

Cora Realty Co., LLC a/k/a 301 Holdings, LLC and Chestnut Holdings of New York Inc.¹ and Service Employees International Union, Local 32E, AFL-CIO. Case 2-CA-32008

September 29, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS
LIEBMAN AND WALSH

On March 6, 2000, Administrative Law Judge Raymond P. Green issued the attached decision. The Respondent² and the General Counsel each filed exceptions, a supporting brief, and an answering brief. The Respondent also filed a reply brief.

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

The Board has considered the decision³ and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,⁴ and conclusions only to the extent consistent with this Decision and Order.⁵

¹ We find merit in the Respondent's exception that "301 Holdings, LLC" is not another name for "Cora Realty, LLC" but rather is a separate entity. The General Counsel neither contested this assertion nor introduced evidence during the proceedings that "301 Holdings, LLC" was involved in this matter. Therefore, we delete the reference to "301 Holdings, LLC" from the Order and from the notice.

² There are no exceptions to the judge's finding that the Respondent, Cora Realty Co., LLC and Chestnut Holdings of New York, Inc., constitute a single employer within the meaning of the Act.

³ We correct several inadvertent misstatements by the judge: (1) the termination date of the most recent BRAB collective-bargaining agreement was March 14, 2002, not 2001; (2) the correct name of the New York State agency is Employment Relations Board, not Labor Board or Labor Relations Board; (3) the Respondent's fax to the Union requesting suggested bargaining dates was sent on October 19, 1998, not October 5, 1998; (4) the date of the scheduled State board hearing was November 30, 1998, not November 20, 1998; (5) the BRAB's March 29, 1999 letter to the Union notifying the Union that the Respondent had withdrawn from the BRAB and the Union's consequent April 6, 1999 letter to the Respondent both referred to another building managed by the Respondent, not to the building involved in the instant case; and (6) Mendez' suspension letter was dated January 5, 1999, not January 25, 1999.

⁴ 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.

⁵ We shall modify the judge's recommended Order in accordance with our decisions in *Ferguson Electric Co.*, 335 NLRB 142 (2001), and *Excel Container, Inc.*, 325 NLRB 17 (1997). We shall also substitute a new notice in accordance with our decision in *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001).

A. Background

In September 1998, the Respondent purchased an apartment building at 2170 University Avenue, Bronx, New York from Bronx New Dawn Renaissance VI. Prior to the sale, The Alpert Group (Alpert) had managed the building for the seller. Alpert had employed two full-time employees, Manual Mendez and Juan Velasco, who worked as the building's superintendent and porter, respectively. The Union represented the employees.⁶ Alpert had adopted and applied the terms of the Union's multiemployer collective-bargaining agreement with the Bronx Realty Advisory Board (the BRAB), a local multiemployer association.⁷ The agreement was effective from March 15, 1998, through March 14, 2002.

On September 24, 1998,⁸ the building was sold and title passed to the Respondent. On the following day, the Respondent met with the two employees and continued their employment without hiatus. At the September 25 meeting, the Respondent told the employees that their work schedules would change but did not mention any changes in wages or contractual benefits. The Respondent immediately reduced the employees' wages and discontinued their contractual benefits without telling the employees about these changes. The Union received no advance notice from the Respondent and had no opportunity to bargain over these changes.

On October 21, the Respondent signed a document authorizing the BRAB to represent the Respondent for purposes of collective bargaining with the Union.

In January, the Respondent suspended Mendez for 2 days and in February, the Respondent discharged Mendez and Velasco, assertedly for poor work performance.

The judge found that the Respondent was a *Burns*⁹ successor that was obligated to recognize and bargain with the Union, but that it was not a "perfectly clear"

⁶ The Union represented the following unit:

All superintendents, assistant superintendents, janitors, handymen, porters, firemen, doormen, elevator operators, garbage handlers and all other persons necessary in the maintenance of the building located at 2170 University Avenue, Bronx, New York, excluding all guards, professional employees and supervisors as defined in the Act.

⁷ The seven BRAB is a New York organization whose membership comprises owners, cooperative corporations, condominium owners, lessees, agents, receivers, administrators, managing agents, and mortgagees in possession of real estate in New York City, Westchester County, and Rockland County. The BRAB negotiates collective-bargaining agreements with the Union on behalf of its members.

⁸ All dates hereafter are between September 1998 and April 1999 unless otherwise indicated.

⁹ *NLRB v. Burns Security Services*, 406 U.S. 272 (1972).

successor.¹⁰ Accordingly, the judge found that the Respondent was free to set the employees' initial terms and conditions of employment. He further found that the Respondent adopted the BRAB agreement on October 21 and that the Respondent's refusal to apply the agreement's terms to Mendez and Velasco after October 21 violated Section 8(a)(5). Finally, the judge found that Velasco's discharge violated Section 8(a)(3), but that Mendez' suspension and discharge were not unlawful.

The General Counsel excepts, contending that the Respondent additionally violated the Act by changing the terms of employment when it commenced operations in September, and by suspending and discharging Mendez. The Respondent excepts, contending that it neither adopted the BRAB agreement in October, nor violated the Act by discharging Velasco.

As explained below, we find, contrary to the judge, that the Respondent violated the Act by unilaterally changing the employees' wages and benefits, but not by changing their work schedules. We also find, in agreement with the judge, that the Respondent adopted the BRAB contract on October 21. We further find, in agreement with the judge, that the Respondent violated the Act by discharging Velasco. For the reasons stated by the judge, we find that the Respondent did not violate the Act by suspending and discharging Mendez.

B. *The Unilateral Changes*

When it took over operations at the building, the Respondent planned on a work force of two employees to perform the necessary general maintenance and janitorial duties. On September 25, Abidin Radonicic, the Respondent's building manager, approached Mendez and Velasco at the building. Radonicic implicitly offered jobs to both men, telling them that they needed to do a better job of maintaining the building. Radonicic did not mention any changes in wages or benefits.

During this same September 25 conversation, Radonicic learned that Alpert had employed a third unidentified individual as a weekend porter. This individual apparently did not receive contractual wages or benefits and had been paid, on a cash basis, by Mendez who was later reimbursed by Alpert. Radonicic also learned that Mendez and Velasco had worked only Monday through Friday, with the unidentified person covering the weekends. Radonicic immediately told Mendez and Velasco that the Respondent was not hiring a weekend porter and

¹⁰ Id. at 294–295, as interpreted by the Board majority in *Spruce Up Corp.*, 209 NLRB 194 (1974), *enfd.* 529 F.2d 516 (4th Cir. 1975).

directed them to reconfigure their existing work schedules to cover the weekends.¹¹

Both men accepted Radonicic's implicit employment offer and continued to perform their respective duties as superintendent and porter at the building without hiatus, albeit with modified work schedules. Subsequently, the Respondent reduced the employees' pay slightly¹² and failed to contribute to the Union fringe benefit funds,¹³ causing the employees to lose medical and other benefits. Radonicic did not tell the employees about these changes,¹⁴ and the Respondent neither notified the Union nor bargained with it before making the changes.

The judge found that the Respondent, although a successor employer, was not a "perfectly clear" successor obligated to consult with the Union before setting the employees' initial terms and conditions of employment. Accordingly, the judge found that the Respondent did not violate Section 8(a)(5) by failing to bargain with the Union before altering the employees' initial wages and benefits. Under the facts in this case, we disagree.

During the September 25 meeting, Radonicic implicitly offered Mendez and Velasco employment with Respondent. With the exception of the references to the schedule change, Radonicic did not say anything regarding the terms of employment that Respondent was offering to Mendez and Velasco. Accordingly, Mendez and Velasco reasonably believed that the Respondent was offering the employees the same wages and benefits as Alpert. Therefore, when Mendez and Velasco accepted the Respondent's employment offer by continuing to perform their jobs for the Respondent, their initial terms of employment were those in effect when they had worked for Alpert (except for the schedule change).

The Respondent's actions in reducing the employees' wage rates and in discontinuing the employees' fringe benefits—actions that did not become known to the employees for some time—therefore constituted changes from the initial terms and conditions set by the Respondent. By unilaterally changing these initial terms and conditions of employment, without first notifying the Union of the proposed changes and providing the Union an opportunity to bargain, the Respondent violated Section 8(a)(5).

¹¹ During the week following the September 25 conversation, Mendez and Velasco decided that Mendez would work Sunday-Thursday and Velasco would work Tuesday-Saturday.

¹² The Respondent reduced Mendez' pay from \$540/week to \$538/week and reduced Velasco's pay from \$286/week to \$285/week.

¹³ There were four fringe benefit funds: health, pension, legal, and training.

¹⁴ Mendez first learned about the loss of medical benefits when he attempted to see a doctor in January.

We do not pass on the issue of whether the Respondent fell within the “perfectly clear” caveat to the general rule of *Burns* that a successor employer is free to set the initial terms and conditions of employment. Rather we assume arguendo that the Respondent was free to set the initial terms. However, in setting the initial terms and conditions, the Respondent told the employees that scheduling would change, thereby implicitly telling them that all other terms and conditions would remain the same. In these circumstances, we conclude that the Respondent could not thereafter unilaterally depart from those other terms and conditions.¹⁵

C. *The BRAB Contract*

On October 13, the Union learned that the Respondent had purchased the 2170 University Avenue building. On October 14, the Union filed a representation petition with the New York State Employment Relations Board. The State board scheduled a hearing on the petition for November 30.

On October 14, the Union also sent a letter to the Respondent stating that it represented the employees and requesting a meeting with the Respondent to discuss “the execution of an agreement covering wages, hours, working conditions and benefits.” Following several phone and fax communications, the parties scheduled a meeting for November 6.

Meanwhile, on October 21, Respondent Building Manager Radoncic completed two separate BRAB forms entitled “Authorization for Collective Bargaining” and “Preliminary Application for Membership”, respectively, and mailed both forms to the BRAB.¹⁶ He signed the authorization. Radoncic also forwarded to the BRAB a \$320 check signed by Respondent owner and President Jonathan Weiner as payment for annual BRAB dues.

The authorization identifies the 2170 University Avenue building as the “building to be bound” and designates the BRAB as the Respondent’s bargaining representative to negotiate “any successor collective-bargaining agreement” following the March 14, 2002 expiration of the then-current BRAB-Union contract. As stated, Radoncic signed the authorization.

The application states that the Respondent “hereby applies for membership in the Bronx Realty Advisory Board, on behalf of the building located at 2170 University Avenue and agrees to pay yearly dues as levied by the Board of Directors.” The application also states:

¹⁵ As noted above, the Respondent announced the schedule change to the employees during the September 25 conversation when it established the initial terms of employment; accordingly, the schedule change did not violate Sec. 8(a)(5) and (1) of the Act.

¹⁶ The collective-bargaining authorization is dated October 21; the preliminary application is undated.

“AUTHORIZATION, ONCE EXECUTED, WILL BIND BUILDING TO CURRENT LABOR AGREEMENT EXPIRING MARCH 14, 2002 AND IT WILL ALSO BIND BUILDING TO FUTURE AGREEMENTS UNLESS REVOKED IN WRITING.” Although Radoncic filled in the various blanks on the application, Radoncic did not sign the application.

On October 28, the BRAB faxed a letter to the Union advising the Union that the Respondent had joined the BRAB. The BRAB and the Union understood that all BRAB members were bound by the BRAB-Union collective-bargaining agreement.

On November 6, Union Business Representative Charles Ayers met with Radoncic for the previously-scheduled bargaining meeting. Ayers did not know about the BRAB’s October 28 fax notifying the Union that the Respondent had joined the BRAB and Radoncic did not say anything about the Respondent having joined the BRAB. Ayers presented Radoncic with the alternative options of either joining the BRAB or executing a new collective-bargaining agreement for independent employers. Radoncic accepted neither option and instead stated that he “would get back to [Ayers] in a few days.”

According to the testimony of Respondent President Weiner, Weiner wanted the Respondent to bargain directly with the Union and did not want the BRAB to represent the Respondent. Weiner did not learn of Radoncic’s October 21 submission of the BRAB authorization and application until sometime after October 21. Weiner immediately confronted Radoncic and “reamed” him out for signing the authorization. Weiner then spoke with the Respondent’s attorney, who suggested that perhaps the Respondent could be a BRAB member without authorizing the BRAB to be the Respondent’s bargaining representative.

Weiner telephoned the BRAB’s office and spoke with a BRAB employee. Weiner told the BRAB employee that Radoncic’s action in signing and mailing the October 21 authorization to the BRAB had been a mistake. The BRAB employee directed Weiner to send the BRAB a letter confirming Weiner’s rescission of the authorization. Weiner then sent a letter dated November 18 to the BRAB attempting to rescind the authorization. Weiner’s letter stated, in pertinent part:

I have just learned to my surprise, that an employee of mine signed and mailed to you your form of “Authorization for Collective Bargaining.” My employee signed this document without my knowledge, approval or authorization and misunderstood the nature and purpose of the document.

I hereby advise you of these facts and that I consider that document to be without any legal effect.

Please retain my check as I do wish to become a member of the BRAB, but do not wish to grant it authorization to negotiate or bind me to any Collective Bargaining Agreements.

On receiving Weiner's November 18 letter, the BRAB returned the Respondent's October 21 check to the Respondent with the explanation that an employer could not be a BRAB member unless the employer authorized the BRAB to represent the employer for collective-bargaining purposes. Notwithstanding that the BRAB had notified the Union on October 28 that the Respondent had joined the BRAB, neither the BRAB nor the Respondent notified the Union of Weiner's November 18 attempted rescission of bargaining authority until several months later.

On November 30, Radonic and Union Representative Jeff Turner met at the state board for the scheduled hearing on the Union's representation petition. While they waited for the hearing to begin, Radonic told Turner that he (Radonic) saw no reason to proceed with the hearing because the Respondent had joined the BRAB. Radonic then telephoned the Respondent's office and had a copy of the Respondent's BRAB application faxed to him. Radonic showed this faxed copy to Turner. Based on Radonic's documented assertion that the Respondent had joined the BRAB, Turner withdrew the Union's representation petition.

The Respondent never honored the terms of the BRAB agreement. Specifically, the Respondent did not pay the wage rates set forth in the agreement and did not make the benefit fund contributions required by the agreement.

The judge found that the Respondent unequivocally manifested an intention to be bound by the terms of the BRAB agreement based on Radonic's conduct in completing and mailing the BRAB application and authorization on October 21, and executing the authorization. He accordingly found that the Respondent violated Section 8(a)(5) by refusing to apply the terms of the 1998–2002 BRAB agreement. We agree.

Before finding that an employer has assumed a contract, the Board requires clear and convincing evidence of the employer's consent, either actual or constructive.¹⁷ We find that the General Counsel has met this burden of proof.

The judge, in finding that the Respondent assumed the BRAB contract, correctly relied on Radonic's October 21 filings with the BRAB, his executing the authoriza-

tion, and Radonic's actions at the November 30 state hearing confirming to the Union that the Respondent had joined the BRAB.

The Respondent effectively concedes that Radonic was its agent. In any event, the evidence shows that the Respondent clothed Radonic with at least apparent authority in his dealings with the BRAB and the Union. With regard to the BRAB, Respondent President Weiner signed the dues check that Radonic mailed to the BRAB with the authorization and application. With regard to the Union, the Respondent repeatedly sent Radonic to represent the Respondent in dealings with the Union, including the November 6 bargaining meeting and the November 30 state hearing. Accordingly, the Respondent is bound by Radonic's actions in dealing with the BRAB and the Union.¹⁸

We agree with the judge that Radonic's actions—in submitting the signed authorization to the BRAB on October 21 and in leading the Union to believe the Respondent had joined the BRAB during Radonic's discussions with a union representative at the November 30 state hearing—demonstrate that the Respondent adopted the BRAB contract.

In reaching this conclusion, we particularly rely upon the language contained in the BRAB application explicitly stating that, by signing the BRAB authorization, an employer agreed to be bound by the then-current 1998–2002 BRAB contract. Although Radonic did not sign the application, he filled out the application and mailed it to the BRAB. He accordingly read the application and is thereby charged with knowledge of the language contained in the application. By reading the application and then signing the authorization, Radonic manifested an intention to bind the Respondent to the 1998–2002 BRAB contract.

The Respondent notes that Radonic did not sign the BRAB application and that the BRAB application Radonic showed to the Union at the November 30 state hearing was unsigned. The Respondent contends that these facts reasonably would have led the Union to believe that the Respondent was not bound by the BRAB contract. We find the Respondent's contention unpersuasive. First, there is no evidence suggesting that an employer must sign the BRAB *application* in order to adopt the BRAB contract. To the contrary, the BRAB application—that Radonic read—explicitly states that

¹⁷ See *Brookville Health Care Center*, 337 NLRB No. 17, slip op. at 1–2 (2002); *Field Bridge Associates*, 306 NLRB 322, 323 (1992), enf'd, 982 F.2d 845 (2d Cir. 1993), cert. denied 509 U.S. 904 (1993); *E G & G Florida, Inc.*, 279 NLRB 444, 453 (1986); *All State Factors*, 205 NLRB 1122, 1127 (1973).

¹⁸ *Dick Gore Real Estate*, 312 NLRB 999 (1993) (“apparent authority is created through a manifestation by the principal to a third party that supplies a reasonable basis for the latter to believe that the principal has authorized the alleged agent to do the acts in question”); *SSC Corp.*, 317 NLRB 542, 546 (1995); *West Covina Disposal*, 315 NLRB 47, 61 (1994).

by signing the *authorization*, an employer will be bound by the current BRAB contract.¹⁹ Second, when Radonic showed the BRAB application to the Union at the November 30 state hearing, Radonic told the Union words to the effect that the Respondent had joined the BRAB (by virtue of which it was bound to the current contract). Therefore, any arguable doubt arising from the absence of a signature on the application was dispelled by Radonic's statements at the November 30 hearing.

The Respondent further contends that—at the time of the November 30 state hearing—Radonic did not know that Weiner had attempted to rescind the October 21 BRAB bargaining authorization. However, it is Radonic's actions and statements at the November 30 state hearing—not Radonic's knowledge or state of mind—that are legally significant. In any event, Weiner's testimony—that he harshly reprimanded Radonic for signing the authorization *before* Weiner wrote his November 18 letter to the BRAB—is strong evidence that Radonic did, in fact, know of the Respondent's efforts to rescind the BRAB authorization when Radonic made his misleading statements to the Union at the November 30 state hearing.

The Respondent also notes that the Respondent never signed a wage acceptance agreement²⁰ and contends that this shows the Respondent was not bound by the BRAB contract. It is true that when a new employer joins the BRAB, the Union routinely sends a wage acceptance agreement to the employer. However, there is no evidence that the parties believe that an employer is not bound to the BRAB contract until the employer signs the wage acceptance agreement. To the contrary, as noted above, the standard BRAB application explicitly states that the new employer, by signing the BRAB authorization, thereby agrees to be bound by the then-current BRAB contract; there is no reference in the application language to any requirement that the new employer also sign a wage acceptance agreement. BRAB Executive Director Carol Keenan similarly testified that an employer who signs the BRAB authorization is thereby bound to the then-current BRAB contract; Keenan made no reference to an additional requirement that the em-

ployer must also execute a wage acceptance agreement before becoming bound to the BRAB contract.²¹

Finally, the Respondent relies upon a provision in the BRAB's bylaws to the effect that an employer's application for BRAB membership is not effective until a BRAB admissions committee approves the application. However, BRAB Executive Director Keenan, while acknowledging the existence of the bylaw provision, repeatedly and specifically testified that there were only three steps to obtaining BRAB membership—an application, an authorization, and a check. That is, Keenan implicitly conceded that the BRAB, in practice, did not follow the admissions committee approval procedure set forth in the bylaws. Furthermore, the fact that the BRAB notified the Union that the Respondent had joined the BRAB is additional evidence that the BRAB believed the Respondent had satisfied all membership requirements.

In any event, even if the Respondent is not a member of the BRAB, the critical facts are that the Respondent signed the BRAB authorization and the Union reasonably believed the Respondent signed the BRAB authorization. Radonic—by signing the BRAB authorization with the knowledge that signing the BRAB authorization would bind the Respondent to the BRAB agreement—bound the Respondent to the BRAB agreement. The BRAB's October 28 fax to the Union and Radonic's November 30 state hearing statements to the Union that the Respondent had joined the BRAB reasonably lead the Union to believe that the Respondent had signed a BRAB authorization and had thereby agreed to be bound by the BRAB agreement.

D. Velasco's Discharge

For the reasons stated by the judge, we find that the Respondent violated the Act when it discharged Velasco. In its exceptions, the Respondent presses several contentions not specifically addressed by the judge. We reject these contentions.

1. The prima facie case of unlawful motive regarding Velasco's discharge

The Respondent excepts to the judge's finding that the General Counsel met her initial *Wright Line* burden of establishing a prima facie case that the Respondent was

¹⁹ Although the BRAB says that an employer must authorize it to bargain as a condition of membership, there is nothing to suggest that an employer cannot agree to the BRAB contract without becoming a member of the BRAB.

²⁰ A wage acceptance agreement is a one-page document listing the wage rates for each job classification and the benefit contributions for each of the four benefit funds for each year of the BRAB-Union contract; a separate wage acceptance agreement was prepared for each multiyear contract.

²¹ The General Counsel Exhibits folder contains two wage acceptance agreements. An agreement dated April 11, 1995 for the 1995–1998 BRAB contract is GC Exh. 3. An agreement dated February 16, 1999 for the 1998–2002 BRAB contract is attached to GC Exh. 8, a fax dated October 27, 1998. The agreement dated February 16, 1999 (for the 1998–2002 BRAB contract) is mistakenly attached to GC Exh. 8; it should be attached to GC Exh. 11, a letter dated February 16, 1999. A copy of GC Exh. 3, the agreement dated April 11, 1995 (for the 1995–1998 BRAB contract), should be attached to GC Exh. 8 (the October 27, 1998 fax).

motivated by the employees' support for the Union when it discharged Velasco (and Mendez). In support of this exception, the Respondent contends that it knew that both employees were union members before the takeover. The Respondent asserts that, had it been strongly opposed to the Union, it would have refused to hire the employees at that time. The Respondent argues that, since it did not seize this early opportunity to rid itself of the employees, it follows that it was not motivated by the employees' support for the Union when it discharged them 4 months later. We disagree.

The Respondent's decision to retain the employees at takeover may have been dictated by business considerations. The building required substantial maintenance and cleaning. Mendez and Velasco knew the building's problems and knew the building's tenants. In these circumstances, the Respondent's immediate need for knowledgeable staff to deal with the pressing work backlog may have compelled the Respondent to hire Mendez and Velasco notwithstanding their known support for the Union.

In any event, the hiring of Velasco and Mendez is one thing. Retaining them after the Union has pressed its contract claim is another. As we have seen, the Respondent's resistance to that claim was unlawful. In our view, that unlawful conduct is evidence of union animus.

2. The absence of progressive discipline before Velasco's discharge

In concluding that Velasco's discharge was unlawful, the judge relied heavily upon his finding that the Respondent disciplined Velasco only once for job performance prior to his discharge—in an oral warning. The Respondent argues that Radoncic additionally orally criticized Velasco's work performance on several occasions. The Respondent further contends that, because Velasco spoke only Spanish, the Respondent could not issue Velasco written discipline. We find these contentions unpersuasive.

With regard to the oral criticism issue, Radoncic testified that he frequently criticized Velasco's work. Velasco testified that Radoncic criticized his work on only the one occasion—when he was given the warning. The judge explicitly credited Velasco's testimony regarding this issue and we find no basis for overturning the judge's credibility determination.

With regard to the written criticism issue, the evidence shows that, notwithstanding the language barrier, the Respondent was able to give Velasco written discipline. In October, when Velasco was absent without permission, Radoncic gave Velasco a written warning docking Velasco's pay for the day in question. In February, when the Respondent discharged Velasco, the Respondent

communicated the discharge decision to Velasco through a written letter. These written disciplines—the October AWOL warning and the February discharge letter—refute the Respondent's contention that its failure to impose written discipline on Velasco for his allegedly poor work performance was attributable to Velasco's inability to speak English.

In any event, the language barrier would not have prevented the Respondent from imposing more serious discipline such as a suspension—however communicated—to give Velasco unambiguous notice that his work performance was unacceptable. The fact that the Respondent imposed a 2-day suspension on Mendez for poor work performance but did not impose a similar suspension on Velasco suggests that although the Respondent was seriously concerned with Mendez' work performance, it was not seriously concerned with Velasco's work performance.

3. The tenant's testimony regarding Velasco's work

Luz Schulerbron, a tenant in the building, testified that Velasco did an excellent job of keeping the building clean. The judge credited Schulerbron's testimony. The Respondent challenges the judge's credibility determination. We affirm the judge's credibility determination.

The Respondent alleges that Schulerbron was "friendly with Velasco", that she testified "at Velasco's request", and that Schulerbron "offered her testimony to right the wrong that she believed had occurred—that Velasco was discharged because he did not speak English." The record does not support the Respondent's allegations of witness bias.

Schulerbron was "friendly" with Velasco, but only to the extent that she spoke with him when she saw him at work cleaning the building. She had no contact with him outside the building, did not discuss personal issues with him, and simply asked him about his job cleaning the building.

Schulerbron did not testify "at Velasco's request." Velasco identified Schulerbron to the General Counsel as a tenant who might testify in support of his work performance and the General Counsel, not Velasco, requested that Schulerbron testify. Furthermore, Schulerbron testified pursuant to the General Counsel's subpoena.

Schulerbron did express her belief that Velasco had been discharged because he did not speak English. However, Schulerbron made clear that her motive for testifying was that she thought Velasco had done a good job as a porter and that she therefore thought his discharge was unfair. Schulerbron's testimony does not support the conclusions implied by the Respondent—that Schulerbron felt an affinity for Velasco because they

both spoke Spanish and that this affinity caused her to give false testimony regarding Velasco's work performance. What Schulerbron clearly did testify and what the judge credited was that Velasco did good work. We decline the Respondent's invitation to overturn the judge's credibility determination.²²

CONCLUSIONS OF LAW

1. By making unilateral changes in wages and benefits of the unit employees following the September 1998 takeover without notifying the Union or providing the Union with an opportunity to bargain about these changes, the Respondent violated Section 8(a)(5) and (1) of the Act.

2. By failing and refusing to apply the BRAB collective-bargaining agreement to the unit employees since October 21, 1998, the Respondent violated Section 8(a)(5) and (1) of the Act.

3. By discharging Juan Velasco because of his membership in the Union, the Respondent violated Section 8(a)(3) and (1) of the Act.

4. The unfair labor practices described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

5. The General Counsel has not proved that the Respondent engaged in any other violations of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Specifically, having found that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing employees' terms of employment, we shall order the Respondent, upon request by the Union, to rescind the unilateral changes in wages and benefits implemented following the September 1998 takeover.

Having found that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to apply the BRAB collective-bargaining agreement, we shall order the Respondent to apply the terms of the agreement to the unit employees retroactive to October 21, 1998.

As to those unilateral changes as to which rescission is requested and as to the post-October 21, 1998 application of the BRAB collective-bargaining agreement, we shall order the Respondent to make whole the unit employees for any loss of wages and other benefits suffered, as calculated in accordance with *Ogle Protection Service*, 183 NLRB 682, 683 (1970), enfd. 444 F.2d 502 (6th Cir.

1971), with interest computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). In addition, we shall order the Respondent to reimburse the contractually-established benefit funds for contributions not paid on behalf of the employees, with interest computed as prescribed in *Merryweather Optical Co.*, 240 NLRB 1213, 1216 (1979). We shall also order the Respondent to reimburse employees for the costs they incurred, such as payments to health care providers and third-party insurers, because of the Respondent's failure to make contributions to the contractual benefit funds on their behalf.

Having found that the Respondent is a successor to Alpert and noting that the 1998–2002 BRAB collective-bargaining agreement was due to expire in March 2002, we shall order the Respondent to recognize and bargain with the Union, upon the Union's request, as the representative of the unit employees, and, if an understanding is reached, to embody the understanding in a signed agreement.

Having found that the Respondent violated Section 8(a)(3) and (1) by discharging Juan Velasco, we shall order the Respondent to offer Velasco full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed. The Respondent shall also make Velasco whole for any loss of earnings and other benefits suffered as a result of his unlawful discharge, computed on a quarterly basis as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, supra.

ORDER

The National Labor Relations Board orders that the Respondent, Cora Realty Co., LLC, and Chestnut Holdings of New York, Inc., Bronx, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Making unilateral changes in wages, benefits, or other terms and conditions of employment of the unit employees without notifying or providing Service Employees International Union, Local 32E, AFL–CIO with an opportunity to bargain about these changes.

(b) Failing and refusing to apply the 1998–2002 BRAB collective-bargaining agreement to the unit employees retroactive to October 21, 1998.

(c) Failing and refusing to bargain collectively in good faith with the Union as the exclusive representative of the unit employees.

(d) Discharging or otherwise discriminating against employees because of their membership in or activities on behalf of the Union.

²² The Respondent, with access to all the tenants in the building, failed to call any tenants as witnesses to refute Schulerbron's testimony that Velasco did a good job of cleaning the building.

(e) 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) Upon request of the Union, rescind the unlawful unilateral changes in the unit employees' wages and benefits that were implemented following the September 1998 takeover and make the affected employees whole for losses they incurred by virtue of these unilateral changes in the manner set forth in the remedy section of this decision.

(b) Apply the 1998–2002 BRAB collective-bargaining agreement to the unit employees retroactive to October 21, 1998, including but not limited to: (i) making whole the unit employees for any loss of wages and benefits they incurred because of the Respondent's failure to apply the terms of the agreement; (ii) making required contributions to the various benefit funds established by the agreement; and (iii) reimbursing the unit employees for any expenses they incurred by reason of the Respondent's failure to make the contributions; all as set forth in the remedy section of this Decision.

(c) Upon request of the Union, bargain collectively and in good faith with the Union, as the exclusive representative of the employees in the following appropriate unit, and, if an understanding is reached, embody the understanding in a signed agreement:

All superintendents, assistant superintendents, janitors, handymen, porters, firemen, doormen, elevator operators, garbage handlers and all other persons necessary in the maintenance of the building located at 2170 University Avenue, Bronx, New York, excluding all guards, professional employees and supervisors, as defined in the Act.

(d) Within 14 days from the date of this Order, offer Juan Velasco full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(e) Make whole Juan Velasco for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of this decision.

(f) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Juan Velasco and within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place desig-

nated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its facility in Bronx, New York, copies of the attached notice marked "Appendix."²³ Copies of the 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 and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 25, 1998.

(i) 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.

APPENDIX

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

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist any 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.

²³ 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."

WE WILL NOT make unilateral changes in wages, benefits, or other terms and conditions of employment of our unit employees without notifying or providing Service Employees International Union, Local 32E, AFL-CIO with an opportunity to bargain about these changes.

WE WILL NOT fail and refuse to apply the 1998–2002 BRAB collective-bargaining agreement to our unit employees retroactive to October 21, 1998.

WE WILL NOT fail and refuse to bargain collectively and in good faith with the Union as the exclusive representative of our unit employees.

WE WILL NOT discharge or otherwise discriminate against you because of your membership in or activities on behalf of the Union.

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

WE WILL, on request of the Union, rescind the unlawful unilateral changes in the unit employees' wages and benefits that were implemented following the September 1998 takeover, and make the affected employees whole for losses they incurred by virtue of these unilateral changes to their wages and benefits with interest.

WE WILL apply the 1998–2002 BRAB collective-bargaining agreement to our unit employees retroactive to October 21, 1998, and make the affected employees whole for losses they incurred by virtue of our failure to apply the agreement with interest, including lost wages, lost benefits, required contributions on the employees' behalf to benefit funds established by the agreement, and expenses employees incurred by reason of our failure to make the required benefit fund contributions such as employees' payments to health care providers and third-party insurers.

WE WILL, on request, bargain collectively and in good faith with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

All superintendents, assistant superintendents, janitors, handymen, porters, firemen, doormen, elevator operators, garbage handlers and all other persons necessary in the maintenance of the building located at 2170 University Avenue, Bronx, New York, excluding all guards, professional employees and supervisors as defined in the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Juan Velasco full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Juan Velasco whole for all loss of earnings and other benefits, resulting from his unlawful discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files, any reference to the unlawful discharge of Juan Velasco, and WE WILL, within 3 days thereafter, notify him in writing that we have done so and that we will not use the discharge against him in any way.

CORA REALTY CO., LLC AND CHESTNUT HOLDINGS OF NEW YORK, INC.

Vonda L. Marshall Esq., for the General Counsel.
Ira Drogin, Esq., for the Respondent.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was heard by me in New York, New York, on September 13 and 14 and October 18, 1999. The charge and first amended charge were filed on February 22, 1999, and March 5, 1999. A complaint was issued on May 27, 1999, and the amended complaint was issued on June 11, 1999. In substance the amended complaint alleged as follows:

That on or about September 24, 1998, the Respondents purchased an apartment building at 2170 University Avenue, Bronx, New York from The Alpert Group and has since that date continued to operate it without a hiatus after employing all of the predecessor's employees. That by virtue of this, the Respondents became a successor with an obligation to bargain with the Union which represented the employees of the predecessor through a collective-bargaining agreement with the Realty Advisory Board whom the predecessor had designated to represent it in bargaining with the unit.

That the appropriate unit is:

All superintendents, assistant superintendents, janitors, handymen, porters, firemen, doormen, elevator operators, garbage handlers and all other persons necessary in the maintenance of the building located at 2170 University Avenue, Bronx, New York, excluding all guards, professional employees and supervisors as defined in the Act.

That by hiring all of the predecessor's employees, the Respondents became a "perfectly clear" successor, obligated to bargain with the Union prior to making any changes in the existing terms and conditions of employment extant at the time of the takeover.

That on or about September 24, 1998, the Respondents violated Section 8(a)(1) & (5) by unilaterally changing the existing terms and conditions of employment including wages, hours of employment, health and welfare payments, pension benefits and vacation leave.

That on or about October 21, 1998, the Respondents joined the Realty Advisory Board and thereby agreed to continue, in full force and effect, the terms and conditions of the predecessor's contract.

That notwithstanding joining BRAB on October 21, 1998, the Respondents have refused to abide by the terms of the contract.

That on or about January 5, and January 29, 1999, the Respondents, for discriminatory reasons, suspended and discharged Manuel Mendez.

That on or about February 5, 1999, the Respondents, for discriminatory reasons, discharged Juan Velasco.

FINDINGS OF FACT

The parties agree and I find that the Respondents are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.¹ It also is agreed and I find that the charging party, Service Employees International Union, Local 32B, SEIU, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

THE ALLEGED UNFAIR LABOR PRACTICE

A. *The Preexisting Condition*

This case involves an apartment building located at 2170 University Avenue in the Bronx, New York. It has 7 floors and 110 units including a basement, storage room, shop and office. The Alpert Group, (Alpert), managed this building from 1991 to the building's sale in September 1998.

Initially, Alpert was a member of the Bronx Realty Advisory Board, (BRAB), and was party to a collective-bargaining agreement through that multiemployer association. The agreement essentially covers superintendents and porters. However, Alpert's membership in BRAB was terminated by that organization when Alpert failed to pay its membership dues. Nevertheless, Alpert, although not signing any agreements, continued to apply the terms and conditions of the successive collective-bargaining agreements to the employees of this building. And by doing so, its conduct amounted to an adoption of the BRAB/Local 32E contracts. Cf. *ESP Concrete*, 327 NLRB 711, 713 (1999). The most recent contract between BRAB and the Union, and adopted by Alpert, runs for a term from March 15, 1998 through March 14, 2001.²

During the period of time immediately preceding the building's sale, there were three people working at this location. The superintendent was Manuel Mendez, the porter was Juan Velasco, and there was a third person, whose name is not known by me, who worked as a porter on the weekends. This third person apparently was paid by Mendez who, in turn, was reimbursed by Alpert. This person was employed so that Mendez and Velasco could take off on the weekends. Mendez and Velasco were paid in accordance with the terms of the union contract, but the third person was apparently paid off the books and he was not paid the wages or benefits contained in the collective-bargaining agreement.

¹ At the hearing the Respondents conceded that Cora Realty Co., and Chestnut Holdings of New York Inc., having some common owners, constituted a single employer within the meaning of the Act.

² That Alpert adopted the BRAB contract is evidenced by its payments of contractual wages and benefits during the time that it no longer was a member of the BRAB. Further, it participated in an arbitration proceeding in 1997 over an issue of delinquent fund contributions and this resulted in an award which Alpert complied with.

Mendez, as the superintendent, had a rent free apartment and was paid \$550 per week. Velasco was paid \$296 per week. Pension and Welfare benefits were paid by Alpert to the Union on behalf of Mendez and Velasco but not for the third person. The Respondents are engaged in the business of owning and operating residential apartment buildings. The principle owner and president is Jonathan Wiener. Abidin Radoncic is the building manager. These two are the people who run this business and there is no question but that both are agents of the Respondents. There is evidence that some of the other buildings owned by the Respondents have contracts with unions other than Local 32E.

On July 2, 1998, Weiner, on behalf of Cora Realty, entered into a purchase agreement for 2170 University Ave. Sometime in the summer of 1998, Wiener visited the building to inspect its condition and had a chance to speak to Mendez. According to Mendez, he told Wiener that he wanted to retain his job and that Weiner said that he didn't like Local 32E and that he would introduce him to another union.

Apart from talking to Mendez, Weiner's reason for visiting the building was to see what kind of condition it was in. And the evidence indicates that the condition of the building was not good. At the time, there existed a large number of housing code violations which had to be corrected. (Persistent nonrepair of violations can give tenants a good and legal reason to withhold or reduce their rents).

B. *The Successorship Issue*

Notwithstanding the condition of the building, Weiner went through with the closing and title passed on September 24, 1998. The purchase price was about \$3.5 million. (The price no doubt reflecting the condition of the building). Immediately after the closing, Radoncic visited the site and told Mendez and Velasco that if they wanted to keep their jobs they would have to shape up. According to Radoncic, he told Mendez that the building looked like shit. In any event, the two men were offered jobs but the Respondents decided not to employ the third person who had worked on weekends. This initial decision to hire two out of the three employees working at the building therefore necessitated that Mendez and/or Velasco spend time at the building on the weekends and that their total amount of work per week be increased to some extent.

Mendez and Velasco continued to work at the building with no break in service. They were told within a week of Respondents taking control over the building that they had to arrange their schedules so that the weekends were covered. Also, the wages of both men were reduced by a small amount. Finally, the Respondent did not make payments into the Local 32E benefits funds.

By letter dated October 14, 1998, union president, Robert L. Chartier, made a demand for recognition. This read:

Please be informed that Local 32E . . . has been designated by the employees of the above named buildings to act as their collective bargaining agent pursuant to the New York State Labor Relations Law.

In view of this designating, we are requesting that you communicate with the undersigned within five days . . . for a conference relative to the execution of an agreement

covering wages, hours, working conditions and benefits for such employees.

On the same date, the Union filed a petition with the New York State Labor Board. On October 5, Radonic faxed a memorandum to Union Representative Charles Ayers asking that the latter call with some dates for a meeting.

On October 19, 1998, the State Board issued a notice stating that a hearing would be held on November 30, 1998.

On October 20, 1998, the Union sent another letter to the Respondents. In this letter, the Union asserted that it represented the workers at 2170 University Avenue and that it wanted to arrange an appointment to discuss the "assumption and/or renewal of this agreement by you." November 2 was suggested as the time for a meeting to be held at the Union's office.

On October 21, 1998, Radonic, on behalf of Cora Realty, executed a document entitled "authorization for collective bargaining." This stated:

The undersigned, in connection with a Collective-Bargaining Agreement with local 32 E . . . which expires March 4, 2002, does hereby designate the Bronx Realty Advisory Board, Inc., as its true and lawful attorney to represent it as its sole and exclusive bargaining representative, to negotiate, bind and administer on its behalf any succeeding Collective-Bargaining Agreement which may be negotiated between the Bronx Realty Advisory Board, Inc. and the Union.

In relation to the above document, a representative of BRAB testified that the authorization is intended to mean that the signatory agrees to be bound by the existing BRAB agreement with Local 32E as well as designating the BRAB to be its collective bargaining representative for any succeeding agreement. She testified that in order to become a member of BRAB, an employer has to fill out a preliminary application, sign the authorization and pay the dues.

On October 27, 1998, Respondents by Radonic, faxed a memorandum to union agent Ayers which stated:

Regarding the meeting you set up for us on 11/2/98, please be aware that I cannot attend at that time but I would like to reschedule for 11/6/98 at 9:00 A.M. if possible. I also need for you to fax to me a copy of any agreements with regard to 2170 University for me to review prior to our meeting . . .

Also on October 27, 1998, Ayers faxed a reply to Radonic indicating his agreement to adjourn the meeting to November 6. He also sent a 1-page document purporting to be a copy of the last wage acceptance agreement for the building and covering the period from March 15, 1995 to March 15, 1998. This document, however, was not signed by any representative of Alpert; instead being signed by Michael Laub, president of BRAB and Robert Chartier, president of Local 32E.

On October 28, 1998, BRAB faxed a letter to Local 32E advising that Cora Realty had joined the Association in relation to two buildings, one of which was 2170 University Avenue.

On November 6, 1998, there was a meeting between Ayers and Radonic. At this meeting, Ayers presented a copy of the new contract effective from March 15, 1998, to March 15, 2001. Ayers said that the company could either execute the new wage acceptance form (binding the employer to the new

BRAB contract), or that it could execute the new agreement for independent employers. Radonic promised to get back to Ayers.

The Respondents introduced into evidence a letter purportedly dated November 18, 1998, from Weiner to the BRAB stating, in substance, that Radonic signed the BRAB authorization for collective bargaining without Wiener's knowledge, approval or authorization. In this letter, Weiner stated that he considered it to be without any legal effect. The letter went on to state that the company wished to become a member of BRAB but did not want to give it authorization to negotiate or bind it to a labor contract. A copy of this letter was not, however, sent to the Union and Union Agent Ayers credibly testified that he did not receive a copy of this letter (which came from the BRAB), until March 1999. (More than 4 months later).

On November 30, 1998, there was a meeting at the New York State Labor Relations Board at which the employer was represented by Radonic. Indicating that he didn't know why it was necessary to be present at this hearing, Radonic stated that the company had joined BRAB. To support this assertion, Radonic had the BRAB signed application faxed from the company's office to the Board and a copy was given to Union Representative Ayers. (This also indicated that a check for \$320 was sent to BRAB). Based on these assertions and the documentation, the Union withdrew its petition at the State Agency on the assumption that the company had agreed to assume the BRAB/Local 32E contract. *Nothing was said by Radonic about a November 18, 1998 letter.* (Emphasis added.)

On February 16, 1999, Union President Chartier sent a copy of the new wage and benefit schedule to the Respondents and asked that this document be signed and returned to the Union's contract department.

On March 29, 1999, BRAB sent a letter to Local 32E indicating that the Respondents had withdrawn from the BRAB "and in doing so, their collective-bargaining authorization is rescinded."³

On April 6, 1999, Union Agent Ayers sent a letter to the Respondents which stated, inter alia:

On March 29, 1999 . . . Local 32E received notification from the Bronx Realty advisory Board saying you withdrew from its organization on said date.

Local 32E would like to remind you that you are legally bound by the above said agreement between Local 32E and the Bronx Realty advisory Board. Expiration date 3/14/01.

However, if you feel that you would like to come in and negotiate an independent collective bargaining agreement, Local 32E would be more than happy to comply.

³ The fact this letter was sent by BRAB on March 29, 1999, coupled with the fact that at the State Labor Board hearing held on November 30, 1999, where Radonic had the BRAB application faxed to the Agency, leads me to have deep suspicions as to the alleged date, (November 20, 1998), that Weiner sent the letter to BRAB stating that his employee was not authorized to sign the BRAB application

C. The Discharges of Mendez and Velasco

As noted above, when the Respondent's purchased the building, they retained two of the three employees who worked at the building; these being Mendez, the super and Velasco the regular porter. The third person was not hired. This decision not to hire the third person, resulted in and was the cause of Mendez and Velasco having their work schedule change inasmuch as there now was more work for them to do and they no longer could rely on someone else to be available for the week-ends.

As also noted above, at the time of their hire, the building had numerous outstanding violations and Mendez, as the superintendent, was assigned the job of fixing many of these in order to make the building meet building code specifications. This also would serve to prevent the possibility that tenants could legally withhold or reduce their rents. At the outset, Mendez was given somewhere between 80 and 100 work orders that he was to take care of. In this regard, the procedure was that Mendez was required to get the signature of each tenant on each work order in order to prove that the work was, in fact, done.

Many of the events that occurred after the building was taken over by the Respondents coincide with the events described in the early section. It therefore would be advisable to keep in mind those dates as we go along.

On or about October 13, 1998, Velasco went to the Union for some matter. Velasco testified that before going, he asked for and got permission from Mendez.

On October 14, 1998, Radonic issued a warning to Velasco which stated:

On October 13, 1998, you did not report to work on time. Instead you took it upon yourself to take the complete morning off and you went to Local 32-E office. No permission was given to you from my office or myself. Let me inform you that you are not to take off during your workdays which are Tuesday-Saturday 8 a.m.-5 p.m., unless it is approved only by me. You will be docked a complete day's pay for October 13, 1998 and if this happens again, you will be fired immediately.

Mendez concedes that on November 8, 1998, he forgot to order oil for the weekend. On Saturday, November 9, tenants made complaints to the Respondent that the building was too cold. This necessitated that an emergency delivery of heating oil be made.

On November 11, 1998, Radonic sent Mendez a certified letter warning him about the oil situation and stating that if it ever happened again, Mendez would be suspended or terminated. Although this warning was issued a couple of days after the November 6 meeting where the new labor agreement was presented to the company, it is impossible for me to conclude that this warning was not justified by Mendez' neglect.

On November 17, 1998, Radonic sent another warning letter to Mendez. This stated:

As you are aware, the building has a very large amount of violations that are still open. I personally wrote all the violations on work orders and gave them to you on or

about October 13, 1998. As of today's date, I still haven't received one violation work order back. I told you verbally the importance of removing these violations as quickly as possible and addressed you to check off the work that is your responsibility on these work orders after you have completed them.

I am once again informing you of the importance of addressing these violation work orders. I expect for you to start with the apartments that have violations on the top floors and work your way down to the lobby. You are also to make sure that you get the tenants signature and telephone number on each violation. I also expect these violations to be started immediately and to be returned to me on a weekly basis of five or more. Failure to do so will leave me no choice but to commence with disciplinary actions.

With respect to this warning, Mendez testified that he did not have enough time to do these work orders and that he did them as best he could. Yet significantly, in my opinion, he also testified that he decided not to do some of the work orders particularly the ones requiring him to remove certain types of locks installed by some of the tenants. These locks, which can be locked from the inside as well as the outside, are violations of the building code as they present a serious danger that tenants might not be able to exit their apartments in the event of a fire. There is no question but that the Respondent made removal of these locks a priority matter and that Mendez simply chose not to do this work.

On December 16, 1998, Radonic issued another warning to Mendez. This stated:

I have inspected the building on 12/16/98 and found the following deficiencies still exists. They areas follows:

#1. There is graffiti on the staircases that has not been cleaned for two weeks now. I have mentioned it to you at least twice during that time.

#2. The light fixture on the 2nd floor compactor room is still out for 3 weeks now. I instructed you to pick one up and put a new fixture if you have to.

#3. The staircases have been painted for 2 weeks and I have not seen any doorknobs or glass being put on the staircase doors since. I told you before the staircase painting started that as soon as they are finished I want you to finish the glass and doorknobs.

The above items are to be remedied immediately as well as the other orders that I wrote to you on December 14, 1998. The above items are also to be maintained without my having to tell or write to you. You have until December 28, 1998, to remedy the above items as well as to make sure that all the staircase, compactor and hallway doors are self closing. Failure to accomplish this request will result in suspension and or termination . . .

On receiving this new warning, Mendez went to the Union. On December 29, 1998, Union Representative Rivera, sent a letter to Weiner asking for a meeting on January 8, 1999, to discuss the job performance and writeup of Mendez.

On January 4, 1999, Mendez received another warning which involved a situation where the company, having renovated the laundry room, had made arrangements for the old washing machines to be disposed of. Mendez admits that he decided to keep one of the washing machines and retained it in the basement area. The letter stated *inter alia*;

On December 19, 1999 we entered into a agreement with Hercules to . . . remove all the old washers and dryers. In turn, they were to put in new machines for the residents. You were made very well aware that they were to take all the old machines out from the building.

Upon completion of their agreement, I discovered that one machine was left behind . . . Mr. Mendez, we have spent thousands of dollars to remove all the garbage which was left in the rooms in the building. We have removed over twelve 40 yard containers of trash, furniture, motor parts and nonworking appliances to clean the building up and you want to keep things that we want to get rid of. I specifically told you to remove this machine at your expenses but to my surprise it was still there two weeks later . . . If you fail to have it removed by January 12, 1999, I will have no choice but to immediately terminate your employment . . . Also be aware that the building is not a salvage or secondhand thrift shop for you to store things. If you store or keep anything else in the building rooms without my approval, then you will be terminated immediately . . .

According to Mendez, in January 1999 he went to the Union's health clinic but found out that he didn't have medical benefits because his employer had not been making contributions to the health fund. Thereafter, in late January, Mendez spoke to Radonic about his need for his union medical benefits and Radonic replied that the building was no longer in the Union. According to Mendez and substantially conceded by Radonic, the latter told him that he could get Mendez into a different union.

On January 25, 1999, Radonic sent another letter to Mendez stating:

Pursuant to my letter dated December 16, 1998, I conducted another building inspection on December 30, 1998. During my re-inspection I discovered that my requests were not complied with during the time that I had given you. Also not submitted from you were any of the violation and work orders that you have, which I requested to receive at least five completed work order per week as stated in my letter.

I explained to you verbally as well as in writing the importance of completing work that is necessary to keep the building in shape and running free of violations.

It is with regret that I must inform you that you are hereby suspended for two days without pay . . .

Thereafter on January 29, 1999, Mendez received a discharge letter from Jonathan Wiener. This stated:

Please be aware that your employment . . . is terminated effective February 2, 1999. We have received numerous calls about reports that were expressed to you by

the tenants and you either responded very late or not at all. Also your response on clearing the violations and making sure the graffiti is removed within the building has not been acceptable. It is apparent that you are not suitable to handle 2170 University in the manner which we expect. Please be aware that you are to vacate your apartment by March 2 also to turn over all the keys for the building . . .

On February 5, 1999, the Respondents also decided to discharge Velasco. They sent him a discharge letter which stated:

Please be aware of the fact that your job performance has not improved since we purchased the building. Due to this condition we regret to inform you that your position as the porter at 2170 University Avenue has been terminated effective 2/8/99.

Unlike the situation with Mendez, the company did not give any written warnings to Velasco concerning his work performance. Indeed the only written warning that Velasco received was the one described above and which related to his visit to the union on October 13, 1998. Although Radonic testified that Velasco was not doing his cleaning job adequately, the General Counsel produced one of the building's tenants who testified that Velasco did a good job in keeping the building clean. Velasco credibly testified that there was only one time that Radonic told him that an area he was responsible for was not good, and that this was fixed by him thereafter.

On February 12, 1999, the employer filed a civil complaint to have Mendez evicted from his apartment. This eventually resolved itself into a settlement whereby the employer agreed to pay Mendez a sum of money in exchange for his vacating the apartment. As the settlement there involved a landlord-tenant claim, its resolution cannot have any effect on the outcome of this case under any deferral theory.

ANALYSIS

A. *Successorship*

The building, 2170 University Avenue, which was previously managed by the Alpert Group, employed people, some of whom since about 1991, have been represented by the Union. Initially, that company was a member of BRAB and as a member of that multiemployer bargaining association, was bound to a collective-bargaining agreement covering the superintendents and porters employed at the building.

Despite the fact that Alpert stopped paying dues and ceased being a member of BRAB, it nevertheless continued to abide by the terms and conditions of subsequent BRAB/Local 32E collective-bargaining agreements. In this regard, the evidence shows that it paid contract wages, made payments to the various contractual funds, and participated in several arbitration proceedings.

There is, therefore, no question in my mind but that at the time that the building was sold to the Respondents, the Alpert Group had adopted by its conduct and was bound to the then existing labor contract that was executed between the BRAB and Local 32E. Thus, although not a member of a multiemployer association and bargaining unit, Alpert had nevertheless

adopted the terms of that contract effective for the employees at 2170 University Avenue. Cf. *ESP Concrete*, supra.

The complicating factor here is that at the time of the sale, there were three people working at the building, of which only two were covered by the collective-bargaining agreement, these being Mendez and Velasco. A third person was also employed to work at the building in a bargaining unit type of job on weekends but was paid in cash and was not afforded any of the contract benefits.

In *Fall River Dyeing & Finishing v. NLRB*, 482 U.S. 27 (1987), the Supreme Court held that an employer which purchases the assets of another, is required to recognize and bargain with a union representing the predecessor's employees when (1) there is a "substantial continuity" of operations after the takeover, and (2) if a majority of the new employer's workforce, in an appropriate unit, consists of the predecessor's employees at a time when the successor has reached a "substantial and representative complement."

Accordingly, I find that when the Respondents took over the building, they hired Mendez and Velasco and continued to employ them in the same jobs without any break in service. The nature and scope of the business was unchanged and under the Act, they constituted a successor having an obligation to recognize and bargain with the Union.

Normally, unless the new company voluntarily and with the consent of the Union, assumes the predecessor's collective-bargaining agreement, it has no contractual obligations to the employees or the Union. *NLRB v. Burns Security Services*, 406 U.S. 272 (1972). This is because the new employer has never had a contractual relationship with the Union in the first place and the Board under *H.K. Porter Co., v. NLRB*, 397 U.S. 99 (1970) has no authority to impose contractual terms on the parties to a collective bargaining relationship. Thus, under *NLRB v. Burns*, supra, a successor employer is ordinarily free to set the initial terms of employment when it takes over operations.

The Court in *Burns* did, however make a limited exception to the above rule and stated at 294–295:

Although a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor there will be instances in which *it is perfectly clear that the new employer plans to retain all of the employees in the unit* and in which it will be appropriate to have him initially consult with the employee's bargaining representative before he fixes terms. In other situations, however, it may not be clear until the successor employer has hired his full complement of employees that he had a duty to bargain with a union, since it will not be evident until then that the bargaining representative represents a majority of the employees in the union as required by Section 9(a) (Emphasis added.)

Subsequent to *Burns*, the Board held that even where the new employer takes over all of the former employer's employees, it still may establish initial terms and conditions if it announces this intention to the employees at the time they are interviewed and/or hired. Thus in *Spruce Up Corp.*, 209 NLRB 194, 195 (1974), the Board stated that the *Burns* "perfectly clear" caveat should

[B]e restricted to circumstances in which the new employer has either actively or, by tacit inference, misled employees into believing they would all be retained without change in their wages, hours or conditions or employment, or at least to circumstances where the new employer . . . has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment.

The *Spruce Up* doctrine was reaffirmed by the Board in *Planned Building Services Inc.* 318 NLRB 1049 (1995), where the Board, after finding that PBS was a successor, concluded that where the Respondent's representatives told the predecessor's employees at the outset that benefits would not be the same, that it was free to set the initial terms and conditions on which it would hire the predecessor's employees "because the Respondent made a lawful *Spruce Up* announcement." (Chairman Gould dissented and opined that *Spruce Up* should be overruled.

In the present case, I am not convinced that the Respondents would fall within the "perfectly clear" exception of *Burns*. The most salient point being that the Respondent did not make it perfectly clear that it was going to hire all of the predecessor's employees. In fact, the Respondent did not do so, but instead hired two out of the three employees who had worked for the predecessor in bargaining unit jobs. Additionally, it is clear to me that the Respondents set the initial terms for Mendez and Velasco at rates of pay and benefits lower than what they had previously earned. Further, as a consequence of the initial decision to not hire the third man, the Respondents, of necessity, changed the work schedules and hours of Mendez and Velasco.

Subsequent events, however, demonstrate that the Respondents did in fact, agree to be bound by the terms of the BRAB/Local 32E 1998–2001 collective-bargaining agreement. Moreover, although the evidence indicates that the Respondents may have done so in a deceptive manner with the expectation or hope that they could subsequently breach the agreement, (which they did), I shall conclude that they are stuck with their overtly manifested actions.

The evidence shows that after the Union made its demand for recognition and filed a petition with the State Labor Board, the Respondents, by Radoncic, communicated with the Union, BRAB, and the State Agency indicating an intention to adopt the BRAB/Local 32E contract.

On October 21, 1998, Radoncic executed and sent a membership application to BRAB. This, in my opinion, indicated that the Company was authorizing BRAB to represent it for collective-bargaining purposes. This was accompanied by a check for dues which was signed by Weiner. On October 27, 1998, Radoncic, having agreed to meeting with representatives of the Union, requested copies of any contracts between the Union and the predecessor. On November 6, 1998, Union Representative Ayers met with Radoncic where, among other things, he tendered a copy of a document summarizing the 1998–2001 labor agreement. On November 30, 1998, at a meeting at the State Labor Board, Radoncic stated that there was no reason to proceed inasmuch as the Respondents had joined BRAB. When a copy of the signed BRAB application was faxed to the State Board and given to the Union, the Union

withdrew its petition on the reasonable conclusion that there no longer was any issue to be resolved.

The Respondents assert that subsequent to the meeting of the State Labor Board, Weiner told Radoncic that he was not authorized to join BRAB or make a contract with Local 32E. In this regard, Radoncic testified that when he engaged in these actions, he believed that he did have such authority. Whether or not Radoncic had real authority, the facts show that over a period of more than a month, Radoncic, who is clearly an agent of the Respondents with substantial authority to make contracts and manage the buildings it owns, was engaged in a course of written communications and meetings in relation to the claim by Local 32E that it was the rightful collective-bargaining representative of the employees at 2170 University Avenue. The Company's owner, Weiner, did not make an appearance either in writing or at any of the meetings with the Union, including the meeting at the State Labor Board. Instead, he relied on Radoncic to take care of this business.

In my opinion, the evidence indicates that Radoncic probably had real authority to enter into a relationship with Local 32E. But if he did not, Weiner by relying on Radoncic to deal with the Union and with the State Agency on the question of the Union's representation claim, held him out as the responsible company official and therefore imbued him with apparent authority. *Dentech Corp.*, 294 NLRB 924 (1989); *Meco Products v. NLRB*, 884 F.2d 156, 159-160, (4th Cir. 1989); *NLRB v. Donkin's Inn*, 532 F.2d 138, 141 (9th Cir. 1976); *Hawaiian Paradise Park Corp. v. Friendly Broadcasting Co.*, 414 F.2d 750, 756 (9th Cir. 1969).

I therefore conclude that the Company, by executing an application to join the BRAB on October 21, 1998, and by asserting, on November 20, 1998, at the State Labor Board that it had joined BRAB, that even if the Respondents never actually became members of that organization, they nevertheless unequivocally manifested their intention to be bound by the terms and conditions of the BRAB/Local 32E 1998-2001 collective-bargaining agreement. As such, I would recommend that the Respondents be held liable for any and all payments called for under that collective-bargaining agreement to be made for the benefit of those employees covered by that agreement. I also would recommend that the Respondents be held liable for the difference between what employees were paid from October 21, 1998, and what they should have been paid under the labor agreement. Additionally, I shall recommend that the Respondents reimburse any employee who had medical expenses that would have been covered by the collective-bargaining agreement.

B. *The 8(a)(3) Allegations*

Under *Wright Line*, 251 NLRB 1083, (1980) enf. 622 F.2d. 899 (1st Cir. 1981), cert denied 455 U.S. 989, once the General Counsel has established a prima facie showing of unlawful motivation, the burden is shifted to the Respondent to establish that it would have laid off, discharged or otherwise disciplined employees for good cause despite their union or protected activities.

In my opinion, the General Counsel has proffered proof sufficient to make out a prima facie case regarding the discharges

of both employees. The employer had knowledge that both were desirous of retaining their membership in Local 32E and there was credible evidence that it sought to induce them to join another labor organization. The evidence also shows a pattern of deceptive dealing by the employer in relation to Local 32E. Thus, while indicating to the Union and to the State Labor Board that it recognized the Union and that by joining BRAB, that it intended to be bound by the BRAB/Local 32E labor agreement, the evidence indicates that it made those representations in order to gain time in the hope that the Union would go away. When the Union persisted, the two employees who were union members, were terminated.

In the case of Velasco, the employer asserted that he didn't do his job properly and that as a consequence, the building was dirty. Nevertheless, unlike the situation with Mendez, the employer never issued any written warnings to Velasco and Velasco credibly testified that at most, he received one mild criticism from Radoncic about his work. Moreover, the General Counsel produced as a witness, a tenant of the building, who testified that from her observation, Velasco was doing a fine job.

Having established a prima facie case of discriminatory motivation regarding the discharge of Velasco, it is my opinion that the Respondents have failed to establish that they would have discharged Velasco for legitimate reasons. I therefore conclude that in this respect, the Respondents violated Section 8(a)(1) and (3) of the Act.

However, the case involving Mendez involves a situation where the person who is responsible for the day-to-day care of the building was simply not doing his job. This conclusion is based on Mendez' own testimony.

At the outset of his employment with the Respondents, Mendez was given a set of 80 to 100 work orders that he was supposed to work on over a period of time. These work orders were, to a large extent, designed to remedy building code violations. And Mendez either didn't do them fast enough or didn't do some of them at all. In some instances, particularly having to do with illegal locks, Mendez testified that he made a conscious decision not to do the work. Additionally, Mendez concedes that on November 8, 1998, he forgot to order fuel for the boiler for the weekend and the evidence shows that this resulted in tenant complaints about the lack of heating.

On January 4, 1999, Mendez received his third warning, this time dealing with his retention and storage of an old washing machine that the employer had replaced and wanted out of the building.

On January 25, 1999, Radoncic sent a fourth warning and suspension to Mendez. This involved Mendez' continued failure to provide the work orders as required. On January 29, 1999, Mendez was discharged.

The evidence, in my opinion, indicates that Mendez gave the employer ample cause to discharge him. In this regard, it is my opinion, that unlike the situation with Velasco, the employer has satisfied its burden to show that it would have discharged Mendez for just cause, despite his union membership and/or activities.

CONCLUSIONS OF LAW

1. The Respondents, Cora Realty Co., LLC a/k/a 301 Holdings, LLC and Chestnut Holding of New York Inc., constitute a single employer and are the successor to the Alpert Group in relation to 2170 University Avenue, Bronx, New York, having an obligation to recognize and bargain with Service Employees International Union, Local 32E, AFL-CIO.

2. The Respondents, by executing an application for membership in the Bronx Realty Advisory Board and representing to the Union and to the New York State Labor Relations Board that it had joined this bargaining association, unequivocally manifested an intent to bound to the 1998–2001 collective-bargaining agreement between BRAB and the Union.

3. By failing and refusing, since October 21, 1998, to apply the terms of the aforesaid collective-bargaining agreement to the employees working at 2170 University Avenue, the Respondents have refused to bargain in good faith and have violated Section 8(a)(1) & (5) of the Act.

4. By discharging Juan Velasco because of his membership in and/or activity on behalf of Service Employees International Union, Local 32E, AFL-CIO, the Respondents have violated Section 8(a)(1) & (3) of the Act.

5. The Respondents have not violated the Act in any other manner encompassed by the complaint.

6. The unfair labor practices found herein affect commerce within the meaning of Section 2(2) (6) & (7) of the Act.

REMEDY

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

The Respondents having discriminatorily discharged Juan Velasco, they must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of his discharge to the date of his

reinstatement or a valid reinstatement offer, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). See also *Florida Steel Corp.*, 231 NLRB 651 (1977).

Inasmuch as I have found that the Respondents are the successor to the Alpert Group, I shall recommend that they recognize and bargain with the Union as the representative of the superintendents and porters who are employed at 2170 University Avenue. Further, as I have concluded that the Respondents have manifested an intention to bound by the terms and conditions of the BRAB/Local 32E 1998–2000 contract, I shall recommend that they apply the terms and conditions of employment of that contract to the employees in the bargaining unit. In this respect, I recommend that the Respondents be liable, from October 21, 1998, for any difference in pay and benefits between what its bargaining unit employees were actually paid and what they would have been paid under the terms of the aforesaid contract. Interest on these amounts to be determined in the manner described above. Additionally, I shall also recommend that the Respondents make any and all payments to benefit funds on behalf of its employees to the extent that payments are required under the terms of the aforesaid collective-bargaining agreement. As to moneys owed to contract benefit funds, interest shall be paid and computed in accordance with the practice set forth in *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).

In addition, as I have concluded that the Respondents have unlawfully withheld contributions to the Union's health fund, I shall recommend that the Respondents make whole, with interest, any employee within the bargaining unit who, during the period of his or her employment in the unit, after October 21, 1998, incurred medical expenses that would have, but were not reimbursed by the health fund.

[Recommended Order omitted from publication.]