

675 West End Owners Corp., Salomon Management Co., LLC; Niv Realty, LLC; Solomon Management Co., LLC; Sharon Realty, LLC; Dan Co., LLC; and Tal Co., LLC-A Single Employer and Gal Realty, LLC; Salomon Realty; Niv Realty; Solomon Realty; Sharon Realty; Uzi EINY d/b/a Dan Co.; Tal Co.; and Riv Realty-A Single Employer, Joint Employers and Stationary Engineers, Firemen, Maintenance and Building Service Union Local 670, RWDSU, UFCW, AFL-CIO. Cases 2-CA-33940, 2-CA-34059, and 2-CA-34587

August 26, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND SCHAUMBER

On December 27, 2002, Administrative Law Judge Eleanor MacDonald issued the attached decision. The Respondents filed exceptions, supporting briefs, and reply briefs.¹ The General Counsel filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,² and conclusions and to adopt the recommended Order as modified and set forth in full below.

The judge found, and we agree for the reasons stated by her, that the Respondents violated Section 8(a)(5) by hiring a security guard company to perform bargaining unit work without prior notice to and bargaining with the Union, refusing to meet and negotiate with the Union on this matter, and refusing to provide information to the

¹ The Board accepted separate exceptions filed by both individual Respondent Uzi Einy and attorney Morris Tuchman on behalf of the Respondents. Accordingly, we are referring to arguments made in both Einy's and Tuchman's briefs when we reference arguments made by the "Respondents."

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

The Respondents contend that the judge's rulings, findings, and conclusions demonstrate bias and prejudice, and that it was not afforded a full opportunity to be heard. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondents' contentions are without merit. Accordingly, we also find no merit in the Respondents' exception to the judge's refusal to recuse herself.

Finally, in adopting the judge's findings, we find it unnecessary to rely on the judge's reference to Uzi Einy's religious practices in her finding that the Respondents did not mail a letter to the Union requesting bargaining.

Union.³ Further, the judge found, and we agree for the reasons stated by her and discussed below, that the Respondents' ownership and management companies are each a single employer and together are joint employers, and that the Respondents' argument that the Board in its earlier representation case did not properly certify the Union is meritless. Additionally, we find that the judge did not abuse her discretion in dismissing the Respondents' other procedural arguments.⁴ Finally, we agree with the judge's recommendation, as discussed below, that a hearing should be held to determine the litigation costs expended by the Union and the General Counsel as a result of Respondent Uzi Einy's (Einy) willful violation of the judge's instructions regarding subpoenas. However, for the reasons discussed below, we do not adopt the judge's further recommendation that the Board warn and reprimand Einy for his conduct during the hearing.

1. Background

The Respondents own and manage residential buildings in New York City. Each of the Respondents' seven residential rental properties is respectively owned and managed by a different limited liability company and a partnership of the same name.⁵ Einy has substantial ownership interest in all of the Respondents' affiliated business entities.

In 1999, the Respondents' doormen began organizing. In a Decision and Direction of Election issued on December 20, 1999 (Case 2-RC-22120), the Regional Director determined, among other things, that the Respondents' ownership companies are a single employer, that the Respondents' management companies are a single employer, and that together they are joint employers.

³ We find it unnecessary to pass on the judge's conclusion that the Respondents' hiring of nonunit security guards violated Sec. 8(a)(3) in addition to Sec. 8(a)(5) because the additional finding of the Sec. 8(a)(3) violation would not materially affect the remedy. We have modified the Order accordingly, and we have substituted a new notice to comport with these modifications.

⁴ We adopt the judge's decision to revoke the Respondents' post-hearing subpoena, which requested from the court reporter audiotapes of the hearing. We have reviewed the transcript of the hearing cited by the Respondents in support of their exceptions to the judge's ruling. Even if the audiotapes support the Respondents' contentions that the judge raised her voice in addressing Uzi Einy on one occasion and, on another occasion, mistakenly accused him of speaking when he had not, the judge's conduct in this regard would not establish bias. In light of Einy's conduct at the hearing, as described in detail in the judge's decision, the judge's rulings occurred in the context of Einy's disputing or ignoring the judge's rulings and instructions. Such evidence does not show bias on the part of the judge or require a different result than we reach here. Member Schaumber does not join with his colleagues on this point.

⁵ All of the ownership companies are managed by a company of the same name except 675 West End Owners Corp., which is managed by Gal Realty.

The Respondents requested review of this determination, which the Board denied by unpublished decision on February 29, 2000.

An election was conducted on January 28, 2000. Thereafter, the Respondents filed objections alleging conduct during the election showing Board bias. The Regional Director has correctly determined that the Respondents withdrew this objection. The Respondents also filed challenges to the ballots of six doormen on the ground that they were statutory guards, which a hearing officer overruled. The Respondents excepted to the Hearing Officer's Report; the Regional Director adopted the hearing officer's recommendations regarding the challenges and the Board denied the Respondents' request for review. A corrected tally of ballots issued after the ballots were opened and counted, reflecting that the Union received a majority of the valid votes cast. Thereafter, the Respondents filed further objections to the election, again disputing, among other things, the single employer and joint employer findings.⁶ On May 23, 2001,⁷ the Acting Regional Director disposed of the Respondents' objections and issued a Certification of Representative.

2. The Respondents' arguments concerning the representation case

The Respondents argue that the Union was not properly certified and that the Respondents' ownership and management companies were not properly determined to be each a single employer and together joint employers in the earlier representation case. The Respondents allege that the Board never dealt with the Respondents' objections to the corrected tally of ballots, which disputed, among other things, the single employer and joint employer findings.

We find no merit in the Respondents' assertion. The Acting Regional Director disposed of the Respondents' objections on May 23, concluding that the objections were either untimely, had been resolved with finality by the Board's denials of the Respondents' requests for review, or were meritless. The Respondents did not request Board review of the Acting Regional Director's disposition of its objections. Under Section 102.67(f) of the Board's Rules and Regulations, "[f]ailure to request review shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the repre-

⁶ As stated earlier, the Respondents requested Board review of these findings after the Regional Director issued the Decision and Direction of Election, which the Board denied.

⁷ Unless otherwise stated, all dates are in 2001.

sentation proceeding." Accordingly, we find that the Respondents are barred from raising this argument now.

3. Conduct of Einy

The judge recommended that the Board warn Einy for evading and delaying the processes of the Board by refusing certified mail, and reprimand him for submitting an essentially groundless answer on behalf of the Respondents and failing to follow the judge's instructions during the hearing. The judge's recommendation does not comport with Section 102.177(e) of the Board's Rules and Regulations.⁸ Accordingly, we decline to follow that recommendation.

Under Section 102.177(b) of the Board's Rules and Regulations,⁹ the judge had the authority to reprimand or admonish Einy for his conduct during the hearing. Ac-

⁸ Apart from the authority of a judge to reprimand or admonish for conduct during the course of a hearing, Sec. 102.177(e) sets out a carefully delineated procedure for the investigation and institution of disciplinary procedures designed to ensure that allegations of misconduct will be handled according to established procedures with appropriate due process safeguards. Sec. 102.177(e) states in relevant part:

All allegations of misconduct pursuant to paragraph (d) of this section, except for those involving the conduct of Agency employees, shall be handled in accordance with the following procedures: (1) Allegations that an attorney or party representative has engaged in misconduct may be brought to the attention of the Investigating Officer by any person. The Investigating Officer, for purposes of this paragraph, shall be the Associate General Counsel, Division of Operations-Management, or his/her designee. (2) The Investigating Officer or his/her designee shall conduct such investigation as he/she deems appropriate and shall have the usual powers of investigation provided in Section 11 of the Act. Following the investigation, the Investigating Officer shall make a recommendation to the General Counsel, who shall make the determination whether to institute disciplinary proceedings against the attorney or party representative. The General Counsel's authority to make this determination shall not be delegable to the Regional Director or other personnel in the Regional Office. If the General Counsel determines not to institute disciplinary proceedings, all interested persons shall be notified of the determination, which shall be final. (3) If the General Counsel decides to institute disciplinary proceedings against the attorney or party representative, the General Counsel or his/her designee shall serve the Respondent with a complaint which shall include: a statement of the acts which are claimed to constitute misconduct including the approximate date and place of such acts together with a statement of the discipline recommended; notification of the right to a hearing before an administrative law judge with respect to any material issues of fact or mitigation; and an explanation of the method by which a hearing may be requested. Such a complaint shall not be issued until the Respondent has been notified of the allegations in writing and has been afforded a reasonable opportunity to respond.

See also Sec. 102.177(f).

⁹ Sec. 102.177(b) states, "Misconduct by any person at any hearing before an administrative law judge, hearing officer, or the Board shall be grounds for summary exclusion from the hearing. Notwithstanding the procedures set forth in par. (e) of this section for handling allegations of misconduct, the administrative law judge, hearing officer, or Board shall also have the authority in the proceeding in which the misconduct occurred to admonish or reprimand, after due notice, any person who engages in misconduct at a hearing."

ording to the judge, Einy talked loudly at counsel table and interrupted while witnesses were testifying, claiming he did not know what was going on; interfered with opposing counsel's questions by demanding to know their purpose; communicated with testifying witnesses by testifying himself in response to opposing counsel's questions; interposed baseless objections for the purpose of delay; and repeatedly attempted to evade the ruling that he could only testify if another person at counsel table posed the questions. The judge did not exercise her authority under Section 102.177(b), but instead recommended that the Board discipline Einy. However, such allegations of misconduct are not to be presented to the Board in the first instance. *McAllister Towing & Transportation*, 341 NLRB 394 fn. 7 (2004).¹⁰ See also *Bethlehem Temple Learning Center*, 330 NLRB 1177, 1178 (2000). Accordingly, we do not pass on the judge's recommendation, but shall transmit the judge's recommendation to the investigating officer under Section 102.177(e), with whom the judge should have filed her recommendation.

The judge also recommended that a hearing be held to determine the litigation costs owed by Einy to the Union and the General Counsel for Einy's violation of the judge's instructions regarding subpoenas. The subpoenas in question involved the Respondents' requests for (1) information already in the Respondent's possession and revoked by the judge for that reason, and (2) audiotapes of the hearing. Specifically, the judge found that Uzi disobeyed her instructions that a revoked subpoena may not be served again and that issuance of a subpoena after the close of the hearing is an abuse of Board process. Because we find that Uzi's actions regarding the subpoenas amounted to "bad faith in the conduct of the litigation," we agree with the judge's recommendation that a hearing be held to determine litigation costs owed to the Union and the General Counsel. See, e.g., *Service Employees District 1199 (Staten Island University Hospital)*, 339 NLRB 1059 fn. 2 (2003) (rejecting charging party's request that the Board order the respondent to pay its legal fees but noting that the Board has the power to do so); *Teamsters Local 122 (August A. Busch & Co.)*, 334 NLRB 1190, 1193 (2001) (Board has remedial authority to award litigation costs where a party exhibits bad faith in the conduct of the litigation), *enfd.* No. 01-1513, 2003 WL 880990 (D.C. Cir. 2003); *Lake Holiday Manor*, 325 NLRB 469 (1998) (Board has inherent power to control its own proceedings through the appli-

¹⁰ While Member Schaumber disagreed with his colleagues on the application of the law to the facts in *McAllister Towing & Transportation*, *supra*, he did not disagree with the use of the procedure under Sec. 102.177(e).

cation of the bad-faith exception to the American Rule against awarding litigation costs). Cf. *Alwin Mfg. Co. v. NLRB*, 192 F.3d 133, 143-144 (D.C. Cir. 1999), enforcing 326 NLRB 646 (1998) (not deciding whether the Board has the authority to award litigation costs under its inherent authority). We have modified the Order and notice accordingly.¹¹

ORDER

The National Labor Relations Board orders that the Respondents, 675 West End Owners Corp., Salomon Management Co., LLC, Niv Realty, LLC, Solomon Man-

¹¹ We emphasize that although the D.C. Circuit in *Unbelievable*, 118 F.3d 795 (D.C. Cir. 1997), reversing in relevant part *Frontier Hotel & Casino*, 318 NLRB 857 (1995), found that the Board does not have the power to impose litigation costs under Sec. 10(c), it expressly did not reach the issue of whether the Board has the power to award litigation costs under appropriate circumstances such as here: bad faith in the conduct of litigation. *Unbelievable* at 800 fn. *. Further, in *Alwin*, *supra* at 143 fn. 13, the D.C. Circuit declined to find a litigation cost remedy "patently in excess of the Board's authority" and referred to its caveat in *Unbelievable* regarding the "bad-faith" exception to the American Rule on litigation costs. We further note that relevant cases cited above awarding costs for "bad-faith" litigation involve discrete misconduct that is similar to the misconduct at issue here, contrary to the Chairman's statement, below. For example, in *Teamsters Local 122 (August A. Busch & Co.)*, *supra* at 1194, the Board awarded litigation costs linked to a portion of the proceedings involving particular complaint allegations because the respondent refused to put on a defense and engaged in lengthy, "abusive" cross-examination designed to delay the hearing. Similarly, in *Lake Holiday Manor*, *supra* at 470, the Board awarded that portion of litigation costs associated with the respondent's repeated renegeing on settlement agreements and attempting to delay the hearing at the last minute, contrary to the judge's instructions. Finally, we do not address the Chairman's assertion that the allegation of misconduct here is "cognizable" under Sec. 102.177 of the Rules involving possible discipline because we find that the award of litigation costs is appropriate in any event.

Chairman Battista would not award litigation costs assertedly incurred because of the Respondent's counsel's alleged disobedience of the judge's instructions. The majority finds that this conduct constituted "bad faith in the conduct of litigation." However, there is a serious and substantial question as to whether the Board has the power to award litigation costs. See *Unbelievable, Inc.*, 118 F.3d 795 (D.C. Cir. 1997), reversing in relevant part *Frontier Hotel and Casino*, 318 NLRB 857. My colleagues say that the D.C. Circuit, in *Unbelievable*, did not pass on whether the Board has the power to award litigation costs for bad faith in litigation. I disagree. The court clearly held that, absent clear language in Sec. 10(c), the Board lacked the remedial power to award litigation costs. Although the court did not pass on whether the Board had *inherent authority* to award such costs, the award here is granted as part of the remedial order, and Sec. 10(c) does not permit this.

Chairman Battista does not reach the issue of Board power to award litigation costs. He notes that the cases cited by the majority are cases where a party litigates a case frivolously, e.g., with no reasonable defense to the allegation of the complaint, or no defense at all; or where there would have been no litigation at all if settlement had been honored. By contrast, the misconduct here was a discrete event, viz an alleged failure to follow specific instructions from the judge. If the allegation is true, it is cognizable under Sec. 102.177 of the Rule, as is the other alleged misconduct by counsel in this case.

agement Co., LLC, Sharon Realty, LLC, Dan Co., LLC, Tal Co., LLC, Gal Realty, LLC, Salomon Realty, Niv Realty, Solomon Realty, Sharon Realty, Uzi Einy d/b/a Dan Co., Tal Co., and Riv Realty, New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from
 - a. Refusing to meet and negotiate with the Union and refusing to provide information to the Union.
 - b. Hiring nonunit employees to perform unit employees' work without notice to the Union and without affording the Union an opportunity to bargain over its decision and the effects of the change.
 - (c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, recognize and bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and continue such bargaining as if the initial year of certification had not expired, and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time doormen, porters, maintenance employees and superintendents employed by the joint employer at the residential apartment house buildings located in Manhattan at 675 and 700 West End Avenue, 215 West 101st Street, 309 and 317 West 99th Street, and 214 West 102nd Street, and in the Bronx at 665 and 690 Allerton Avenue, excluding all guards and supervisors as defined under the Act.

(b) Furnish the Union with the information requested in the Union's letter of August 3, 2001.

(c) Restore the status quo ante by assigning a unit employee to perform the work currently performed by a nonunit employee of Command Security Corporation.

(d) Within 14 days after service by the Region, post at its office and in all the buildings in which unit employees are employed in New York, New York, the attached notice marked "Appendix."¹² Copies of the notice, in English and Spanish, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all

¹² If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 12, 2001.

(e) Pay to the Stationary Engineers, Firemen, Maintenance, and Building Service Union, Local 670, and the General Counsel all litigation costs incurred by them in the conduct of this proceeding as a result of the Respondents' failure to follow the judge's instructions regarding subpoenas, all such costs to be determined in the compliance stage of this proceeding.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the alleged misconduct by Respondent Uzi Einy, for which the judge recommended the Board discipline Einy, as set forth in Section I. of the judge's decision, is referred to the Investigating Officer, the Associate General Counsel, Division of Operations-Management, pursuant to Section 102.177(e) of the Board's Rules.

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT refuse to meet and negotiate with and furnish information to Stationary Engineers, Firemen, Maintenance and Building Service Union Local 670, RWDSU, UFCW, AFL-CIO, as the representative of our employees in the following unit:

All full-time and regular part-time doormen, porters, maintenance employees and superintendents employed by the joint employer at the residential apartment house buildings located in Manhattan at 675 and 700 West End Avenue, 215 West 101st Street, 309 and 317 West 99th Street, and 214 West 102nd Street, and in the Bronx at 665 and 690 Allerton Avenue, excluding all guards and supervisors as defined under the Act.

WE WILL NOT hire nonbargaining unit employees to perform your work without notice to Local 670 and without affording Local 670 the opportunity to bargain over this decision and its effects.

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

WE WILL, on request, bargain with Local 670 and furnish the Union with information necessary to represent you and put in writing and sign any agreement reached on terms and conditions of employment for our employees.

WE WILL pay to the Union and the General Counsel of the National Labor Relations Board all litigation costs incurred by them in the trial of that portion of these proceedings dealing with our willful violation of the judge's instructions regarding subpoenas.

675 WEST END OWNERS CORP.

Judith M. Anderson, Esq., for the General Counsel.

Morris Tuchman, Esq., of New York, New York, for NIV Realty, LLC., Tal Co., Tal Co., LLC, Zvi Eyny, Solomon Management, LLC., Solomon Realty, 675 West End Owners Corp., Salomon Realty, Salomon Management Co., LLC.

Mr. Uzi Einy, of New York, New York, for Uzi Einy, Sharon Realty, LLC., Dan Co., Dan Co., LLC.

Mr. Zvi Eyny, of New York, New York, for NIV Realty, NIV Realty, LLC, TAL Company and Tal Company, LLC.

Ms. Sofia Einy, of New York, New York, for Sharon Realty, Salomon Realty, Salomon Realty, LLC.

Jamin R. Sewell, Esq., (*Law Offices of Richard M. Greenspan, P.C.*) of Elmsford, New York, for the Union.

DECISION

STATEMENT OF THE CASE

ELEANOR MACDONALD, Administrative Law Judge: This case was tried in New York, New York, on June 3 through 7, 2002. The amended consolidated complaint alleges that the Respondent, in violation of Section 8(a)(1), (3), and (5) of the Act, refused to bargain with the Union, refused to furnish information to the Union, and hired nonunit security guards to replace

bargaining unit employees in retaliation against employees for their union activities.¹

On June 2, Uzi Einy served an amended answer headed "Uzi Einy, Employer," in which he denied service of the amended consolidated complaint and denied all the allegations in the complaint. In addition, he appended a "cross-complaint" addressed to the underlying representation case.

At the hearing, Attorney Tuchman interposed a statute of limitations defense to the allegations in paragraphs 8 and 10 of the amended consolidated complaint relating to the demand for information. Uzi Einy joined in this defense.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties in September, 2002, I make the following²

FINDINGS OF FACT

I. JURISDICTION

Respondents filed an answer denying all allegations of the complaint. At the close of the instant hearing, Respondent admitted the jurisdiction of the Board. Based on the admission of Respondent I find that 675 West End Owners Corp., Salomon Management Co., LLC; Niv Realty, LLC; Solomon Management Co., LLC; Sharon Realty, LLC; Dan Co., LLC; and Tal Co., LLC are affiliated business enterprises with common officers, ownership, directors, management, and supervision; have formulated and administered a common labor policy; have shared common premises and facilities; have provided services for and made sales to each other; have interchanged personnel with each other, have held themselves out to the public as a single-integrated business enterprise and constitute a single employer within the meaning of the Act engaged in the ownership of various residential apartment buildings in New York City, including 675 and 700 West End Avenue, 215 West 101st Street, 309 and 317 West 99th Street, 214 West 102nd Street, Manhattan and 665 and 690 Allerton Avenue, Bronx, New York. I find that Gal Realty, LLC; Salomon Realty; Niv Realty;

¹ On May 31, counsel for the General Counsel mailed a Notice of Intent to Amend Complaint at Hearing. The General Counsel's motion to amend was granted. The amendments relate to a Union's demand for information dated August 3, September 5 and 20, 2001. At the hearing, the date alleged in new par. 11(a) relating to the hiring of nonunit security guards to replace unit employees was changed to February 18, 2001.

² The record is hereby corrected so that at page 34, line 9 the correct title is "Judge Davis"; at p. 65, L. 6, the record should show that the ALJ was speaking; at p. 68, L. 19, the correct phrase is "doorman position"; at p. 105, L. 25, the correct phrase is "Fed Ex Way Bill"; at p. 135, L. 11 and p. 136, LL. 8 and 20 the correct name is "Zachi Einy"; at p. 138, LL. 22-23 the correct phrase is "stopped calling"; at p. 188, L. 3 the correct phrase is "replacement of a doorman"; at p. 242, L. 10, the answer ends and the next question begins after the phrase "I don't recall."; at p. 347, L. 7 the date is August 3; at p. 348, L. 16, the phrase should read "prefer not to have it"; at p. 350, L. 1, Anderson was speaking; at p. 353, L. 19, Anderson was speaking; at p. 373, L. 20, the first word is "here"; at p. 445, L. 3, the phrase is "you don't know how to ask a non-leading question,."; at p. 780, L. 18, the phrase should read "we're going to celebrate Shabbat"; at p. 804, L. 17, Ms. Anderson was speaking; at p. 831, L. 1, Uzi Einy was speaking; at p. 897, L. 24, the word should be "closed."

Solomon Realty; Sharon Realty; Uzi Einy d/b/a Dan Co.; Tal Co.; and Riv Realty are affiliated business enterprises with common officers, ownership, directors, management and supervision; have formulated and administered a common labor policy; have shared common premises and facilities; have provided services for and made sales to each other; have interchanged personnel with each other; have held themselves out to the public as a single-integrated business enterprise and constitute a single employer within the meaning of the Act engaged in providing building management and maintenance services at the buildings listed above. Respondents, engaged in the business of owning and managing residential apartment buildings located within New York City, are joint employers of the unit employees described below. Respondents annually derive revenues in excess of \$500,000 and purchase and receive at their places of business in New York City goods and materials valued in excess of \$5,000 indirectly from points located outside the State of New York or directly from suppliers located outside the State of New York. Respondents are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Based on my discussion below, I find that Stationary Engineers, Firemen, Maintenance and Building Service Union, Local 670 RWDSU, UFCW, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Status of the Union, Appropriate Unit, Exclusive Representative of the Unit Employees

My findings concerning the status of the Union, the appropriate unit and the exclusive representative of the unit employees are based on prior Board proceedings which I will briefly summarize herein. A Decision and Direction of Election was issued on December 20, 1999. On February 29, 2000, the Board denied Respondent's request for review. The election was conducted on January 28, 2000. Respondents challenged the ballots of six doormen who worked at 675 West End Avenue and 215 West 101st Street on the ground that they were statutory guards. The hearing on challenged ballots was held on June 12, 14, July 18, August 14, September 11, and October 3, 2000. On December 29, 2000 a hearing officer's report on challenges and recommendations issued recommending that the ballots be opened and counted. Following the filing of exceptions to the report and recommendations by the Respondents, the Regional Director issued a Supplemental Decision and Order on March 14, 2001. The Supplemental Decision adopted the hearing officer's findings and recommendations and ordered the opening and counting of the contested ballots. The Board denied Respondents' request for review of the Supplemental Decision and Order on April 25, 2001 and May 3, 2001. On May 18, 2001, a corrected Tally of Ballots issued showing that the Union had received a majority of the valid votes counted. On May 23, 2001, the Regional Director issued a Certification of Representative. Based on the foregoing proceedings, the record shows that Respondents as joint employers manage seven rental properties and a cooperative apartment building listed above. Each of the seven residential rental properties is owned by a different limited liability company and managed by a partnership of the same name. Uzi Einy has substantial ownership

interests in all of the LLCs and has the same percentage ownership in the parallel management company. Thus, Uzi Einy owns some of the buildings outright, owns some in partnership with his brothers Shlomo Einy and Zvi Eyny or his wife Sofia Einy and some are owned by Uzi Einy with more than one other family member. 675 West End Owner's Corp. is a cooperative corporation that owns the building at that address. Uzi Einy is president of the Board, Sofia Einy is vice-president and daughter Galit Ben-Baruch is the assistant vice-president. Gal Realty, LLC, the managing agent for this building, is owned by Uzi and Sofia Einy and Gal Realty, LLC owns about 60 percent of the shares in 675 West End Corp.

The Decision and Direction of Election of December 20, 1999, found that Stationary Engineers, Firemen, Maintenance and Building Service Union Local 670, RWDSU, UFCW, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act. The Union is the certified exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time doormen, porters, maintenance employees and superintendents employed by the joint employer at the residential apartment house buildings located in Manhattan at 675 and 700 West End Avenue, 215 West 101st Street, 309 and 317 West 99th Street, and 214 West 102nd Street, and in the Bronx at 665 and 690 Allerton Avenue, excluding all guards and supervisors as defined under the Act.

B. Background

The record shows that Uzi Einy and his family control all of the entities involved in the instant hearing. Uzi Einy hires employees, assigns employees and makes decisions concerning manning, security, and subcontracting for all of the related businesses. Zvi Eyny testified that he takes over for his brother when Uzi Einy is away. The record also shows that Uzi Einy directs the legal affairs of all of the entities and that he appears at hearings and proceedings representing all of the related businesses. Further, it is clear that Uzi Einy is responsible for dealing with the Union on behalf of Respondent. During the instant hearings Uzi Einy, Zvi Eyny, Sofia Einy, and Morris Tuchman, Esq., made appearances on various days of the hearing, claiming to represent some but not all of the entities. However, it was clear that Uzi Einy spoke for all of the entities and that he made the decisions concerning the conduct of the instant case.³ Although Zvi Eyny purportedly sent letters to the NLRB in Washington, D.C. concerning this case, he testified that he was out of the country when at least one such letter was sent, that he did not write the letter and that he had authorized his brother to sign the letter.

The Respondents are not satisfied with the outcome of the earlier representation proceedings in Case 2-RC-22120, which led to the certification of the Union. In various motions, letters, statements on the record and in the amended answer which contains a "cross-complaint" the Respondents seek to reopen

³ Indeed, at one point Uzi Einy stated on the record that he was representing Shlomo Einy, whom he had claimed not to represent previously, "for the next five minutes."

the representation case. I informed the parties in the unfair labor practice case before me that I had no authority to reopen the representation case nor to disturb the findings in that case in any way.⁴ I did not permit the Respondents to litigate the representation issues on the record before me. In order to prevent my decision in this case from being unnecessarily complicated by matters extraneous to the unfair labor practice allegations before me, I shall not deal in detail with any motions or arguments which go to the validity of the certification. Thus, the parties are advised that all motions, whether in writing or oral, addressed to me to reopen the representation case are denied.

It is the practice of Respondents to refuse certified mail delivery of documents from the Regional Office and from other correspondents. Uzi Einy testified that his office is located at 700 West End Avenue. He testified that mail addressed to all of the entities at issue in this complaint is properly addressed to him at 700 West End Avenue. In one of the lengthy submissions by Respondents a document was inadvertently included that showed that tenants from the various buildings write letters to Uzi Einy at 700 West End Avenue. The record shows that other people work at the office at 700 West End Avenue: there was testimony about secretaries, desks and various rooms in this office. Yet several copies of the complaint and notice of hearing herein addressed to Uzi Einy at 700 West End Avenue and sent by certified mail were returned to the Regional Office marked "unclaimed." The Postal Service attempted delivery of the items on more than one occasion.⁵ Jamin R. Sewell, Esq., counsel for the Union, stated on the record that he was informed by Fed Ex that Uzi Einy had refused to accept delivery of the Union's petition to revoke Subpoena which was being served on Respondents at 700 West End Avenue. Further, Zvi Eyny stated that his address is 215 West 101st Street and he signed the appearance sheet accordingly. Yet certified mail addressed from the Regional Office to Zvi Eyny at his address was also returned unclaimed after several delivery attempts. Other correspondence from the Regional Office concerning Respondents' failure to file a timely Answer suffered a fate similar to that described above. Because of its inability to deliver correspondence to Respondents, the Regional Office had adopted a policy of sending copies of all notices and letters to all of the buildings involved in the instant case. At the hearing, the ALJ informed all of Respondents' representatives that henceforth mail would only be addressed to them according to the signed appearance sheet and the ALJ cautioned them to stop refusing certified mail from the NLRB. It is well established that a Respondent's failure or refusal to accept or claim certified mail cannot defeat the purposes of the Act. *ITAL General Construction, Inc.*, 331 NLRB No. 64 (2000) (not reported in Board volumes); *Michigan Expediting Service*, 282 NLRB 210 fn. 6 (1986), enfd. 869 F.2d 1492 (6th Cir. 1989).

On the first day of the instant hearing the ALJ informed Uzi Einy that before the hearing opened the New York Division of

Judges had received multiple copies of 45-page faxes, apparently a motion from Einy, in which the sending number of the fax machine had been obliterated so that it was not possible to determine who was sending the faxes.⁶ There was no cover sheet on these faxes with a proper telephone number. While these documents were being faxed the machine at the Division of Judges was tied up and it was impossible to contact the person operating the machine to ask that the process be halted. Uzi Einy stated that his fax machine is not always working and that he gave the documents to another person to send. He denied responsibility for the fact that a 45-page document was sent three times in succession on the same day. Counsel for the General Counsel stated that the Regional Office had encountered difficulties in communicating with Respondent and in replying to faxed documents because there was sometimes no indication of the source of the fax. The ALJ warned Uzi Einy that it was unlawful to send improperly identified faxes.⁷

The record is clear that certain representatives of Respondents made statements designed for Respondents' advantage or designed to delay the proceedings without regard for the accuracy of the facts. For example, on August 13, 2001, Uzi Einy wrote to the Union "in response to your letter dated August 3rd, 2001." Yet on October 26, Uzi Einy wrote to a Board agent that, "The union did not have any contact with us at all in August 2001." During the hearing, apparently wishing to continue the claim that he had not received the Union's August 3 letter, Uzi Einy attempted to cross examine the witness who hand delivered the letter to Respondents' office on minute details concerning who was in the office and where the furniture was placed. Another example occurred on a day when the official translator was present during the instant hearing for the examination of a Spanish speaking witness. Uzi Einy objected to a Spanish word used by the translator. Einy explained that Sofia Einy is a licensed English-Spanish translator and that she had heard the mistake by the translator.⁸ Yet on another occasion Sofia Einy gave as the reason for a request she was making the fact that she could not understand English. Further, the record shows that Uzi Einy conducted the majority of the case for Respondents from counsel table speaking in English. When Counsel for the General Counsel called Uzi Einy as a witness pursuant to FRCP Section 611(c) an English-Hebrew translator was present. However, despite instructions from the ALJ, Uzi Einy did not wait for the translator. Einy answered questions, speaking in English, before the translator could translate the questions into Hebrew. Attorney Tuchman, one of Respondents' representatives that day, remarked that Einy was not waiting for the Hebrew translation. Later in the proceeding, when Attorney Tuchman called Uzi Einy to testify for the Respondents without providing a translator Einy was able to answer his questions without any problem. But as soon as Counsel for the General Counsel rose to begin cross-examination, Uzi Einy asked for a translator. When counsel for the General

⁴ Rules and Regulations Section 102.67(f).

⁵ In fact, notations made by the Postal Service on some of the copies addressed to the other buildings involved herein show that the Postal Service also attempted to deliver those items to 700 West End Avenue without success.

⁶ Respondent introduced a different version of the motion at the hearing.

⁷ United States Code, Title 47, Chapter 5, Subchapter II, Part I, Section 227, (d)(1)(B).

⁸ Sofia Einy was seated at Respondent's counsel table.

Counsel asked Uzi Einy to identify letters he himself had written in English, Sofia Einy objected that he could not read English and that the letters had to be translated.

On June 5, the third day of the hearing, during a procedural discussion Counsel for the General Counsel remarked that transcripts and exhibits from previous hearings involving Respondents had been in the hearing room since the first day of the instant hearing. Representatives for Respondents including Uzi Einy and Attorney Tuchman were present during this colloquy and they did not object to the remark. On the fourth day of the hearing, June 6, Uzi Einy opened a discussion concerning a subpoena addressed to Region 2. The ALJ had granted a petition to revoke the subpoena based on Respondents' failure to follow proper procedure. Thereafter, Respondents by Shlomo Eini sought the General Counsel's consent to production of the material.⁹ On June 6, the General Counsel responded to Shlomo Eini, stating, *inter alia*, that transcripts and exhibits would be made available. These were the transcripts and exhibits that had been present in the hearing room since the first day of the hearing. Thereafter, Uzi Einy asked for a delay in the proceedings suggesting that he needed time to consult the transcripts and exhibits because they had only just been made available. He stated that he had not felt free to look at the documents before. The ALJ stated that the documents had been in the hearing room since the first day and that Uzi Einy and Attorney Tuchman had been consulting them the day before. Counsel for the General Counsel stated on the record that after the conclusion of the previous days' proceedings she had suggested that Attorney Tuchman and Uzi Einy stay in the hearing room after hours and consult the documents further. Uzi Einy then stated that he needed an adjournment so that he could order copies from the reporting company. When it was pointed out again that the documents had been in the hearing room since the first day of the hearing, Uzi Einy persisted in his statement that he had not had access to the transcripts and exhibits. Thus, in an attempt to delay the proceedings and obtain an adjournment, Uzi Einy baldly maintained that he had not been able to look at documents which he had been openly consulting during the hearing.

Attorney Tuchman stated in a letter dated June 2, 2002, that he represented Zvi Eyny and his related companies, and at the hearing, he listed various companies named in the complaint whom he represented. Uzi Einy appeared on behalf of Sharon Realty, LLC; Dan Co., and Dan Co., LLC. Shlomo Eini signed the appearance sheet herein and his name appears as the signatory on many communications on behalf of Respondents, but Shlomo Eini did not speak on the record.¹⁰ As the hearing progressed, Sofia Einy and Zvi Eyny made appearances on behalf of various entities comprising the Joint Employer. Attorney Tuchman was present on the first day of the hearing and he did not request any adjournment on the record due to an inability to be present on any subsequent days. Attorney Tuchman was not present on the second day of the hearing. No adjournment was

requested on the second day. On the third day of the instant hearing Sofia Einy asked for an adjournment due to the absence of Tuchman. The request was denied. That afternoon Tuchman appeared on behalf of Respondent. He did not request any adjournments on the record due to an inability to be present on subsequent hearing days. Throughout the hearing, however, other representatives of Respondent constantly requested adjournments, citing the absence of Tuchman. Because Tuchman did not request any of these adjournments himself and did not advise the ALJ that he wished to attend the hearing but was unable to be present at a certain time, I conclude that the other representatives of Respondent were acting in bad faith and for the purpose of delaying the proceedings when they used Tuchman's absence as the basis for a requested adjournment.

Uzi Einy engaged in various types of behavior on the record which served to disrupt and delay the proceedings. The record is replete, beginning in the first minutes of the instant proceeding and continuing every day thereafter, with occasions when the ALJ was required to tell Uzi Einy that he was talking out loud to other people at counsel table during the questioning of a witness or during procedural discussions and to warn him that this behavior was unacceptable. On numerous occasions Uzi Einy complained that he could not hear and the ALJ was required to inform him that he couldn't hear because he was talking to other people. On various occasions Uzi Einy asked witnesses to raise their voices because he did not hear well, but he continued the constant buzz of talk from counsel table which prevented him from paying attention to the proceedings. As a result, people in the hearing room raised their voices to capture the attention of Uzi Einy. On more than one occasion Uzi Einy returned late from a break in the hearing and then interrupted the proceedings and demanded to know what had been going on. At various times Uzi Einy had to be warned by the ALJ that it was impermissible to speak to a witness while that witness was in the witness box actually being questioned by opposing counsel.¹¹

On numerous occasions Uzi Einy had to be warned by the ALJ that he was impermissibly interfering with the questioning of witnesses by opposing counsel. On one occasion Uzi Einy interfered with questioning of a 611(c) witness by Counsel for the General Counsel, constantly interrupting her questions and demanding to know why she had called the witness. On this occasion, as on many others, the ALJ warned Einy that he was risking possible sanctions and exclusion from future NLRB proceedings. During questioning of witnesses by counsel for the General Counsel Uzi Einy often interposed baseless objections because he did not listen to the questions. On various occasions Uzi Einy argued with the ALJ after rulings on objections, refusing to accept those rulings. Uzi Einy often interrupted questioning by opposing counsel demanding to know the purpose of the questioning even though the questions were not objectionable. These tactics were especially troublesome while employee witnesses were testifying through an interpreter as they had the effect of confusing the witnesses and breaking the train of thought of the interpreter. While Uzi Einy was himself

⁹ Shlomo Eini did not participate in the instant hearing. He was present at certain times during the hearing.

¹⁰ It appears from the record that Shlomo Eini does not speak English.

¹¹ On one occasion Uzi Einy sat at counsel table and issued instructions in Hebrew to a witness who was testifying in English.

questioning witnesses he was not prepared with relevant and proper questions. He had constantly to be prompted to ask his next question because he often let several minutes go by between the answer to a question and posing the next question. On these occasions Uzi Einy was warned by the ALJ that he was using this tactic to prolong and delay the proceedings. Often when Uzi Einy asked a question he interrupted the answer and did not permit the witness to finish. This led to confusion and delay in the proceedings. Uzi Einy argued with his own witnesses. When his own witness answered "no" to a question, Einy asked him what he meant by "no."

Uzi Einy tried to put in the Respondents' case through witnesses called by the General Counsel. Thus, instead of calling his own witnesses who had direct knowledge of facts relevant to Respondents' defense, Einy tried to get evidence by cross examining General Counsel's witnesses who knew none of the facts. When these witnesses denied knowledge of a fact Einy wished to establish he tried to introduce tapes and videos. The ALJ often explained to Uzi Einy that he had to prove his own case by calling witnesses who had knowledge of the facts. The ALJ often explained to Uzi Einy that he could not simply introduce audio tapes and video tapes to prove facts that his witnesses should be testifying to. Apparently, Respondents did not wish to call witnesses and so attempted to resort to the introduction of photographs and tapes to prove Respondents' case. Moreover, Respondents did not call witnesses to lay a foundation to show why tapes and photographs should be used to take the place of sworn testimony by a witness.

On the occasion when Respondents called their own witness Uzi Einy persisted in examining him by the use of leading questions. The ALJ constantly warned Einy that this was not proper. Further, Uzi Einy repeatedly attempted to obtain hearsay testimony from his own witness. The ALJ warned Einy that he could not prove his case by hearsay testimony. Apparently not wishing to be called himself to testify about facts of which he alone had first hand knowledge, Einy called Zvi Einy who did not have such first hand knowledge. Uzi Einy then posed leading questions to Zvi Einy and showed him documents in an attempt to have Einy testify about the contents of the documents and thus give hearsay testimony. The ALJ warned Uzi Einy that Zvi Einy's testimony would be terminated if he was not asked questions about which he had first hand knowledge. Instead of establishing that Zvi Einy had knowledge of an event and of when and where it occurred, Uzi Einy wanted to submit exhibits in place of Einy's testimony, saying "I have thousand pictures." The ALJ repeatedly warned Einy that he could not show his witness a picture and introduce the picture into evidence as a substitute for testimony from that witness.

On more than one occasion the ALJ warned Uzi Einy of the dangers inherent in his insistence on personally representing Respondents in this case. The ALJ warned Einy that in view of the great value of the real estate owned and managed by Respondents he was putting Respondents and himself in jeopardy by personally representing Respondents, seemingly without a proper understanding of the legal proceeding in which he was

engaged.¹² The ALJ warned Uzi Einy that it appeared that he did not understand the issues in the case nor the facts that the General Counsel had to prove and he did not understand the applicable law. Einy was warned that he did not seem to understand what was relevant and that he did not seem to be able to pose a nonleading question. Further, Einy was told that he did not seem to want to follow the ALJ's instructions. The ALJ warned Uzi Einy that his tactics were producing delay and preventing the conclusion of the proceeding. This warning was given before the close of General Counsel's case and the commencement of the Respondents' case.

The ALJ informed Uzi Einy that if he intended to testify he had to do so in a question and answer format in which a person sitting at counsel table would ask him questions. This ruling was made after the hearing had been going on for 3 days and after sufficient opportunity to observe Uzi Einy's behavior in the courtroom. Yet after this ruling Uzi Einy took the witness stand and attempted to ask himself questions and argued with the ALJ about the prior ruling. Further, after Sofia Einy stated that she was going to pose questions to Uzi Einy and after she was directed to commence questioning Uzi Einy he began communicating with her in Hebrew from the witness stand.

By Order dated May 30, 2002, the ALJ revoked subpoena duces tecum B-370219 issued by Shlomo Eini.¹³ On June 7 Uzi Einy requested on the record in the instant hearing that the Union produce the materials listed in that subpoena. The ALJ informed Einy that the subpoena had been revoked. On the record Uzi Einy stated that he had amended the subpoena and served it on the Union.¹⁴ The ALJ informed Uzi Einy that he could not take a copy of a subpoena which had been revoked and write the word "amended" at the top and then serve the document on a party. Einy was told that a new subpoena had to be issued. On the last day of the hearing, after the record had been closed and after the ALJ had left the hearing room, Uzi Einy served a subpoena on the audiotape reporter in the instant hearing. By Order dated June 13, 2002, the ALJ revoked Respondent's subpoena duces tecum B-370220, stating that a subpoena is properly used to obtain material for use during a hearing and that the issuance of a subpoena after the close of a hearing is an abuse of Board process.¹⁵ By Order dated July 18, 2002, the ALJ noted that in a letter from Uzi Einy he claimed to have served an "Addendum subpoena" B-370219.¹⁶ The "Addendum" purports to be issued by Shlomo Eini. The Order of July 18 provides that the Respondents shall cease and desist from serving further subpoenas and solicits the views of the other parties whether sanctions should be imposed and whether litigation costs should be assessed for the willful disregard of prior orders concerning the issuance of subpoenas.

¹² The ALJ warned Uzi Einy that he might leave himself open to a charge that he was violating a fiduciary duty to other shareholders in those buildings that had a cooperative form of ownership.

¹³ The Order is ALJ Exh. 1.

¹⁴ The "amended" subpoena is R. Exh. 21.

¹⁵ This Order is ALJ Exh. 6.

¹⁶ This Order is ALJ Exh. 7. The letter dated July 16, 2002 is appended to the Order.

C. Service of the Charges and Amended Charges

The record shows that the charges and amended charges in the instant cases were properly served by the Regional Office. It is not necessary to detail the proof of the various mailings as those are clear on the record and amply discussed in the General Counsel's brief. Although Respondents' answers signed by Uzi Einy include a blanket denial, including a denial of receipt of the charges, the record contains letters from Einy to the Regional Office discussing the charges. Thus on August 29, 2001 Einy wrote to a Board agent, "In response to your charge. . . ." Einy's letter was headed "Re.: Case No 2-CA-33940-1; it went on to discuss in detail the rationale for hiring a security guard company and it states, "Employers have not fired or replaced employees with other security guard employees." On November 8, 2001 Uzi Einy wrote to a Board agent heading his letter "Case Nos. 2-CA-33940/34059" and discussing those charges. Additionally, the record establishes that the charge in Case 2-CA-3457 was sent by certified mail, by regular mail and by fax in May 2002, not long before the commencement of the instant hearing. Yet the Respondents did not admit receipt of that document when the hearing started. As detailed above, the various owners of Respondents have a practice of refusing mail from the Regional Office and they have a practice of denying receipt of mail from the Regional Office and from the Union even when their own evidence makes it clear that they have indeed received the letters. I conclude that the denial of receipt of the Charges was made in bad faith.

D. Credibility of the Witnesses

I credit Jose Moran, Jose Urena, and Robert Goldstein who testified in a forthright and cooperative manner.

I do not credit the testimony of Uzi Einy. As discussed above, the record is replete with occasions when Einy said anything that came to mind that he thought might assist the litigation of Respondents' case without regard for the truth and the actual facts. Uzi Einy contradicted his own documentary evidence on occasion and he wrote letters, including letters to Board agents, that did not accurately reflect the facts as he knew them. The tape recordings of Uzi Einy's conversations with Urena, discussed below, are clear that Einy wanted Urena to testify to certain facts even though Urena repeatedly insisted he did not remember the incidents the way Einy wanted them presented. These tapes show that Uzi Einy does not understand the importance of giving truthful statements and accurate testimony and that he would encourage the presentation of facts for which there was no basis.

I do not credit the testimony of Zvi Eyny. His testimony was given in response to leading questions and he did not seem to have an independent recall of the incidents or dates about which he was asked.

E. Supervisors and Agents of Respondents

The evidence is overwhelming that Uzi Einy and Zvi Eyny are supervisors and agents of Respondents. The Respondents made no argument on the record to support the answer's denial that they are supervisors and agents. Indeed, the testimony of Uzi Einy and Zvi Eyny was all about the managerial and personnel decisions they constantly make in running the various

buildings at issue herein. I conclude that Uzi Einy's answer denying the status of both himself and Zvi Eyny was made in bad faith, without any ground to support it and for the purpose of delay.

Urena's testimony, discussed below, that Zachi Eini informed him that he was no longer to report to Uzi Einy but that he was to call Zachi Eini was uncontested on the record. Zachi Eini did not testify herein. Similarly, Urena's testimony that he was instructed to come to work only when Zachi Eini called him and that eventually he was fired by Zachi Eini was un rebutted. Manifestly, Zachi Eini had the authority to decide when employees would work and to assign them work and he had the authority to discharge employees. I find that Uzi Einy, Zvi Eyny and Zachi Eini are supervisors and agents of the Respondents within the meaning of Section 2(11) and (13) of the Act.

F. The Hiring of Command Security Corporation

1. Facts

Robert Goldstein, senior vice president for client relations of Command Security Corporation, testified that he met Uzi Einy at a trade show in June 2000. After he and Uzi Einy discussed the services that could be provided by Command Security, Goldstein thought he had a deal. On December 6 Goldstein wrote to Einy that "ever since we met . . . our conversations have been truly excellent and contributory towards excellent reception/doorman/security services for your buildings. . . ." The letter went on to commend the quality of service provided by Command and mentioned that the "Post Instructions" already provided by Uzi Einy would be followed by the Command employees at both 675 West End Avenue and 215 West 101st Street. Goldstein enclosed a contract with this letter in the expectation that Uzi Einy would sign and return it. Goldstein stated that it is the practice at his company to send out successive contracts for signature by a prospective client in the event that the company does not receive the initial contract submitted for signature. Thus, after December 6, Command sent successive contracts to Uzi Einy dated December 12 and 20, 2000, and January 31, 2001. Goldstein testified that Uzi Einy actually signed the contract on February 27, 2001. Goldstein filled out an internal Command form on March 5 showing that the effective date of service was expected to be March 7. In the event, on March 12, 2001 Command employee Raymond Cumberbatch began working at 675 West End Avenue.¹⁷ Goldstein stated that he did not know why there had been a delay in commencing service by Command from the time he first spoke to Uzi Einy in June 2000. He recalled that Uzi Einy told him that he had sent back a signed contract before February 27, but no such contract could be found in the Command offices.

Uzi Einy testified that he had signed a proposed contract sent to him by Goldstein on December 20, 2000. Command Security did not provide service until March 2001. Einy explained that the reason for the delay was that he did not want to fire the employee working at the building in order to replace him with a Command employee.

¹⁷ Cumberbatch works Monday through Friday from 4 p.m. to 12 midnight.

Uzi Einy testified that the employees' support for the Union did not play any role in his decision to retain Command Security. He stated that he had begun looking into the possibility of hiring a security guard company in 1984. In the year 2000, he installed a security video camera and monitor in 675 West End Avenue. According to Einy, this was part of his plan to hire a security guard: he wanted the guard to be able to check the monitor. Einy said that the reason he hired a security guard company was to rid himself of responsibilities such as payroll, finding a replacement for the doorman in case he does not report for his shift, supervising the doorman and dealing with the NLRB concerning employee problems. Einy also said that in case a crime is committed the guard company is responsible. Zvi Eyny testified that the Respondents engaged Command Security because the guards wear uniforms, Respondents do not have to supervise the guards, the company provides any needed replacements, and Command Security has liability insurance to handle claims.

The contract of February 27 is between Command Security Corporation and 675 West End Ave. Owners Corp./215 West 101st Street Owners Corp. It provides that Command will provide "reception/doormen/security officers" for \$11 per hour. Command agrees to pay all wages and social security taxes and it agrees to provide supervision for its employees. The contract provides that Command "is not an insurer" and that the contract does not "confer any rights on any other party." The Client "agrees to indemnify Command" against any claims by third parties. However, Command agrees to be liable for injury or damage "resulting directly from the negligent performance of the services" up to an amount of one million dollars. The Client "waives any and all rights of subrogation that any Insurer of Client may have against Command Security Corporation."

Goldstein identified the post instructions for the Command Security employee at 675 West End Avenue. This is a document entitled "Security Guidelines." It requires visitors to sign in and out of the building and it requires, among other things, that "the doorman" shall check with the tenant before admitting visitors, that "the doorman" shall check that doors are locked, and that his replacement has arrived before he leaves. The document also details "duties of doormen in different shifts" for the entire 24 hour period. The duties for the 4 p.m. to 12 midnight shift require "the doorman" to sweep and mop floors, wipe and clean other surfaces, and take care of the rain mats.

The testimony of Jose Moran who has worked as a doorman at 675 West End Avenue for 6 or 7 years shows that Cumberbatch replaced Waldo Guerra, the former doorman. Moran stated that he and Cumberbatch perform the same work. The only difference between them is that Cumberbatch wears a uniform and Moran does not. Employee Jose Urena who works at 675 West End Avenue identified a document entitled "Security Guidelines for 675 West End Avenue." These contain the same substantive instructions concerning security and the same "duties of doormen in different shifts" as were given to Command Security by Uzi Einy. Urena testified that his duties have not changed since he was hired as a doorman in 1999. Urena also stated that the security measures in use at the building have remained constant. Employees have access to a key pad to punch in their hours and a telephone for use in emergencies.

Moran testified without contradiction that there has never been a robbery in the building during his shift. When questioned about security in the building, Moran replied that Uzi Einy sends the superintendent from another one of his buildings to perform repairs in 675 West End Avenue.¹⁸ On occasion the super has left the basement door unlocked contrary to the applicable security rules. Uzi Einy testified that from 1998, there have been burglaries at both 675 West End Avenue and 215 West 101st Street. He did not present any evidence of police reports or tenant complaints concerning these events. In fact, Einy did not give any dates or particulars concerning these incidents. Zvi Eyny also testified that there had been a robbery at 675 West End Avenue but he could not recall when this occurred. He also recalled that a tenant had complained that the superintendent had taken the tenant's property. Zvi Einy testified that there had been a rape at 215 West 101st Street before 1987. Respondents introduced a letter from the 215 West 101 Tenants Union dated March 31, 1987, relating to pending legal action concerning the number of hours of doorman service the Respondents were required to provide. Zvi Eyny stated that a tenant in 215 West 101 had complained that she heard a person in her apartment but a search turned up no evidence of any intruder.

Moran identified a security guard application which Uzi Einy gave him and asked him to fill out. Moran recalled that Einy spoke to him about the application about 2 weeks after the election.¹⁹ The application consists of a form prepared by the New York Department of State Division of Licensing Services. Moran testified that he did not fill out the application because he is a doorman and not a security guard.

Uzi Einy testified that he asked all the employees at the buildings to fill out the security guard application. None of them did so. Einy stated that he could not recall whether he presented the applications to the employees before or after the election.

The General Counsel contends that the Respondents decided to replace the unit employees with employees of Command Security in retaliation for the protected and Union activities of the unit employees. To support its contention of anti-union animus the General Counsel presented the testimony of Jaime Urena that he had been interrogated by Uzi Einy and that his hours had been reduced. Urena testified that he had been hired by Uzi Einy in early 1999.²⁰ Einy informed him that he would work as a doorman at 215 West 101st Street from 9 a.m. to 5 p.m. on Friday and on 3 other days from 5 p.m. to 1 a.m. He would also work as a doorman at 675 West End Avenue at various hours. Urena testified that he worked a total of 40 to 48 hours per week in the two buildings.

Soon after Urena began work Uzi Einy telephoned him and instructed him to tell the other employees at the buildings that employees could not work 16 hours in a row and that the em-

¹⁸ The superintendent is based at 700 West End Avenue.

¹⁹ When Moran had testified in a prior matter in July 2000 concerning when he was given the application he stated, "I don't remember but I think it was after the election."

²⁰ Urena, who testified through a Spanish interpreter, stated that he was able to speak English. He said that Uzi Einy always spoke to him in English.

ployees must not punch each others' time cards. Urena transmitted Einy's instructions to employees Orlando Cabrera, Waldo Guerra and Jose Moran.²¹ On March 23, 1999, Urena spoke to Uzi Einy in the latter's office and he told Einy that he had passed on the message but that the others did not like this because Urena was a new employee and they believed that Einy should speak to them directly. Urena said that Einy should not use him for that type of message. The other employees were upset that Urena, a new employee, was being used as a conduit and possibly as a plant or informer by Uzi Einy. On June 29, Urena again spoke to Einy in his office. Einy wanted Urena to say that Cabrera had been threatening him and he wanted Urena to come to the NLRB to testify against Cabrera.

The record shows that Uzi Einy used a tape recorder whenever he had a conversation in his office with an employee. Some transcripts of these tapes were admitted into evidence in prior hearings in other cases. The parties stipulated into evidence transcripts of the March 23 and July 29, 1999 conversations between Urena and Uzi Einy.

Uzi Einy testified that in March 1999, Urena telephoned and said that he had been threatened and was afraid for his life.

The transcript of the March 23 1999 conversation shows that Uzi Einy attempted to obtain from Urena a statement that the employees had threatened him because he told them that he did not want to be in the Union. Einy repeatedly tried to get Urena to acknowledge that he had previously told Einy that he did not want to be in the Union. In the face of these efforts by Einy, Urena steadfastly maintained that he had been threatened by the employees because they did not want him to transmit instructions from Einy. Urena kept repeating that he had been told not to go near 675 West End Avenue on the day that he informed employees of Einy's instructions about not working 16 hours straight and not punching each others' cards. And Einy kept trying to get Urena to say that he had been threatened before that because he did not want to join the Union. Urena concluded his rendition to Uzi Einy by saying that that Cabrera had called him a liar when Urena transmitted Einy's message but that later Cabrera asked Urena's forgiveness and said to forget about it. The transcript of the June 29 conversation shows that Urena did not want to talk to Uzi Einy about purported threats from other employees and he repeatedly asked Einy to leave him alone. In response, Einy threatened to subpoena Urena. As stated by General Counsel, the tapes show that Uzi Einy did not give Urena the assurances required by *Johnnie's Poultry*, 146 NLRB 770 (1964), when he questioned him about his own desires for Union membership and about statements other employees may have made about Union activities. Shortly after June 29, Respondents tried to give Urena subpoenas for an NLRB hearing. Urena did not want to accept the subpoenas and he did not want to testify.

Urena testified that after the June 29 conversation Uzi Einy made changes to his working conditions. In August 1999, Uzi Einy told Urena that he could not work at 675 West End Avenue any longer.²² After that, Urena worked at 215 West 101st

Street, but the times were changed and he worked fewer hours. Urena testified that after he got into the Union Uzi Einy's nephew Zachy Eini worked in place of Urena. In September 1999, Zachy told Urena that he would henceforth report to him instead of to Uzi Einy. Zachy Eini told Urena not to come to work unless he were called. Eventually, Zachy stopped calling Urena for work and he informed Urena in late September or early October that Uzi Einy did not need him any longer. Urena filed a charge with the NLRB on October 5, 1999.²³ In November 2000, Urena began to work full time as a doorman at 675 West End Avenue. Urena denied that when he began to work at 215 West 101st Street Uzi Einy had informed him that the job belonged to Zachy Eini. Urena also denied that Zachy paid him out of his own pocket. Respondent did not call Zachy Eini to testify in this hearing. Uzi Einy testified that he never fired Urena and he never told Zachy that Urena could not replace him.

At the hearing the Respondents sought to show that although they had provided a uniform or jacket for employees they did not wear them. Apparently this would be an argument to support the hiring of security guards, although the rationale was not made clear. Respondents also showed that they gave name tags to the employees. The Respondents did not offer testimony to show when they had provided uniform jackets, to whom they were given or what the instructions were concerning the jackets. Urena testified that when he was working at 675 West End Avenue he found an old jacket in the basement with the number 675 printed on the front. Urena said that he had the jacket cleaned and he used it until it wore out. Urena denied that Uzi Einy gave him a jacket to wear and he denied that he had been instructed to wear a jacket. The Respondents did not call any witness to testify that a uniform was given at a certain time to a named employee but that the employee refused to wear the jacket.

The Respondents intimated that the doormen did not keep good records of visitors to the buildings and that this was a reason for hiring the security guard company. However, Urena testified that he was careful to keep the visitors logs accurately. Apparently Uzi Einy reads all the visitor logs to the buildings. He once berated Urena because no visitors were logged in between 10:45 p.m. and 1 a.m. at 215 West 101st Street. Further, Uzi Einy had instructed Urena to monitor the comings and goings of a certain tenant named McKofsky and he criticized Urena for failing to see this tenant often enough. Urena said he could not invent the times McKofsky went in and out of the building.

In a letter to a Board agent dated August 29, 2001, Uzi Einy denied that employees were replaced with security guard employees. Einy explained his reasons for hiring the security company as follows: "[I]n another building I manage we had a . . . verdict of \$2.5 millions for improper security. . . ." The security company was hired "for the security of tenants and to protect the tenants' and the employers' property and not in retaliation for employees' bargaining and protected activities." The \$2.5 million verdict referred to was in a case entitled *Cabral v. Champ Broadway Company c/o C & E Associates*.

²¹ Moran is Urena's half-brother.

²² Urena recalled that this conversation took place in Uzi Einy's office.

²³ Apparently this case was eventually settled.

LLC. According to Einy the lawsuit concerned a rape. When questioned about this verdict Uzi Einy testified that he has a 48 percent interest in C & E but that he is not the manager and does not receive the rent. Einy did not explain why he had claimed to be the manager in the letter to the Board agent. Einy claimed not to know the address of the building involved in the lawsuit. Einy acknowledged that the building involved in the lawsuit he cited as justification for hiring the security company had nothing at all do with any of the buildings involved in the instant case. In fact it is in Washington Heights, a very different part of Manhattan from the Upper West Side locations of the buildings on West End Avenue and West 101st Street.

Zvi Einy testified that there have been security problems since 1988. He took a picture of some doorman uniforms in the basement of 675 West End Avenue but he could not recall when this was. The uniforms had been purchased when the building was converted to cooperative ownership.²⁴ He was shown his passport which refreshed his memory that he entered the United States on April 15, 2000, and left on July 24. Zvi Einy stated that he took the picture during this period but that the uniforms disappeared a few weeks later. Einy testified that he gave out name tags to the doormen on August 9, 2000 and Respondent introduced a picture of various names tags bearing that date. Einy did not explain how this meshed with his departure from the country on July 24. Zvi Einy also testified to a number of misdeeds engaged in by a former doorman named Bobby. This person, the subject of a prior unfair labor practice case, was fired long before the instant hearing according to Einy.

2. Discussion and Conclusions

Respondents' brief argues that the 8(a)(3) allegation relating to the hiring of Command Security is time-barred. As shown above, the security guard began working on March 12, 2001. The charge in Case 2-CA-33940-1 was filed on July 20, 2001, well within the period allowed by Section 10(b) of the Act. The Charge alleged that Respondents "hired a security guard to replace a bargaining unit employee and to perform bargaining unit work in retaliation for employees engaging in protected activities." This Charge cited a violation of Section 8(a)(1) of the Act. On October 31, the Union filed an amended charge in Case 2-CA-33940-1 using the identical language to describe the alleged unfair labor practice but also citing Section 8(a)(3) and (5) of the Act. Manifestly, the charge filed on July 20 gave Respondents full notice of the allegation against them: hiring a security guard to perform unit work in retaliation for the employees' protected activities. The Respondents' statute of limitations argument is without merit. *Nickles Bakery of Indiana, Inc.*, 296 NLRB 927 fn. 5 (1989).

A vivid demonstration of Respondents' antiunion animus is provided by Uzi Einy's relentless attempts on March 23 and June 29, to obtain a statement from Urena that the other employees had threatened him in connection with the Union. Even though, as shown on the transcripts of the two conversations, Urena persisted in denying that he had been threatened because

he did not want to join the Union, Einy would not stop trying to get Urena to change his story. It is clear that Uzi Einy wished to use a statement from Urena to fight the Union. When Urena refused to go along, Einy threatened to subpoena him even though Urena begged to be left alone. Moreover, Einy did not give Urena the assurances required by Johnnie's Poultry: this is another indication of antiunion animus on the part of Respondents. When it became clear that Urena would not make the statements he was trying to obtain from Urena, Uzi Einy reduced Urena's hours of work. Eventually, Urena had no work at all at Respondents' buildings. The timing of the reduction and cessation of Urena's work leads to the conclusion that it was in retaliation for Urena's refusal to cooperate with Einy. This is another example of Respondents' antiunion animus.

Finally, Respondents' asserted reasons for replacing the unit employee doormen with employees from Command Security do not seem credible. Although Respondents assert that they were motivated by concerns for the security of the tenants and the property the evidence does not support that claim. Respondents produced evidence to show that a rape occurred at 215 West 101st Street before 1987. Yet Respondents did not hire a security guard company in response to that violent occurrence.²⁵ Respondents introduced testimony that there had been robberies at both 675 West End Avenue and 215 West 101st Street but the witnesses could not recall when these had taken place and no details were furnished. As has been amply demonstrated, Respondents maintain documentary evidence from the earliest days of their real estate operations in New York City and Respondents maintain tape recordings of management-employee conversations in their offices. Respondents have copies of the visitors' logs from buildings where such logs are kept. Yet Respondents had no documentation for the purported robberies. This failure to document the assertions combined with the absence of any firm testimonial details leads me to doubt that they occurred. Further, Moran and Urena denied that they knew of any robberies.

Respondents asserted that the security guard company relieved them of liability for incidents at the buildings. However, a reading of the contract with Command Security shows that the opposite is true. The contract specifically states that Command is not an insurer and that Command does not agree to defend Respondents in any actions brought against it. In fact, the contract provides that Respondents agree to indemnify Command against any third party claims.

Respondents assert that a benefit of Command Security is that its employees wear uniforms. The evidence shows that at some point Respondents purchased uniforms for the unit doormen.²⁶ Respondents offered vague testimony that the uniforms "disappeared" and that the men did not wear them. Yet Respondents offered no testimony that any named doorman re-

²⁴ At one point in the proceedings Uzi Einy stated that the building had been converted in 1988.

²⁵ The rape in the building managed by C & E occurred prior to the verdict in 2001, but Respondents furnished no evidence as to its actual timing.

Moreover, that building is far removed from the buildings at issue in the instant case. Respondents did not show that they hired a security guard service for the building where the actual event occurred.

²⁶ Based on the statements of Zvi Einy, it seems likely that the uniforms were purchased in 1988.

fused to wear the uniform issued to him or that any named doorman improperly disposed of his uniform. Urena, the only witness who was questioned about wearing a uniform, testified that he found a uniform jacket in the basement, had it cleaned and wore it until it was past wearing. He firmly denied that he had ever been issued a uniform. Zvi Eyny's testimony identifying the picture of uniforms in the basement is not credible. Eyny did not recall when he took the picture until prompted by being shown his passport. There is no reason to believe that the date given was accurate. Significantly, Respondents had many pictures of uniforms but no invoice showing when they had been purchased. I am not convinced that Respondents' employees refused to wear their uniforms. It is just as likely on the record before me that the uniforms wore out long before the events relevant to the instant case.

The record shows that sometime around the election in January 2000, Respondents gave New York State security guard applications to the unit employees. The asserted reason for this was to improve the security of Respondents' buildings. I can find no convincing reason in the record for the timing of this effort. There is no evidence that any incident occurred which would prompt new security measures in January 2000. Furthermore, the proffered reasons for preferring a security company employee are not convincing. The evidence is undisputed that the unit employees perform the same duties as Cumberbatch, the security guard company employee. The unit employees and Cumberbatch follow the same post instructions about punching in, maintaining security and the like. And Cumberbatch performs the same cleaning chores on his shift as any other unit employee. Respondents did not dispute the witnesses' testimony that Cumberbatch does the same work they do and the same work as the man he replaced.

Moreover, the evidence shows that Respondents took various security measures such as installing a video camera and monitor in the years before the Union was on the scene. Yet Respondents did not hire the security guard company until after the January 2000 election and after the December 29, 2000 hearing officer's report on challenges and recommendations finding that the doormen at 675 West End Avenue and 215 West 101st Street were not statutory guards.

The pretextual nature of Respondents' asserted reasons for hiring the security guard company and the timing of the commencement of the guard service in March 2001 points to a conclusion that it was effected in retaliation for the Union activities of the unit employees. The Board has held that "contracting out a portion of the business for antiunion considerations violates Section 8(a)(3) and (1) of the Act." *Hood Industries, Inc.*, 248 NLRB 597, 601 (1980). See also *Caguas Asphalt, Inc.*, 296 NLRB 785, 790-791 (1989). Thus, I find that the Respondents violated Section 8(a)(1) and (3) of the Act by hiring nonunit security guards to replace bargaining unit employees to perform bargaining unit work in retaliation for the unit employees' protected activities.

G. Alleged Refusal to Bargain

1. Facts

Local 670 representative David Green testified that he organized the unit employees. Green testified that he had a problem

with mail sent to the Respondent being returned. As a result, on August 3, 2001 he hand delivered a letter to Respondent's office at 700 West End Avenue. After gaining admittance to the office Green handed the letter to Zvi Eyny. The letter requested the following information:

1. A list of all bargaining unit employees arranged by classification and shift including names, addresses, phone numbers, present wage rates, date and amount of last wage increase, date of hire and average number of hours worked per week that each has worked during the last 12 months.

2. The total number of overtime hours paid each for the last 12 months.

3. The total gross pay for each bargaining unit employees (sic) for the last calendar (sic) year.

4. A copy of the staffing patterns or schedules for all units including a shift-by-shifts breakdown for each classification in each unit, as well as the staffing patterns on weekends per unit.

5. A copy off (sic) all current job descriptions.

6. A copy off (sic) all current work rules.

7. A copy of all policies related to employment conditions and employees' benefits, including a copy of all employees handbooks and manuals.

8. Copies of any Summary Plan Description Booklets or materials for all insurance plans, including premium rates and contributions rates for all coverages for each of the last three years; and Pension Plans.

9. Names of employees enrolled in each insurance category (employee only, employee plus 1, family, etc.) For each Plan Pension Plan.

The letter closed by stating:

Your prompt attention to the foregoing is required. Upon receipt of the requested information, we suggest that the following dates for the commencement of negotiations subject to your expeditious confirmation: August 15, 22 and 29. To be held at the Union office located at 299 Broadway, Ste. 1000, Time: 10:00 a.m.

Green testified that he received one letter in response to his hand delivered letter of August 3. This letter from Uzi Eyny was dated August 13, 2001. It read as follows:

This is in response to your letter dated August 3rd, 2001. As you are aware, we have wrote (sic) a letter to Region two stating that their certification of the election is in error.

We are awaiting for a response from the Region to our letter dated July 27th, 2001. I have herewith attached a copy of said letter, of which a copy was previously sent to you.

Despite the mention of an attached July 27 letter to the Region, no such letter was in fact attached to the letter Green received.

On September 5, 2001 Green again wrote to Uzi Eyny as follows:

Local 670 wishes to meet with you on September 18, 2001 at 10:00 a.m. in the Union office to negotiate a Collective Bargaining Agreement. The Union has yet to receive it's [sic] prior request for information.

Green testified that he personally mailed this letter in the mailbox across the street from his office. Green testified that the Respondent did not meet to negotiate with the Union on September 18 and it did not submit any of the requested information to the Union. Uzi Einy denied that he received the letter of September 5 from the Union.

On September 20, 2001 Green again mailed a letter to Uzi Einy. This letter stated:

Local 670 wishes to meet with you on October 3, 2001 at 10:00a.m. in the Union office to negotiate a Collective Bargaining Agreement. The Union has yet to receive it's (sic) prior request for information.

Green testified that Respondents did not meet and negotiate with the Union and did not supply the requested information. Uzi Einy testified that he did not receive the Union's letter of September 20.

On October 11, 2001 Uzi Einy wrote to the Board agent investigating the refusal to bargain charge as follows:

I have wrote [sic] to the union that I would meet with their representative in my office. The union has never responded to my letter or come to the appointment or schedule with the parties another appointment date. I have never refused to bargain.

I wrote another letter to the union in which I mentioned my letter to the Region about the certification because at the time of making the certification the Region did not take into consideration the objections to the election timely filed by the parties.

On October 26, Uzi Einy wrote another letter to the Board agent stating that he denied the charge that he refused to bargain since on or about August 20. Einy's letter stated:

I deny said charge. The union did not have any contact with us at all in August 2001 and did not provide us with the union terms of an initial bargaining agreement, and I have never refused to bargain with the union.

With regard to your request for a copy of the letter that we wrote to the union, I have to say that currently I cannot locate this letter. The person who has this letter is out of the country and will be back probably at the end of November 2001. I do not know why you do not believe what I say and you ask me to provide you a copy of the letter

....

On cross examination by Respondent, Green recalled that he had received only one letter from Einy in 2001; he received Respondents' letter of August 13, in which Einy stated that Respondents were challenging the certification.²⁷ When shown a letter addressed to the Union from Uzi Einy dated September 5, 2001, Green said that he did not recognize the letter and had not received it. This letter, which was admitted through Respondent's witness as will be described below, states as follows:

As I wrote you in my last letter, I am disputing the Certification of the Union as exclusive collective-bargaining representative for the employees.

As I previously wrote you in response to your previous letter, I am ready to meet you in my office at the above address on September 19, 2001 at 4:00 pm.

With regard to the information that you have requested, your letter does not use exact language. Most of the information has been provided to your representative and to the Board at prior hearings. When we meet in my office, you can clarify your request and may be able to give you the remaining of the information while you are in my office.

The Respondents did not produce any letter dated earlier than September 5 in which Uzi Einy offered to meet with the Union on September 19, 2001.

The letter of September 5, 2001 is the letter referred to in Einy's letter to the Board agent of October 26, quoted above, which he asserts he cannot locate because the person who has the letter is out of the country. In response to leading questions Zvi Eyny testified that he saw Uzi Einy put this letter into an envelope while both of them were in Respondents' office and Eyny testified that he mailed the letter. Eyny did not give any testimony at all as to when this took place. Uzi Einy did not testify that he wrote the letter and did not testify that he gave it to Zvi Eyny to mail.

2. Discussion and Conclusions

The Charge in Case 2-CA-34059 alleging that the Respondents have refused to bargain with the Union on the terms of an initial collective-bargaining agreement was filed on September 10, 2001. The charge was served on Respondents by regular mail on September 24, and was further served by regular and certified mail on October 31, 2001. The charge in Case 2-CA-34587 was filed on May 6, 2002 alleging that the Respondents have refused to provide information requested by the Union in order for the Union to negotiate the terms of an initial collective-bargaining agreement. This charge was served on Respondents on May 10, May 17 and 22, 2002.

Respondents maintain that the allegation in the Amended complaint based on the refusal to provide information is barred by Section 10(b) of the Act. I do not find that the allegation is time-barred. The refusal to bargain charge in Case 2-CA-34059 is based on the Respondent's failure to negotiate pursuant to the Union's requests dated August 3, September 5 and 20 in the letters set forth above. Those letters not only requested that Respondents meet and negotiate but they also requested information about the bargaining unit. The charge in Case 2-CA-34587 refers to the information requests set forth in the Union's letters of August 3, and September 5 and 20.

The earlier charge, which was timely served, would have supported a complaint alleging both a refusal to meet and negotiate an initial agreement and a refusal to provide information. The duty to provide information is a part of the duty to bargain. Thus, the complaint allegation that Respondents refused to provide information involves the same legal theory as the allegation that Respondents refused to bargain for an initial contract. Both allegations arise from the same factual circum-

²⁷ Green did not recall receiving R. Exh. 23, a letter dealing with a different case, and this letter was not admitted through any witness called by Respondent.

stances, namely that Respondent did not bargain with the Union pursuant to its requests of August 3 and September 5 and 20, 2001. Finally, the Respondent has raised the same defense to the allegations: it maintains that it is not obliged to bargain with the Union because it is challenging the certification. Thus, even without the filing of a charge in Case 2–CA–34587 I would have permitted amendment of the complaint to allege a refusal to furnish information because it is closely related to the charge that Respondents refused to bargain. *Redd-I*, 290 NLRB 1115, 1118 (1988)

I do not believe that the letter from Uzi Einy to the Union dated September 5 purportedly setting a date of September 19 to meet and bargain is genuine, nor do I believe that it was ever sent to the Union. There is no testimony on the record by any of Respondents' witnesses that the supposed letter of September 5 was in the witness' possession while he was out of the country as asserted in Einy's October 26 letter to the Board agent. Thus, no reason has been given to explain why Respondents did not have this letter as asserted by Uzi Einy in his letter to the Board agent. It strains credulity to suppose that Respondents, who maintain videotapes and audio tapes of employees going back many years and who retain letters from tenants going back to 1987, did not retain a copy of a very important letter that was typed and put into an envelope in their own office. Further Uzi Einy did not testify that he caused the supposed letter to be typed nor when this might have occurred. Significantly, Zvi Eyny did not state when he was given the letter to mail and he did not testify when he mailed it. Thus, there is no testimony in the record as to when the letter was prepared, who prepared it and when it was mailed.

My finding that the purported letter of September 5 is not genuine and was not mailed to the Union on or about September 5 is based on the discussion in the paragraph above. However, there is another reason why I find it hard to believe that the letter from Uzi Einy dated September 5, 2001 is genuine. In the year 2001, the Jewish New Year began on the night of September 17. The following 2 days, September 18 and 19, were two of the holiest days in the Jewish calendar. Uzi Einy identified himself as an observant person, requesting and receiving an expeditious end to the hearing on a Friday so that he could be present for the Sabbath observance before candle lighting time. Furthermore, Urena testified that he did not telephone Uzi Einy on Saturday because Einy did not answer the telephone on the Sabbath.²⁸ It seems well nigh impossible that Uzi Einy would have written a letter to the Union offering to meet on the second day of Rosh Hashanah.²⁹

Respondents' letter of August 13, 2001 to Green did not contain an agreement to negotiate with the Union. Instead, the letter said that Respondent disputed the Certification. By implication, Respondents' letter constituted a refusal to meet and bargain with the Union and a refusal to furnish information to

²⁸ Although Einy stated that he did answer the telephone on Saturday, he at first avoided giving this answer. Based on my findings that he is not credible and that Urena is a truthful witness, I do not rely on Einy's answer.

²⁹ The administrative law judge is herself Jewish and does not work on the first 2 days of the New Year.

the Union. I find, based on Green's testimony, that he mailed the letters of September 5 and 20 to Respondents. I do not credit Uzi Einy that Respondents did not receive the Union's requests for bargaining dated September 5 and 20, 2001. This is based on my finding above that Einy is not a reliable witness and that he wrongly denied receipt of the hand delivered letter of August 3 from the Union. I find that the Respondents did not answer Green's letters of September 5 and 20. I have found above that the letter from Uzi Einy to Green dated September 5 is not genuine. Green categorically denied ever receiving this letter and neither Uzi Einy nor Zvi Eyny offered testimony as to when this letter had been mailed. Uzi Einy's written claim to a Board agent that someone had a copy of this letter was never substantiated by testimonial proof. Further, the Union's letter of September 20 would have elicited a response from Respondents if the employer had been willing to meet with the Union. In summary, Respondents' refused to meet with the Union, did not respond to further Union requests to meet for negotiations and did not attend any meetings.

The information requested by the Union relates to wages, hours and working conditions of the unit employees and it is presumptively necessary for and relevant to the Union's function as a bargaining representative. Indeed, Respondents did not articulate any claim that that the Union's request for information was overbroad.

I find that the Respondents refused to bargain with the Union and refused to provide information to the Union in violation of Section 8(a)(1) and (5) of the Act. The fact that the Respondents maintained that the certification was issued in error did not suspend the duty to bargain. *East Coast Equipment*, 229 NLRB 825, 829–830 (1977); *enfd.* 577 F.2d 727 (3d Cir. 1978).

H. Hiring of Command Security

Green stated that Waldo Guerra had been a doorman in the bargaining unit when Green was organizing the employees. Guerra was replaced by a Command Security Corporation employee. Green testified that Respondents did not bargain with the Union over the decision to replace a bargaining unit employee with a Command Security employee. Respondents do not contend that they gave notice to or bargained with the Union concerning the hiring of the Command Security to perform bargaining unit work. Thus, it is undisputed that on March 12, 2001 Command Security employee Cumberbatch began performing the duties formerly performed by unit employee Guerra on the 4 p.m. to midnight shift at 675 West End Avenue. This change took place after the Report on Challenges and Recommendations issued on December 29, 2000 recommending that the ballots of the doormen at Respondents' buildings should be opened and counted. An employer acts at its peril in making changes in terms and conditions of employment during the period of post election challenges and objections. As the Board said in *Mike O'Connor Chevrolet*, 209 NLRB 701, 703 (1974):

To hold otherwise would allow an employer to box the union in on future bargaining positions by implementing changes of policy and practice during the period when objections or determinative challenges to the election are pending. Accordingly, since we have already determined in this case that the

Union should be certified, we find, . . . that Respondent was not free to make changes in terms and conditions of employment during the pendency of postelection objections and challenges without first consulting with the Union.

I find that the Respondents violated Section 8(a)(5) and (1) by hiring a security guard company to perform bargaining unit work commencing on March 12, 2001 without prior notice to and without affording the Union an opportunity to bargain over its decision to do so and the effects of this change.

1. Conduct of Uzi Einy

Uzi Einy, as “Employer,” filed an answer and an amended answer consisting of a blanket denial and a denial of receipt of the complaint.³⁰ The ALJ cautioned him that he might wish to reconsider his position because a finding that the answer was interposed for the purpose of delay might result in an imposition of sanctions. Section 102.21 of the Board’s Rules and Regulations provide with respect to the signing of an answer:

The signature of the attorney or non-attorney party representative constitutes a certification by him/her that he/she has read the answer; that to the best of his/her knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. . . . For a willful violation of this section an attorney or non-attorney party representative may be subjected to appropriate disciplinary action.

On the last day of the instant hearing just as the ALJ was going to close the record, Uzi Einy stated that he wished to admit the jurisdiction of the Board over the Respondents, including all the separate entities that make up Respondents. In making this admission at the last possible moment, Respondents did not admit the other portions of the complaint such as the supervisory status of Uzi Einy and Zvi Eyny, the status of the labor organization under the Act, receipt of the charges and the complaint, and the receipt of the hand delivered August 3, 2001 letter.³¹ Thus, the Answer signed by Uzi Einy failed to admit facts and events as to which he could not be in doubt and which he spoke of freely during the hearing. Moreover, admitting jurisdiction at the last possible moment did not relieve Counsel for the General Counsel of the necessity of proving jurisdiction during the presentation of General Counsel’s case. Together with the dilatory tactics of Uzi Einy during the trial, detailed above, there is a preponderance of evidence that he was aware that the Answer signed by him was not supported by good ground and that the Answer was interposed for delay. Moreover, Uzi Einy was warned on the record by the ALJ that it was improper to file a blanket denial to a complaint for the purposes of delay and not in good faith. Section 102.77(b) of the Board’s Rules and Regulations provide that “the administrative law

judge . . . or Board shall also have the authority in the proceeding in which the misconduct occurred to admonish or reprimand, after due notice, any person who engages in misconduct at a hearing.”

I therefore recommend that the Board reprimand Uzi Einy for submitting an Answer on behalf of Respondent without any belief that there was good ground to support major portions of it and for the purpose of delay. I find that this misconduct was willful; it followed a specific warning to Uzi Einy on the record. Uzi Einy has represented Respondents in various prior unfair labor practice cases and in the representation case before the Board. He should be held accountable for failing to admit the jurisdiction of the Board, the status of the labor organization, and the supervisory status of himself and his brother Zvi Eyny. Further, his actions in refusing certified mail addressed to him at the office where he conducts all the business relating to the real estate holdings of himself and his family constitute a conscious effort to evade and delay the processes of the Board and the effectuation of the Act. Thus, his denial of receipt of charges and complaint is a further instance of willful behavior engaged in without good ground and for the purpose of delay. I recommend that the Board warn Uzi Einy that if he engages in this conduct in the future he will be barred from appearing in Board proceedings.

I recommend that the Board also reprimand Uzi Einy for failing to follow the administrative law judge’s instructions during the hearing by repeatedly talking loudly at counsel table while witnesses were testifying and then interrupting the questioning of witnesses because he did not know what was going on, interfering with questioning of opposing counsel by demanding to know the purpose of the questions, communicating with witnesses who were on the stand actually giving testimony in response to opposing counsel, interposing baseless objections for the purpose of delay and repeatedly attempting to evade the ruling that he could only testify if another person at counsel table posed the questions. I recommend that the Board reprimand Uzi Einy for willfully disobeying the ALJ’s instructions that once a subpoena is revoked a copy of it may not be served again and for willfully disobeying the ALJ’s instructions that a subpoena may only be used to obtain evidence for use during a hearing before an ALJ and may not be issued after the close of the hearing. I recommend that the Board warn Uzi Einy that if he engages in the same or similar conduct in future Board proceedings he will be barred from appearing in any proceedings before the Board.

As discussed in detail above, Uzi Einy failed to heed my instructions that (1) subpoenas may only be issued for the production of testimony or evidence for use during the hearing and that issuance of a subpoena after the close of a hearing is an abuse of Board process and (2) copies of previously issued and revoked subpoenas may not be labeled “amended” and served again. I recommend that a hearing be held to determine the litigation costs expended by the Union and the General Counsel as a result of Uzi Einy’s willful violation of this instruction and that Respondents be ordered to reimburse these litigation costs to the General Counsel and the Union. *Tiidee Products*, 194 NLRB 1234, 1236 (1972).

³⁰ The amended answer also contains a “cross complaint” requesting decertification of the Union. I shall not deal with any issues raised in the cross complaint.

³¹ The status of the Union was determined by the Board in the representation case. One of the Respondents’ defenses in the instant case is that they did indeed offer to meet with and bargain with the Union on behalf of the unit employees. Finally, at no time during the testimony of Union representative Green or at any other time did Respondents attempt to litigate the status of the Union under the Act.

J. Motions and Other Papers Filed After Close of Hearing

On July 31, 2002, Morris Tuchman, Esq., filed a motion for recusal of the ALJ. This motion is hereby admitted into evidence as ALJ Exhibit 8. On August 9, counsel for the General Counsel filed an opposition. This opposition is hereby admitted into evidence as ALJ Exhibit 9. On October 1, 2002, Uzi Einy filed a motion to disqualify the ALJ. This motion is hereby admitted into evidence as ALJ Exhibit 10. On October 2, 2002, counsel for the General Counsel filed an opposition. The opposition is hereby admitted into evidence as ALJ Exhibit 11. The recusal motions of Morris Tuchman, Esq. and Uzi Einy are hereby denied.

On July 10, 2002, Uzi Einy wrote to the ALJ requesting an order directed to Region 2. The ALJ responded in a letter dated July 10. The July 10 letter of the ALJ together with letters dated June 26, July 2 and 10, from Uzi Einy, and July 3 from Judith M. Anderson, Esq. are hereby admitted into evidence as ALJ Exhibit 12.³²

On July 19, 2002 Uzi Einy filed a motion seeking reconsideration of the ALJ order of July 18 which was admitted as ALJ Exhibit 7. The July 19 motion, including various attachments, is hereby admitted into evidence as ALJ Exhibit 13. The July 19 motion argues that Respondents wish to present newly discovered evidence. This evidence consists of (1) an NLRB press release dated November 15, 2001 which states that the mail-room at the federal building has been reopened following an October 30 shutdown for anthrax testing and (2) a September 20, 2001 NLRB press release stating that the regular phone lines to the Manhattan Regional Office are down and that public access to the Federal building is denied until further notice. These two press releases are attached to ALJ Exhibit 12. In addition the July 19 motion argues that the Respondents have further newly discovered evidence consisting of (1) a map showing the Union's office at 299 Broadway and (2) a Postal Service press release dated September 17, 2001 stating the locations where certain businesses may pick up mail. These two documents are attached to ALJ Exhibit 13. Respondents argue that these documents prove that the Union office was closed and had no telephone lines and that there was no delivery of mail or pick up of mail near the Union's office. On July 30, 2002, counsel for the General Counsel filed an opposition to the July 19 motion of Uzi Einy. This opposition is hereby admitted into evidence as ALJ Exhibit 14. Manifestly, public documents dated in 2001 do not qualify as newly discovered evidence in July 2002.³³ Moreover, it is clear that the documents proffered by Respondents do not show whether the Union's office, which is not located in the Federal building, was open after September 11, and they do not show what arrangements the Union may have made to pick up mail or send outgoing mail nor do they show when regular mail service was restored to 299 Broadway. The Respondents' motion of July 19, 2002 is hereby denied.

³² These letters, including attachments, relate to the same subject matter.

³³ *Fitel/Lucent Technologies, Inc.*, 326 NLRB 46 fn. 1 (1998). The exercise of due diligence by Respondents before the instant hearing would have led to the public information which they now seek to introduce into the record.

On July 31, 2002 Uzi Einy filed another request. This document is hereby admitted into evidence as ALJ Exhibit 15. This document requests the admission of certain documents into evidence. I believe that most of these documents are in evidence either as a result of actions taken during the hearing or pursuant to the instant Decision. To admit them again would only serve to further complicate an already overburdened record. The Respondents' request of July 31 is hereby denied.

On August 21, 2002, counsel for the General Counsel filed a response to Respondents' July 31 request. The response is hereby admitted into evidence as ALJ Exhibit 16. I do not believe that any further action is warranted as to the matters discussed in the General Counsel's response.

On August 2, 2002, counsel for the General Counsel filed a letter concerning errors by the reporting service in dealing with the exhibits in the instant hearing. That letter is hereby admitted into evidence as ALJ Exhibit 17.

On September 6, 2002, Uzi Einy filed a motion to reopen the record to accept transcripts and exhibits from prior hearing as exhibits, to take judicial notice and application for subpoena forms. The motion is hereby admitted into evidence as ALJ 18.³⁴ On September 9, 2002, Uzi Einy filed a letter concerning typographical errors in the motion of September 6. That letter is hereby admitted into evidence as ALJ 19. On September 24, 2002, counsel for the General Counsel filed an opposition to Respondents' motion of September 6. The opposition is hereby admitted into evidence as ALJ Exhibit 20. The Respondents' motion is an attempt to relitigate rulings of the ALJ on the record in the instant hearing and to admit evidence already rejected by the ALJ. Further, the motion seeks to introduce evidence based on transcripts of prior hearings in which Respondents were involved. No valid reason appears why, with due diligence, this could not have been done during the instant hearing. As noted above, the transcripts were available in the hearing room throughout the hearing and the ALJ noted that Attorney Tuchman and Uzi Einy consulted the transcripts during the hearing. The Respondents' Motion of September 6 is hereby denied.

CONCLUSIONS OF LAW

1. The Union is the certified exclusive collective-bargaining representative of the Respondents' employees in the following unit:

All full-time and regular part-time doormen, porters, maintenance employees and superintendents employed by the joint employer at the residential apartment house buildings located in Manhattan at 675 and 700 West End Avenue, 215 West 101st Street, 309 and 317 West 99th Street, and 214 West 102nd Street, and in the Bronx at 665 and 690 Allerton Avenue, excluding all guards and supervisors as defined under the Act.

2. By hiring nonunit security guards to replace bargaining unit employees to perform bargaining unit work in retaliation

³⁴ This motion was accompanied by various audio tapes and video tapes.

for the employees' protected activities the Respondents violated Section 8(a)(3) and (1) of the Act.

3. By refusing to meet and negotiate with the Union and by refusing to provide information to the Union the Respondents violated Section 8(a)(5) and (1) of the Act.

4. By hiring a security guard company to perform bargaining unit work without prior notice to the Union and without affording the Union an opportunity to bargain over its decision and the effects of the change the Respondents violated Section 8(a)(5) and (1) of the Act.

REMEDY

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

The General Counsel seeks an extension of the Union's certification year in order that the Union may enjoy the same period of good faith bargaining uninterrupted by challenges to its presumption of majority that it would have enjoyed had Respondents bargained in good faith after the Union was certified. I have found above that the Respondents have refused to bargain

with the Union and have refused to provide information requested by the Union. This conduct began with the first request for bargaining after the Union was certified and continued through the pendency of the instant proceedings. I shall grant the remedy sought. Accordingly, I shall include in my recommended remedy a one year extension of the certification period after Respondents have actually commenced to bargain in good faith, including supplying in a prompt manner the information requested by the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1982); *Valley Inventory Service Inc.*, 295 NLRB 1163, 1167 (1989).

Further, as the Board said in *Colfor, Inc.*, 282 NLRB 1173, [11]75 (1987):

While the certification period will be extended . . . the Respondent's duty to bargain will not stop when the certification year expires. It is well settled that on the expiration of the certification year a certified union enjoys a rebuttable presumption that its majority representative status continues.

[Recommended Order omitted from publication.]