

**Holder Construction Company and Russell Gold.**  
Case 12-CA-17766

December 29, 1998

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On September 3, 1998, Administrative Law Judge William N. Cates issued the attached Bench decision. The General Counsel filed an exception and a supporting brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exception and briefs and has decided to affirm the judge's rulings, findings, and conclusions<sup>1</sup> and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Holder Construction Company, Orlando, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

*Thomas W. Brudney, Esq.*, for the General Counsel.  
*William B. deMeza, Jr., Esq. (Holland & Knight)*, of Tampa, Florida, for the Respondent.  
*Glenn J. Paul, Esq. (James, Zimmerman, Paul & Huddleston)*, of Miami, Florida, for the Charging Party.

BENCH DECISION

STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge. This is a wrongful discharge case. At the close of a 2-day trial in Orlando, Florida, on August 10 and 11, 1998, I rendered a Bench Decision in favor of the General Counsel (Government) thereby finding a violation of 29 U.S.C. § 158(a)(1). This certification of that Bench Decision, along with the Order which appears below, triggers the time period for filing an appeal ("Excep-

<sup>1</sup> There are no exceptions to the judge's finding that the Respondent violated Sec. 8(a)(1) of the Act by discharging employees Gold and Shirley because they engaged in protected concerted activity. The General Counsel, however, excepts to the judge's failure to provide a remedy requiring the Respondent to offer reinstatement to the two discriminatees. The General Counsel concedes that reinstatement was not sought at trial, but argues that the Board may impose a remedy not requested by the General Counsel pursuant to its authority under Sec. 10(c) of the Act. While the Board possesses broad remedial authority to ensure that unfair labor practices are remedied, we find no merit in the General Counsel's exceptions in this case. At trial, the General Counsel affirmatively disclaimed any intent to seek reinstatement for the two discriminatees. Further, Shirley, who was separately represented by counsel at the hearing, neither objected to the General Counsel's disclaimer nor excepted to the judge's failure to include a reinstatement remedy.

In adopting the judge's proposed order, we do not rely on the judge's finding that the completion of the construction project from which the employees had been discharged precluded him from ordering reinstatement. Under *Dean General Contractors*, 285 NLRB 573 (1987), reinstatement and backpay issues in the construction industry, as in other industries, ordinarily are to be resolved by a factual inquiry during the compliance process.

tions") to the National Labor Relations Board I rendered the Bench Decision pursuant to Section 102.35(a)(10) of the National Labor Relations Board's (the Board) Rules and Regulations.

For the reasons stated by me on the record at the close of the trial, and by virtue of the prima facie case established by the Government, a case not credibly rebutted by Holder Construction Company (the Company), I found the Company violated Section 8(a)(1) of the National Labor Relations Act (the Act) when on November 13, 1995, it discharged its employee Russell Gold (Gold), and when on November 20, 1995, it discharged its employee William T. Shirley Jr. (Shirley) because of their concerted protected activities related to raising safety concerns with the Company. See: *Meyers Industries*, 281 NLRB 882 (1986) (*Meyers II*), enfd. 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).<sup>1</sup> I rejected the Company's stated reasons for discharging Gold and Shirley—namely, that Gold walked off the job and that Shirley had many job related complaints against him; refused to perform crane lifting duties for certain crafts (or individuals); or, that he incorrecly reported his hours of work and/or that he disrupted certain concrete testing operations. I concluded the Company did not demonstrate it would have terminated the two employees in the absence of any protected conduct on their part. See *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

I certify the accuracy of the portion of the transcript, as corrected,<sup>2</sup> pages 371 to 392, containing my Bench Decision, and I attach a copy of that portion of the transcript, as corrected, as "Appendix A."

CONCLUSION OF LAW

Based on the record, I find the Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act; that it violated the Act in the particulars and for the reasons stated at trial and summarized above, and that its violations have affected and, unless permanently enjoined, will continue to affect commerce within the meaning of Section 2(2) and (6) of the Act.

REMEDY

Having found the Company has engaged in certain unfair labor practices, I find it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found the Company discriminatorily discharged its employees Russell Gold and William T. Shirley Jr., I recommend they be made whole<sup>3</sup> for any loss of earnings or other benefits suffered as a result of the discrimination against them, with interest. Backpay shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest, as computed in *New Horizons for the Retarded*, 283

<sup>1</sup> In *Meyers II*, the Board reaffirmed its definition of concerted activity contained in *Meyers Industries*, 268 NLRB 493 (1984) (*Meyers I*) revd. sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 971 (1985).

<sup>2</sup> I have corrected the transcript to conform to my intended words, without regard to what I may have actually said in the passages in question.

<sup>3</sup> The Government did not seek reinstatement for the two discharged employees because the project is, as of the trial herein, completed.

NLRB 1173 (1987). I also recommend the Company, within 14 days from the date of this Order, be ordered to remove from its files any reference to Gold's and Shirley's unlawful discharges and, within 3 days thereafter, notify Gold and Shirley in writing this has been done and that their discharge will not be used against them in anyway. Finally, I recommend the Company be ordered, within 14 days after service by the Region, to mail<sup>4</sup> a copy of an appropriate notice to employees, copies of which are attached as "Appendix B"<sup>5</sup> to all employees employed by the Company on its Orange County Florida Courthouse Project (Orlando, Florida) on or after November 13, 1995, in order that employees may be apprised of their rights under the Act and the Company's obligation to remedy its unfair labor practices.

On these conclusions of law and on the entire record, I issue the following recommended<sup>6</sup>

#### ORDER

The Respondent, Holder Construction Company, Orlando, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees because they engage in protected concerted activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make Russell Gold and William T. Shirley Jr. whole for any loss of earnings they may have suffered as a result of the discrimination against them in the manner described in the section entitled the remedy.

(b) Within 14 days from the date of this Order, remove from its files any reference to their unlawful discharge and within 3 days thereafter notify Russell Gold and William T. Shirley Jr. in writing this has been done and their discharge will not be used against them in any way.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents, for its 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.

(d) Within 14 days after service by the Regional Director of Region 12 of the National Labor Relations Board, mail copies of the attached notice marked "Appendix B" (on forms provided by the Regional Director for Region 12) after being signed by the Company's authorized representative, to all employees employed on or after November 13, 1995, by the Company on its Orange County Courthouse Project.

(e) Within 21 days after service by the Region, file with the Regional Director for Region 12 of the National Labor Relations

Board sworn certification of a responsible official on a form provided by the Region attesting to the steps the Company has taken to comply.

371

#### APPENDIX A

#### BENCH DECISION

#### JUDGE CATES: On the record.

Before we go back on the record, let me thank the parties again for the presentation of the case.

Each of the counsel are a credit to the party they represent.

Whoever wins or loses may not be based on counsel, in my opinion. It's merely based on the facts and the law.

It's always a pleasure to be in Orlando, Florida. And this is my decision.

The charge in this case was filed by Mr. Russell Gold on February 28, 1996, and thereafter timely served on the Respondent.

The Respondent, the Company in this case, is a corporation with its principal office and place of business located in Atlanta, Georgia, and it has been and is engaged in the construction industry.

In this particular case, it was involved in the construction of the Orange County, Florida, Courthouse, located in Orlando, Florida.

During the twelve month period ending July 31, 1996, the Company, in conducting its business operations, purchased and received goods valued in excess of \$50,000 at its Orlando, Florida, job site, directly from points located outside the state of Florida.

372

During that same twelve month period ending July 31, 1996, the Company, in conducting its business operations, performed services valued in excess of \$50,000 for various enterprises located in states other than the state of Florida, and for enterprises within the state of Florida, each of which enterprises is an enterprise directly engaged in interstate commerce.

Based on these facts and the Company's admission, I find the Company is an employer engaged in commerce within the meaning of Sections 2(2), (6) and (7) of the Act.

I find that, at all times material herein, Superintendent Christopher Brogdon, Superintendent Mark Rose, and Assistant Superintendent Andy Rogero, were supervisors and agents of the Company within the meaning of Section 2(11) and 2(13) of the Act.

With respect to Mr. Brogdon and Rose, the Company admits they are supervisors and agents within the meaning of the Act.

The evidence clearly establishes that Assistant Superintendent Andy Rogero meets the requirements of a supervisor and agent of the Company within the meaning of the Act. And I so find.

This case centers around the discharge of two tower crane operators, Messrs. Russell Gold and William T. Shirley, Jr.

The government has contended herein that the two were

373

discharged for voicing safety concerns and/or declining to operate cranes that they perceived to be unsafe.

The Company, on the other hand, contends Gold was discharged for walking off the job, after expressing safety concerns that had been put to rest by the Company.

<sup>4</sup> I have ordered the notices be mailed to the employees because the project, as of trial herein, is completed.

<sup>5</sup> If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

<sup>6</sup> If no exceptions are filed as provided by Sec.102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

The Company contends Shirley was discharged for so many complaints against his performance, his refusal to make certain picks or lifts for certain individuals, and his bumping other cranes in the operation of his crane.

Before I get to the facts that make up the case herein, let me briefly describe for you the law that I will be applying in reaching the conclusions that I will herein.

The parties appear to be in agreement that a key or central issue herein is whether Mr. Gold's leaving work on or about November the 8th, 1995, was protected concerted activity.

And the legal principle will apply whether or not it is concluded that Mr. Gold walked off the job or whether Mr. Gold was told there was nothing for him to do, for him to leave the job.

The Board, in *Meyers Industries* 268 NLRB 493, a 1984 case, commonly referred to as *Meyers I*, noted that the concept of concerted action has its basis in Section 7 of the Act.

The Board pointed out in *Meyers I*, that although the legislative history of Section 7 of the Act does not specifically define concerted activity, it does reveal that

374

Congress considered the concept in terms of individuals united in pursuit of a common goal.

The statute requires that activities under consideration be "concerted" before they can be "protected."

As the Board observed in *Meyers I*, indeed Section 7 does not use the term, "protected concerted activities," but only concerted activities.

It goes without saying that the Act does not protect all concerted activity.

With the above, as well as other considerations in mind, the Board, in *Meyers I*, set forth the following definition of concerted activity:

In general, to find an employee's activity to be concerted, we shall require that it be engaged in, with, or on the authority of other employees, and not solely by and on behalf of the employee, himself.

Once the activity is found to be concerted, an 8(a)(1) violation will be found if, in addition, the employer knew of the concerted nature of the employee's activity, the concerted activity was protected by the Act, and the adverse employment action at issue, for example, as the case herein, discharge, was motivated by the employee's protected concerted activity. *Meyers Industries*, reported at 281 NLRB 882, commonly referred to as *Meyers II*, did not purport to change those principles.

375

Not only am I required to apply what I shall refer to collectively as the *Meyers* doctrine, I am also required to analyze the facts in this case under the teachings of *Wright Line*, reported at 251 NLRB 1083, enforced 622 F.2d 899 (1st Circuit).

And in a subsequent case, *NLRB v. Transportation Management Corporation*, 462 U.S. 393, the Supreme Court reviewed the Board's *Wright Line* test and appeared, as various courts of appeals have stated, to approve its use in so-called dual motivation cases.

The Board, in its *Wright Line* case, indicated that it would utilize the analytical mode set forth therein on all cases turning on employer motivation, whether they were Section 8(a)(3) allegations or Section 8(a)(1) allegations.

Under the *Wright Line* case, it is the General Counsel's threshold burden to, "make a prima facie showing sufficient to support the inference that protected conduct was a motivating factor' in the employer's decision."

Accordingly, it would go without saying that lacking such prima facie showing, the complaint may be dismissed on that basis alone.

Likewise, it is only when such a showing can be found in the credible record that it may become necessary to the ultimate decision, to determine whether the employer has, nevertheless, made out a *Wright Line* defense.

376

In other words, has the employer or respondent demonstrated that the same action it took would have been taken even in the absence of any protected conduct.

The prosecution, meaning the General Counsel in this case, must establish the existence of four factual elements to satisfy its threshold burden under *Wright Line*, namely protected activity, knowledge by the employer of the protected activity, animus on the part of the employer, and adverse action.

If any one of those elements is missing, the government's case will fail.

The *Wright Line* burden of proof imposed upon the General Counsel may be sustained with evidence short of direct evidence of motivation, for example, inferential evidence arising from a variety of circumstances, timing, pretext, and the like.

Furthermore, it may be found that where the respondent's proffered non-discriminatory motivational explanation is false, even in the absence of direct evidence of motivation, the trier of fact may infer unlawful motivation.

Motivation of animus may also be inferred from the record as a whole, where an employer's proffered explanation is implausible or a combination of factors circumstantially support such an inference.

Direct evidence of animus is not required to support such an inference.

Now we come to the facts that constitute this case. And

377

let me state, before I address the facts, that the facts that I present will be the facts that I consider to be the credible facts in this case.

If there is testimony that would contradict any testimony that I credit, I have, even if I do not say so, discredited any contrary evidence.

I make my credibility determinations to the extent necessary based not only on demeanor, but on the record as a whole.

The construction project that gives rise to this case involves the construction of the Orange County, Florida, Courthouse and adjacent buildings.

The Courthouse, itself, the evidence reflects, was perhaps a 25-story project, referred to by the parties herein as the tower, plus 3 buildings that were lower-storied buildings, that is perhaps only to a height of 5 floors.

In the construction of projects that reach this height, it is necessary for the building materials, workers, and other matters to be hoisted to the various levels of the building as it is constructed.

And in this project, as with other projects, there were a number of cranes utilized for that purpose.

The two cranes referred to as the tower cranes were identified in the record as the SK400 and the SK280.

The evidence will show that Mr. Shirley primarily involved

**378**

himself with the SK400, and Mr. Gold the SK280.

There were various other types of cranes on the project. The 650 ton crane, for example, its boom or long arm for lifting materials could, when extended, reach heights that would be primarily the same as the heights reached by the SK400 and the SK280.

There were several lesser cranes utilized on the project that moved materials closer to the ground surface.

The case herein primarily involves the SK400 and the SK280.

One further bit before I get into the facts that take place in November of 1995. The overriding flavor of this case is permeated by two factors.

One is that the particular construction company herein, the Respondent, does not, by its practice, appear to generate or maintain disciplinary records on its employees.

The project superintendents testified that they worked more as a team and a family, and did not operate, as might be the case in any other types of industry, where you would have various levels of discipline before action was taken against an employee.

I do not say that in any critical manner. I just simply point out that this case is permeated by that factor.

Secondly, it appears that the tower crane operators are a pampered group of employees. I base that on the testimony of

**379**

Superintendent Rose, Superintendent Brogdon, and Assistant Superintendent Rogero.

In fact, I think it was Superintendent Brogdon who described them as prima donnas who sat perched at the top of the construction project and looked down on everything that happened, and had the power, if they chose by declining to lift products shut the job down.

Superintendent Rose testified he treated the crane operators differently because they were hard to find and sometimes difficult to deal with.

So we have that flavor working its way through the case, in conjunction with the fact the Company does not compile, maintain, or keep disciplinary records on its employees.

The events of November 7 and 8, 1995, and thereafter are those that must be focused on.

And let me state sort of parenthetically that no explanation was offered in this record as to why events that took place in 1995 are only now coming to trial. But that is not a misstatement when I refer to events in November 1995, even though this is 1998.

It appears that during the week of November 1, the cranes and particularly crane SK280, was getting to where there was less and less clearance room, because later on in November, perhaps November the 11th, the SK280 was scheduled to be jacked up. And in very brief terms, that simply meant adding

**380**

additional structures under the crane, so that the crane was lifted to a greater height and had more clearance.

There is no dispute that the clearance room was becoming less and less as the building got higher to where the crane was, and this was taking place commencing in the week of November 1.

Matters sort of came to a head on November 7, when Mr. Gold became concerned about the clearance that the crane he was operating, the SK280, had, particularly with the counter-balance matters affixed to one end of the crane.

The crane is essentially and simply described, a vertical object with a long horizontal object that extends, has a hook on one end, goes down, picks up items from ground level or from the surface, and lifts it onto the project.

In order to keep the crane from tumbling, it has counterweights on the opposite end of the lift part of the crane.

And Mr. Gold became concerned of the clearance that he perceived he had on November the 7th. And he discussed that matter with, among others, Mr. Shirley.

Mr. Shirley was concerned about the clearance and the matter was raised with, among others, Superintendent Rose.

On the early morning hours of November 8, 1995, perhaps as early as 4:00 a.m. on that date, certain steel columns were 24 erected on the topmost level at that point.

And, again, this raises concern with Mr. Gold as to

**381**

whether or not he could operate his crane in what he perceived to be a safe manner.

With his conferring with Crane Operator Shirley, they expressed their concerns as I have indicated to Superintendent Rose.

Let me go back to the evening of November the 7th. Mr. Rose, Mr. Gold, and perhaps another individual or two, took certain measurements to see how much the clearance was.

Those measurements, and Mr. Gold's and Shirley's concerns, were relayed to Morrow Crane Service, because the cranes were owned by Morrow and only on either loan or lease to the Respondent herein.

Morrow Crane took the information that was provided to them by Mr. Rose and the measurements, as well as certain engineering drawings they already had, and determined, sight unseen, that it was safe to operate the SK280 on, among other dates, November the 8th.

Additionally, the Company, specifically through Superintendent Rose, and perhaps either directly or indirectly through Superintendent Brogdon and Assistant Superintendent Rogero, offered to provide Mr. Gold with a spotter or spotters so that the spotter or spotters could, by radio, advise Mr. Gold how close he was to any object in the operation of his crane, or advise him where he could move the crane so he would not be over or near items that would be closest to the crane.

**382**

Mr. Gold explained that he had been, for many years, a crane operator and that when picking a load from the ground surface, the crane would bow toward the ground.

And that when the crane was lifted—or the load was lifted by the hook on the crane to whatever level it was being delivered to, that when the weight was released from the crane, you got a see-saw type result that would cause the counterweight end of the crane to proceed up and down.

And he feared that it was unsafe to operate the crane on November 8th.

Mr. Gold rectified a spotter would not have been of that great assistance to him, because he could look around and see, when in movement, where he was going, but that neither a spotter nor himself could accurately determine what the see-saw or

recoil motion would be when the weight was taken away from the crane.

So Mr. Gold declined to operate the crane on November the 8th.

There is a conflict as to what took place on that date with respect to Mr. Gold's leaving the premises of the Company on that date.

There is no question Mr. Gold left the premises.

Mr. Gold testified he waited around to see what the result would be with Mr. Rose and Mr. Brogdon, and that Mr. Rose was there, but apparently they were not getting an

### 383

answer, based on Mr. Gold's testimony, from anyone else.

So with nothing for him to do other than operate the crane, which he was declining to do, Mr. Rose told him he may as well go home. And Mr. Gold said he did so.

Mr. Gold contends he called the office of the Company on Thursday, November 9, and Friday, November 10.

Superintendent Rose, on the other hand, says he did not give Mr. Gold permission to leave the project, and that Gold simply walked off the project, and that Gold was terminated at a later point for his walking off the project.

Going through the items of concerted activity and whether it is activity protected by the Act or not, and the elements that are outlined in Meyers, I am persuaded that Messrs. Gold and Shirley were concerned about and discussed their concerns about safety, the safe operation of the cranes, and more specifically the safe operation of the SK280, on or about November 8 or anytime after November 7, until such time as the crane was jacked up so that it had clearance.

I am persuaded they had concerted activity. The two of them got together to discuss safety concerns.

Secondly, I am persuaded the discussion of safety concerns is a matter that is protected by the Act. It is inextricably intertwined with working conditions.

Thirdly, did the Company know that these two individuals and perhaps others were concerned about safety?

### 384

Yes, it was communicated to the Company. In fact, the Company took action, made measurements, called Morrow Crane Company, so they were fully aware that the two employees in question had joined together and expressed their concerns about the safe operation of the cranes and particularly the SK280.

Did Mr. Gold walk off the job or was Mr. Gold instructed to, in essence, go home? You might as well go home till we contact you.

I credit Mr. Gold's testimony. But let me state that the end result of this case would have made no difference if I had not had credited his testimony and had in fact, concluded that he walked off the job.

The end result would have been the same for these reasons.

Number one, the Company had tolerated Mr. Gold's walking off the job on previous occasions. For example, Mr. Gold had walked off the job in a dispute over a paycheck.

Secondly, Mr. Gold had walked off the job over a dispute he had with a Marine-type carpenter foreman, that the two of them couldn't get along. And I am not addressing who was at fault there or at fault at all in that case. I'm simply saying the Company had tolerated his walking off the job in the past.

But further, and perhaps more important, is the testimony of Superintendent Brogdon, in which he said that even if Mr. Gold had remained on the job, but had refused to operate the

### 385

crane after the Morrow Crane people had proven it was safe, he would have terminated Gold anyway.

So whether he walked off the job or whether he was told to go home, in the final analysis, makes no difference, although I conclude he was told to go home.

The Company discharged Gold.

So the four elements, that is he engaged in concerted activity that was protected by the Act, and as a direct result of that, he was discharged.

Did the Company establish it would have discharged Gold anyway for valid reasons? That is did the Company establish that it, through technical data of the owner of the crane, established that the crane could be safely operated and, therefore, it discharged Mr. Gold for refusing to operate a crane that it had established was safe?

I find the Company failed in its defense, because the individual concerned about the safe operation of the crane need not be absolutely correct in determining it would be unsafe to operate the crane, but merely that he had good faith reasons to believe the crane could not be safely operated under the conditions that he was called upon to operate the crane.

Does it make any difference to this case that a different crane operator came in and operated the crane under the same circumstances that Mr. Gold would have operated it without any problem?

### 386

The answer is no. The mere fact that another crane operator could come in and operate it without incident up until the crane was jacked up is of no great moment.

The evidence here indicates that not only did Messrs. Gold and Shirley have a concern about the safe operation of the crane, Superintendent Rose and others did also, because they were not sure. They called Morrow Crane and pursued it.

So I find the Company violated the Act when on or about November 13, it discharged its employee, Crane Operator Russell Gold.

Next, we move to the discharge on or about November 20 of Mr. Shirley.

There is no question that Mr. Shirley discussed with and pursued safety concerns with Mr. Gold.

The Company was aware of Mr. Shirley's and Mr. Gold's concerns involving safety.

The question then moves to whether or not Mr. Shirley was discharged because he pursued safety concerns, or whether he was discharged as testified to by the Company's representatives, specifically Mr. Brogdon, who testified that Shirley was dismissed because of so many complaints against him, because of the refusal to make certain picks for certain employees at the job site, and other conduct attributed to Mr. Shirley, such as his operation of the crane in a manner that he was, as Superintendent Rose testified, continually hitting cranes; and

### 387

also that the Company went back through his time records and concluded he was working one or two hours more than anyone else, and hence his time records were suspect; and that Mr. Shirley, in operating the crane, hit other cranes, hit an individ-

ual's hard hat with a hook, and knocked over cylinders that were being utilized by Universal Testing in testing concrete that it was mandatory to be tested.

I think it's essential to look at some of the events that took place between November 7 and November 20, in very summary fashion.

November 7 is when as I have earlier stated, Messrs. Shirley and Gold became concerned about clearance of the cranes, and their discussions among themselves and with Mr. Rose and with Mr. Brogdon, and as I recall, Mr. Shirley testified he even called Morrow Crane to ascertain if the Company had, in turn, called Morrow Crane.

Then on November the 8th, when Mr. Gold did not work, it appears that Mr. Shirley did. But I quickly note that Mr. Shirley was operating the SK400, which was in a different position and did not have as much clearance problem, at that time.

November the 9th, which was on a Thursday, Mr. Shirley was not at work, as I understand it, because he had a doctor's appointment.

On Saturday, November the 11th, it appears that, based on

**388**

Mr. Shirley's testimony, he came in at about 6:00 p.m. to "jack the crane," which was meaning the SK280, and on Sunday, November the 12th, he contends he continued jacking on the crane, and that he worked thereafter, specifically on Monday, I guess it would have been, November the 13th, without any complaints, and that he was then notified on November the 20th, that he was no longer needed on the project.

The question then becomes as to whether Mr. Shirley was discharged as a result of the number of factors that the Company indicates he was discharged or was Mr. Shirley discharged because of his concerted complaints with Mr. Gold about safety and his and Mr. Gold these separately and jointly pursuing those matters.

I am persuaded that Mr. Shirley's discharge was motivated, in part, by the Company's distaste for his pursuing the safety matters with Mr. Gold.

The Company was concerned, specifically Mr. Brogdon, Superintendent Brogdon, that Mr. Shirley had made a comment that he was going to bring the project to its knees.

And each of the individuals perceived, management individuals, perceived or believed that Mr. Shirley was behind of, the instigator of, or at least the encourager of Mr. Gold's complaining about safety.

Messrs. Brogdon, Rose, and Rogero were all concerned about the conduct of Mr. Shirley, and the potential that he might shut

**389**

the job down.

So I am persuaded the General Counsel established that Mr. Shirley engaged in concerted activities with Mr. Gold and perhaps others, that it was conduct concerning safety and protected by the Act, that the Company knew about it, and that the Company took adverse action against Mr. Shirley.

Did the Company establish it would have discharged Mr. Shirley, even in the absence of any protected conduct on his part?

And I am persuaded the answer to that question is no, because, among other reasons, the Company says we discharged Mr. Shirley for various infractions operating the crane.

Well, assume for the sake of discussion that Mr. Shirley did hit the 650 ton crane with the SK400. It appears that the Company had tolerated another employee two cranes, perhaps the same cranes, the SK400 and the 650 ton crane.

Mr. Rose alludes to the fact he smelled alcohol on, I believe it was, November the 11th, on Mr. Shirley. But even by Rose's own testimony, he told him to go ahead and operate the crane for approximately two hours, while he gave another crane operator a restroom break.

Mr. Shirley's time records had not been a problem previous to this.

And the Company had also tolerated Mr. Shirley and other

**390**

crane operators' conduct that might not in some other industries be condoned.

So I am persuaded the government established Mr. Shirley was discharged for his participation in concerted protected activities, and that the Company failed to demonstrate it would have discharged Mr. Shirley in the absence of any concerted protected activity on Mr. Shirley's part.

In so concluding, I don't mean to imply that Mr. Shirley is an exemplary employee. The evidence would tend to indicate perhaps otherwise.

He had disagreements with other crane operators. He contends he got trapped between cranes. He took the log book from the crane, from the SK400, didn't return it. His comments were "they didn't ask me for it." That totally misses the point.

So I don't mean to imply that Mr. Shirley is an exemplary employee. The evidence doesn't support such a conclusion.

But I need not even reach that to conclude that the evidence, to my satisfaction, demonstrates the Company took the action it did against Mr. Shirley because he participated in discussions with Mr. Gold concerning safety that resulted in Mr. Gold not working, and the Company perceived Mr. Shirley's role in all of this was controlling.

Whether it was or not, the Company perceived that to be the case.

**391**

Accordingly, I shall order that the Company cease and desist, that it make Messrs. Russell Gold and William T. Shirley, whole for any wages they may have lost as a result of the unlawful action against them; that the Company remove from its records, any reference to their unlawful termination; that the Company mail an appropriate notice to all employees employed by the Company at this location, since on or about November 8, 1995.

I do not order that the Company reinstate or offer employment to Messrs. Gold or Shirley, because the government does not seek any such remedy.

And it is my understand the government would not be in a position to seek such a remedy because the Orange county Courthouse project has been completed.

The court Reporter will provide to me in approximately ten days, a copy of the transcript and exhibits. And, at that point, I will certify those pages of the transcript that constitute my decision to the Board.

It is my understanding that any appeals period that any party might wish to take would commence to run from the certification of my decision. That's my understanding of the rules.

I urge you, if you wish to take an appeal or exceptions, that you follow the Board's rules and regulations, rather than relying on my understanding of them.

**392**

Again, let me thank counsel for their presentation of the case.

And this trial is closed.

**(Whereupon, at 2:45 p.m., the hearing in the above-entitled matter was concluded.)**

APPENDIX B

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

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union  
To bargain collectively through representatives of their own choice  
To act together for other mutual aid or protection  
To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge our employees for engaging in concerted protected activities.

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

WE WILL make Russell Gold and William T. Shirley Jr. whole for any loss of earnings and/or other benefits resulting from their unlawful discharge less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to their unlawful discharge, and within 3 days thereafter, notify Russell Gold and William T. Shirley Jr. in writing that this has been done and that their discharge will not be used against them in any way.

HOLDER CONSTRUCTION COMPANY