H. C. Thomson, Inc. *and* District No. 1 – Pacific Coast District, Marine Engineers' Beneficial Association. Case 20–CA–10206

July 13, 1977

DECISION AND ORDER

BY MEMBERS JENKINS, MURPHY, AND WALTHER

On December 3, 1976, Administrative Law Judge Maurice M. Miller issued the attached Decision in this proceeding. Thereafter, Respondent, General Counsel, and the Charging Party filed exceptions and supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge, only to the extent consistent herewith.

1. During the latter part of 1973 or early 1974, Floyd Crites purchased Respondent and its tugboat *Yolo*. Initially, the Company was not an operative enterprise but, sometime during the first few months of 1975, Crites shifted his barge-hauling services from another company he owned, River Sands, Inc., to Respondent. At that time two tugboat operators, Peter Ferrari and Woodie Wilkinson, were transferred from another of Crites' enterprises (West Coast Dredging Company) to Respondent in order to operate the *Yolo*. While employed by West Coast Dredging Company, these tugboat operators had been covered by a collective-bargaining agreement between that company and the Marine Engineers Beneficial Association (MEBA), which expired in mid-1974 without being renegotiated. However, at the time of their transfer to Respondent and immediately thereafter, Wilkinson and Ferrari were not covered by a collective-bargaining contract. Nevertheless, Crites was aware of their coverage under the previous contract and of their membership in MEBA.

On February 7, 1975, MEBA Business Representative Ferguson and Leo Turrin, Respondent's vice president and general manager, executed a 30-day interim agreement providing in relevant part that: (1) the two parties would meet again during its term in order to ratify a complete working agreement; (2) rates of pay and contributions to fringe benefit plans would be the same as contained in MEBA's commercial towing agreements in the San Francisco Bay area; and (3) the working and general conditions would be governed by the terms of a June 1, 1974, agreement with Operating Engineers Local #3 (hereinafter Local 3) covering Northern California barge operations.

During the 30-day life of this interim agreement, Ferguson tried unsuccessfully on several occasions to contact Turrin to arrange bargaining sessions. The two finally met on March 10, and three or four times subsequently. Although Ferguson was not initially so informed, Turrin was not authorized to bind Respondent during these negotiations. Consequently, the sessions between Turrin and Ferguson did not result in any final agreement or specific contract language, but Turrin nevertheless testified that "[W]e worked this out, so that we got fairly close . . . ." At their last meeting, Ferguson presented Turrin with the Union's complete contract proposal. Turrin then indicated for the first time that he was not authorized to bind Respondent, that only Crites could give final approval for any agreement, and that he would submit the MEBA proposal for Crites' consideration. Turrin did so, but Crites refused to approve it because he believed it varied too greatly from the terms of Respondent's contract with Local 3. On Friday, April 4, Crites, Turrin, and Ferguson met together for the first and only time during the negotiations. They discussed the MEBA proposal — which Crites essentially rejected, while at the same time insisting upon a contract paralleling the Local 3 contract referred to above. Ferguson strongly protested this demand, particularly since it would result in a wage reduction to $6.30 an hour from the $8.74 provided for under the interim agreement. Upon Ferguson's rejection of his proposal, Crites stated that "MEBA wasn't the only union that [he] could deal with. As a matter of fact, with the employment situation the way it was, [he] really didn't have to do business with any union." In spite of this reaction, arrangements were made for Turrin to draft a complete counterproposal which Ferguson would present at MEBA's membership meeting 2 days later on April 6. Ferguson promised that the proposal would be considered, but predicted its rejection.

At that union meeting, Respondent's contract proposal was rejected. Ferguson informed Respondent of the membership's action in a letter dated April 8. Upon receipt of this letter, Crites concluded that MEBA had terminated negotiations and that the

[1] The General Counsel and Charging Party have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

Union had forfeited its recognition rights because the tugboat operators, as discussed more fully below, had been on strike since the latter part of March. He then directed Turrin to contact Captain Fuller of the International Organization of Masters, Mates and Pilots (hereinafter MMP) to see if they had people available to staff the *Yolo*. Captain Fuller indicated that his union could supply the necessary people and suggested that "later on down the road" they could negotiate a collective-bargaining agreement. Shortly thereafter, Turrin met with Fuller and the two reached a verbal consensus that MMP would supply the tugboat operators at wages and fringe benefits along the lines of those contained in Respondent's contract with Local 3. No written contract or other agreement had, as of the hearing, been executed by Respondent and MMP, although a copy of Respondent's contract proposal had been sent to that union. Nevertheless, MMP members manned the *Yolo* when it resumed operations 1 - 2 weeks after the MEBA membership rejected Respondent's contract proposal.

MEBA Representative Ferguson again met with Turrin on a date some 3 or 4 weeks subsequent to the April 6 contract rejection and suggested a resumption of negotiations. Turrin rejected this offer, stating that Ferguson was too late in that Crites either had already entered into an agreement with MMP or was about to do so. Turrin also indicated that he would contact Ferguson later, but had not done so as of the hearing.

The Administrative Law Judge found that the striking tugboat operators were only economic strikers who had been permanently replaced. From such findings, he then concluded that MEBA no longer represented Respondent's employees, Respondent's refusal to resume negotiations was thereby privileged, and, accordingly, there was no violation of Section 8(a)(5) of the Act when it refused to resume bargaining with MEBA. We disagree. In our judgment, Respondent engaged in bad-faith bargaining in violation of Section 8(a)(5) of the Act throughout the negotiations—a conclusion we draw from several indicative factors.

First, while the Administrative Law Judge, relying on credited testimony, found that Turrin was not, in fact, vested with authority to bind Respondent in the negotiations, there is no probative record evidence[2] to show that Turrin ever disavowed the apparent authority to commit his employer which Ferguson would reasonably have presumed him to possess. Inasmuch as no exceptions were taken to the Administrative Law Judge's finding that just a few weeks before Turrin, acting independently of Crites, had negotiated and executed an interim Agreement with Ferguson, and as the record is void of evidence to counter this finding, we accept and rely on it. Thus, absent any notice or indication to the contrary, Ferguson could reasonably have expected that Turrin, who previously had authority to bind Respondent, continued to possess such power. Thus, we conclude that Turrin's failure affirmatively to inform Ferguson of his lack of authority until their third or fourth bargaining session is indicative of bad faith. This is particularly true in view of Turrin's own testimony at the hearing that the negotiations to that point had drawn the parties' positions fairly close together.

Secondly, at the sole negotiation meeting with Crites — the only person actually authorized to bind Respondent — on April 4, Respondent proposed a substantial wage reduction. The record clearly suggests, as even attested to by Turrin, that up to that point negotiations had progressed smoothly with the parties having shifted positions and compromised on issues in order to approach agreement. Nevertheless, at this stage in the negotiations Crites interjected a proposal to reduce wages by more than $2 an hour. In view of the severity of the proposed wage reduction, Crites must have, or at the very least shoud have, known that such a proposal concerning a vital issue of primary employee interest could not have been favorably received or accepted by the Union. Thus, we conclude, contrary to the Administrative Law Judge, that Crites' introduction of the wage-reduction issue was, indeed, a "widening of the area of disagreement" evidencing Respondent's bad faith.

Finally, Respondent's conduct immediately after MEBA's rejection of its counterproposal is further indicative of its bad faith. Hardly before the ink on MEBA's April 8 letter to Respondent was dry, Crites instructed Turrin to contact MMP concerning replacements for the striking employees, licensed operators were secured to operate the vessel, and a verbal agreement was reached with MMP that the

[2] We recognize that, in answering a leading question by Respondent's attorney on direct examination, Turrin responded affirmatively when asked to confirm that he told Ferguson from the outset that he did not have full authority. Again, in response to a leading question, Turrin also stated that he at no time told Ferguson he was in charge of Respondent's negotiations. We note, however, that in this latter response Turrin failed to indicate that he, in fact, affirmatively disavowed his authority in the negotiations. Since both these answers were in response to leading questions under direct examination, we accord minimal weight to them and view them as little more than Respondent attorney's testimony in favor of his client's position. In view of the absence of any testimony to this effect on Turrin's own initiative or, in his own words, rather than those of his attorney, we find the record evidence insufficient to establish that he disclaimed his apparent authority. Our finding in this regard is not, however, in derogation of the Administrative Law Judge's conclusion (which we adopt) that after MEBA's complete contract proposal was presented to Respondent at the last negotiation session between Turrin and Ferguson Turrin then made it clear that he was "working" for Crites who would make the Company's final determination.

wages and employment conditions would parallel the Local 3 contract. These actions clearly indicate Respondent's eagerness to extricate itself from its collective-bargaining relationship with MEBA. Such definitive actions by Respondent, following so closely upon MEBA's rejection of its proposal and after only *one* session between the individuals capable of binding the parties, compel the conclusion that Respondent was not inclined to approach these negotiations with a good-faith intent to reach agreement. Further, viewing these actions in light of Crites' April 4 statement to Ferguson that, "MEBA wasn't the only union that [he] could deal with," serves to underscore Respondent's bad faith. Thus, on the basis of these considerations we conclude that, on or before April 4, Respondent violated Section 8(a)(5) of the Act by engaging in bad-faith bargaining.

In view of these findings, it is apparent that Respondent's hiring of the two operators referred by MMP did not have the effect of permanently replacing Ferrari and Wilkinson who were then on strike. As discussed further below, the MEBA strike may well have begun as an economic strike. However, by the time the two MMP operators had been retained, the strike had been converted into an unfair labor practice strike by virtue of Respondent's 8(a)(5) conduct. Accordingly, Ferrari and Wilkinson then enjoyed the status of unfair labor practice strikers, they were not subject to permanent replacement, and Respondent had an ongoing obligation to bargain with MEBA.

2. As mentioned above, during the course of the negotiations herein, Respondent's MEBA-represented tugboat operators went on strike. Sometime during the last 15 days of March, operator Ferrari called Ferguson at the MEBA business office by ship-to-shore radio from the *Yolo* to learn whether the contract then being negotiated had been settled and to complain about a new boat-staffing policy he had learned about before commencing his run. According to Ferrari, while at Respondent's Richmond yard preparing to make a run to Port Chicago, salesman Mike Kuzak (a spokesman for Crites) told him that he and Wilkinson would be split up as "Mr. Crites wanted his boat to be operated with one boat operator and one non-licensed man" at a time. Both Ferrari and Wilkinson, nevertheless, went on this scheduled run, but Ferrari stated that he was not sure whether this was actually contrary to Kuzak's latest orders. Ferrari had called Ferguson to complain about Kuzak's orders because, as he understood them, they would require either that a licensed operator be on duty for more than 12 hours or that a nonlicensed person operate the vessel part of the time — all violations of Federal law which could result in the licensed operator being fined and/or losing his license. Ferguson directed Ferrari to take the *Yolo* back to the Richmond yard and tie it up, which he did. Shortly thereafter, MEBA members began intermittently picketing at the Richmond Yard and at several other of Respondent's facilities.

Kuzak, on the other hand, without being able to recall the precise language he used, testified that he told Ferrari and Wilkinson that he was "in charge of trying to work [sic] out, so as to have one operator on the boat at one time." Kuzak also testified, however, that "I can't remember now what phase [sic] it was in; but I am sure it wasn't in the form of an order. It was probably just in the form of telling them what our ideas were, about the boat." He further stated that when the half-filled tugboat returned to Richmond he tried to explain to Ferrari and Wilkinson that "the idea we had there was to have three operators, maybe even four operators — and switch 'em off." He testified that, in spite of this explanation, the employees ceased working.

Since the beginning of the strike, MEBA picketed Respondent's operations on a sporadic basis. As detailed above, a week or two after MEBA rejected Respondent's contract proposal, Respondent resumed operation of the *Yolo*. Upon becoming aware of this, Ferrari called Kuzak and asked what was going on. Kuzak replied that the tugboat operators had not been discharged, nor laid off, but simply that Respondent had a new tugboat crew. Turrin also indicated that he possibly had seen Ferrari on one occasion after he was no longer employed by Respondent and acknowledged that he very possibly told him that he could reapply for work, but if he did return to work for Respondent he would have to join MMP since the Company no longer had a contract with MEBA.

The Administrative Law Judge found that Ferrari and Wilkinson misconstrued Kuzak's comments concerning Respondent's new boat-staffing policy, and that they had not been told that Respondent would reduce its licensed operator complement so as to require operators to man the vessel in excess of 12 hours. Instead, the Administrative Law Judge found the tugboat operators were told that Respondent was merely considering a manning schedule whereby operators would be relieved after their 12-hour shift by other operators ferried to the boat for that purpose. Thus, the Administrative Law Judge concluded that the strikers herein were not unfair labor practice strikers protesting a change in work schedule because the scheduling policy had not, in fact, yet been altered; and, further, since the decision to definitely do so had not even been made, the tugboat operators were only told that Respondent was considering a change in manning policy.

While the record is admittedly far from clear as to what Kuzak told Ferrari and Wilkinson concerning the manning-policy change, we, nevertheless, cannot accept the Administrative Law Judge's characterization of this incident. Kuzak's testimony relating to his comments to the employees prior to their departure from the Richmond yard was extremely sparse, and can, at best, be described as vague and conclusionary generalizations utterly lacking in specificity. As to the statements he made upon the operators' return to Richmond, his testimony is considerably more specific and detailed. But, both this disparity in testimony about the two conversations and the very fact that it was even necessary for Kuzak to further explain management's plans moves us to conclude that Kuzak's original comments to the operators were not marked by the clarity and precision attributed to it by the Administrative Law Judge. Thus, rather than denominating Ferrari's interpretation of Kuzak's comments and resultant action as "misconstruing" Kuzak's statements, we find that the conduct of Ferrari and Wilkinson was, instead, a legitimate response to what they had been told.[3] Kuzak's comments were undoubtedly so vague and confusing as to arouse concern among the tugboat operators that they would be required to violate Federal law and thereby lose their licenses and means of livelihood. However, in view of the absence of record evidence that Respondent had in fact unilaterally changed the vessel manning schedule, the Administrative Law Judge properly found that the work stoppage resulting from Ferrari's call to Ferguson was not an unfair labor practice strike in protest of such a change. However, in light of our above finding that Respondent engaged in bad-faith bargaining violative of Section 8(a)(5) on or before April 4, we find, contrary to the Administrative Law Judge, that, while the strike may not have been an unfair labor practice strike at its inception, it was converted into one shortly thereafter — at least by the beginning of April when Respondent pursued its bad-faith course of conduct.

It is clear from the record that one of the reasons why Ferrari called Ferguson on the ship-to-shore telephone was to ascertain how contract negotiations had progressed. Further, Ferguson testified that whenever he called a strike at least one of the purposes was to induce negotiations, and there is evidence that he had experienced great difficulty in getting Turrin to resume negotiations in March. Thus, we find that the tugboat operators' strike was motivated at least in part by a desire to stimulate negotiations between the parties. While the strike may have initially been economic in nature, Respondent's continued bad-faith bargaining in violation of Section 8(a)(5) most certainly created serious impediments to the settlement of the strike and thereby converted an economic work stoppage into an unfair labor practice strike.[4] Thus, at the time Respondent replaced its striking employees with MMP operators, Ferrari enjoyed the status of an unfair labor practice striker. Therefore, when Ferrari, shortly after learning of Respondent's resumed operations, made an unconditional offer to return to work, Respondent was obligated to reinstate him. Accordingly, we find, contrary to the Administrative Law Judge, that in refusing to reinstate Ferrari upon his unconditional offer to return to work because he had engaged in protected concerted activity, Respondent violated Section 8(a)(3) of the Act.

3. Although the Administrative Law Judge found that Turrin conceded it was "very possible" he had told Ferrari that the latter could reapply for work, but if he returned to Respondent's employ he would have to join the Masters, Mates and Pilots, he failed to find that remark to be a violation of the Act. Despite the tentative nature of Turrin's testimony, we conclude that, since this declaration is consonant with Respondent's course of conduct herein, Turrin did make such a comment to Ferrari. And, while this statement was not alleged as a separate violation of Section 8(a)(1), it was fully litigated at the hearing. We have long held "that when an issue relating to the subject matter of a complaint is fully litigated at a hearing . . . the Board [is] expected to pass upon it even though it is not specifically alleged to be an unfair labor practice in the complaint."[5] Accordingly, we find that Turrin's statement to Ferrari that in the event he were rehired he would have to join the MMP interferes with Ferrari's Section 7 rights and is therefore a violation of Section 8(a)(1).

Upon the foregoing findings of fact, and upon the entire record in this case, including the Administrative Law Judge's Decision as modified herein, the Board makes the following:

CONCLUSIONS OF LAW

1. Respondent, H. C. Thomson, Inc., is an employer within the meaning of Section 2(2) of the Act, engaged in commerce and business activities which affect commerce within the meaning of Section 2(6) and (7) of the Act.

[3] In this regard, we particularly note that the Administrative Law Judge deemed Ferrari's testimony to be credible and found that Kuzak and General Manager Turrin "proffered no recitals specifically calculated to controvert Ferrari's testimonial recollections, particularly with reference to Kuzak's purported comments, which had stimulated Respondent's tugboat operators to make their crucial ship-to-shore" call.

[4] *Cantor Bros., Inc.* 203 NLRB 774 (1973); *Cavalier Division of Seeburg Corporation and Cavalier Corporation,* 192 NLRB 290 (1971).

[5] *Monroe Feed Store,* 112 NLRB 1336 (1955).

2. District No. 1 — Pacific Coast District, Marine Engineer's Beneficial Association, is a labor organization within the meaning of Section 2(5) of the Act.

3. All employees employed in Respondent's barge operations; excluding office and clerical employees, professional employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since on or about February 7, 1975, MEBA has been the collective-bargaining representative of the employees in the aforementioned appropriate unit, and by virtue of Section 9(a) of the Act, has been, and is, the exclusive representative of all the employees in said unit for purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

5. By failing and refusing to bargain in good faith with MEBA since on or before April 4, 1976, and by refusing to resume negotiations with that labor organization since shortly after April 6, 1976, Respondent has engaged in, and is engaging in, unfair labor practices in violation of Section 8(a)(5) and (1) of the Act.

6. The strike of Respondent's employees represented by MEBA commencing during the latter 15 days of March 1976 was converted into, and continues to be, an unfair labor practice strike which was prolonged by Respondent's unfair labor practices described above.

7. By refusing, since sometime during April 1976, to reinstate Peter Ferrari to his previous position or, in the event that position no longer existed to a substantially equivalent position, because of his membership in and activities on behalf of MEBA, Respondent has engaged in, and is engaging in, unfair labor practices in violation of Section 8(a)(3) and (1) of the Act.

8. By telling Peter Ferrari that he would have to join MMP if he returned to work, Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act.

9. By withdrawing its job offer and determining that Anthony Taliaferro would not be offered a tugboat operator's position, because he proposed to clear his possible employment with MEBA and indicated a reluctance to seek a work referral from, or membership in, MMP, Respondent has engaged in unfair labor practices in violation of Section 8(a)(3) and (1) of the Act.

The Remedy

Having found that Respondent has engaged in unfair labor practices, we shall order it to cease and desist therefrom and take certain affirmative action, including the posting of appropriate notices, designed to effectuate the purposes of the statute.

Having found that Respondent has engaged in bad-faith bargaining and has refused to resume negotiations with MEBA, we shall order it to cease and desist from such conduct and to bargain collectively in good faith, upon request, with MEBA as the exclusive representative of its employees concerning terms and conditions of employment; and, if an understanding is reached, embody such terms in a signed agreement. Further, we shall order Respondent to reinstate Peter Ferrari to his former job or, in the event it no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, dismissing, if necessary, any person hired on or after the conversion of the economic strike to an unfair labor practice strike following Respondent's embarking on a course of bad-faith bargaining. Respondent shall also make Ferrari whole for any loss of pay he may have suffered by reason of Respondent's refusal to reinstate him, by payment to him of a sum of money equal to that which he normally would have earned as wages from the date on which he applied for reinstatement to the date of Respondent's offer of reinstatement, less his net earnings, plus interest at the rate of 6 percent per annum, in accordance with the formulas set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

Having found that Respondent discriminated against Anthony Taliaferro with regard to his prospective employment, we shall order it to offer Taliaferro a tugboat operator's position, discharging, if necessary to make a position available for him, any operators hired after May 6, without prejudice to his seniority and other rights and privileges which he would have enjoyed had he been employed on May 6, 1975. Should it be determined, however, that no tugboat operator vacancy presently exists, and that Respondent has hired no tugboat operators since May 6, 1975, Respondent H. C. Thomson, Inc., shall prepare a preferential hiring list headed with Anthony Taliaferro's name. Talifiaferro shall then be offered employment whenever a tugboat "operator" vacancy develops with respect to Respondent's vessel. Respondent shall, further, make Taliaferro whole for any pay losses which he may have suffered by reason of the discrimination against him, by paying him a sum of money equal to the amount which he normally would have earned as wages, from the date when his services would have been initially required to the date of his actual employment or placement on a preferential hiring list, less his net earnings during the period designated. Taliaferro's

backpay shall be computed in the manner prescribed in *F. W. Woolworth Company, supra;* and *Isis Plumbing & Heating Co., supra.*

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, H. C. Thomson, Inc., Pittsburg, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Failing or refusing, on request, to bargain collectively in good faith with District No. 1 — Pacific Coast District, Marine Engineers' Beneficial Association, as the exclusive collective-bargaining representative of its employees in the following appropriate unit:

> All employees employed in Respondent's barge operations; excluding office and clerical employees, professional employees, guards and supervisors as defined in the Act.

(b) Discouraging membership in District No. 1 — Pacific Coast District, Marine Engineers' Beneficial Association, or any other labor organization, by refusing to reinstate or hire employees, or by discriminating against them in any other manner with respect to their hire, tenure, or any term or condition of their employment because of their membership in said labor organization.

(c) In any other manner interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection as guaranteed by Section 7 of the Act, or to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of the Act, as amended.

2. Take the following affirmative action designed and found necessary to effectuate the policies of the Act:

(a) Bargain collectively in good faith, upon request, with the above-named Union as the exclusive representative of its employees in the appropriate unit and embody any understanding reached in a signed agreement.

(b) Offer Peter Ferrari immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, dismissing if necessary any persons hired after the conversion of the economic strike into an unfair labor practice strike; make Peter Ferrari whole for any loss of pay he may have suffered as a result of Respondent's refusal to reinstate or reemploy him, in the manner set forth in the Remedy section of this Decision.

(c) Offer Anthony Taliaferro immediate employment without prejudice to whatever seniority and other rights and privileges he would have enjoyed had he been employed on May 6, 1975, dismissing, if necessary to make a position available for him, any tugboat operator hired after May 6, 1975. In the event no tugboat operator vacancy presently exists and no one has been hired for such a position since May 6, 1975, establish a preferential hiring list headed by Taliaferro. If such a preferential hiring list is established, offer Taliaferro employment immediately upon the development of a tugboat operator vacancy. Make Anthony Taliaferro whole for any loss of pay he may have suffered by reason of the discrimination practiced against him, in the manner set forth in the Remedy section of this Decision.

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

(e) Post within its Richmond, California, facility and other facilities or premises from which Respondent carries on business copies of the attached notice marked "Appendix."[6] Copies of said notice, on forms provided by the Regional Director for Region 20, after being duly signed by Respondent's representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 20, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

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[6] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively in good faith, upon request, with District No. 1 — Pacific Coast District, Marine Engineers' Beneficial Association, as the exclusive collective-bargaining representative of our employees in the following appropriate unit:

> All employees employed in Respondent's barge operations; excluding office and clerical employees, professional employees, guards and supervisors as defined in the Act.

WE WILL NOT discourage membership in District No. 1 — Pacific Coast District, Marine Engineers' Beneficial Association, or any other labor organization, by discriminating against any employee, or job applicant, with regard to his hire or tenure of employment, or any term or condition of employment because of his membership in said labor organization.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees, or job applicants, with respect to their exercise of the right to self-organization, to form labor organizations, to join or assist the Union named above, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in any other concerted activity for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities, except to the extent that such rights may be affected by an agreement which requires membership in a labor organization as a condition of employment, as authorized by Section 8(a)(3) of the National Labor Relations Act, as amended.

WE WILL offer immediate reinstatement to Peter Ferrari to his former position or, if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority and other rights and privileges he would have enjoyed if we had reinstated him upon his offer to return to work, dismissing if necessary any persons hired after the strike by District No. 1 — Pacific Coast District, Marine Engineers' Beneficial Association, was converted to an unfair labor practice strike by our conduct.

WE WILL make Peter Ferrari whole for any loss of pay he may have suffered as a result of our refusal to reinstate him by paying him a sum of money equal to that which he would have earned absent our refusal to reinstate him.

WE WILL offer Anthony Taliaferro immediate employment without prejudice to whatever seniority and other rights and privileges he would have enjoyed had he been employed on May 6, 1975, dismissing, if necessary to make a position available for him, any tugboat operator hired after May 6, 1975. In the event no tugboat operator vacancy presently exists and no one has been hired for such a position since May 6, 1975, WE WILL establish a preferential hiring list headed by Taliaferro. If such a preferential hiring list is establshed, WE WILL offer Taliaferro employment immediately upon the development of a tugboat operator vacancy.

WE WILL make Anthony Taliaferro whole for any loss of pay he may have suffered as a result of the discrimination practiced against him by paying him a sum of money equal to that which he would have earned absent such discrimination.

H. C. THOMSON, INC.

DECISION

Statement of the Case

MAURICE M. MILLER, Administrative Law Judge: Upon a charge and amended charge filed on May 5 and July 18, 1975, respectively, and duly served, the General Counsel of the National Labor Relations Board caused a complaint and notice of hearing dated October 6, 1975, to be issued and served on H. C. Thomson, Inc.,[1] designated as Respondent within this decision. Therein, Respondent was charged with the commission of unfair labor practices within the meaning of Section 8(a)(1), (3), and (5) of the National Labor Relations Act. 61 Stat. 136, 73 Stat. 519. Respondent's answer, duly filed, conceded — through its failure specifically to traverse — certain factual allegations within General Counsel's complaint, but denied the commission of any unfair labor practice.

Pursuant to notice, a hearing with respect to this matter was held on January 22, 1976, in San Francisco, California, before me. The General Counsel, Complainant Union and Respondent were represented by counsel. Each party was afforded a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence with respect to pertinent matters. Since the hearing's close, a brief has been received from General Counsel's representative; that brief has been duly considered.

[1] Respondent's answer, together with correspondence made part of the record suggests that the firm's name should properly be spelled H. C. Thomsen, Inc. No motion to amend the case caption has, however, been made.

FINDINGS OF FACT

Upon the entire testimonial record, documentary evidence received, and my observation of the witnesses, I make the following findings of fact:

I. JURISDICTION

Respondent, H. C. Thomson, Inc., presently functions as a California corporation. It maintains a principal place of business in Pittsburg, California, from which it conducts business hauling commodities by barge on San Francisco Bay and nearby waterways. The firm does business as a wholly-owned subsidiary of F. E. Crites, Inc., likewise a California corporation.

Some time before the situation developed with which this case is concerned, Respondent H. C. Thomson, Inc., had been purchased by F. E. Crites, Inc., to take over the business of River Sands, Inc.; that corporation — which Floyd E. Crites likewise owned — had, previously, staffed, operated, and maintained a tug, with which it had performed barge-hauling and various other services. During 1975's early months — though Respondent H. C. Thomson, Inc., then "owned" the tug, *Yolo*, which River Sands, Inc., had previously staffed and maintained — the latter corporation continued to perform barge-hauling services, for which it utilized the tug designated. Respondent's tugboat operators were — for several months — treated as River Sands' employees; since that firm was then considered the so-called "operational" company, *Yolo* personnel were compensated with payroll checks drawn in that firm's name. Currently, however, River Sands provided no business services.

F. E. Crites, Inc., so far as the record shows, functions solely as a holding company, with Floyd E. Crites sole stockholder and managerial head. Functioning in that capacity for both F. E. Crites, Inc., and Respondent herein, Crites concededly formulates and controls labor relations policies for his corporate *alter ego* and likewise for Respondent, that firm's subsidiary. Crites, further, functions as the sole owner-stockholder of West Coast Dredging Company, likewise a California corporation, and controls its labor relations policies.

During Respondent's fiscal year, or, alternatively, the calendar year which preceded the date on which General Counsel's complaint issued, West Coast Dredging performed services worth more than $50,000 for Pacific Gas and Electric Company, a Northern California public utility company which is, concededly, engaged in commerce, within the meaning of the statute.

Since Floyd E. Crites functions as the responsible owner-stockholder and managerial head of F. E. Crites, Inc., Respondent, and West Coast Dredging, these firms may properly be considered both commonly owned and commonly managed. More particularly, their labor relations policies have been, and still are — so the record shows — commonly determined. For jurisdictional purposes, therefor, these three firms may legitimately be considered a single employer. *Sakrete of Northern California, Inc.* v. *N.L.R.B.*, 332 F.2d 902 (C.A. 9, 1964) enfg. 140 NLRB 765 (1963), supplementing 137 NLRB 1220 (1962). And Respondent herein, H. C. Thomson, Inc., because of its close, shared ties with F. E. Crites, Inc., and West Coast Dredging, may properly be considered an employer within the meaning of Section 2(2) of the Act, engaged in commerce and business activities which affect commerce, within the meaning of Section 2(6) and (7) of the statute. I so find. Further, with due regard for presently applicable jurisdictional standards, I find assertion of the Board's jurisdiction in this case, with respect to H. C. Thomson, Inc. particularly, warranted and necessary to effectuate statutory objectives.

II. COMPLAINANT UNION

District No. 1 – Pacific Coast District, Marine Engineers Beneficial Association, designated as Complainant Union within this decision, is a labor organization within the meaning of Section 2(5) of the Act, as amended, which has admitted certain of Respondent's employees to membership.

III. THE UNFAIR LABOR PRACTICES CHARGED

A. *Issues*

This case presents several substantive questions. Two derive from General Counsel's complaint, initially drafted and served; the third derives from a supplementary amendment to General Counsel's complaint, proffered and permitted while the hearing was in progress. These questions may be summarized, generally, as follows:

1. Whether Respondent's management sometime during April or May 1975, specifically, improperly withdrew its previously conceded recognition of Complainant Union as the collective-bargaining representative for certain of its tugboat personnel, within a defined unit considered appropriate for collective-bargaining purposes.
2. Whether, following a work stoppage which had temporarily halted Respondent's tugboat operations, that firm's management improperly refused to reinstate a tugboat crew member, Peter Ferrari, when he sought reinstatement unconditionally.
3. Whether, shortly thereafter, Respondent's management withdrew a tentative job offer, which had previously been communicated to Anthony Taliaferro, and subsequently refused to hire him, because of his conceded membership in Complainant Union herein.

With respect to these several matters, General Counsel, of course, pressed for affirmative responses. Respondent counters, however, with contentions: (1) That Complainant Union's members previously in Respondent's hire had been permanently replaced, following their voluntary cessation of work, and that Respondent's consequent failure to recognize Complainant Union as collective-bargaining representative for such replacement employees should, therefore, be considered proper; (2) that Ferrari, particularly, had been legitimately replaced, following his voluntary cessation of work, and that Respondent's subsequent failure or refusal to reinstate him, pursuant to request, should, therefore, be considered privileged; and (3) that Taliaferro, despite his participation in certain preliminary discussions with a company representative, had not really been given a tentative job offer, by any management

spokesman properly authorized to make such commitments, and that whatever communications Taliaferro might have so construed, had in any event been withdrawn or countermanded thereafter for business reasons, and not because of his union membership.

B. *Facts*

1. Background

a. *Respondent's business relationships*

As previously noted, Floyd E. Crites, throughout the period with which this case is concerned, personally controlled and responsibly directed a corporate complex primarily devoted to dredging sand from San Francisco Bay and nearby waterways, selling materials derived from such dredging operations, and delivering such materials to Bay Area purchasers in waterborne barges or by truck. Crites' dredging operations were conducted primarily by West Coast Dredging; before January 1, 1975, that firm, so the record suggests, had, *inter alia,* participated in several joint venture dredging projects with another corporation, Select Contractors, Inc., likewise designated as Select Dredging Corporation within the transcript herein.

Save for several passing record references, wherein witnesses designated Select Contractors as West Coast Dredging's joint venturer, the present record warrants no definitive determination with regard to that firm's regular business relationship, if any, with Floyd Crites' several subsidiary corporations. During certain recent labor contract negotiations with a representative of Complainant Union herein, which will be noted further within this decision, Respondent H. C. Thomson's vice president and general manager, Leo Turrin, described Select Contractors as some "completely new outfit" which he, Turrin, responsibly headed.

During this period, Crites' sand-hauling operations were conducted through another corporation, River Sands, Inc., previously noted herein. Thereby sand dredged from San Francisco Bay and nearby waterways was delivered to various purchasers. The present record, though hardly crystal clear, will support a determination, which I make, that Respondent H. C. Thomson then "owned" the particular tug with which River Sands hauled laden barges. The record, though fragmentary, warrants a determination, within my view, that Floyd Crites, through his corporate holding company previously noted, had previously purchased Respondent H. C. Thomson, sometime during 1973's latter months, or early during the following year. However, sometime during 1975's first few months, Crites determined, so I find, that his corporate subsidiary, River Sands, would no longer be required to provide barge-hauling services for his corporate complex; plans were formulated, therefore, whereby Respondent H. C. Thomson would, itself, become "operational" with its tug, *Yolo,* performing sand-hauling services, directly in Respondent's corporate name. Sometime during 1975's summer months, so the record shows, this changeover was finally effectuated.

b. *Collective-bargaining history*

Complainant Union's collective-bargaining relationship with particular enterprises within Floyd Crites' corporate complex began, so far as the present record shows, during 1972; sometime during that year, Complainant Union's business representative, Chester Ferguson, negotiated a contract with West Coast Dredging which covered certain workers employed in connection with that firm's sand-dredging business. The contract, so Ferguson credibly testified, bore a July 1, 1974, termination date. Nothing within the present record, however, would warrant a determination with respect to its renewal or renegotiation.

Sometime during late 1973, or during the first few months of the following year, as previously noted, Floyd Crites, through his corporate *alter ego,* F. E. Crites, Inc., had purchased Respondent herein; thereby, Crites had acquired direct managerial control with respect to Respondent's tug, *Yolo,* with whose subsequent history we are now concerned. Thereafter, during a restaurant conference, while representatives of three labor organizations were present, he (Crites) declared that he wanted to run a so-called "union" sand-hauling business, with respect to which he would utilize Respondent's marine equipment.

The record warrants a determination, which I make, that Crites conferred then with Business Representative Ferguson of Complainant Union, Business Representative Mayfield of Operating Engineers Local Union No. 3, International Union of Operating Engineers, AFL–CIO, and some Inland Boatmen's Union representative. The present record, however, permits no definitive determination with respect to whether a contractual consensus resulted. It shows merely that sometime during this period two West Coast Dredging workers concededly known to Crites as MEBA members, who had been covered by Complainant Union's previously negotiated but now terminated 1972–74 contract, were transferred to work directly on Respondent's tugboat. While functioning as tugboat operators responsible for Respondent's tug *Yolo* during calendar 1974's last months, so far as the record shows, neither man enjoyed collective-bargaining contract coverage.

On February 3, 1975, Complainant Union's business representative signed a so-called "construction" labor agreement with Select Contractors, Inc., previously mentioned within this decision. That contract had been drafted to cover certain workers, employed by that particular firm, in connection with a San Francisco Bay dredging project for which the U.S. Army Corps of Engineers was responsible. The agreement had been "negotiated" directly with Leo Turrin, previously known to Business Representative Ferguson as Floyd Crites' general manager and designated representative. While bargaining in Select Contractors' behalf, however, Turrin had, so his credible, corroborated testimony herein shows, characterized himself as that particular firm's responsible head; he had declared, categorically, that Floyd Crites held no "ownership" interest so far as Select Contractors was concerned. Consistently, he had himself signed Complainant Union's proffered "construction" contract form, promptly following its presentation.

2. Recent contract negotiations

a. *Respondent's interim agreement*

Shortly thereafter, on February 7 specifically, the Complainant Union's business representative negotiated a so-called "Interim Sand Hauling Agreement" with Turrin, functioning in Respondent's behalf. That agreement, pursuant to its terms, covered work done in connection with "towing sand from one point to another" with no application to work traditionally considered dredging work, or work concerned with the disposal of dredging spoils. This so-called "interim" contract, so I find, covered both "operators" then working on Respondent H. C. Thomson's tugboat. Despite their service, then, running the tugboat *Yolo* which Respondent legally owned, these operators were receiving their semimonthly paychecks from River Sands, Inc., which was still Crites' designated "operational" sand hauling firm. Management representatives were, however, planning their subsequent transfer to Respondent H. C. Thomson's payroll, formally, within a period of several months. And the record does warrant a determination, which I make, that Respondent H. C. Thomson did sometime later take over operational responsibility directly for River Sands' barge-hauling functions.

The contract in question was signed for Respondent H. C. Thomson by Leo Turrin, functioning in his capacity as Respondent's vice president and general manager. *Inter alia,* it provided that "hourly rates of pay and contribution rates" payable to Complainant Union's various fringe benefit plans, for those workers who were covered, should match those set forth in Complainant Union's so-called Commercial Towing Agreement covering various San Francisco Bay Firms. Working and general conditions for the workers covered, however, were to match merely those set forth within a contract previously negotiated with Respondent by Operating Engineers, Local Union No. 3, covering certain other workers concerned with barge operations throughout Northern California, with a May 1, 1974, effective date.

Within their February 7 so-called "interim" contract, Complainant Union and Respondent agreed, further, that they would meet, again within 30 days "for the purpose of ratifying a complete working agreement" covering Respondent H. C. Thomson's projected sand-hauling operations.

b. *Further negotiations*

During the 30-day period which followed their February 7 contract's execution, Ferguson made several attempts to communicate with Turrin; his various efforts to fix a date for their next bargaining session, looking toward a full-scale, long term contract, were unsuccessful. On or about March 10, however, Turrin communicated finally with Complainant Union's business representative. Within that month they subsequently met for some three or four negotiating sessions. No one else was present. The record, however, warrants a determination, which I make, that their various conferences produced no definitive contractual consensus.

While a witness, herein, Ferguson did claim that during his several March 1975 discussions with Respondent's general manager, firm agreements had been reached with respect to nearly all of the matters which their projected long term contract would cover; the sole matter which remained unresolved, so Complainant Union's business representative contended, was a contractual provision with respect to wage rates payable for Saturday work. Testifying in Respondent's behalf, however, Turrin declared, with Crites' corroboration, that he had never been definitively "authorized" to commit Respondent H. C. Thomson with respect to whatever long term contractual proposals Ferguson presented; that he had merely promised to submit them for his superior's review; and that Ferguson could not reasonably have construed his remarks as more than a commitment to recommend Complainant Union's various proposals for President Crites' favorable consideration.

Complainant Union's business representative testified, *inter alia,* that he had preliminarily questioned Turrin's power to bind Respondent with respect to their tugboat "operator" negotiations, but that Respondent's general manager had told him Crites was "out of the picture" so far as H. C. Thomson was concerned, and that he [Turrin] could speak, authoritatively, for that firm. Replying, Turrin conceded that he had, indeed, given Ferguson such reasurances during their *February 3* discussion, previously noted herein, with regard to Select Contractors' so-called "construction" labor contract, negotiated with Complainant Union herein to cover the latter firm's prospective San Francisco Bay dredging project; Respondent's general manager declared, however, that he had never represented himself as Respondent H. C. Thomson's responsible head, either during his *February 7* negotiations with Complainant Union's business representative, or thereafter. The record herein, which I have considered in totality, with due regard for the witness-chair mannerisms and behavior of Business Representative Ferguson, Crites and Respondent's general manager, persuades me that H. C. Thomson's president and sole stockholder [Crites] would hardly have been likely to delegate plenary powers, with respect to that firm's long term labor contract negotiations, directly to his general manager; within my view, Turrin's testimony that he was never specifically "authorized" to commit his principal, and that during the negotiations now in question he never represented himself as possessed of such powers, merits credence.

The business representative's proposals, particularly with reference to tugboat "operators" pay scales, had paralleled those set forth within Complainant Union's current Bay Area commercial towing contracts. Presented with Ferguson's demands, General Manager Turrin probably did declare his willingness to convey the business representative's contract proposals to President Crites, his superior; he may, conceivably, have declared his willingness to convey those proposals with a favorable recommendation. However, the present record, within my view will not support a determination that Ferguson's contractual proposals were "accepted" definitively, by Respondent's general manager.

During their final March 1975 conference, Complainant Union's business representative presented Turrin with a complete contract proposal. Ferguson's prepared draft

contained proposals, with respect to wages, hours, and conditions of work, which would cover "all boat operators employed in [H. C. Thomson's] sand hauling operations" while functioning as a private carrier transporting its own sand as a commercial commodity. With respect to hourly wage rates, Complainant Union's proposal provided that $8.74 would be payable, with an April 1, 1975, effective date; and that $9.03 would be payable, effective June 1, 1975. These rates matched those set for tugboat "operators" covered by Complainant Union's current General Towing Agreement for San Francisco Bay, which shortly prior thereto had been negotiated and signed February 24, 1975, by several firms, with a February 1 effective date. Ferguson's proffered draft, further, provided that boat operator's basic hourly rates would be adjusted on January 1, 1976, and June 1 of that year so that they would continue "identical" with those set forth within Complainant Union's General Towing Agreement, previously noted. Respondent's general manager declared, so Ferguson's credible testimony shows, that he would take Complainant Union's proposal back to President Crites; Turrin made it clear however, so I find, that he was "working" for Crites, and that the latter would make Respondent's final determination.

c. *The April 4 conference*

General Manager Turrin conferred with his principal subsequently, so his testimony shows, with regard to Ferguson's draft proposal. They compared Complainant Union's proposed terms with those set forth within the 1974–77 Barge Agreement, then in force, covering barge loaders and bargemen, which Operating Engineers, Local Union No. 3, had previously negotiated with various covered firms. And they concluded, so their composite testimony shows, that Business Representative Ferguson's draft contract terms and Local 3's barge contract were not sufficiently "close" to warrant Respondent's concurrence.

On Friday, April 4, during a late evening restaurant conference, Crites and Turrin discussed Complainant Union's proposal with Complainant Union's business representative. Respondent's president, during this talk, substantially rejected the business representative's proffered draft.

While a witness, Ferguson declared that throughout their negotiations he had consistently taken the position that Respondent's sand-hauling operations should be considered "commercial towing" for contract purposes. General Manager Turrin, however, had, so Ferguson conceded, proffered contract proposals based upon and comparable with those found in Local 3's Barge Agreement, previously noted. According to Complainant Union's business representative, his complete draft proposal had reflected a substantial "amalgamation" compassing terms derived from both Local 3's Barge Agreement, and Complainant Union's general towing contract; Ferguson claimed therefore, that Crites' negative reaction, with respect thereto, had taken him by surprise.

Complainant Union's business representative strongly protested Crites' professed determination that their contract should parallel Local 3's Barge Agreement completely; he noted, *inter alia,* that Respondent's proposal, taken literally, would mandate a wage rate reduction, from $8.74 to $6.30 hourly, for H. C. Thomson's tugboat operators, who were then being paid, consistently with the terms of their so-called "interim" contract, the current rates set forth within Complainant Union's commercial towing agreement.

There was a discussion, further, with respect to wage rates which would be payable for Saturday work. Complainant Union had previously proposed that time-and-a-half rates should be considered payable for hours worked beyond 8 hours daily, and/or for hours worked beyond 40 within a given week, while work performed after Saturday noon, on Sundays, or during recognized holidays should be considered compensable at twice the covered "operator's" basic hourly rate. Respondent's president had, however, declared his willingness, merely, to provide time-and-a-half rate overtime compensation for work beyond 40 hours weekly, with basic straight time hourly rates or time-and-a-half rates alternatively payable for Sunday or holiday work, with the particular rate dependent upon certain specified circumstances. However, no consensus, with regard to these divergent overtime time pay proposals, was reached. With respect to President Crites' reaction, following his [Ferguson's] rejection of Respondent's contract proposals, the latter testified, credibly, that:

> He, [Crites] told me, that MEBA wasn't the only union that he could deal with. As a matter of fact, with the employment situation the way it was, he really didn't have to do business with any union, he said . . . . To the best of my recollection, what I said was: "You have a collective-bargaining relationship, and you aren't going to walk away from it. . . ." He just repeated, "You've got my offer."

Crites, so the record shows, thereupon directed his subordinate, Turrin, to prepare a complete counterproposal, which would "follow the lines" defined within Local No. 3's barge contract previously noted. Respondent's general manager was directed to prepare such a proposal on Saturday, April 5, so that Ferguson could present it, for the consideration of Complainant Union's members, during a membership meeting scheduled for the following day. Business Representative Ferguson promised that Respondent's proposal would be considered, but forcast its rejection. Upon this note, negotiations were concluded.

d. *Respondent's proposal rejected*

On Sunday, April 6, Respondent's general manager met Ferguson, pursuant to prearrangement, while the latter was en route to Complainant Union's hall; the business representative was given a copy of Respondent's complete contract proposal. Ferguson and Turrin reached a consensual "understanding" that Respondent's proposal would be submitted to Complainant Union's membership for possible ratification, and that H. C. Thomson would be given written notice with regard to their ratification vote's result.

With regard to tugboat "operator's" wage rates, throughout a projected 21-month contract term, Respondent's proposal paralleled precisely the rate progression set for "barge loaders" within Operating Engineers Local Union

No. 3's Barge Agreement, previously noted herein. Likewise, with respect to Saturday, Sunday, and holiday overtime rates, Respondent's proposal recapitulated the provisions found in Local 3's contract. Complainant Union's membership, so the record shows, rejected Respondent's contract proposal. And shortly thereafter, within a letter dated April 8, Business Representative Ferguson notified Respondent H. C. Thomson, d/b/a River Sands, that its April 6 proposal had been rejected, following a membership vote.

e. *Respondent's contacts with Masters, Mates and Pilots*

Following his receipt of Complainant Union's April 8 letter, Respondent's president concededly concluded, within his own mind, that MEBA had "terminated" their contract negotiations. Further, he concluded, so his testimony shows, that since the tugboat *Yolo's* two "operators" with MEBA membership were not currently manning Respondent's vessel, for reasons which will be discussed subsequently within this decision, their labor organization had forfeited whatever recognition rights it might properly have been entitled to claim previously. President Crites determined, therefore, that he would not seek further negotiations with Complainant Union herein. Concededly, he directed Respondent's general manager to communicate, instead, with Captain Don Fuller of the International Organization of Masters, Mates, and Pilots, to determine whether that labor organization had "people" available who could staff Respondent's tugboat. While a witness, Crites testified that Captain Fuller had presumably sometime during the prior 30-day term of Respondent's so-called "interim" contract with Complainant Union herein notifed him that Masters, Mates, and Pilots had "licensed" members who could man Bay Area vessels.

Pursuant to his superior's directive, Respondent's general manager telephoned Fuller, Masters, Mates, and Pilots' business representative. He [Turrin] reported Respondent's desire to procure tugboat operators; Fuller declared that his organization could supply them, suggesting further that "later on, down the road," they could negotiate a collective-bargaining contract.

Shortly thereafter, General Manager Turrin and Captain Fuller met; their discussion produced a verbal consensus that Masters, Mates, and Pilots would supply Respondent with tugboat "operators" whose wages and fringe benefits would "follow the lines" defined within Operating Engineers Union, Local 3's Barge Agreement, previously noted. No correspondence memorializing this consensus has ever been drafted or delivered, however. Respondent's management representatives have never, so far, been requested to sign a written collective-bargaining contract. While a witness, Respondent's general manager testified that when his "verbal understanding" with Captain Fuller was reached, the latter knew MEBA men had manned H. C. Thomson's tugboat before April 6, but that Respondent's collective-bargaining negotiations with Complainant Union, before that date, had failed to produce a contractual consensus. The record, further, warrants a determination, which I make, that sometime during this period Respondent's management did send Masters, Mates, and Pilots' representative a copy of their draft contract proposal, which had previously been submitted to Complainant Union herein. No contract consistent with that proposal was ever signed, however.

Both Respondent's president and General Manager Turrin testified that, consistently with their "verbal understanding" described herein, two tugboat operators whom Masters, Mates, and Pilots referred subsequently were hired; they were paid hourly rates "somewhere near" those which Local No. 3's barge contract provided for barge loaders. Respondent's spokesmen claimed, however, that they could not recall their firm's defined wage rates for such personnel specifically.

Sometime within "one or two" weeks following Complainant Union's April 6 rejection of Respondent's contract proposal, the firm's tugboat, which had not been running, was reactivated. The present record, though hardly a model of clarity, warrants a determination, which I make, that both "operators" referred by Masters, Mates, and Pilots pursuant to Captain Fuller's commitment — Keith Miller and Tom Vilas — thereupon manned the vessel concurrently and/or successively.

f. *Subsequent developments*

Three or 4 weeks after Complainant Union's April 6 membership meeting, during which Respondent's draft contract proposal had been rejected, that labor organization's business representative called upon General Manager Turrin; they met within the latter's "trailer" office, located in Pittsburg, California. Ferguson suggested a resumption of negotiations. His testimony with regard to their conversation, proffered for the record without significant contradiction, reads as follows:

> I told him that we had better get back to negotiating the agreement; and I tried to set a date. I think what [I] said was, that this thing was getting ridiculous. So, I said, "Let's get together and have a meeting." . . . Well, I don't remember precisely what he said . . . He said something about Floyd [Crites] either had, or was going to enter into an agreement with the Masters, Mates and Pilots. That that was his [Crites'] thinking. But he [Turrin] said that he would get back to me — that he would call me . . . I never heard from him. [Interpolations provided to promote clarity.]

While a witness, Turrin generally corroborated Complainant Union's business representative, so I find, save in certain minor respects. He declared that, following Complainant Union's April 6 rejection of Respondent draft contract proposal, President Crites and he concluded that Complainant Union was essentially disregarding a prior commitment, which they thought Ferguson had made, to frame a contractual consensus consistent with Operating Engineers, Local Union No. 3's barge contract. Consequently, so General Manager Turrin testified, Respondent's management representatives determined that they "did not want to negotiate" further with Complainant Union's representative. Thus, when Ferguson visited him, Respondent's general manager, so his testimony shows, specifically rejected the business representative's sugges-

tion that negotiations should resume; he declared that, since Complainant Union had rejected his firm's draft contract proposal, Respondent had initiated "talks" with another labor organization. Ferguson was told, so Turrin presently claims, that his suggestion for a resumption of negotiations had come too late.

Shortly thereafter, presumably on May 10, Respondent H. C. Thomson's tugboat sank; the vessel was not refloated and reactivated, so the record suggests, until sometime late in June, when it resumed service.

President Crites' testimony, however, warrants a determination, which I make, that Respondent's tugboat has not really been utilized regularly since its reactivation; some of Respondent's continued barge-hauling operations have been contracted out to so-called "independent" tugboat firms. Further, while a witness, Crites claimed without contradiction that his firm's tugboat has not been "operating" since sometime in late November 1975, 2 months before the formal Board hearing with respect to the present case convened.

3. The termination of Ferrari

With contract negotiations - between Complainant Union's business representative and Respondent H. C. Thomson's spokesmen - terminated, General Counsel's representative requests consideration for a contention that, following President Crites' determination to staff Respondent's tugboat with "operators" recruited through Masters, Mates and Pilots' hall, Petter J. Ferrari, previously in Respondent's hire, was denied reinstatement because of this MEBA membership. Proper determinations, with regard to this contention, will require a retrospective review, concerned with certain developments which preceded Complainant Union's April 6 rejection of Respondent H. C. Thomson's contract proposal, previously noted.

a. *Ferrari's work history*

Ferrari began work aboard Respondent's tugboat, *Yolo,* sometime in January 1975; together with a fellow operator, Elwood Wilkinson, he [Ferrari] manned the vessel, hauling barges laden with sand, for some 3 months. Though they serviced a vessel which Respondent H. C. Thomson owned, they were compensated, so the record shows, with checks drawn on River Sands' payroll. Before his hire, for work on Respondent's tugboat, Ferrari had worked presumably in a similar capacity for West Coast Dredging; while in that firm's employ, his wages, hours, and conditions of work had been governed by a previously negotiated MEBA contract.

The record, with regard to Ferrari's January 1975 hire for work on Respondent's tugboat, merits characterization as less than clear. With due regard for probabilities, however, I am satisified that Respondent's management representatives first suggested his shift from West Coast Dredging to H. C. Thomson's vessel, where he would join Wilkinson, who had previously been similarly transferred. Prompted by Respondent's hiring offer, Ferrari had voluntarily procured a dispatch slip from Complainant Union's hall, referring him to H. C. Thomson, despite the fact that MEBA then had no formal contractual relationship with Respondent herein. When previously transferred from West Coast Dredging for service on Respondent's tugboat, sometime during the latter part of calendar 1974 presumably, Ferrari's companion, Wilkinson, had likewise voluntarily procured a formal referral from Complainant Union's dispatcher. Testifying herein, Respondent's president and general manager have both conceded their awareness that, during the 3-month period which followed Ferrari's shift from West Coast Dredging to Respondent H. C. Thomson's hire, both "operators" who were then manning their firm's tugboat held MEBA membership.

b. *Complainant Union's March 1975 work stoppage*

Throughout the 3-month period during which Wilkinson and Ferrari manned Respondent's tugboat, Crites' sand-hauling operations were being conducted with three- or four-man crews. There were, of course, two licensed tugboat "operators" responsible for handling the vessel. Concurrently, River Sands, previously designated herein as Crites' so-called "operational" firm, had workers specifically designated to handle sand barges, and to provide certain incidental services; during the period with which we are now concerned, these men were represented by Operating Engineers, Local Union No. 3, with their wages, hours, and conditions of work set pursuant to that organization's barge contract. Respondent's witnesses testified that a single "barge loader" worked with their tugboat's two-man crew. However, Ferrari, while a witness, mentioned a second barge worker whom he designated a leverman. For present purposes, the testimonial discrepancy which Ferrari's passing comment generated need not be resolved. With respect to licensed tugboat personnel, generally, U.S. Coast Guard regulations currently provided, so the record herein shows, that particular "operators" may not be required by their employers to work more than 12-hour shifts daily. Respondent's two-man licensed "operator" complement, therefore, was, so I find, maintained to provide personnel, qualified to conduct tugboat operations without interruption, throughout barge-hauling trips which frequently required more than twelve hours for their completion.

Sometime within March 1975's last 15 days, on a date which no witness herein could designate precisely for the record, both Wilkinson and Ferrari, following a directive which Complainant Union's business representative concededly gave them, left Crites' Port Chicago, California, sand dredging grounds, with their tugboat, hauling a partially laden barge; they returned to River Sands' Richmond, California, dock, where they left their vessel. Thereafter, so the record shows, Complainant Union picketed the Richmond dock, together with some of Crites' other facilities, sporadically. Between the first day of Complainant Union's work stoppage and Sunday, April 6, when that organization's membership rejected Respondent H. C. Thomson's draft contract proposal, the firm's tugboat was, so the record shows, continuously out of service.

The concatenation of circumstances which concededly persuaded Business Represenative Ferguson to direct a work stoppage, calculated to halt Respondent's tugboat operations, merits careful consideration. Unfortunately,

General Counsel's presentation with respect thereto, proffered through Ferrari's testimony primarily, can hardly be considered crystal clear.

While a witness, Business Representative Ferguson testified that Wilkinson and Ferrari, presumably while their tugboat was berthed at Crites' Port Chicago sand-dredging grounds, had telephoned Complainant Union's headquarters through their "ship-to-shore" radio telephone facilities to report a complaint. With respect thereto, they had requested instructions; Complainant Union's business representative had concededly directed them to return to River Sands' Richmond dock, where they were to "tie up" their vessel.

Ferrari, when questioned with respect to these developments, conceded that he had indeed telephoned Complainant Union's business representative. When queried further with regard to his reason for doing so the tugboat operator testified that:

> One thing, we wanted to clarify if the contract [which Business Representative Ferguson and Respondent's general manager were then discussing] was settled; and another thing was, that they wanted one of us boat operators to be aboard the tug *Yolo*, with an Operating Engineer and a licensed man to run the boat to and from the job.
>
> Q. [Ms. Rosen] Who told you that they wanted just one of you to work on the boat with the Operating Engineer?
>
> A. Mr. Kuzak [River Sands' salesman and Crites' putative surrogate] did.
>
> Q. Explain to me, if you had those two men on the tugboat, who is operating the boat, driving the boat, when there are just two men? Is one man doing it 24 hours a day?
>
> A. No. It has got to be two tugboat operators there . . . You cannot operate a tugboat for more than twelve hours; and then you are supposed to get twelve hours of sleep, after your eight hours in the wheelhouse.
>
> Q. Well, if you were sleeping, who would have been running the tugboat — if you had followed Mr. Kuzak's request?
>
> A. A non-operator. An unlicensed man would have been operating the boat. . . .
>
> Q. If you are a boat operator, and you permit an unlicensed man to run that boat, can you be fined by the U.S. Coast Guard?
>
> A. You can be fined, yes — and your license can be pulled.

Before he left the witness stand, Ferrari was questioned further, particularly with regard to the specific tugboat "manning" problem affecting licensed personnel which had prompted his "ship-to-shore" communication with Complainant Union's business representative. He testified as follows:

> JUDGE MILLER: How had you discovered, or heard, or learned that you were supposed to be operating the boat with just one [licensed] man?
>
> THE WITNESS: When we left there [Richmond] that is what Kuzak said — that Woodie [Wilkinson] and I were to be split up . . . . We discussed it, in the boat, that we would not operate the boat with one unlicensed man and one licensed man.
>
> JUDGE MILLER: How had you and Mr. Wilkinson learned that you were to be split up?
>
> THE WITNESS: That was when we left Richmond — when we got our [barge loading] orders from Mr. Kuzak . . . When we were tied up to the Richmond yard . . . Mr. Kuzak gave us the [barge loading] orders, and said that Mr. Crites wanted this boat to be operated with one boat operator and one non-licensed man.
>
> * * * * *
>
> Q. [Mr. Brotsky] You and Mr. Wilkinson were in the Richmond yard, waiting to go out on a trip to Port Chicago — is that correct?
>
> A. Yes.
>
> Q. Was it at that time, that Kuzak told you that Mr. Crites wanted only one, rather than two, operators on the boat?
>
> A. Yes — only one licensed operator at a time.
>
> Q. And he told you that, before you started on that trip?
>
> A. Yes.
>
> Q. So he didn't tell you that you had to make that particular trip with only one operator?
>
> A. No, he didn't. . . .
>
> Q. Did both of you still go out on the trip?
>
> A. Yes, we both left together . . .
>
> Q. All you knew, at that time when he talked to you, was that you were to take the barge, the tug, up to Port Chicago, and take on a load of sand? Is that right?
>
> A. Yes.
>
> Q. Then, when you got to Port Chicago, were you going to radio the company and Kuzak, and find out where they wanted you to take that load?
>
> A. Yes.
>
> Q. Now, wherever you went — whether it was to be Redwood City, or back to Richmond, or to Oakland, would the full trip from [Richmond] up to Port Chicago, and back down to any one of those places, have taken more than twelve hours? . . .
>
> A. Yes, it would . . . .
>
> Q. So it was clear to you, when he told you that he wanted just one operator, that he was asking you to have one operator work for more than 12 consecutive hours?
>
> A. Yes, that's right.
>
> Q. And it was on that trip [to Port Chicago], in the course in that trip, that you radioed to Mr. Ferguson?
>
> A. Yes.
>
> Q. You told him, in effect: "Kuzak has told us that we can only have one licensed operator on these trips, and not two?" Is that correct?
>
> A. Yes. . . .
>
> Q. And he told you what?
>
> A. Mr. Ferguson says, "Pick her up and take her back to Richmond." "Now!" he says . . . And he said

"Tie her up." [Interpolations provided to promote clarity.]

Shortly thereafter, so Ferrari's credible testimony shows, Complainant Union's picket line was established. The record, however, warrants a determination, which I make, that Complainant Union's pickets did not patrol continuously; nor did they confine their picketing to Crites' Richmond facility, where Respondent's tugboat had been docked. Credible testimony herein proffered without contradiction suggests that several facilities utilized in connection with Crites' various business operations were picketed sporadically. I so find.

While testifying herein, Respondent's general manager and Michael Kuzak, River Sands' salesmen, proffered no recitals specifically calculated to controvert Ferrari's testimonial recollections, particularly with reference to Kuzak's purported comments, which had stimulated Respondent's tugboat operators to make their crucial "ship-to-shore" telephone call. Their testimony, however, does suggest that Ferrari and Wilkinson may have misconstrued Kuzak's remarks. With respect thereto, General Manager Turrin testified as follows:

> Q. [Mr. Brotsky] Didn't there come a time, in early April [sic] of 1975 when a decision was made by the company to operate with just one operator — rather than with two?
>
> A. Yes: For certain parts of our operation. But I would have to explain that . . . Well, under the new licensing law, they require that a tow boat operator cannot have more than 12 continuous hours at the wheel. But after the 12 continuous hours, a lesser-licensed person could operate the boat; as long as the other licensed person was available, in case of need — either asleep or somewhere else on board. Our operation wasn't quite that way; but we did have the facility to run men out to our digging ground, so that no man would have to remain on the boat for more than 12 hours — and then, we would not have to have two fully licensed men on the boat, at the same time. There's no law that says that we have to have two boat operators on the tugboat at the same time. It just says that no tow-boat operator will operate a boat for more than twelve continuous hours. . . .
>
> Q. Isn't it true, that you had Mr. Kuzak tell the two boat operators that the company was proposing to make this change in its operations?
>
> A. I'm quite sure we did, yes.

Consistently with Turrin's testimony, River Sands' salesman, when summoned as Respondent's witness, proffered a version of his conversation with Wilkinson and Ferrari which could conceivably warrant a determination that they misunderstood him. Specifically, Kuzak recalled that when he queried Wilkinson and Ferrari with respect to their reason for bringing Respondent's tugboat with a partially loaded barge back to River Sands' Richmond dock they mentioned the contract negotiations and Respondent's projected "one man" proposal. With respect thereto, River Sands' salesman testified that:

> I tried to explain to them what the caucus at River Sands had been thinking about, in regard to the switching on and off. But I don't think they understood or realized what we were talking about. I think that at that time they thought that the one guy would go from Richmond to the digging grounds, back to Richmond, and would spend more than twelve hours at the wheel. But the idea we had there was to have three operators, maybe even four operators — and switch'em off. Because the overtime was becoming a major problem for us.
>
> Q. [Mr. Fujinaga] So, in other words, it wasn't the design or the plan, of River Sands or of H. C. Thomson, to violate the twelve-hour rule, if I may call it that? But rather, it was a plan so that you could work out your labor scheduling, so that you wouldn't have to have somebody in violation of that 12-hour rule? Is that correct?
>
> A. Right.
>
> * * * * *
>
> Q. [Mr. Brotsky] The day that the Richmond occurrence took place, is it not true that before Ferrari and Wilkinson went out and started on the trip, that you told them that the company was going to end the practice of having two operators on the boat at one time? Didn't you tell them that?
>
> A. I told [them] that that was what we were thinking about doing, and that that was what I was in charge of trying to work out, so as to have one operator on the boat at one time. . . I can't remember now what phase it was in; but I am sure it wasn't in the form of an order. I was probably just in the form of telling them what our ideas were, about the boat.

This record, which I have reviewed with due regard for Ferrari's somewhat confused testimonial recitals and demonstrably poor recollection, persuades me that Respondent's two tugboat operators must have misconstrued Kuzak's comments. Wilkinson and Ferrari were not, so I find, told that Respondent's management would reduce their vessel's licensed "operator" complement, so that one licensed man would be required to handle the vessel for more than 12 continuous hours; rather, they were told that their employer proposed to draft a manning schedule pursuant to which a single operator, designated to handle the tugboat would be replaced when his 12-hour stint had been completed with a relief operator ferried to the tugboat for that purpose wherever it might be located. Further, Respondent's spokesman, so I find, never told Wilkinson or Ferrari that Respondent's projected program would become operative forthwith, either for their current trip or some designated future trip; rather, Respondent's tugboat operators were told merely that new manning schedules whereby a single tugboat operator would be "replaced" whenever necessary with a relief man were being considered.

When Wilkinson and Ferrari thereafter concededly struck their vessel, pursuant to Business Representative Ferguson's directive, the latter participated in Complainant Union's picketing; the record, however, warrants a deter-

mination, which I make, that his participation was limited. Wilkinson, so far as the record shows, did little or no picketing; shortly after Respondent's tugboat had been secured at River Sands' Richmond dock, he [Wilkinson] declared that he would resign. Within a formal "Notice of Termination" which Respondent's general manager had signed, proffered for the record by General Counsel's representative, Wilkinson was reported as "terminated at own request" on April 4; Ferrari's testimony, proffered herein without contradiction, will within my view support a determination, which I make, that his fellow operator found "regular and substantially equivalent" work shortly thereafter.

c. *Respondent's resumption of tugboat operations*

From the date on which Wilkinson and Ferrari struck Respondent's tugboat, whenever that was, until Sunday, April 6, the *Yolo* was concededly not in service. Though Complainant Union's pickets may not have patrolled River Sands' Richmond dock facility regularly, MEBA's members, so I find, never boarded, serviced, or manned the struck vessel.

Thereafter, throughout a vaguely defined "one or two" week period which followed April 6, the situation continued without change. Complainant Union's picketing though sporadic, continued; Respondent's tugboat remained inoperative regardless.

During this period, however, President Crites and Respondent's general manager negotiated their "verbal understanding" with Masters, Mates, and Pilots' business representative, previously noted. Then, sometime in mid-April, Respondent's management hired two tugboat "operators" whom Captain Fuller had referred. Thus manned, Respondent's tugboat was reactivated.

d. *Ferrari's request for reassignment*

Sometime in April Ferrari discovered that Respondent's tugboat had resumed operation. He telephoned River Sands, spoke with Kuzak, and queried him with respect to "what the score" was. The tugboat operator's credible testimony, with regard to their conversation, reads as follows:

> He says, "The boat is operating" . . . I said, "Then I am laid off?" He says, "No, you are not." "Well, I am not working," I says. "But I never got a discharge." I says, "I can't draw my unemployment pay, because I never got a discharge slip." "Well, you are not discharged," he says. But the *Yolo* was operating.

Kuzak told Ferrari, so the latter's testimony shows, that Respondent had a new tugboat crew. Further, Respondent's general manager, while a witness, conceded that it was "very possible" he had likewise told Ferrari sometime during this period, that he could reapply for work, but that Respondent had no MEBA contract, and that should he come to work he would "have to join" the Masters, Mates, and Pilots' organization.

4. The refusal to hire Taliaferro

a. *General Counsel's presentation*

Early in May 1975, presumably on May 5, one Anthony Taliaferro received a telephone call, so he testified, from Michael Kuzak; River Sands' salesman reported that Respondent was looking for a boat operator. He asked if Taliaferro was looking for work; the latter replied affirmatively. Previously, sometime in 1973, Taliaferro had spoken with General Manager Turrin regarding work on River Sands' barge operation; he had been told that River Sands had no openings. The record, however, warrants a determination, which I make, that River Sands had retained a record of Taliaferro's contact. Kuzak promptly asked Taliaferro whether he could visit Pittsburg, California, that very afternoon. Taliaferro said he could; he commented, further, that while on his way he would stop in San Francisco and clear Kuzak's job offer with his union. Kuzak asked which union Taliaferro meant; the latter named Complainant Union herein. At that point, so Taliaferro testified, their conversation "changed in tone" immediately; Kuzak declared that he would be busy that afternoon, and would not be "able to see" the tugboat operator. When Taliaferro asked, however, whether they could meet the following afternoon, Kuzak replied affirmatively. The tugboat operator requested River Sands' salesman to designate a convenient time; Kuzak specified 3:30 p.m. for their next day's conference.

The next day, May 6 presumably, when he reached Respondent's yard, Taliaferro was told that Kuzak was not there and that no one knew when he might return. The tugboat operator decided to wait. Approximately 1 hour later, Kuzak telephoned; Taliaferro was notified and spoke with him. While a witness, Taliaferro recapitulated their conversation as follows:

> I asked him if the job was still open; because, with him not being there, I wasn't sure. He said, Yes, that it was. So I asked him what the job paid; and he told me . . . He said that it was between $6.00 and $6.50 an hour — he didn't know exactly. I think I then asked him further details about the job, and he told me that it was on the tug *Yolo* — and that it was four days on, and four days off. I indicated that that sounded fine to me. He then asked me if I was a member of the Masters, Mates and Pilots; and I said No. And he said that one [would have to be a member of become a member] of the Masters, Mates and Pilots in order to have the job. I asked him if I could take the job without joining it, and he said, No . . . Then I mentioned that I really did not want to join another union; but I didn't rule it out. I believe then, in our discussion, he asked me if I would be willing to "ride the boat" to see if I liked it — and, I guess, for them to see if they wanted to hire me. I said, "Fine!"

However, Taliaferro, so his testimony shows, never heard from Kuzak or any other H. C. Thomson spokesman, thereafter. He has never been on Respondent's tugboat.

b. *Respondent's defensive presentation*

While a witness, General Manager Turrin claimed that, during this period, Respondent had not been seeking tugboat operators, either on May 5, or thereafter. Kuzak conceded, however, that he had himself communicated with Taliaferro. When queried with regard to his contact's background and consequences, River Sands' salesman testified as follows:

> . . . [At] that time, I was asked by Mr. Crites to try and work out a viable solution, and present it to him, on a program for switching people from River Sands in Pittsburg to the barge, so that at no time would a boatman be on the tugboat longer then twelve hours. So at that time I called — I remember now, calling Mr. Taliaferro . . . And I set up a meeting with him, to discuss what we were looking for. I had been told to interview him, and see if he would be interested in the job . . . in the conversation, I was telling him basically what we do, and what the boat was like. This was on the phone. And he said, "Can I come out this afternoon?" . . . And I can't say, for sure, whether I said No, or Yes. But it was mentioned, by him, that he wanted to go by the Union hall. I then asked him what union he belonged to; and he said, the MEBA . . . I can't remember verbatim [what I said to him] it was almost a year ago. But I imagine that what I said would probably be along the lines that we had already gone through negotiations with the MEBA and that we are now in negotiations, or in agreement, with the Masters, Mates and Pilots . . .

Kuzak was then queried specifically with respect to whether Taliaferro had been told that he would have to join the last named organization, in order to work on Respondent's tugboat. River Sands' salesman conceded that he did not know "for sure" because of the time lapse since their conversation. He declared, however, that:

> . . . I certainly doubt that I said that. Because, in the first place, I have not the authority to tell anybody that they have to join anything. Nor do I have the bluntness to say it. I don't think I was ever that blunt . . . I imagine I would have said . . . something like: "River Sands, or H. C. Thomson, is now involved in negotiations with the Masters, Mates and Pilots. And if you did come to work with us, and if we get a contract with them, the Masters, Mates and Pilots would probably expect you to join their union."

When queried further, Kuzak testified that suggestions looking toward a prospective modification of Respondent's tugboat manning schedule had been propounded during a so-called management-sponsored "caucus" while he, President Crites and General Manager Turrin were present; that he (Kuzak) had been directed to determine whether a revised manning schedule would be possible, and how it could best be done; that while pursuing this directive from Respondent's management, thereby discharging the particular task which he had been "authorized" to perform, he had telephoned Taliaferro; and that the tugboat operator had been told he (Kuzak) wished to discuss the "feasibility" of working him (Taliaferro) into a job. River Sands' salesman testimonially conceded his knowledge, during this period, that Respondent's contract negotiations with Complainant Union had broken down; that Masters, Mates, and Pilots had, thereupon, provided Respondent with two tugboat operators; and that these operators were currently manning H. C. Thomson's vessel. Thus, Kuzak's testimony shows he told Taliaferro consistently with his knowledge that Respondent had tried to negotiate a contract with Complainant Union, without success; however, he denied telling the tugboat operator that a position with Respondent would have to be procured through a Masters, Mates, and Pilots referral. River Sands' salesman could not recall whether he had mentioned Respondent's proposed work schedule for a new tugboat operator, or whether he had mentioned Respondent's projected pay scale. According to Kuzak, Taliaferro was told that President Crites liked to have prospective tugboat operators make one trip aboard Respondent's tugboat, "to see if they liked it." He could not, however, recall a commitment to telephone Taliaferro the next morning so that his (Taliaferro's) trial run could be arranged.

Finally, River Sands' salesman reported his "thought" that he had told President Crites he had contacted a prospect, but that respondent's president had decided he would continue the two-man crew arrangement which H. C. Thomson then maintained. Concededly, however, Kuzak never telephoned Taliaferro with such a message.

c. *Credibility determination*

Upon this record, Kuzak's testimony that Respondent's management had specifically "authorized" him to develop a program whereby H. C. Thomson's tugboat manning schedules could be modified for cost reduction purposes merits credence. River Sands' salesman so testified without challenge or contradiction.

While a witness, General Manager Turrin did claim that during the May 5–6 period now in question his firm did not "need" more tugboat operators. He proffered no denial, however, with respect to record testimony which persuasively suggests that President Crites, during this period, wanted to reduce Respondent's costs for overtime worked by tugboat crew members.

However, confronted with the somewhat divergent testimony which Kuzak and Taliaferro proffered, with regard to the substance of their several conversations, I credit Taliaferro's recital rather than the less-than-positive recollections of Respondent's witness. River Sands' salesman knew that Respondent's contract negotiations with Complainant Union had broken down; further, he knew that Respondent's tugboat had, recently, been reactivated and staffed with Master, Mates, and Pilots referrals. Confronted with Taliaferro's testimony that he [Taliaferro] had been told he would have to join Masters, Mates, and Pilots, to work on Respondent's tugboat, Kuzak could not recall his remarks precisely; he testified with commendable candor that the "doubted" he had made such a blunt statement, that he did not "think" he had done so, and that he "imagined" he had "probably" volunteered some less positive statements. Such tentative testimony, within my

view, normally reflects a process of rationalization, bottomed upon afterthought primarily, rather than firm recollections or conviction. Taliaferro's contradictory testimony, with regard to their several conversations, merits Board credence, within my view.

C. *Conclusions*

1. Respondent's withdrawal of recognition

Within her brief, General Counsel's representative points to Respondent's concession that when Complainant Union reported that the firm's contract proposal had been rejected H. C. Thomson's management representatives promptly contacted a rival union which agreed to furnish "operators" qualified to man their tugboat. Further, General Counsel notes Respondent's concession that when Business Representative Ferguson subsequently tried to resume negotiations he was told that his belated request would not be honored, and that H. C. Thomson's management would no longer negotiate with his organization.

With matters in this posture, General Counsel contends that Complainant Union's rejection of Respondent's draft contract proposal provided no sufficient ground for Respondent's repudiation of their collective-bargaining relationship. Thus, Respondent's refusal to resume negotiations, sometime following Business Representative Ferguson's April 8 letter, plus the firm's hasty "recognition" granted a rival union, should be considered, so General Counsel contends, conduct statutorily proscribed.

Within my view, Board determination with regard to these contentions must begin, however, with a review of Respondent H. C. Thomson's situation when President Crites and General Manager Turrin rejected Business Representative Ferguson's request for continued negotiations. Respondent's tugboat had previously been struck. Between a date never specified within March 1975's last 15 days, and some other date within the 2-week period which followed Complainant Union's April 6 rejection of Respondent's contract proposal, the firm's vessel, so far as the record shows, was never in service.

During the hearing, Complainant Union's counsel sought to develop testimony that Respondent's tugboat had been manned sporadically during this period. When queried in this connection, however, Ferrari several times conceded failures of recollection. The record considered in totality will not warrant a determination, within my view, that Respondent's tugboat made any trips during the period now in question.

With matters in this posture, we really confront a question significantly divergent from General Counsel's formulation: Was Respondent H. C. Thomson's refusal to resume contract negotiations, with Complainant Union herein, privileged because the firm's two tugboat "operators" had, pursuant to their business representative's direction, generated a work stoppage which had resulted in their subsequent replacement? This question must now be considered.

General Counsel's representative proffers no characterizations, herein, with respect to Complainant Union's strike. Upon careful consideration, however, I am persuaded that, since Respondent's tugboat was never "tied up" within the firms' Richmond facility because Complainant Union, thereby, planned to protest conduct, chargeable to Respondent's management, which could properly have been considered unfair labor practices, the work stoppage which resulted cannot legitimately be designated a so-called "unfair labor practice" strike. My conclusion, thus baldly stated, rests upon several grounds.

First: Ferrari did testify, herein, that Wilkinson and he telephoned Complainant Union's business representative, presumably from Respondent's Port Chicago digging grounds, because their contract had not yet been settled. However, throughout March 1975 negotiations between Business Representative Ferguson and Respondent's general manager had been, and were still in progress. While a witness, Ferguson claimed that whenever he directed a work stoppage that stoppage was calculated to "induce" bargaining. However, nothing within the present record would warrant a determination that during March 1975 specifically any collective-bargaining impasse had developed, or that General Manager Turrin was, then, considered to be bargaining in bad faith. Since the parties' contract negotiations had not then reached deadlock, no conclusion would be justified that Ferrari and Wilkinson were directed to strike Respondent's tugboat because their employer's representative was then refusing to bargain.

Second: The present record considered in totality will not, within my view, support a determination that Complainant Union's members were directed to strike Respondent's tugboat because Respondent's management had significantly modified their working conditions unilaterally without consulting Complainant Union, their recognized bargaining representative. For present purposes, we may presume, *arguendo,* that had Respondent's management representatives really effectuated some March 1975 unilateral change, with respect to Wilkinson's and Ferrari's working conditions, that change's effectuation would have constituted an unfair labor practice. However, Ferrari's testimony, taken at face value, provides no substantial, reliable, or probative evidence that Respondent's tugboat "manning" schedules were effectively modified. The tugboat operator reported merely that Wilkinson and he were told Respondent's management "wanted" certain changes made.

Previously, within this decision, I have found that Ferrari misconstrued Salesman Kuzak's message regarding the particular change which President Crites was then considering. Ferrari's mistaken belief, with respect to the projected change's purport and consequences, may have prompted his decision to telephone Complainant Union's business representative. With matters in their present posture, however, the fact that Ferrari's communication derived from a mistaken, but good-faith belief may be considered immaterial, with respect to this case's disposition.

Further, Ferrari conceded that Wilkinson and he were permitted to make the particular trip, which they were being directed to undertake together. He proffered no testimony, whatever, that Respondent's spokesman had designated a specific future trip with respect to which Respondent's tugboat crew complement would be reduced.

Mindful of Ferrari's limited testimony, I credit Kuzak's proffered recollection that Respondent's tugboat operators essentially, were merely told their employer's management was "thinking about" making a change, and that he [Kuzak] was "in charge of trying to work out" modifications in Respondent's tugboat manning schedule. Since no real "unilateral" change was then effectuated, or definitively set for some future tugboat run, Business Representative Ferguson could have requested consultations and bargaining with respect thereto; he reacted, however, reflexively. His decision that Respondent's vessel should be "tied up" forthwith, within my view, cannot, properly, be considered a protest directed against statutorily proscribed conduct.

Third: Upon the present record, no determination would be warranted within my view that President Crites' April 4 rejection of Complainant Union's contract proposal reflected a concurrent rejection of collective-bargaining principles. Conceivably, General Counsel's representative and Complainant Union's counsel might contend that, when Respondent's president rejected those provisions, within Business Representative Ferguson's draft proposal, with which his designated representative, General Manager Turrin, had previously concurred, his [Crites'] reaction revealed "bad faith" negotiations. Compare *N.L.R.B.* v. *Shannon & Simpson Casket Company,* 208 F.2d 545, 548 (C.A. 9, 1953), enfg. 99 NLRB 430 (1952). The record, however, will support a determination, which I have made previously within this decision, that Respondent's general manager had never been "authorized" specifically to commit his principal; that he had never represented himself as possessing plenary powers in Respondent's behalf; and that Ferguson's belief, regarding Turrin's presumed power to bind Respondent herein, derived from a mistaken recollection. Thus, when Respondent's president, during their April 4 restaurant session, rejected Complainant Union's proffered contract and directed General Manager Turrin to prepare a counterproposal, he was not thereby "widening the area of disagreement" between Respondent and Complainant Union's negotiator. His conduct therefore could not transform Complainant Union's tugboat strike, which continued thereafter, into the so-called "unfair labor practice" stoppage.

To put the matter shortly then, since Business Representative Ferguson's March 1975 decision to strike Respondent's vessel cannot properly be characterized as calculated to protest some statutorily proscribed conduct, both Wilkinson and Ferrari must for present purposes be considered economic strikers. As such, they were legitimately subject to permanent replacement. And, within "one or two" weeks following Complainant Union's April 6 rejection of Respondent's contract proposal, they *were* replaced. Before his replacement, Wilkinson had, so the limited record herein shows, presumptively lost "employee" status. See Section 2(3) of the statute. He had formally resigned; thereafter, he had, so Ferrari's testimony proffered without contradictions suggests, secured "regular and substantially equivalent" work elsewhere.

Despite a contrary suggestion, proffered by General Counsel's representative within her brief, the record herein supports a determination, which I have made, that Respondent's striking tugboat operators had been replaced *before* Ferrari presented himself for reinstatement. Thus, when Complainant Union's business representative, sometime thereafter, requested General Manager Turrin to resume their contract talks, MEBA no longer represented Respondent's tugboat operators. And Turrin's refusal to resume negotiations was, therefore, privileged.

Again, despite a contrary contention suggested within General Counsel's brief, no determination would be warranted, within my view, that Respondent's management had "hastily" recognized Masters, Mates, and Pilots for collective-bargaining purposes, while Complainant Union herein was still entitled to demand recognition as the collective-bargaining representative for Respondent's tugboat operators. The record reveals that Respondent's general manager, pursuant to President Crites' direction, had merely queried Captain Fuller with respect to whether his organization could provide licensed personnel qualified to staff Respondent's vessel. When Captain Fuller reported that such personnel could be supplied, he suggested merely that a collective-bargaining contract could be later negotiated. These reciprocal communications, within my view, reflect nothing more than Respondent's determination to procure licensed tugboat operators from a known referral source; they reflect no *a priori* commitment to recognize Masters, Mates, and Pilots for collective-bargaining purposes.

With matters in this posture, finally, Respondent's refusal to resume contract negotiations, pursuant to Business Representative Ferguson's somewhat belated request, cannot be considered a refusal to bargain, statutorily proscribed. General Counsel's contention, with respect thereto, must be rejected.

2. The termination of Ferrari

Clearly, when Ferrari sought reinstatement, he was told that he had neither been laid off, nor discharged. Respondent's spokesman, when he denied the propriety of these descriptive characterizations with respect to Ferrari's situation, was technically correct. The tugboat operator, while a striker, had been permanently replaced. Though he retained "employee" status, since he had not, so far as the record shows, procured "regular and substantially equivalent" work elsewhere, Respondent had no continuing statutorily mandated "obligation" with respect to his reinstatement forthwith. Cf. *The Laidlaw Corporation,* 171 NLRB 1366, 1368–70 (1968). The firm's refusal to put Ferrari back to work immediately, therefore, cannot properly be considered reflective of discrimination, statutorily proscribed.

Conceivably, because his "unconditional application for reinstatement" nevertheless continued current, Ferrari may arguably have subsequently been deprived of statutorily guaranteed rights, defined within this Board's *Laidlaw* decision previously noted, since Respondent presumably failed to "seek him out" with a reinstatement offer, whenever some later tugboat operator vacancy developed. The present record, however, provides no substantial, reliable, or probative basis for a determination that since April 1975 tugboat operator vacancies have developed or been filled. Thus, a determination that Respondent has failed to fulfill some statutory obligation, with respect to

Ferrari's *post-application* reinstatement, would not be warranted herein.

While a witness, General Manager Turrin did concede that Ferrari had very possibly been told sometime during this period that he could reapply for work, but that Respondent had no MEBA contract, and that, should he be rehired, he would "have to join" the Masters, Mates, and Pilots organization. Such a statement — *with respect to which Ferrari, while a witness, was never questioned* — might arguably be considered reasonably calculated to restrain and coerce him, with respect to rights statutorily guaranteed. The present record, however, provides no clue, pro or con, with respect to whether Respondent's management, since April 1975 particularly, has negotiated a collective-bargaining contract with Masters, Mates, and Pilots, compassing a union-security provision. Thus, since General Manager Turrin's testimonial concession that he made the statement was merely tentative, and since the statement, whenever made, could conceivably have been bottomed upon some valid contractual provision, no statutory violation with respect thereto has, within my view, preponderantly been established.

3. The refusal to hire Taliaferro

General Counsel contends, herein, that Respondent discriminated with respect to Taliaferro's hire, since the firm's management refused to employ him because of his membership in Complainant Union, or because it conditioned his hire upon his willingness to become a Masters, Mates, and Pilots member. The record considered in totality persuades me that, with respect to this particular facet of the present case, the General Counsel's contention merits Board concurrence.

a. *The status of Kuzak*

Since River Sands' salesman, Michael Kuzak, was the person who communicated with Taliaferro regarding his possible hire, Respondent's liability for the salesman's course of conduct must necessarily rest upon some determination with respect to his status as President Crites' surrogate.

Before the hearing convened, with respect to this matter, Respondent's answer, duly filed, had conceded, through a failure to plead, Kuzak's supervisory status, together with his status as Respondent's statutory "agent" for present purposes. However, I permitted Respondent's counsel to withdraw these tacit concessions during the hearing and to note denials with respect to both of General Counsel's contentions.

The present record, considered in totality, persuades me that, while Kuzak may not have been a statutory "supervisor" with respect to Respondent H. C. Thomson's sand-dredging and sand-hauling operations, he clearly functioned as the firm's designated agent, throughout his several contacts with Taliaferro, previously noted.

While a witness, Kuzak conceded that Respondent's president had specifically requested him to develop a program, pursuant to which Respondent's tugboat manning schedule might be revised; further, he conceded that, pursuant to this general directive, Taliaferro had been contacted. In this connection, Kuzak testified that President Crites had specifically "authorized" him to proceed, during a management-sponsored "caucus" wherein he, Respondent's president, and General Manager Turrin had participated. Both Crites and Turrin were present, within the hearing room, when Kuzak's testimony to this effect was proffered; neither, however, challenged the correctness of their salesman's recital. With matters in this posture, Respondent's failure to controvert Kuzak's testimony, within my view, warrants a determination, consistent therewith, that his subsequent conversations with Taliaferro were conducted pursuant to specific "authority" with which he had been vested. In addition, the record reveals that Respondent's management representatives have regularly utilized Kuzak as their "conduit" whereby orders and information were relayed to tugboat and barge personnel. Mindful of these circumstances, I conclude that Kuzak's conversational statements and course of conduct, with respect to Taliaferro specifically, can be imputed to Respondent herein. *Clevenger Logging, Inc.*, 220 NLRB 768, 778 (1975); *Broyhill Company*, 210 NLRB 288, 294, fns. 40, 41 (1974); cf. *Paramount Trends, Inc.*, 222 NLRB 141, 142 (1976) in this connection.

b. *The refusal to hire*

There can be no doubt, upon the present record, that Kuzak had himself communicated with Taliaferro; further, there can be no doubt that Taliaferro had been specifically solicited to contact him (Kuzak) with regard to possible employment. During their May 6 telephone conversation, when the tugboat operator asked whether Respondent's position was still open, Kuzak declared that it was. Further, he proffered details with respect to Respondent's pay scale and the position's projected work schedule. Finally, he queried Taliaferro with regard to whether the latter would be willing to make a trial run.

During this conversation, so Taliaferro's credited testimony shows, Kuzak had likewise asked whether he (Taliaferro) held Masters, Mates, and Pilots membership; when the tugboat operator replied negatively, Kuzak had declared that whatever person Respondent hired would have to be a Masters, Mates, and Pilots member, or become a member, to retain the position.

Previously, during their preliminary May 5 conversation, Taliaferro had told Kuzak he would clear Respondent's job offer with Complainant Union herein. Kuzak's reaction, though not forthrightly negative, had been, so I find, subtly discouraging. Taliaferro, so his credited testimony shows, did declare his reluctance to consider joining "another" labor organization; however, he did not "rule out" such a possibility, prospectively. During the balance of their conversation, neither Kuzak nor Taliaferro pursued the matter further.

Nevertheless, Taliaferro was never summoned for his promised trial run on Respondent's vessel, which River Sands' salesman had designated a hiring prerequisite. With matters in this posture, there can be no doubt that thereby Kuzak effectively withdrew a job "offer" which Taliaferro could reasonably consider made, or alternatively, that River Sands' salesman suspended certain standard proce-

dures which normally would have preceded a formal "offer" with respect to some position. I so find.

While a witness, Kuzak reported his present "thought" that Taliaferro was never hired because President Crites had decided he would continue Respondent's current two-man crew arrangement, pursuant to which no relief operators would be required. Such testimony necessarily suggests that, whatever Taliaferro may have thought, the firm's search for a tugboat operator was really suspended for business reasons. I have not, however, been persuaded. The record shows that Kuzak had previously been directed to consider and formulate some revision in Respondent's tugboat manning schedule during March 1975; concededly, he was still working on President Crites' project some one and one-half months later. Under these circumstances, the salesman's suggestion that he was directed to forego any further communication with Taliaferro, because Respondent's president had thus belatedly changed his mind, carries no ring of truth.

Whether Kuzak himself decided that his contacts with Taliaferro should be terminated, or whether President Crites directed him to forego further contacts need not be determined. Respondent's management representatives had clearly manifested already their desire to refrain from further contacts with Complainant Union herein. Concededly, they had been and were concerned that, should they rehire or hire MEBA members for tugboat operations the continuity of those operations might be jeopardized. Their decision to forego Taliaferro's hire — clearly manifested when Kuzak failed to maintain their previously initiated contacts — stemmed, I find, from their concerns. That decision, thus motivated, violated the law.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICE UPON COMMERCE

Respondent H. C. Thomson's course of conduct set forth in section III, above, since it occurred in connection with Respondent's business operations set forth in section I, above, had, and continues to have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States; absent correction, such conduct, so far as it has been found subject to statutory proscription, would tend to lead to labor disputes burdening and obstructing commerce, and the free flow of commerce.

CONCLUSIONS OF LAW

In view of these findings of fact, and upon the entire record in this case, I make the following conclusions of law:

1. Respondent, H. C. Thomson, Inc., is an employer within the meaning of Section 2(2) of the Act, engaged in commerce and business activities which affect commerce within the meaning of Section 2(6) and (7) of the Act, as amended.

2. District No. 1 — Pacific Coast District, Marine Engineers Beneficial Association, is a labor organization within the meaning of Section 2(5) of the Act, as amended, which admits certain employees of H. C. Thomson, Inc. to membership.

3. Respondent H. C. Thomson's management representatives, when they withdrew a job offer or determined that Anthony Taliaferro would not be offered a tugboat operator's position because he proposed to clear his possible employment with Complainant Union herein, and because Taliaferro had suggested his possible reluctance to seek a work referral through International Organization of Masters, Mates, and Pilots, or to seek membership therein, discriminated against Taliaferro with respect to his hire and further interfered with, restrained, and coerced Respondent's employees generally, with respect to their exercise of rights statutorily guaranteed.

4. General Counsel's representative has not provided, for the present record, substantial, reliable or probative evidence sufficient to justify a determination that Respondent H. C. Thomson, Inc. has violated Section 8(a)(5), (3), or (1) of the statute, save in the particular respect hereinabove noted.

THE REMEDY

Since I have found that Respondent H. C. Thomson has committed, and has thus far failed to remedy, the specific unfair labor practice found herein which affects commerce, I shall recommend that it be directed to cease and desist therefrom, and to take certain affirmative action, including the posting of appropriate notices, designed to effectuate the policies of the statute.

Specifically, since I have found that Section 8(a)(3) and (1) of the statute were violated when Respondent's management representatives withdrew a job offer which Anthony Taliaferro had previously received, or determined to suspend their firm's standard procedures which normally would have preceded his prospective hire, for statutorily proscribed reasons, I shall recommend that Respondent be required to offer Taliaferro a tugboat operator's position promptly discharging, if necessary, to make a position available for him, any operators hired after May 6 without prejudice to his seniority and other rights and privileges which he would have enjoyed had he been employed on May 6, 1975. Should it be determined, however, that no tugboat operator vacancy presently exists, and that Respondent has hired no tugboat operators since May 6, 1975, Respondent H. C. Thomson, Inc. should prepare a preferential hiring list headed with Anthony Taliaferro's name. With this done, Taliaferro should be offered employment whenever a tugboat "operator" vacancy develops, with respect to Respondent's vessel. *Consolidated Dairy Products Company, d/b/a Darigold Dairy Products Company,* 194 NLRB 701, 706–707 (1971); cf. *W. B. W. Services, Inc.,* 190 NLRB 499, 504 (1971); *Lipsey, Inc.,* 172 NLRB 1535–36, 1551–53 (1968); *The Hughes Corporation,* 135 NLRB 1222, 1223 (1962). Respondent should, further, make Taliaferro whole for any pay losses which he may have suffered by reason of the discrimination practiced against him, by paying him a sum of money equal to the amount which he normally would have earned as wages, from the date when his services would have been required, initially, to the date of Respondent's hiring offer, or the date of his placement on Respondent's preferential hiring list, less his net earnings during the period designated. Taliaferro's backpay should be computed by calendar

quarters, pursuant to the formula which the Board now uses, cf. *Yuba Consolidated Industries, Inc.*, 136 NLRB 683, 688–689 (1962); *F. W. Woolworth Company*, 90 NLRB 289. Interest thereon should likewise be paid, computed at 6 percent per year. See *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), in this connection.

[Recommended Order omitted from publication.]