts material to this allegation. The Union and its Local 610 have represented the security officers employed by the Respondent at Turkey Point since July 8, 1999. The Union's certification, and the recognition clause in the collective-bargaining agreement negotiated by the parties in 2000, specifically includes within the bargaining unit the CAS and SAS operators. Although the collective-bargaining agreement was set to expire on April 3, the parties have extended it pending negotiation of a new agreement. On March 4, the Union was certified to represent another unit of the Respondent's employees at Turkey Point, i.e., sergeants. The scope of this unit was defined in a decision by the Board's Regional Director that was adopted by the Board specifically rejecting the Respondent's contention that the sergeants were supervisors within the meaning of the Act.

In March, about the same time that the Union was certified to represent the sergeants, the parties commenced negotiations for a new collective-bargaining agreement covering the security officers unit to replace the 2000–2003 agreement. The parties held a series of 2-day bargaining sessions, in early March, mid-April, mid-July, and early September, without reaching an overall agreement on a new contract. There is no dispute that the Union has sought, from the outset of negotiations, to include the newly-certified unit of sergeants in any contract negotiated for the security officers, a proposal that the Respondent has rejected. It is also undisputed that, despite the Respondent having advised the Union from the beginning of negotiations that it intended to negotiate a separate agreement for the sergeants' unit, the Union has never formally requested bargaining separately for the sergeants and has instead insisted on its proposal to, in essence, merge these two units.

It is also undisputed that, at the beginning of negotiations, the Respondent proposed removing all references to the CAS and SAS from the collective-bargaining agreement on the basis that the Respondent wanted to achieve consistency with how such duties are performed at other FPL nuclear facilities where the Respondent provides guard services. It is also undisputed that the Union has adamantly opposed the removal of references to CAS/SAS duties from the contract. Despite the Union's opposition to this proposal, the Respondent never abandoned it. The evidence thus supports a finding that both sides were insisting to impasse on proposals to alter the scope of the certified units.[21]

The evidence further establishes that, in the midst of the parties' negotiations, FPL solicited bids for a new contract to provide security services at Turkey Point and the two other nuclear facilities where the Respondent was providing such services. The bid specifications issued with FPL's request for proposals provided, inter alia, that "all personnel assigned to operate CAS/SAS functions shall be supervisors" and that "contractor supervisors will be defined as non-bargaining personnel." There is no mention of sergeants in the bid specifications nor in the proposed organizational structure attached to the bid specifications. The attached organizational structure specified only

[20] In the last incident, the employee contacted his lieutenant before leaving his post to go home sick. The officer's violation was in failing to notify the captain or someone higher in the chain of command before leaving his post.

[21] The Union could have achieved the result it sought in negotiations by requesting a self-determination election allowing the sergeants to decide if they wished to be represented in a combined unit. As the Regional Director and the Board noted in their respective decisions, no party made such a request.

one lead shift supervisor and five shift supervisors per shift, with the rest of the staffing to consist of full- and part-time armed security officers.[22] In late June, during a hiatus in bargaining, the Respondent submitted a bid that complied with FPL's specifications. Uncontradicted testimony establishes that the Respondent was chosen from among three bidders who had submitted bids with identical staffing provisions. The Respondent was awarded the contract to continue providing guard services for FPL in mid-August and the contract went into effect on September 1. There is no evidence in the record, and the General Counsel does not contend, that the Respondent and FPL conspired in the formulation of the bid specifications to exclude the CAS/SAS operators or sergeants from the units represented by the Union.[23]

The evidence further establishes that the Respondent's first formal notification to the Union of the bid specifications and their impact on the units occurred at the July 16 negotiation session. The parties disagree as to exactly what was said regarding this subject. The General Counsel's witnesses, while not entirely consistent, claim that the Respondent only mentioned elimination of CAS/SAS from the unit and did not specifically tell the Union that it was going to eliminate the sergeants classification as well. The Respondent's witnesses, with corroboration from their bargaining notes and from a document provided to the Union at the meeting, claim that they did tell the Union that both CAS/SAS and the sergeants would be eliminated under the new FPL contract, if the Respondent was successful in its bid. I find the testimony of Wegener and Hurley more convincing on this point. It makes no sense that the Respondent would take the position, in its written proposal, that the Union's proposal to include sergeants in the collective-bargaining agreement was moot without also telling the Union that the proposal was moot because the Respondent believed that bid specifications required sergeants to be supervisors. In any event, there is no dispute that the Union did not agree with the Respondent's plans to eliminate a significant portion of one unit and all of the second unit at the July 17 meeting.[24]

There is also no dispute that, notwithstanding the absence of an agreement and the recency of the notification to the Union, the Respondent went ahead with its plans to eliminate the CAS/SAS and sergeant positions the next day. On July 17, the Respondent's captains announced and Fernandez posted openings for new shift supervisors, soliciting employees to bid on these positions. Within a month, the Respondent had selected, tested, and trained the new supervisors, announcing the promotions about the time it was awarded a new contract by FPL. Uncontradicted testimony from witnesses for the General Counsel establishes that, in late August, the Respondent informed its sergeants who had not bid on the new positions that they would be demoted to security officers effective September 1. When the Respondent's new contract with FPL went into effect on September 1, the former sergeants became security officers with a reduction in pay and benefits and security officers who previously staffed the CAS/SAS were reassigned to field posts without any loss of pay or change in benefits. The preponderance of the evidence also reveals that the lieutenants/shift supervisors, including those promoted in August, who assumed the duties previously performed by unit sergeants and CAS/SAS operators are essentially performing the same day-to-day functions without any discernable change.[25]

Based on these facts, the General Counsel and the Charging Party argue that the Respondent has violated the Act either by altering the scope of established bargaining units without the Union's consent or by unilaterally reassigning bargaining unit work to nonunit employees without affording the Union adequate notice and an opportunity to bargain regarding this mandatory subject. The Respondent counters that it was under no obligation to bargain with the Union before making these changes because they were the types of decisions which the Supreme Court has held are not amenable to resolution through the process of collective bargaining, citing *First National Maintenance Corp. v. NLRB,* 452 U.S. 666 (1981). In the Respondent's view of the facts, the bid specifications issued by FPL on May 28 took the sergeant and CAS/SAS issues out of the realm of mandatory bargaining.

The Board has consistently held that, once a specific job has been included within the scope of a bargaining unit by Board action or agreement of the parties, an employer can not remove the position without first securing the consent of the Board, i.e. through a unit clarification proceeding, or of the union that represents the unit employees. *Mt. Sinai Hospital,* 331 NLRB 895 (2000), enfd. in an unpublished opinion at 2001 WL 533552 (2d Cir. 2001); *Holy Cross Hospital,* 319 NLRB 1361 (1995). Accord: *Public Service Co. of New Mexico,* 337 NLRB 193, 199 (2001). The Board has also held for many years that a proposal to transfer employees outside the unit is a permissive subject of bargaining. See *Catalina Pacific Concrete Co.,* 330 NLRB 144 (1999). In a somewhat parallel line of cases, the Board has also held that the removal or reclassification of work from unit to nonunit work is a mandatory subject of bargaining if it has a significant impact on the bargaining unit, e.g., through a reduction in amount of work available for unit employees. Before an employer may implement such a transfer of work, it must provide sufficient notice to the Union to afford an opportunity for meaningful bargaining. *Regal Cinemas, Inc.,* 334 NLRB 304 (2001), enfd. 317 F.3d 300 ((D.C. Cir. 2003); *Hampton House,* 317 NLRB 1005 (1995); *Lutheran Home of Kendallville, Indiana,* 264 NLRB 525 (1982); *Fry Foods,* 241 NLRB 76, 88 (1979). It has not always been clear what the

[22] Although the bid specification includes provision for part-time officers, the Respondent advised the Union in July that it was eliminating part-time positions in accordance with these specifications. No explanation for this contradiction in the evidence has been offered by the Respondent. It is not necessary for me to resolve this conflict because neither the Union nor the General Counsel has alleged that the Respondent's decision to eliminate part-time positions violated the Act.

[23] There is evidence that FPL had previously considered requiring that CAS/SAS functions be performed by supervisors and that these functions at its other nuclear facilities are in fact staffed by nonunit supervisors.

[24] On this point, I find Wegener's testimony that the Union did not reject the Respondent's proposal incredible and implausible.

[25] The Respondent's contention that the authority possessed and exercised by the individuals now doing these jobs has changed will be discussed infra.

distinction is between an alteration in the scope of the unit and the transfer of unit work. In *Hill-Rom Co.,*[26] the Board attempted to explain the difference. According to the Board, the reclassification of both employees and their work to new positions outside the unit results in a change in the scope of the unit whereas a transfer only of the work to nonunit employees presumptively constitutes a mandatory subject of bargaining.

I find that the Respondent's actions here with respect to the sergeants is more akin to a change in the scope of the unit than a transfer or reassignment of unit work. In reaching this conclusion, I note the remarkable factual similarity to cases such as *Mt. Sinai,* supra, and *Holy Cross Hospital,* supra, where the Board reached this conclusion. In all of those cases, the employer, after a representation proceeding or arbitration at which its contention that a group of employees were supervisors was rejected, created new positions and promoted employees occupying the allegedly supervisory positions to these new positions, where they continued to perform essentially the same duties. In this case, after failing to convince the Board that the sergeants were supervisors, the Respondent created and posted additional shift supervisor positions and invited its employees, including those who held the sergeants position, to bid on these new jobs. The Respondent here even asserted the same claim as the employer in *Holy Cross Hospital,* i.e., that it decided to create the new shift supervisor position after learning at a unit clarification hearing that its "house managers" were not exercising the authority they had. The employer there, as here, justified its decision by claiming a need for additional supervision of other employees.

The Respondent also claimed here that its decision to eliminate the sergeant's position was dictated by its client, FPL, when the new bid specifications were issued. According to the Respondent, it had to eliminate the sergeants and create additional shift supervisor positions outside the unit in order to keep the contract. I disagree. As previously noted, there is no mention of sergeants in FPL's bid specification. The only specific requirement is that all "supervisors" be nonunit personnel and that the CAS and SAS be staffed by nonunit supervisors. Because the Board had already ruled that sergeants were not "supervisors" and because sergeants did not ordinarily staff the CAS and SAS, the Respondent was already in compliance with the bid specifications in July when it informed the Union that it planned to eliminate the sergeant's position. As the Union suggested, the Respondent could have satisfied the bid specifications without eliminating unit positions by treating the sergeants as nonsupervisory lead officers. In fact, the wage scale attached to the contract ultimately executed by the Respondent and FPL includes a classification of "armed officer/lead guard." It was the Respondent's own interpretation of the language in the bid specification which led it to the decision to eliminate sergeants. By implementing this decision, the Respondent eviscerated the recently certified unit and left the Union with no employees to represent. A more significant alteration of the unit can hardly be imagined. See *Public Service Co. of New Mexico,* supra; *Holy Cross Hospital,* supra. Accordingly, I find that the Respondent violated Section 8(a)(1) and (5) by altering the scope of unit B without the Union's consent when it announced and unilaterally implemented its decision to eliminate the position of sergeant.

I find that the Respondent's removal of the CAS/SAS operator functions from the security officers unit also constitutes a change in the scope of the unit. The certification and the collective-bargaining agreement specifically included CAS/SAS operators in the unit. Although the lieutenants and newly promoted shift supervisors may be performing additional supervisory functions, their primary responsibility is to monitor the various security devices and dispatch security officers to respond to alarms. The only significant difference is that the new supervisors, if they are truly supervisory, have the authority to enforce their instructions to a security officer with discipline. In the past, if a security officer failed or refused to respond to an alarm as directed by the CAS/SAS operator, the CAS/SAS operator would have to inform the lieutenant or captain to take further action.[27] I also find that the Respondent did not simply reassign work from unit to nonunit employees but in fact removed the employees performing this work from the unit when it promoted CAS/SAS operators into the newly opened shift supervisor positions. The fact that the employees voluntarily bid on the jobs is not decisive. See *Holy Cross Hospital,* supra, where the employer also posted the new supervisor position and invited unit employees to apply. The job posting specifically required that applicants have CAS/SAS skills and offered a significant increase in salary. The obvious intent was to encourage those security officers already performing this work to bid on the new position.[28]

Assuming arguendo that the Respondent's elimination of the CAS/SAS operator position and the reassignment of work previously performed by those employees to nonunit supervisors did not alter the scope of the unit, it nonetheless constituted a change in a mandatory subject of bargaining. As the Board has noted, although an employer has the right to unilaterally create and fill supervisory positions, it must bargain with the union if the new supervisor will continue to perform unit work to the detriment of unit employees. *Hampton House,* supra. Here, as a result of the Respondent's creation of new shift supervisor positions, the unit classification of CAS/SAS operator was eliminated and the work they did was re-assigned to nonunit personnel. The Respondent thus would have a duty to notify and bargain with the Union before implementing such a change even if it did not result in a change in the scope of the unit. Although the Respondent had proposed removing all references to CAS and SAS from a new collective-bargaining agreement since the start of contract negotiations, it did not inform the Union that it intended to eliminate the unit position of CAS/SAS operator, even in the absence of an overall contract agreement, until July

[26] 297 NLRB 351 (1989), enf. denied 957 F.2d 454 (7th Cir. 1992).

[27] Although the Respondent's witnesses claimed this was one of the perceived needs FPL's bid specification was intended to fill by having supervisors monitor the CAS and SAS, there is no evidence that security officers in fact failed or refused to respond to the CAS/SAS operator's directions.

[28] In fact, the Respondent did encourage at least one CAS/SAS operator, Daniels, who had withdrawn his bid on the job to re-apply by telling him individually and at group meetings that he would make a good supervisor.

16. Rather than await a response and bargaining over this decision, the Respondent in effect implemented it the next day when it posted the new supervisor positions and invited employees to apply. The parties could not have been at impasse on this subject on July 17 since they had not even reached the economic proposals for a new contract and the Union barely had time to digest the announcement. Thus, even assuming the Respondent's announcement on July 16 was the same proposal it had made in March, the Respondent was not privileged to implement this contract proposal piecemeal. See *Bottom Line Enterprises,* 302 NLRB 373, 374 (1991).

Under either theory of violation advanced by the General Counsel, I would ordinarily be compelled to find that the unilateral elimination of the CAS/SAS operator position violated the Act. However, this case presents a factual scenario not present in those cases relied upon by the General Counsel and the Charging Party, i.e. the intervention of FPL and its bid specification for a new contract to provide guard services. In contrast to the situation involving the sergeants, FPL's bid specification expressly required any contractor it hired to staff the CAS and SAS only with nonunit supervisors. This placed the Respondent in the difficult position of having to continue to staff the CAS and SAS with unit employees and thereby lose the contract, or comply with the bid specifications in defiance of its obligations to the Union. I have not found any cases involving an alleged change in the scope of the Unit where the actions of a third party directly caused the change. There are cases, cited by the Respondent, in which the Supreme Court's holding in *First National Maintenance*, supra, has been applied to decisions involving the transfer of unit work to nonunit employees. See, e.g., *Furniture Renters of America, Inc. v. NLRB,* 36 F.3d 1240 (3d Cir. 1994); *Oklahoma Fixture Co.,* 314 NLRB 958 (1994), enf. denied on other grounds 79 F.3d 1030 (10th Cir. 1996); *Collateral Control Corp.,* 288 NLRB 308 (1988). In those cases, the issue turned on whether the alleged change at issue was "amenable to resolution through the process of collective bargaining." Such an analysis would appear apposite to the change alleged here under either theory.

The preponderance of the evidence here convinces me that the decision to eliminate the CAS/SAS operator position from the unit and the transfer of work performed by those employees to nonunit supervisors was not amenable to bargaining. As the Respondent points out in its brief, there was nothing the Union could have offered at the bargaining table which would have changed FPL's bid specification. FPL was not even a party to the collective-bargaining agreement or the negotiations.[29] If the Respondent had not submitted a bid consistent with FPL's bid specifications, in all probability it would not have been awarded the contract. In that case, the entire unit may have been eliminated. This is not much different than the situation that existed in *First National Maintenance,* supra. There, when the employer and the client for whom it provided janitorial and housekeeping services were unable to agree on a management fee, the employer terminated its contract with the client, resulting in loss of employment to the employees working at the facility. A similar result was foreseeable here if the Respondent and FPL were unable to agree on a new contract. Accordingly, I find that the Respondent did not violate Section 8(a)(5) and (1) of the Act by announcing and unilaterally implementing its decision to eliminate the CAS/SAS operator position and reassigning CAS/SAS duties to nonunit employees.

2. Was the Respondent's decision to eliminate sergeants motivated by antiunion animus in violation of Section 8(a)(3)?

I have found above that the Respondent violated Section 8(a)(5) when it altered the scope of unit B by eliminating the sergeants position. The General Counsel alleges that the Respondent's decision also violated Section 8(a)(1) and (3) because it was motivated by the sergeants having voted in favor of union representation in the recent Board-conducted election. In *Wright line, Inc.,*[30] the Board announced the test it would apply in all cases that turn on employer motivation. Under this test, the General Counsel bears the initial burden of proving by a preponderance of the evidence that union or other protected concerted activity was a motivating factor in the employer's actions. To meet this burden, the General Counsel must offer evidence of union or other protected activity, employer knowledge of this activity, and the existence of antiunion animus that motivated the employer to take the action it did. The Board has recognized that direct evidence of an unlawful motivation is rarely available. The General Counsel may meet his burden through circumstantial evidence, such as timing and disparate treatment, from which an unlawful motive may be inferred. See *Naomi Knitting Plant,* 328 NLRB 1279 (1999), and cases cited therein. If the General Counsel meets his burden, then the burden shifts to the respondent to prove, by a preponderance of the evidence, that it would have taken the same action, or made the same decision, even in the absence of protected activity.

The evidence in the record establishes that a majority of the sergeants employed by the Respondent at Turkey Point had exercised their statutory right to designate the Union as their collective-bargaining representative in a Board-conducted election and that the Respondent was well aware of this. It is also beyond dispute that the Respondent was opposed to its sergeants becoming part of the Union. The Respondent's opposition, however, was based on its belief that the sergeants could not be represented by the Union because they were statutory supervisors. The Respondent clearly had the right to assert this position in the representation case, including the right to appeal the Regional Director's contrary decision to the Board. The Respondent could also have refused to bargain with the Union over the sergeants in order to test the certification in the court of appeals. The Respondent did not do this.[31] Instead, while the

[29] As noted throughout this decision, there is no evidence in the record, nor any contention, that FPL was a joint employer of the Respondent's security officers or that the Respondent was behind the formulation of the particular bid specification at issue.

[30] 251 NLRB 1083 ((1980), enfd. 622 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 988 (1982). See also *Manno Electric,* 321 NLRB 278, 280 fn. 12 (1996).

[31] The Respondent may argue that the Union never formally requested bargaining for the sergeants' unit. While no specific request was made, the Union did seek to bargain for the sergeants as part of the existing security officers unit. Rather than refuse to bargain regarding sergeants in general, which would have triggered a test of cert. case, the

parties were in the midst of bargaining for a contract to cover the security officers, and while the Union's proposal to include sergeants in the new contract was pending, the Respondent announced that in order to comply with new bid specifications fortuitously issued by its client, it had to eliminate the position of sergeants. The Respondent then implemented this decision before any bargaining on the matter had occurred. I have already found that the bid specification did not require the Respondent to eliminate sergeants, that this was a choice the Respondent made. The Respondent's use of the FPL bid specification as a justification for eliminating the sergeants was thus a pretext for the Respondent to achieve the result it had been unable to achieve through legal process.

In evaluating the Respondent's motivation for eliminating the sergeants position, I have also considered the essentially undisputed evidence that the Respondent communicated to its employees, at meetings and in memos before the election, that it would always consider the sergeants to be supervisors, notwithstanding the decision of the Board. In the meetings and memos, the Respondent presented the sergeants with an ultimatum, either vote against the Union and remain supervisors in the Respondent's eyes, or turn in their chevrons and become rank and file security officers. Once the employees made their choice in the election, the Respondent proceeded to eliminate their position, thus negating the employee's choice. The Respondent continued to espouse the belief, despite the Board's findings, that the sergeants were supervisors and that it could no longer employ them if they were in the unit because of the FPL bid specification. Under these circumstances, it is unlikely that the Respondent would have eliminated the sergeants position had the employees voted against union representation.

I find that the General Counsel has established by a preponderance of the evidence, including the timing of the Respondent's decision and the pretextual reasons advanced for it, that the Respondent was discriminatorily motivated in deciding to eliminate the sergeants position. The Respondent offered no evidence to show that it would have taken the same action had employees not voted in favor of representation. Accordingly, I find that the Respondent violated Section 8(a)(1) and (3) of the Act, as alleged, when it eliminated the position of sergeant effective September 1.

3. Did the Respondent violate Section 8(a)(5) and (1) by failing to furnish information to the Union in a timely manner?

The General Counsel alleges that the Respondent failed to timely produce the following information requested by the Union:

> 1. a seniority list of sergeants currently employed, which was requested by the Union on April 24 and July 8.
> 2. Sergeant Ortiz' attendance record from January 2002 to June 24, 20003, records showing the hours Ortiz worked during this period and any doctor's notes he provided, requested on June 24 and July 8.
> 3. the mailing address and seniority dates of Sergeants Baxley, DeFreitas, Koontz, Marquez, Myers and Ortiz, requested on June 24 and July 8.

There is no dispute that the Union made these requests and that none of this information was provided to the Union until October 2. Although Fernandez testified for the Respondent that he routinely provided the Union with any information it requested as soon as he could, he did not deny delaying in furnishing this particular information relating to the sergeants' unit. Fernandez did claim that he was not aware of the first request, which was addressed to Bitner about the time that he took over from Bitner as project manager, until September. However, although the Union requested the same information in another letter addressed to Fernandez on July 8, he admittedly did not respond to this request until October 2. Fernandez also claimed that the Respondent had provided some of the information requested by the Union relating to sergeants to Baxley, because he had been identified at negotiations as a representative of the sergeants unit. The evidence in the record shows only one piece of information provided to Baxley, a list of sergeants who had received awards, provided by Bitner on April 10. This predates the requests at issue here. There is no evidence that the Respondent gave any of the information in question to Baxley or any other representative of the Union before October 2.

In its brief the Respondent argues that the delay in providing information here was inadvertent and that the Union never pursued the information request. The Respondent also suggests that the Union was not entitled to the information related to Ortiz because there was no grievance procedure in place covering the sergeants' unit. Martin in fact did pursue the information request by speaking to Fernandez shortly after submitting the July 8 request. According to Martin, Fernandez told Martin that he had no jurisdiction over the sergeants. Martin did not pursue the request thereafter because it apparently would have been futile. Fernandez could not recall such a conversation and claimed he only spoke to Martin about the information request on October 1, after the unfair labor practice charge was filed. I credit Martin's testimony in this regard as I find his description of the July conversation more believable that Fernandez' lack of recall. Based on the tenor of Fernandez' comments to Martin, any lack of diligence on Martin's part in pursuing the information request would be understandable.

The information at issue, relating to the terms and conditions of employment of sergeants employed in the recently certified unit, is presumptively relevant. See *NLRB v. Acme Industrial Co.,* 385 U.S. 432 (1967); *Farina Corp.,* 310 NLRB 318 (1993). This includes the information regarding Ortiz that Martin claimed he needed to investigate a potential grievance. Although there may not have been a contract in effect containing a grievance procedure, the Respondent had a duty to bargain with the Union, on request, regarding discipline issued to unit employees because discipline is a mandatory subject of bargaining. The Union, in performing its statutory function as Ortiz' representative, had a right to request information to investigate whether to seek bargaining over discipline that may have been imposed.

Respondent simply told the Union that it intended to bargain separately for the sergeants.

The fact that the information at issue was requested by Local 610 rather than the International Union, which had received the certification, does not excuse the delay in furnishing the information. The Respondent was aware, from its bargaining history with the Union in the security officers unit and from negotiations that had been going on since March 4, that Local 610 was an affiliate of the International Union and had been delegated the task of representing the employees at Turkey Point. If the Respondent truly questioned the right of Local 610 to ask for information relevant to the sergeants unit, it could have sought clarification from the International Union. The Respondent's decision to ignore the information request entirely is consistent with its overall conduct toward the Union regarding the sergeants, i.e. ignore the Union's right to act as the employees' bargaining representative.

Based on the above, I find that the Respondent has violated the Act as alleged. It is well established that, when a union makes a request for relevant information, an employer has a duty to supply the information in a timely manner or to adequately explain why the information was not furnished. *Beverly California Corp. II,* 326 NLRB 153, 157 (1998), enfd. 227 F.3d 817 (7th Cir. 2000). The Respondent failed to give the Union any explanation, beyond Fernandez' statement to Martin, for failing to furnish the information until October 2. The Respondent's compliance with the request, only after the unfair labor practice charge was filed, did not excuse the more than 3 months' delay in furnishing the information.

CONCLUSIONS OF LAW

1. By announcing and implementing the decision to eliminate the job classification of sergeant, effective September 1, 2003, because a majority of the sergeants had voted in favor of union representation, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

2. By eliminating the sergeant position without the consent of the Union, the Respondent has altered the scope of the unit certified by the Board and has failed and refused to bargain collectively in good faith with the Union, thereby engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

3. By failing to furnish the Union, in a timely manner, information requested by the Union that was relevant to and necessary for representation of the sergeants, the Respondent has failed and refused to bargain collectively in good faith with the Union, thereby engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

4. The Respondent did not violate Section 8(a)(1) and (5), or any other provision of the Act, when it announced and implemented its decision to re-assign operation of the CAS and SAS to nonunit supervisors pursuant to contract requirements imposed by Florida Power & Light.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. As a remedy for the Respondent's unlawful elimination of the sergeant job classification, I shall recommend that the Respondent restore the status quo ante by reinstating the position to the certified unit represented by the Union and by offering the employees who previously held these positions reinstatement as sergeants with the same wages, benefits and other terms and conditions of employment they had before their demotion to security officer. I shall also recommend that the Respondent make the former sergeants whole for all wages and benefits lost as a result of their demotion from September 1, 2003 until the date they are reinstated to their former position, with interest as computed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987). To further remedy the 8(a)(5) violation, I shall recommend that the Respondent be ordered to bargain in good faith with the Union as the certified representative of the unit of sergeants employed at Turkey Point. Because the Respondent has already furnished the information requested by the Union, no further affirmative relief is required to remedy the Respondent's untimely response to the Union's information request. Finally, I shall recommend the customary notice posting to apprise the employees of their rights.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[32]

ORDER

The Respondent, the Wackenhut Corporation, Palm Beach Gardens, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Eliminating job classifications because the employees occupying those jobs have chosen to be represented by International Union Security, Police and Fire Professionals of America (SPFPA or the Union) or any other labor organization.

(b) Unilaterally altering the scope of any certified or recognized bargaining unit without the consent of the collective-bargaining representative of employees in the unit.

(c) Failing to timely furnish information requested by the Union that is relevant to and necessary for the Union's performance of its statutory functions as employees' exclusive collective-bargaining representative.

(d) 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) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

[32] 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.

All sergeants performing guard duties as defined in Section 9(b)(3) of the National Labor Relations Act, as amended, employed by the Wackenhut Corporation at Turkey Point Nuclear Power Plant at Florida City, Florida, excluding all office clerical employees, professional employees, supervisors as defined in the Act, and all other employees.

(b) Restore the position of sergeant as it existed at the Turkey Point facility prior to September 1, 2003.

(c) Offer the following employees reinstatement to their former position as sergeants at the Turkey Point facility with the same wages, benefits, and other terms and conditions that existed prior to September 1, 2003:

Brian Baxley	William Myers
Robert Koontz	Juan Ortiz
Henry Marquez	

(d) Make the employees named above whole for any loss of earnings and other benefits suffered as a result of their demotion to security officer on September 1, 2003, in the manner set forth in the remedy section of the decision.

(e) 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.

(f) Within 14 days after service by the Region, post at its Turkey Point facility in Florida City, Florida copies of the attached notice marked "Appendix."[33] Copies of the Notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where Notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 16, 2003.

(g) 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.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

[33] 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."