Yonkers Associates, 94 L. P. *and* Local 32E, Service Employees International Union, AFL–CIO. Cases 2–CA–27156 and 2–CA–27564

September 29, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND TRUESDALE

On February 24, 1995, Administrative Law Judge Howard Edelman issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a cross-exception and brief.

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

The Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions,[2] and to adopt the recommended Order as modified and set forth in full below.[3]

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

The Respondent excepts, among other things, to the judge's ''disregard'' of Vice President Israel Roizman's testimony that it was the Respondent's practice to retain an independent contractor for each new property it acquired rather than to hire permanent maintenance employees. However, the judge expressly considered this testimony and discredited it. Further, the judge found Roizman to be a generally untrustworthy witness and pointed out a number of discrepancies in Roizman's testimony on this and other matters. In view of the credited testimony establishing the Respondent's discriminatory motive for refusing to hire the employees, the judge's discrediting Roizman generally, and the fact that Roizman's testimony about the Respondent's practice though undisputed is also uncorroborated, we find that the Respondent has failed to rebut the General Counsel's evidence of discrimination, and we agree with the judge that the Respondent violated the Act. We note that the judge found that the Respondent's discrimination was a violation of Sec. 8(a)(1) alone. Inasmuch as the complaint alleges the conduct to be a violation of Sec. 8(a)(3), and given that the judge analyzed the relevant evidence under *Wright Line*, 251 NLRB 1083 (1980), we find that the Respondent discriminatorily refused to hire the employees in violation of Sec. 8(a)(3), and derivatively of Sec. 8(a)(1).

[2] The judge inadvertently states in par. 4 of his Conclusions of Law that the Respondent refused to hire Francisco Machado, Jose Borbon, and Ariel Rivera on December 29, 1994, when the record and the balance of his decision clearly establish that the year was 1993. We hereby correct the error.

[3] The judge failed to include a provision in the recommended Order that the Respondent pay Machado, Borbon, and Rivera for any losses they suffered as a result of its unlawful unilateral changes in their wages, hours, and terms and conditions of employment, with interest. We have modified the recommended Order to include such a provision, to include the Board's standard expunction, record-keeping, and notification provisions, and to require the posting of a substitute notice to employees.

ORDER

The National Labor Relations Board orders that the Respondent, Yonkers Associates, 94 L.P., Yonkers, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to hire employees because of their membership in or activities on behalf of Local 32E, Service Employees International Union, AFL–CIO, or any other labor organization.

(b) Unilaterally changing the wages, hours, and terms and conditions of employment of its employees without notifying and bargaining with the Union.

(c) Refusing to recognize and bargain collectively with the Union as the exclusive bargaining representative of its employees employed at the Highland facility in the appropriate unit set forth below:

> All building service employees employed at the Highland Avenue, Yonkers, New York facility.

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

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

(a) Make Francisco Machado, Jose Borbon, and Ariel Rivera whole for any losses they suffered as a result of the Respondent's unlawful refusal to hire them and as a result of the unlawful unilateral changes in their wages, hours, and terms and conditions of employment, with interest, in the manner set forth in the remedy section of the judge's decision.

(b) Remove from its files any reference to the unlawful refusals to hire and notify the employees in writing that this has been done and that these unlawful actions will not be used against them in any way.

(c) On request of the Union, rescind the unlawful unilateral changes.

(d) Recognize and, on request, bargain with the Union as the exclusive collective-bargaining representative of all the employees employed at the Highland facility, in the unit described above and, if an agreement is reached, embody the understanding in a signed agreement.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying all records necessary to analyze and compute the amount of backpay and reimbursement that may be owed to the employees pursuant to paragraph 2(a) of this Order.

(f) Post at its Highland Avenue facility copies of the attached notice marked ''Appendix.''[4] Copies of the

[4] 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

notice, 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 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.

(g) Notify the Regional Director within 20 days from the date of this Order what steps the Respondent has taken to comply.

Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

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

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.

WE WILL NOT refuse to hire employees because of their membership in or activities on behalf of a union.

WE WILL NOT refuse to recognize and bargain with Local 32E, Service Employees International Union, AFL–CIO as the exclusive bargaining representative of our employees employed at the Highland Avenue facility in the appropriate unit set forth below:

> All building service employees employed at the 7383 Highland Avenue, Yonkers, New York facility.

WE WILL NOT unilaterally change the wages, hours, and terms and conditions of employment of our employees without notifying and bargaining with the Union.

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

WE WILL make Francisco Machado, Jose Borbon, and Ariel Rivera whole for any losses they suffered as a result of our unlawful refusal to hire them and as a result of our unlawful unilateral changes in their wages, hours, and terms and conditions of employment, with interest.

WE WILL notify each of them that we have removed from our files any reference to our unlawful refusals to hire and that these unlawful actions will not be used against them in any way.

WE WILL, on request, rescind the unlawful unilateral changes that we made.

WE WILL recognize and, on request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the unit described above and, if an agreement is reached, embody the understanding in a signed agreement.

YONKERS ASSOCIATES, 94 L.P.

Gregory B. Davis, Esq., for the General Counsel.
Joel E. Cohen, Esq. (Mudge, Rose, Guthrie, Alexander & Ferdon), of New York, New York, for the Respondent.
Scott P. Trivella, Esq., of Bronx, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

HOWARD EDELMAN, Administrative Law Judge. This case was tried before me in New York, New York, on October 11 and 12, 1994.

On February 1, 1994, Local 32E, Service Employees International Union, AFL–CIO (the Union) filed a charge against Yonkers Associates, 94 L.P. (Respondent) alleging a violation of Section 8(a)(1) and (3) of the Act. On June 24, 1994, the Union filed another charge against Respondent alleging a violation of Section 8(a)(1) and (5) of the Act. On July 29, 1994, a consolidated complaint issued alleging violations of Section 8(a)(1), (3), and (5) of the Act. The thrust of the complaint is that Respondent refused to recognize and bargain with the Union, refused to hire employees who were members of the Union, and committed various independent acts in violation of Section 8(a)(1) of the Act.

Respondent is a domestic partnership with an office and place of business in Yonkers, New York, where it is engaged in the ownership, operation, and rental of apartment buildings, including an apartment building located at 7383 Highland Avenue, Yonkers, New York. Respondent, in the operation of its business, annually derives income in excess of $500,000. Respondent, in the course of its operation of its business, annually purchases goods and materials valued at in excess of $5000 from suppliers located in the State of New York, who receive such goods and materials directly from points located outside the State of New York. I conclude that Respondent is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

It is admitted, and I conclude that the Union is a labor organization within the meaning of Section 2(5) of the Act.

Background

On November 30, 1992, Arco Management Corp. (Arco) signed a contract with Messiah Development Co. Inc. (Messiah) to manage the Highland Avenue apartment building in issue in this case. Arco, as an agent for Messiah entered into a collective-bargaining agreement with the Union sometime in January–March 1993, covering a unit of maintenance employees working at the Highland facility. The unit numbered three employees.

On August 20, the United States Department of Housing and Urban Development (HUD), by its foreclosure commissioner, conducted a foreclosure sale of the Highland facility.

Respondent was the highest bidder and purchased the building on December 29, 1993.

Scott Langan, vice president of Arco, credibly testified[1] that in September 1993 Israel Roizman, vice president of Respondent, called Arco and informed Langan that he was the successful bidder at the HUD foreclosure sale and that as the new owner would not require Arco's management services.

Sometime in the middle of December Roizman called Langan and asked him to terminate the unit employees since he was taking title to the Highland facility on December 29. Langan told Roizman that the three unit employees employed at that facility were excellent workers and suggested that Respondent hire them. The employees were employed by Respondent. Arco was merely the managing agent for Messiah. Langan credibly testified that Roizman replied that he would not hire the employees because he did not want the Union. Roizman further explained that an additional concern with hiring the union employees presently working at the Highland facility was that he did not want to assume the unpaid welfare and pension payments owed the Union by the predecessor, Messiah.[2] Roizman denied making the statements attributed to him by Langan. I credit Langan's testimony. As set forth above, I find Langan to be a credible witness. As set forth in detail below, I find Roizman to be an incredible witness.

Francisco Machado, one of the three unit employees employed at the Highland facility credibly testified that on December 28, the day before Respondent took title to the Highland facility, Roizman called him into his office and told him that he was taking title to the building the following day and that he would not continue his employ beginning on December 29. Roizman continued stating that he ''wasn't going to carry nobody's baggage.'' I conclude that this statement was a reference to any potential union liability associated with the continued employment of union employees. Roizman testified that he did make the statement attributed to him by Machado concerning ''baggage,'' but testified that he didn't know why Arco was not telling the unit employees that he was not going to continue their employment, and he didn't want to carry Arco's baggage for such notification. I do not credit Roizman's testimony in this regard. As set forth below, I did not find Roizman to be an incredible witness.

On December 28, Union Attorney Scott Trivella called Roizman. Trivella credibly testified that he informed Roizman that the Union represented the employees maintaining the Highland facility, that the Union had a collective-bargaining agreement with Messiah, the predecessor employer, and demanded recognition on behalf of the employees. Roizman told Trivella that he had terminated his contract with Arco and would not be entering into any new contractual agreement. Trivella told Roizman that he was concerned with the unit employees working at the building at the building and not the maintenance or service contractors. Trivella credibly testified that in response to his position Roizman replied that ''it was a non-union building and he did not want any union there.''[3]

Roizman incredibly testified that when Trivella demanded recognition and reminded Roizman that the Highland facility was a union building Roizman referred Trivella to his attorney. I have no doubt that Roizman made this statement at some point in his conversation with Trivella, but I conclude that he also made the statement about the Highland facility being a nonunion building, and that he didn't want any union there. As set forth below, I conclude that Roizman is not a credible witness.

As of January 2, 1994, Respondent had failed to employ the above three unit employees. On January 3, 1994, the Union picketed. The pickets included the three unit employees.

On or about March 1994, Respondent, on the advice of its attorney, offered reinstatement of the three former unit employees who accepted such offer and returned to work.

The credible and undisputed testimony of employees Machado and Ariel Rivera establish that Respondent changed the work hours the employees enjoyed at Messiah from 8 a.m. through 4 p.m. to 8:30 a.m. through 5:30 p.m. and that Respondent no longer paid them for their lunch hour. The employees were also informed by Respondent that from now on they would only receive 6 sick days instead of the 10 sick days they received with Messiah. In addition Respondent changed the number of paid holidays from 13 to none. In addition the employees would have been entitled to receive up to 3 weeks paid vacation, depending upon their length of service. Respondent instituted a single week vacation with a new limitation; that the employees would not get paid for vacation time they did not use. In addition, the employees were given additional work responsibilities over those they had while working for Messiah.

Trivella credibly, and without contradiction, testified that the Union was not notified as to the hiring of the above unit employees nor of the changes in wages, hours, and conditions of employment, described above.

By letters dated March and June 10, 1994, the Union demanded recognition for the unit employees and requested

[1] I find Langan to be a credible witness. It was immediately clear that Arco was not going to manage the Highland facility for Respondent, and at that point I conclude Langan became essentially a neutral witness. I was especially impressed with his demeanor. He displayed an excellent recollection of the facts and was most responsive during both direct and cross-examination. Moreover, he was corroborated in the critical area as to why Respondent did not hire the unit employees working at the Highland facility by other credible witnesses, described below.

[2] On cross-examination, Respondent's counsel noted that Langans affidavit stated: ''Roizman stated he did not want (the Union because he did not want) to absorb any backpay money or liabilities because of the union.'' Respondent counsel contended that the bracketed portion of the statement appeared to be inserted after the affidavit was taken and questioned Langan as to this. Langan, notwithstanding persistent cross-examination on this issue, credibly testified that it was his addition, and although it might be redundant, expressed accurately what Roizman had told him. After due consideration of such alleged inconsistancy, I conclude that Langan's testimony is essentially consistent with his affidavit.

[3] I conclude that Trivella is a credible witness. Trivella, notwithstanding extensive cross-examination, gave consistent, and I would conclude logical, testimony. I was impressed with his demeanor. It is obvious that the only reason for such a telephone call, the day before Respondent was to take title, was to see if Respondent would assume the Union's contract, and, in the absence of such assumption, to at the very least demand recognition. Moreover, Trivella's testimony that Roizman told him that he did not want the Union and that the building would be a nonunion building was corroborated by the credible testimony of Langan and Machado.

bargaining. Respondent admittedly has continued to refuse to recognize and bargain with the Union concerning the wages, hours, and other conditions of employment.

Credibility of Roizman

I found Roizman to be an incredible witness. I was unimpressed with his demeanor. He was most responsive, detailed, and articulate during his direct testimony as contrasted with his often vague, evasive, and argumentative testimony during cross-examination, especially during cross-examination by counsel for the Union. At other times Roizman gave contradictory testimony. For example, Roizman testified with certainty that he never asked Messiah to terminate the unit employees. However, on cross-examination he was shown a letter he signed and sent to Langan which stated: ''[Y]ou have advised us that the previous owner (Messiah) will terminate its employees.'' Upon being shown the letter, Roizman reluctantly admitted that he had spoken to Langan about this matter. In connection with the subject of moneys owed to the union funds by Messiah, Roizman testified on direct that he never asked Langan about such moneys. During cross-examination Roizman completely contradicted himself and reluctantly admitted that he had indeed asked Langan about the moneys owed the Union by Messiah, but Langan refused to tell him.

The contradictory statements described above tend to show that Roizman was attempting to hide his interest about moneys owed to the Union and wanted to have Messiah terminate the unit employees prior to his assumption of ownership so that he would not have to recognize the Union as a successor.

Further, and significantly, Roizman attempted to disguise the reason for his refusal to hire the unit employees maintaining the Highland facility. In this connection he testified on direct examination that when he takes over a new building, he usually does substantial renovation and prefers to use outside contractors. Yet although he took over the building in December 1993, he did not hire a contractor to make the substantial repairs described until August 1994. Moreover, rather than keep the unit employees in his employ for the usual day-to-day maintenance duties, he hired a maintenance contractor with his employees. This contractor was a nonunion contractor.

Roizman also was evasive concerning his direct testimony about his reasons for not assuming contracts. In this regard, Roizman testified on direct that he did not want to assume the employer's obligations. When it was pointed out to Roizman on cross-examination that he could have hired the maintenance employees employed by Messiah without any obligation to pick up the Union contract, Roizman appeared taken aback and revealingly testified that: ''That's not what my counsel told me . . . . If they have a contract with somebody, how do I know for a fact that this contract is not my obligation?''

Based on the totality of the above considerations, I conclude that Roizman is simply not a believable witness.

Analysis and Conclusions

It is alleged that Respondent refused to hire the three employees who comprised the unit of maintenance employees employed by Messiah, and represented by the Union, because of their membership in the Union and Respondent's intention to operate the Highland facility as a nonunion building.

Section 8(a)(3) of the Act prohibits employers from discriminating against in regard to their hire or any other term and condition of employment, in order to discourage membership in any labor organization. In order establish a violation of Section 8(a)(3), the General Counsel must establish that a motivating factor in the employer's action, in the instant case a refusal to hire the employees formerly employed by Messiah, was their union or protected activities. Once such factor is established, the burden then shifts to the employer to establish that such action would have taken place in the absence of such union membership or protected activity. *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

The Board has also held that the *Wright Line* standard is applicable to refusal to hire cases, such as the instant case. *Champion Rivet Co*., 314 NLRB 1097 (1994).

In the instant case Respondent had knowledge of the employees membership in the Union and animus concerning such membership. In this connection, on December 13, 1993, Langan, in a telephone conversation with Roizman credibly testified that after he told Roizman that the unit employees were excellent workers, Roizman replied that he did not intend to hire them because he did not want the Union. Roizman further stated that he didn't want the Union because he did not want to assume the moneys owed to the Union by Messiah pursuant to its contract with the Union. Such credited testimony establishes Roizman's knowledge of the unit employees membership in and activities on behalf of the Union. Moreover, such credited testimony constitutes a virtual admission of Respondent's animus and that the sole reason for Respondent's refusal to hire the unit employees was to avoid having to recognize and bargain with the Union.

The credited testimony of employee Machado also establishes that Roizman failed to hire the unit employees because he was determined to avoid the Union. In this connection, Machado credibly testified that Roizman told him that he was not going to hire the maintenance employees because ''he was not going to carry nobody's baggage.'' I find such statement a clearly implied reference to the Union, and an expressed intention not to recognize and bargain, when taken together with his conversations with Langan, described above and with Trivella, described below.

The credited testimony of Trivella, establishes conclusively that Roizman refused to hire the unit employees because he did not want to recognize and bargain with the Union. In this connection during their December 28, 1993 telephone conversation, Roizman told Trivella, after Trivella demanded recognition, that the Highland facility was a ''non-union building,'' and that he ''did not want any union there.''

Moreover, during Roizman's testimony, he virtually admitted, during cross-examination, that he did not hire the unit employees formerly employed by Messiah because he did not want to assume any bargaining relationship with the Union. In this connection when Roizman was asked on cross-examination why he didn't hire the unit employees, because such hiring would not necessarily mean that he would have to assume the union contract, Roizman replied, ''That's not what my counsel told me . . . if they have a contract

with somebody, how do I know for a fact that this contract is not my obligation?''

Thus it is clear, and I find that General Counsel has established a very strong prima face case based on the credited testimony of Langan, Machado, and Trivella, and the admissions by Roizman.

Respondent contends that it did not hire the unit employees because when he closes title to a new building, it is his unvarying practice to perform substantial renovations immediately after closing title, using outside contractors to do such renovations. However, in the instant case, subsequent to closing title on December 29, 1993, Respondent did not commence work on such renovations at the Highland facility until August 1994, a period of 8 months later. Given this situation, Respondent offered no credible evidence as to why he did not hire the unit employees to perform the usual maintenance operations they usually performed. In fact the only maintenance employees Respondent eventually hired were the unit employees in March 1994.

Thus, I conclude that the only motivating factor in connection with Respondent's refusal to hire the unit employees, formerly employed by Messiah, was to avoid having to recognize and bargain with the Union. Accordingly, I find by such refusal to hire, that Respondent has violated Section 8(a)(1) of the Act.

The General Counsel contends that Respondent violated Section 8(a)(1) and (5) of the Act when it refused to recognize and bargain with the Union on December 29, 1993. The General Counsel's theory is based on its contention that Respondent is a successor to Messiah.

Board law clearly establishes that a ''successor'' employer must recognize and bargain with a union when it hires a ''substantial and representative'' compliment of employees, the majority of which are the predecessor employer's employees, who were represented by the union. *NLRB v. Burns Security Services*, 406 U.S. 272 (1972); *Fall River Dyeing Corp*., 482 U.S. 27 (1987). In determining whether such a bargaining obligation is present, the Board looks at a number of factors including:

(1) Whether there has been a substantial continuity of the same business operation; (2) whether the new employer uses the same plant; (3) whether the alleged successor employs the same or substantially the same work force; (4) whether the same jobs exist under the same working conditions; (5) whether the same supervisors exist; (6) whether the same equipment and methods of production exist; (7) whether the same product or services are offered.

Without enumerating each consideration separately, it is clear from the facts recited above that all seven factors cited above are present in the instant case. With respect to (3) above, I have found that as of December 29, 1993, Respondent but for its unlawful refusal to hire the maintenance employees employed by Messiah would have hired these employees. Thus, the third consideration set forth above is met. Therefore, I conclude that Respondent is a successor to Messiah.

Respondent contends that the foreclosure sale of the Highland facility by HUD to Respondent nullifies Respondent's status as a successor. The record does not support a finding that HUD acted as an employer so as to exempt Respondent as a successor employer. In a letter dated December 8, 1993, the associate regional counsel of HUD advised Langan of Arco that HUD at no time held a deed to the Highland facility, and that at all times prior to Respondent taking title, Messiah had continued responsibility for the management and functioning of the Highland facility until the date of closing. HUD was no more then an agent in connection with the sale. Accordingly, I reject Respondent's contention.

The credible evidence establishes that on December 28, the Union, by its attorney, Trivella, made a proper demand for recognition which was refused by Respondent. In this connection, the credited testimony of Trivella established that on December 28, 1993, during his telephone conversation with Roizman, described above, Trivella asked Respondent to recognize the Union as the collective-bargaining representative for the unit employees employed by Respondent's predecessor, Messiah, and set forth in its collective-bargaining agreement with the Union. Roizman unequivocally refused. That same day Trivella called Mary Enyart, Respondent's attorney at the time, and repeated such demand for recognition. Enyart was not called as a witness to rebut Trivella's testimony. I conclude Trivella made a proper demand for recognition concerning all the maintenance employees employed up to that time by Messiah, and covered by a multiemployer collective-bargaining agreement with the Union. *Al Landers Dump Truck*, 192 NLRB 207 (1971), enfd. sub nom. *NLRB v. Cofer*, 637 F.2d 1309 (9th Cir. 1981).

I further conclude that the unit for which the Union requested recognition is an appropriate unit. That unit is effectively all the maintenance employees formerly employed by Messiah, the predecessor employer to Respondent at the Highland facility. The only facility that Messiah owned was the Highland facility. There is no evidence that would tend to establish that the fact that the unit employees employed by Messiah were part of a multiemployer unit which would render such unit an inappropriate unit. *Fall River Dyeing Corp*., supra at 29–30. See also *Stewart Granite Enterprises*, 255 NLRB 569 (1981); *Boston-Needham Industrial Cleaning Co*., 216 NLRB 26 (1975).

I also conclude that on December 29, 1993, Respondent, a successor employer, unlawfully refused to recognize and bargain with the Union in violation of Section 8(a)(1) and (5) of the Act.

It is alleged in the complaint that in March 1994, Respondent hired the unit employees, and that following their hire Respondent unilaterally changed their working hours, sick leave, vacation time, holidays, and work assignments in violation of Section 8(a)(1) and (5) of the Act.

Ordinarily, a successor employer may unilaterally set new initial terms and conditions of employment, unless it has made clear that such employer plans to hire the predecessor's employees as a majority of its work force. *Spruce-Up Corp*., 209 NLRB 194 (1975). However, where an employer has unlawfully refused to hire employees in order to avoid its bargaining obligations as a successor employer with a labor organization representing the predecessor's employees, the Board has unequivocally held that such employer forfeits any right to unilaterally set initial terms and conditions of employment of the affected unit employees. *Carib Inn of San Juan*, 312 NLRB 1212 fn. 4 (1993), enfd. 916 F.2d 1183 (7th Cir. 1990).

As set forth above, Respondent unlawfully refused to hire the unit employees upon taking over the Highland facility from the predecessor, Messiah, in order to avoid recognizing

and bargaining with the Union. When Respondent hired these employees in March 1993, it unilaterally changed the working conditions of these employees by changing their working hours, sick leave, vacation time, holidays, and work assignments. I find such conduct to be violative of Section 8(a)(1) and (5) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent is a successor employer to Messiah.

3. The Union is a labor organization within the meaning of Section 2(5) of the Act.

4. On December 29, 1994, Respondent refused to hire Francisco Machado, Jose Borbon, and Ariel Rivera because of their membership in and activities on behalf of the Union.

5. Since December 29, the Union has been the exclusive bargaining representative of Respondent's employees in the following unit:

> All building service employees at the Highland Avenue, Yonkers, New York facility.

6. Since December 29, 1993, Respondent has failed and refused to recognize and bargain with the Union in the unit set forth above in violation of Section 8(a)(1) and (5) of the Act.

7. In March 1994, Respondent made unilateral changes in the unit employees working hours, sick leave, vacation time, holidays, and work assignments without notifying the Union and giving the Union the opportunity to bargain concerning such changes.

REMEDY

It having been found that Respondent has engaged in certain unfair labor practices, it is recommended that it cease and desist therefrom, and take such affirmative action necessary to effectuate the policies of the Act. Having found that Respondent refused hire the three employees set forth above for a specified period of time, it shall be recommended that Respondent make the employees whole for such period by payment to them a sum of money equal to that which they would have earned during the period when they were not employed less net earnings during such period computed on a quarterly basis in a manner established by the Board in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

It is further recommended that, concerning Respondent's unlawful changes in the employees working conditions, Respondent reestablish the status quo ante, except where those changes have been beneficial to the employees in the appropriate unit. It is also recommended that whether the changes have been beneficial to the employees, whether the employees have lost benefits or money by reason of such changes, and whether there is any money due and owing to such employees and the amount thereof, be referred to the compliance stage of this case. See *Ogle Production Service*, 183 NLRB 682 (1970).

[Recommended Order omitted from publication.]

VerDate 12-JAN-99 09:46 Jul 28, 1999 Jkt 183525 PO 00000 Frm 00006 Fmt 0610 Sfmt 0610 D:\NLRB\319\31920 apps04 PsN: apps04