

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

BEACH LANE MANAGEMENT, INC. AND
FSM MANAGEMENT, INC. AND
CARPE DIEM MANAGEMENT, LLC, SINGLE EMPLOYERS

and

Case Nos. 2-CA-35720
2-CA-36285
2-CA-36629

LOCAL 32BJ, SERVICE EMPLOYEES
INTERNATIONAL UNION

and

ROMAN POLANCO, An Individual

BEACH LANE MANAGEMENT, INC. AND
FSM MANAGEMENT, INC., SINGLE EMPLOYERS

and

Case Nos. 2-CA-37116
2-CA-37219
2-CA-37392
2-CA-37504

EUGENIO DE LOS SANTOS, An Individual

and

BOLIVAR MILLET, An Individual

BEACH LANE MANAGEMENT, INC. AND
FSM MANAGEMENT, INC., SINGLE EMPLOYERS

and

Case No. 2-CA-38598

MANUEL NINA, An Individual

*Burt Pearlstone and Karen Newman, Esqs., for the General Counsel.
Laurent S. Drogin, Esq. and Max Rosenthal and Gregory J. Skiff (Tarter Krinsky &
Drogin, LLP), New York, NY, for the Respondents.
Katchen Locke, Esq., New York, NY, for Local 32BJ.*

DECISION

Statement of the Case

STEVEN DAVIS, Administrative Law Judge: On March 21, 2005, the Regional Director issued a consolidated complaint in Case Nos. 2-CA-35720, 2-CA-36285 and 2-CA-36629 against Beach Lane Management, FSM Management, Inc., and Carpe Diem Management, LLC (Respondent or Employer), and on April 27, 2005, the Regional Director approved a Settlement Agreement executed by the Respondent in those cases. The General Counsel alleges that the Respondent failed to fully comply with the Settlement Agreement and

on July 6, issued an Order Revoking Settlement and Re-issuance of the Complaint. On September 29, 2006, a consolidated complaint was issued in Case Nos. 2-CA-37116, 2-CA-37219, 2-CA-37392, and 2-CA-37504. Thereafter, on July 31, 2008, an amended consolidated complaint was issued which included all of the above cases and Case No. 2-CA-38588.¹

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The complaint alleges essentially that the Respondent unlawfully (a) at various times in 2003 and 2004, imposed more onerous working conditions on employees Eugenio de los Santos, Bolivar Millet and Manuel Nina, by taking away supplemental repair work,² increasing work loads, changing schedules, requiring employees to obtain permission before leaving their work places, failing to pay employees for repair work, and more closely scrutinizing employees' work (b) issued two disciplinary warnings to Nina in 2003 (c) discharged Nina on November 7, 2003, and Domingo Medina, Millet and de los Santos on October 29, 2004 (d) sometime between November, 2003 and July, 2005, brought eviction proceedings against Nina (e) from October 29, 2004 to April 27, 2005 when a Settlement Agreement was approved, refused to reinstate or offer to reinstate the above discharged employees (f) from November 7, 2003 to November, 2005, refused to reinstate Nina (g) from March, 2003 to August, 2003, rendered assistance to Factory and Building Employees Union Local 187 (Local 187) by paying dues to that union on behalf of employees in the absence of deductions for such dues from employees' paychecks (h) from August, 2003 to May, 2004, rendered assistance to Local 187 by deducting money from employees' wages and remitting it to Local 187 notwithstanding the absence of employee authorizations for the deductions and remittances (i) from June, 2003 to August, 2003, rendered assistance to Local 187 by employing Respondent's supervisors and agents to solicit employees to sign cards for Local 187 (j) in July, 2005, offered employees money to resign their employment with Respondent and directed them to resign their employment because they engaged in activities on behalf of Local 32 and provided evidence and assistance to the Board (k) in June, 2005, threatened employees with discharge because they engaged in activities on behalf of Local 32 and provided evidence and assistance to the Board (l) from various dates in 2005, refused to assign supplemental repair work to Millet, De Los Santos, Medina and Nina (m) in December, 2005, solicited complaints from tenants about Millet's performance, in February, 2006, discharged Millet, and in February, 2007, brought eviction proceedings against him (n) in January, 2008, discharged Nina and in May, 2008, brought eviction proceedings against him and (o) in January, 2008, discharged Medina, and in March, 2008, brought eviction proceedings against him.

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¹ The docket entries for the charges which support the above complaints are as follows: 2-CA-35720: the charge, and the first, second and third amended charges were filed by Local 32BJ, Service Employees International Union, AFL-CIO (Local 32 or Union) on August 13, October 29, December 17, 2003, and January 29, 2004, respectively. 2-CA-36285: the charge was filed by Ramon Polanco, An Individual, on May 25, 2004. 2-CA-36629: the charge was filed by Local 32 on November 4, 2004. 2-CA-37116: the charge and amended charge were filed by Eugenio de los Santos, An Individual, on July 20, and September 14, 2005, respectively. 2-CA-37219: the charge was filed by Bolivar Millet, An Individual, on September 15, 2005. 2-CA-37392: the charge was filed by Millet on December 19, 2005. 2-CA-37504: the charge was filed by Millet on March 1, 2006. 2-CA-38598: the charge was filed by Millet on January 10, 2008.

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² "Supplemental repair work" is the term used in the complaint and used by the General Counsel. "Outside contracting work" is the term used by the Respondent. Inasmuch as they refer to the same types of work, for consistency purposes, I will use the term "supplemental repair work." I also note that the Respondent adopted the term "supplemental repair work" since it agreed, in the April, 2005 Settlement Agreement, not to "deprive employees of supplemental repair work...."

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The Respondent's answer denied the material allegations of the complaint. Twenty one days of hearing were held before me in New York, NY, between December 9, 2007 and March 20, 2008.³ On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following:⁴

Findings of Fact

I. Jurisdiction

The complaint alleges and the Respondent admits that Beach Lane, FSM Management, Inc. and Carpe Diem Management LLC, have been engaged in the management of residential apartment buildings in Manhattan, Yonkers, the Bronx and Brooklyn, New York, and have maintained an office and principal place of business at 280 Central Park Avenue, Hartsdale, NY.

The complaint further alleges and the Respondent further admits for the purpose of this case, that Beach Lane, FSM and Carpe Diem have been affiliated business enterprises with common officers, ownership, directors, management and supervision; have formulated and administered a common labor policy; have shared common premises and facilities; have provided services for each other; have interchanged personnel with each other; and have held themselves out to the public as single-integrated business enterprises, and that they constitute a single-integrated business enterprise and a single employer within the meaning of the Act.

The Respondent receives annual gross income in excess of \$500,000, and purchases and receives at its New York facilities goods and supplies valued in excess of \$5,000 directly from suppliers located outside New York State. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that Local 32 is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. Background

Essentially this case involves a Union organizational campaign which began in 2003 during which four employees were discharged, and other action taken against employees allegedly for their activities in behalf of the Union. A Settlement Agreement was reached with the Board pursuant to which the employees were reinstated at various times in 2005. Thereafter, charges were filed which alleged that the Settlement Agreement was not being honored by the Respondent, and thereafter, a Petition for Summary Judgment was filed by the General Counsel which led to the revocation of the Agreement, the reissuance of the pre-settlement complaint, and this trial which involves pre-settlement and post-settlement alleged

³ Respondent's Exhibit Nos. 116 and 119 were received in evidence following the close of the hearing pursuant to agreement of the parties.

⁴ The Respondent's motion to file a reply brief was granted over the opposition of the General Counsel, with permission granted to the General Counsel to file a reply brief. *Fruehauf Corp.*, 274 NLRB 403, 403 fn. 2 (1985). Thereafter, the Respondent filed what it termed a motion to strike, but which was in fact another reply brief, and the General Counsel moved to strike the Respondent's motion. Inasmuch as my Order permitting the filing of reply briefs expressly prohibited the filing of further briefs, I have not considered the Respondent's motion to strike.

unfair labor practices.

5 The Respondent manages more than 100 residential rental apartment buildings in Manhattan and the Bronx. Its office hierarchy consists of its president, Mark Scharfman who is also its chief operating officer, Lou Malone, who is in charge of financial matters including payrolls, and Hany Ramirez who was a “field agent” building manager from 2000 to 2004, and then worked in the repair department from 2005 to 2007, and as a property manager who works in the office having close contact with Scharfman. Clara Mendoza works as an office assistant.

10 The Employer employs building superintendents in its buildings whose duties include maintaining the building, responding to tenant complaints, making repairs to the apartments as needed and as directed, taking out the garbage, and maintaining the building’s operating systems such as the boiler. The superintendents also perform work outside their regular duties, called supplemental repair work, which consists of tasks such as painting, installing tiles, sinks and tubs, for which they are paid extra. They also do renovation work which includes the
15 installation of kitchens, bathrooms, floors, etc. and for which they are also paid extra. The four superintendents involved here are Eugenio de los Santos, Domingo Medina, Bolivar Millet, and Manuel Nina.⁵ The superintendents work five days per week.

20 The Employer also employs porters in its larger buildings whose main responsibility is to ensure that the building is kept clean by sweeping, mopping and cleaning its hallways and common areas and taking out the garbage. In certain smaller buildings where no porter is employed, the superintendent is responsible for performing tasks usually undertaken by the porter. The porters work five days per week and have two days off. On the days that the porter
25 does not work, the superintendent does the porter’s work such as cleaning and taking out the garbage.

The Employer also employs building managers who oversee the buildings they are responsible for. A building manager may have 10 to 15 buildings under his jurisdiction.
30 Depending on the needs of the building, he visits each one from three times per week to once every eight to ten days. His job is to make sure that the superintendent is performing his work. He inspects the building periodically to ensure that it is clean, responds to tenant complaints, and reviews work performed by the superintendent to ensure that such work is satisfactorily done. Manager Robert Bryant described his role as that of management’s “eyes and ears” as to
35 what was happening in the buildings. The managers were Bryant, Steven Burrell, Jose Canales, senior agent Bernard De Chalus, Valdet Prelvukaj, and Rafael Sosa.

40 The Respondent’s answer admitted that Sosa was its supervisor and or agent within the meaning of Section 2(11) and (13) of the Act. Sosa, who was employed from April, 2005 to September, 2007 as a property manager, performed the same duties as the Respondent’s other managers. Accordingly, I find that the other managers are statutory supervisors and agents.

B. The Union’s Organizational Campaign

45 The four superintendents testified variously that their interest in the Union began in 2001 or 2002, but no vigorous campaign began until January, 2003 when they and about 12 other superintendents met with Local 32 agents.

50 ⁵ De los Santos, Medina, Millet and Nina will sometimes be called “the four superintendents” herein.

As stated by de los Santos, in the month following the meeting, the four superintendents visited 100 buildings and solicited the superintendents working there to sign authorization cards for the Union. Medina stated that he asked five to twenty superintendents to sign cards for Local 32.

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Nina testified that on March 1 or 2, 2003, Scharfman phoned him and asked to meet him in the Bronx. Scharfman met with Nina at his building and told him not to meet with his co-workers. Nina denied that he intended to do so. Scharfman replied that he knew that he would be meeting in his apartment with other workers and advised Nina that if the employees had an "issue" they "must" call him. Scharfman offered to give Nina his personal phone number, advising that if he had a concern about work he should call him at any time because he "was going to solve any problem that I might have." Nina stated that during this meeting, Scharfman told him that porter Hidalgo could no longer be his helper. At that time, Nina had two other helpers, and used the three men to assist him in performing supplemental repair work.

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1. The Union Meeting of March 3

On March 3, a meeting was held in Nina's apartment. About 30 to 40 employees and one or two Local 32 officials were present. The workers spoke about the need for medical benefits, a raise in pay, how they could improve their working conditions, and about Local 187, a union which the Respondent claimed represented the workers. At the meeting those superintendents who had not yet signed cards for Local 32, did so.

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During the meeting, Nina heard a knock on the door. He opened it to find property managers Bryant and Burrell. Nina saw them looking over his shoulder, apparently in an effort to see who was in his apartment. Nina stepped outside and closed the door. Nina testified that Bryant asked him "what are you doing?" Nina said that he wanted more money, and asked why they came to the meeting, warning Bryant that he should not have come to his apartment during a workers' meeting.

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Burrell stated that, prior to the meeting, Bryant called him and said that Scharfman told him that he heard that the employees involved with Local 32 were having a meeting at Nina's house that day, and Scharfman wanted Bryant to visit Nina's apartment and "get information." Bryant told Burrell that he had to deliver radiator valves to Nina and wanted Burrell to accompany him as a "witness" since he (Bryant) did not know all the superintendents and "because this was something that Mark [Scharfman] was really involved in and whenever there was anything coming across our travels that involved the union, he wanted to be notified right away." Burrell testified that Bryant told him that there was much "unrest" due to union activity, and that Scharfman urged all the superintendents to sign cards for Local 187 rather than Local 32, and that Nina was one of the "principal people in Mark Scharfman's organization that was trying to stir the superintendents to sign for [Local 32]."

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Burrell stated that when Nina opened the door, he recognized superintendents Medina and Manuel Carvajal, and he heard Bryant ask Nina what was going on.

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Bryant denied that Scharfman told him to go to Nina's apartment and denied any advance knowledge that a Union meeting was to be held that day at Nina's apartment. Bryant testified that he had to drop off a valve at Nina's apartment and he went with Burrell who he happened to meet on the street nearby. He conceded, however, that it was not typical for him to see Burrell during the course of his business day, but they would occasionally run in to each other because they managed nearby buildings. He also conceded that it was unusual for them to visit the same building together. Burrell explained that since Bryant was a senior manager,

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Bryant would occasionally ask him to come with him and Burrell would ask Bryant to go with him as a learning experience.

5 Bryant stated that when Nina answered the door, he saw some of the superintendents he managed. Bryant denied telling the employees that Scharfman sent him and Burrell to the meeting. However, his pre-trial affidavit stated that he may have “jokingly” said to a worker that Scharfman sent him and Burrell.

10 Bryant stated that after they departed, he and Burrell asked each other what was going on in Nina’s apartment. Bryant conceded telling Scharfman the next day that he saw some of his superintendents including de los Santos and others who should not have been there during working hours. Burrell stated that it was “standard operating procedure” to inform Scharfman as to “everything that was going on” including union activity, visits from union agents, and who has signed for which union. Burrell further stated that Scharfman was “staunchly against” the
15 superintendents being represented by Local 32. He further stated that in the spring of 2003 until the fall of that year, he spoke with Scharfman about Local 187 at least once or twice per week. They also spoke about Local 32 – if Burrell learned anything about the union, if, for example, the employees’ photos were in the local newspaper or if union flyers were distributed, he would call Scharfman.
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Bryant denied Burrell’s testimony that during the spring of 2003 they spoke several times about the Local 32 campaign. Bryant denied knowing, at that time, that certain superintendents had been complaining about working conditions, although he admitted that de los Santos complained to him about his pay for supplemental repair work and lack of medical benefits.
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Scharfman did not recall knowing about the March 3, 2003 Union meeting at Nina’s apartment before it occurred. He stated that he did not believe that he sent Bryant and Burrell to surveill the meeting.

30 I credit the testimony of Burrell. It is clear that inasmuch as the campaign had already begun one month before the meeting when the four superintendents solicited 100 superintendents, the Respondent would suspect that employees would meet. Thus, Burrell’s testimony that Bryant mentioned that Scharfman told him that the employees were meeting that night rings true. Further, Bryant conceded that he told Nina that Scharfman sent him and Burrell
35 to the meeting. Indeed, Bryant admitted calling Scharfman the following day and telling him that he saw some superintendents meeting during working hours. Additionally, as set forth below, the fact that Scharfman met separately with de los Santos and Nina one week after the meeting at which time he asked de los Santos why he was not happy and gave him a raise in pay, and warned Nina to cease his Union activity, provide strong support to a finding that Scharfman
40 knew about the March 3 meeting before it occurred and, in fact, directed Bryant and Burrell to learn about who attended. The above findings strongly support Burrell’s testimony which I find to be completely credible.

2. Events Later in March, 2003

45 De los Santos stated that the day after the meeting, Bryant visited him, advising that he knew about the meeting and that “nothing is going to happen with that meeting because Scharfman is going to give money to Nina, who was supposed to be the leader, to quit the job and stop the campaign.” De los Santos responded that Nina was not the sole leader of the
50 campaign, but that the movement is like a “snake with four heads” – if one head was caught the others would continue their Union activity and there was no way to stop it. Bryant replied that if de los Santos was not happy he should quit his employ. De los Santos replied that he had his

“blood” in his job, remarking that Bryant, as an ex-fire fighter and union member, had a future and a pension. Bryant responded that the firefighter’s union was already in place, but this situation is different because de los Santos was “trying to make a union for the company.” De los Santos said that he needed medical benefits, a better salary and more money for supplemental repair work. Bryant replied that he would talk to Scharfman, but that he (de los Santos) should call Scharfman and tell him what he wanted.

De los Santos stated that he and Bryant spoke on the following three days about de los Santos’ complaints, including the need for medical benefits, a higher salary, and his unhappiness with Scharfman’s treatment of him. Bryant said that Scharfman wanted to speak to him, and gave him Scharfman’s phone number. De los Santos called and made an appointment to meet with Scharfman the following day, March 9.

De los Santos testified that he and Scharfman met in the basement of de los Santos’ building on March 9. Scharfman asked him why he was not happy. De los Santos replied that he could not support his family on his salary. Scharfman responded that he already gave him a raise. De los Santos answered that he received a \$30 raise pursuant to his request for more money to pay his phone bills for calls to the office, and that was not a raise in salary. Scharfman said that he would look into the matter. Scharfman called the office and told Ramirez to give de los Santos a raise, retroactive to 2002, for the amount that he should have been earning. De los Santos stated that he received a raise in April, 2003, in which his salary was raised \$25 every two weeks, and retroactive pay. Scharfman then asked him what else he wanted. De los Santos replied that he asked for \$12,000 for a renovation he did, but was only given \$3,000. Scharfman answered that he could not pay more for renovations. De los Santos said that since the Employer was not providing the materials for the renovations, he had to pay for them himself. Scharfman asked for the receipts for the materials and said that he would reimburse him. De los Santos responded that he did not want the money; he wanted better treatment, a higher salary and medical benefits.

De los Santos further testified that Scharfman told him to “use your basement for yourself” which de los Santos interpreted as permission to rent rooms in the basement. Scharfman then told him that “I know you’re trying to organize 32BJ and you got your right, but you are not going to deal with me because if you get into 32BJ I go and sell all these buildings.⁶ I’m only 56 years old ... and I’ll buy an island in Florida and then you can deal with somebody else.” De los Santos replied that perhaps it would be better for him to deal with another landlord who would treat him better. Scharfman then told de los Santos to talk to “our union,” Local 187. De los Santos insisted that that union did not exist and Scharfman said that it did. De los Santos said that he needed a porter to help with cleaning and garbage. Scharfman told him to talk to Local 187, but that he could hire a porter at his own expense.

Medina stated that he received one retroactive pay raise in April, 2003, and four others later in 2003. He stated that prior to April, 2003, he did not receive any pay raise. Medina stated that according to Local 187, the Employer erroneously failed to pay him the contractual raises and that is why he received the retroactive increases.

Millet received more than one raise in pay in 2003 after April, 2003. He was not told that they were union contact raises. He was paid every two weeks. He received pay raises in July, 2003, when his salary was raised from \$450 to \$495, and from \$495 to \$520. He did not know

⁶ De los Santos later testified that Scharfman said “if 32BJ comes in” he would sell the buildings.

why he received these increases, acknowledging, however, that the union contract became effective in July, 2003.

5 Nina stated that on March 7, Scharfman called him and asked him to come to his office in Hartsdale. Nina declined, saying that it was too far to travel. Scharfman replied that he would visit Nina on Monday. Scharfman met with Nina at his apartment on Monday, March 10 and told him that he learned that a meeting was held in his apartment. Scharfman warned him that he did not “want that to keep going on. He told me that he will give me anything that I want but he did not want that to happen again. He asked why I was behaving like that?” Nina replied that he
10 had been employed for ten years and received no significant pay raise and had no medical coverage. Scharfman wrote down his complaints and said that “everything would be resolved. Everything is going to change because you are applying for something different.” Nina replied that he was “looking for a union.”

15 Nina testified that when Scharfman promised him anything he wanted, including renovations and repair work, Nina did not want to accept that offer because he represented many workers, not just himself. Nina also stated that Scharfman told him that he would give whatever anyone wanted to “destroy” the Union movement, and that he had \$1 million to “destroy” it.

20 Nina further stated that Scharfman told him that, effective immediately, he could no longer use his porter for repairs or renovations, adding that the porter was not cleaning the building properly. Scharfman also told Nina that “187 is your union.” Nina replied that 187 is Scharfman’s union because it has not done anything for him (Nina). Scharfman answered that
25 he was listening to what he had to say about Local 187, his interest in medical benefits, an increase in pay and the repair work he did in his building and in other buildings. Scharfman could not recall speaking to Nina at his building, and did not recall speaking with him regarding Locals 32 and 187.

30 Nina testified that two to three days later, Scharfman phoned him, advising that he had some paychecks for him, including an amount due for unpaid medical bills and for a fire escape he painted three months before.⁷ Shortly thereafter, Nina received checks for \$1,700 for assistance with his medical bills and \$1,000 for the paint job. In March, 2003, Nina received a
35 \$45 biweekly pay raise. He stated that he was not told at that time that the raise was pursuant to the contract with Local 187.

40 Bernard de Chalus, the Respondent’s senior managing agent, testified that he learned that the employees were engaging in union organizing in about 2003 when he visited a certain building during work hours and could not find the superintendent. Another superintendent, Wolfred Goodings, told him that the staff was in the basement having a meeting. De Chalus asked what kind of meeting, and he said that they were discussing union membership. De Chalus approached the area where the meeting was being held, listened for five seconds, heard them discuss Local 32, and left. He did not see any of those present, and did not recognize any of their voices. The following day, he told Scharfman that the meeting involved Local 32 but that
45 he did not enter the meeting. Scharfman agreed that he should not intrude on their meeting. About one month later, De Chalus reported to Scharfman that a protest was being held outside one of Beach Lane’s buildings, and that he left. Scharfman told him to stay away.

50 ⁷ In 1999 Nina was in the hospital and could not pay his hospital bill. He asked his manager to pay the bill and the manager refused. Scharfman told Nina to talk to Local 187 president Joseph D’Onofrio, who said he could not help him either. In 2002, the hospital sued Nina.

De Chalus stated that Goodings also told him that manager Canales knew about the Union meeting and was part of the group. De Chalus asked for more information and Goodings told him that Canales was “negotiating” with the superintendents regarding the Union and trying to become a Union member. De Chalus did not speak to Canales about his interest in the Union. However, De Chalus stated that Canales tried to give him information about the Union meetings and De Chalus refused to listen. De Chalus told Scharfman about Canales’ activities and Scharfman replied that Canales could do whatever he wanted.⁸

De Chalus stated that he was also aware that the employees occasionally had Union meetings in the buildings and he and Scharfman agreed that they could do so. They reasoned that the superintendents had to perform their jobs regardless of their attendance at the meetings so they did not object to the gatherings. De Chalus also noted that since they use “staff” who perform their work, no time limit was placed on the length of their meetings. When he was informed that a meeting would take place or if he happened on a meeting, De Chalus immediately left the premises.

Scharfman stated that, over time, he “distanced” himself from the four superintendents because he learned what he was permitted to do and not do. He did not visit or speak with them so that he would not have any conflict or confrontation with them. Bryant testified that Scharfman told him in May or June not to discuss Local 32 with the men.

3. Events between March and May, 2003

The four superintendents decided to have a union meeting on May 7 in Medina’s apartment, and distributed notices to all the superintendents. The notice given to Miguel Soto had a hand-written scribble around it. That was done because the four superintendents believed that Soto was providing the Employer with information concerning their union activities, and they wanted to identify him as the informant.

Manager Bryant testified that after the March 3 meeting but before the May 7 meeting, he told Scharfman that he believed that the superintendents were “getting together and talking.” Scharfman acknowledged that and told him to keep doing what he was doing – to keep him informed. According to Bryant, Scharfman was, as was usually the case, upset at this news.

Bryant stated that prior to the May 7 meeting, de los Santos showed him a newspaper article which dealt with a strike of doormen, and said “now that’s a union.” Bryant did not understand what he meant, specifically. However, he knew that de los Santos was interested in a union because he asked Bryant to give him the telephone number of a friend of his who was a police department union delegate.

4. The Employer’s Meeting of May 7

Bryant testified that he and manager Hany Ramirez received many complaints from the superintendents regarding their conditions of employment. Bryant was aware that only Scharfman could address their concerns so he and Ramirez decided to arrange a meeting with Scharfman and the superintendents. Bryant stated that he told his superintendents to invite

⁸ Canales was discharged on August 30, 2003 for driving a company car that collided with a police car. He illogically testified that the collision was a “setup” by Scharfman and that he was fired for helping the men join Local 32.

interested to a meeting on May 7 in the Respondent's office in the building where Carvajal was the superintendent.

5 Present at the meeting were Scharfman, Bryant, Ramirez, the four superintendents and Carvajal.

10 The superintendents' main complaints expressed at the meeting included lack of medical coverage, their need for salary increases and higher prices for supplemental repair work, and their claim that superintendent Reyes Marte received more supplemental repair work than they did. They also complained that that when they did supplemental repair work they were often not paid the agreed-upon amount or not paid at all. In response, Scharfman defended his failure to pay them on the ground that some of the work they did was part of their regular superintendent's duties. At hearing, manager Bryant stated that he was aware that the superintendents were unhappy with the fact that they asked for a certain amount of money for
15 supplemental repair work, and they were not paid that amount.

20 Scharfman told the men that he would give more supplemental repair work them and would also ask them what price they wanted for the job before the assignment was made. That procedure was a departure from the current practice where the men were directed to do the job and then requested the price they wanted for the completed work, but then management would send a check for an amount which was lower than the sum asked for. However, Scharfman said that if the price they requested was too high he would assign someone else to do the work.

25 Ramirez stated that when the workers complained that they did not receive as much renovation work as in the past, Scharfman did not give as a reason that they were not doing competent work, or that they were asking for too much money for the jobs, or that they had not completed their regular superintendent's work. Bryant said that he told the men that they had to focus first on their superintendents' duties, telling them that if their building was in good repair and well maintained they would be offered supplemental repair work.

30 When the men complained that Marte was being given "all" the supplemental repair work, Ramirez phoned him and asked him to come to the meeting. Marte testified that, at the meeting, he responded to the workers' claim that he received all the work by stating that the employees were angry at him because he refused to join Local 32. This testimony is supported by Nina who stated that, at first, Marte was interested in Local 32 but then did not support it.
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40 De los Santos and Nina stated that during the meeting, Scharfman told the men that Local 187 is "your union" and that they could not have another union, and should call the office if they wanted more information about Local 187. The men protested that Local 187 was not their union and they did not know who represented that organization. In contrast, Ramirez stated that Scharfman did not mention Local 187 at the meeting.

45 The Respondent admits that at this meeting it became aware that certain of its superintendents were interested in Local 32.⁹ Ramirez first learned of their interest when the fax containing the invitation to the Union meeting set for May 7, apparently sent by Soto, was received. Scharfman conceded that a fax from or about the Union was received from the office machine during the meeting. Ramirez and Scharfman denied that they knew that their employees were interested in Local 32 or had been engaged in organizational efforts prior to the meeting.
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⁹ Respondent's Brief, p. 24.

De los Santos testified that, at the meeting, Scharfman asked him if he was happy. De los Santos replied that he was. Scharfman then said "if you're happy why are you doing this thing that you're doing." Millet quoted Scharfman as saying that he would "fix the problem for us, but if we were traitors against him, we would have to wait for the consequences."¹⁰ Nina responded that Scharfman must not only solve the problems of the leaders who were present, but the problems of all the workers. De los Santos and Nina testified that Scharfman said he would give the men medical coverage. In contrast, Scharfman and Ramirez testified only that Scharfman would look into the matter. Nina responded that such benefits must be provided to all the superintendents, not just the "leaders" at the meeting.

Nina quoted Scharfman at the meeting as asking "why are we still doing things behind [my] back?" I tried to resolve all of our issues." Nina replied that he was upset because he was told that all the workers would be at the meeting, but the only ones who were present were those who organized for Local 32 with him. Nina said that Scharfman told Ramirez to write down everything that was said as he was "going to solve every single problem that we have."

Medina said that it was not fair that only nine employees were present when there were 160 workers employed by the Employer. Nina quoted Bryant as saying that all the workers would have to be present to solve their problems. Bryant then said, according to Nina, "I am your manager, the meeting was for the heads and because you are the heads that's why I brought you guys here." Scharfman then told Bryant to keep quiet. Bryant denied telling de los Santos that only those superintendents were invited because they were the leaders of the Union campaign. He conceded, however, that during the meeting, Nina and or de los Santos asked him why all the superintendents were not there. Bryant responded that all of the superintendents could not fit in the room where the meeting was being held. It should be noted, however, that Bryant testified that he told the superintendents to invite whoever they wanted.

Apparently in response to the superintendents' demands at the meeting, Scharfman took a hard-line approach, demanding that they perform extra work. Thus, Scharfman told the men that he was ordering floor buffing machines and that the men had to do that task as part of their regular work. De los Santos, Medina and Millet remarked that Scharfman used to pay them \$100 extra for such work, and that Scharfman remarked "not anymore, and that it was now part of their job." In addition, according to de los Santos, Scharfman also told the superintendents that they had to begin repairing the old plumbing in their buildings as part of their regular work. De los Santos and Millet stated that Scharfman said that a "change" in supplemental repair work would be that he would use licensed contractors on many jobs such as those involving electrical and plumbing work. None of the superintendents had contractors' licenses. Scharfman told de los Santos that if he had a license he would be offered work. Respondent attorney's October 24, 2003 letter to City Council member Martinez, stated that there was a "change in company policy relating to supplemental repair work...."

Further, Millet stated that Scharfman told them that the superintendents must perform their porters' duties during the porters' two days off per week. Millet stated that prior to this meeting, the porter did not have two days off per week, but that this new change required the superintendents to clean the building on the porter's two days off. Nina stated that prior to March, 2003, his porter Hidalgo never had a day off, and Nina did not have to do his work. Even when Hidalgo was sick or on vacation, Scharfman sent a substitute without Nina having to do

¹⁰ The transcript records the word spoken as "traders" but the clear context of the sentence suggests that the word used was "traitors."

the porter's work. Millet also said that at the meeting, Scharfman told the men that they had to carry out debris from the buildings to garbage containers outside. Millet had not done that type of work before the meeting. He conceded that he had been paid \$75.00 in January, 2002 to fill a trash container, but, prior to the meeting, he had not been asked to transport trash to the container.

Scharfman also told Nina of this new change one month later. Nina stated that on June 11 or 12, 2003, Scharfman phoned him and told him that, effective immediately, he could not leave his building and had to do the porter's job. Scharfman added that Bryant would "continuously be in my buildings. The two days the porter had off I had to do his job, including cleaning the building." Nina asked him to put these new rules in writing. Scharfman said he had to speak to his representative first.

According to Millet, Scharfman told the superintendents that they had to make sure the porter did his job, and that if the porter was not working properly he should be fired, adding specifically that if a summons was issued, apparently because the sidewalk was not cleaned, the superintendents would have to pay it. Millet stated that prior to the meeting, the porter's performance of his work was not his responsibility – they each did their respective jobs. Millet stated that as a result of these changes he had to awaken earlier to clean the building if the porter did not do that task.

De los Santos testified that as he was leaving the meeting, he told Scharfman that he was disrespecting him by not offering him the work he assigned to Soto. Scharfman replied that he would give him the work that Soto was then performing. De los Santos answered that he did not want that work, but it should have been offered to him. Scharfman then called the office and told Evelyn Delgado to reassign the work to de los Santos. He refused to accept it since Soto was already doing the work. Scharfman then offered de los Santos \$4,500 for the renovation. De los Santos accepted the offer, did the renovation, and received \$4,500. De los Santos stated that Scharfman told him that that was the last renovation he would be offered.

Scharfman stated that the Employer retained legal counsel after this meeting.

5. Events Later in May, 2003

De los Santos stated that on May 8, one day after the Employer meeting, Scharfman called and asked him "who is on my side and who is not on my side." De los Santos interpreted the question as an inquiry as to who supported the Union. De los Santos lied because he did not want Scharfman to fire anyone and, since he wanted to get back at Soto for sending the fax concerning the union meeting to the Employer and for getting jobs that he was not offered, said that Soto is the "big leader." According to de los Santos, Scharfman was "shocked." He also told Scharfman that Marte supported the Employer. Scharfman told him to call Local 187 president Joseph D'Onofrio.

De los Santos stated that a few minutes after this conversation, office clerical Evelyn Delgado called and asked who supported the Union and who was opposed to it. De los Santos repeated what he told Scharfman, adding that he, de los Santos, supported the Employer.

De los Santos stated that the next day, May 9, Scharfman called, asking how he was feeling and what he thought of the "situation" – "Is this going to keep going? This going to stop? They going to win?" De los Santos replied that in America everyone was entitled to have a union if they wanted one. Scharfman answered that the workers already have a union and do not need another. De los Santos advised Scharfman not to interfere with the Union's campaign and

just “see what happens.” Scharfman answered that it “was not fair” because Local 187 represents the men. De los Santos said that that union does not represent the workers, adding that he supported the Employer. Scharfman said that he knew that de los Santos joined Local 32, and de los Santos denied doing so. Scharfman told him to call Local 187.

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Nina stated that on about May 12 or 13, Scharfman called and asked if everything was well and asked if he needed anything. Nina replied that the men would be meeting with Local 32 to discuss the matters raised at the May 7 meeting, including Local 187, a wage raise and medical benefits. According to Nina, Scharfman asked him how much he wanted to renovate an apartment in his building. Scharfman told him “name your price. How much do you want for this renovation job?” Nina replied that he (Scharfman) was the boss and it was his decision as to how much to pay the men. Nina testified that that was the first time that Scharfman asked him a price because ordinarily there was no negotiation. Nina declined to name a price because if he did he would be the “favored” employee whereas he was representing the other workers who would not be receiving the same treatment. Accordingly, Nina told Scharfman that he should know how much the job was worth.

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On May 14, a Local 32 meeting was held at Medina’s apartment. About 40 employees attended with a Local 32 agent. They spoke about their work hours, salary, and whether they should withdraw from Local 187.

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Nina stated that between May 14 and mid-June, 2003, Scharfman phoned him several times asking if he was all right. In late May, Scharfman delivered rent packages, again asked him if all was well, gave him some cookies for his children, and told him to call if he needed anything. Nina stated that he told Scharfman that he was not interested in what he was offering him. Scharfman asked him to call him, but Nina did not.

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In mid-May, Nina had a large medical bill which Local 187 refused to pay because the contract did not provide for medical coverage. Thereafter, Local 187 president D’Onofrio called Nina, and Nina refused to speak to him. On May 13, de los Santos called D’Onofrio, pretending to be Nina. D’Onofrio told de los Santos that that he knew that he (Nina) was trying to join Local 32. De los Santos asked him how he knew and was told that Scharfman told him. D’Onofrio offered to take care of all his problems and suggested a meeting. De los Santos offered to meet the following day. D’Onofrio wanted to meet alone with [Nina] but de los Santos said that they had to meet as a group, with the other superintendents. The following day, D’Onofrio met with De los Santos, Medina, Millet and two others. They spoke about their concerns and D’Onofrio asked why they were trying to organize for Local 32.

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Later that day, May 14, a meeting to discuss the Local 32 organizing drive was held in Medina’s apartment. De los Santos testified that before the meeting, Scharfman called and said he knew about the meeting and wanted de los Santos to attend in order to see what the Union “has to offer” so that he could offer better terms than Local 32. Scharfman offered to go to the meeting or send Ramirez. De los Santos advised against it, assuring him that he would attend all the meetings and would let Scharfman know what occurred.

At the meeting, attended by de los Santos, Medina, Millet, Nina, Hidalgo, and more than thirty other workers and Local 32 agents, they spoke about their grievances. Following the meeting, Medina asked other superintendents to sign cards for the Union.

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C. Continuing Union Activities and the Employer’s Response

Protest meetings were held in front of Nina’s building and at a downtown office building.

The four superintendents distributed pamphlets in all the buildings managed by the Employer, picketed Scharfman's home, visited City Council members, had interviews with the media and appeared in the *Hoy* newspaper, and were interviewed on a radio program.

5 De los Santos testified that on June 13, 2003, manager Bryant told him that Scharfman was "getting tired of that situation – what we were doing. We have him with water to the neck; once he got the water to the mouth, he had to do something like a strong decision; because of [your] action he's going to have a reaction. So if we keep doing this he has to take a strong decision; we got to stop what we were doing because that's what's going to happen." De los
10 Santos replied that it was too late to stop the Local 32 drive. Bryant answered that he was of the same opinion, but asked him to call Local 187.

Bryant conceded that he was at de los Santos' building on June 13 and admitted that several times he used the words "to every action there is a reaction." Bryant explained his use
15 of the phrase by stating that he believed that de los Santos was "pushing for more money for renovations, pushing for things, and I just let him know that it's a give and take. You push, there's going to be a reaction." Bryant stated that he did not tell de los Santos that the organizing effort had Scharfman up to his neck in water or that he would act against the
20 workers.

Millet stated that during his organizing activities for Local 32 in July and August, 2003, manager David Alvarado told him that Scharfman wanted to pay him to quit his job, and asked
25 him how much money he wanted. Millet replied that he had done nothing wrong to warrant resigning.

Millet testified that Scharfman visited him on September 2 or 3, 2003 and asked if he had signed a card for Local 187 that was being distributed by Marte and D'Onofrio. Millet said
30 that he had not signed such a card. Scharfman told him that "if I signed it, that all my problems would be solved, that I could get a medical plan."

During their conversation that day, Scharfman told Millet that he had too much work in the building, apparently a reference that Millet was not completing his work on time, and should
35 not do any supplemental repair work. Millet replied that all his work is up to date. Scharfman responded that he would return in two months and if "things continued the way he was seeing them he was going to fire me." Scharfman added that there were many complaints about his work, noting that he had a letter containing sixty complaints of repairs not completed. In his pre-trial affidavit, Millet stated that the work that Scharfman complained was not done was, in fact, the porter's responsibility – such as cleaning the hall mouldings, and failing to clean stains on
40 floors. That was the first time Scharfman made such a comment to Millet. Prior to that time, Scharfman visited his building once per year or once every 1½ years.

Scharfman conceded seeing an article in the newspaper *Hoy* which was issued on September 2, 2003 containing the photographs of eleven superintendents and porters, including
45 the four superintendents, and being aware that they were engaged in activities in behalf of the Union. The article stated that the employees "charge abuses by Beach Lane" and accused Scharfman of "various labor violations" including "preventing us from choosing the union.... They ranted against Local 187, a phantom union they imposed on us but never met with us.... Even though their objective is to become part of ... Local 32" they criticized that union because "they are too slow... in processing our claims." The article noted that the superintendents' group
50 "has a leadership headed by Domingo Medina and Manuel Nina...."

Manager Canales testified that supervisor de Chalus told him that he showed the article

to Scharfman who was “very much upset because after we’re giving these people jobs, housing, and a lot of things, this is how they pay us.” Similarly, manager Burrell testified that de Chalus told him that Scharfman was “pretty disappointed” to see the pictures of Arturo Buenjo, Jesus Minjerada and Angel Cordero on a flyer or a *Hoy* newspaper article regarding the Union. Burrell stated that de Chalus told him that Scharfman said that he felt “betrayed” because he gave Cordero a free apartment and work. De Chalus mentioned the same thing about Scharfman’s feelings concerning Angel Cordero, and that Scharfman would stop using him for supplemental repair work, and would demand that he vacate his apartment.

On October 14, 2003, members of the New York City Council wrote to Scharfman, asking that he “work with Local 32 in addressing the needs of these superintendents....” The letter was received by the Respondent.

The Respondent argues that support for the Union’s efforts to organize the four employees and the Union’s interest in representing them ended in early November, 2003, following Nina’s discharge. In support, the Respondent cites employees’ claims in the newspaper *Hoy* that the Union campaign took too long, and a Union agent’s answer that the process was delayed by the negotiation of a citywide contract. Further, certain superintendents who were employed in a one-person building learned that the Employer could not be required to bargain with the Union for their building.

However, the evidence establishes that Union meetings were still being held as late as December, 2007. Even if, as the Respondent suggests, the meetings were held for the purpose of getting greater support and persuading Local 32B to “accept us back” that clearly shows that the employees continued to seek membership in and representation by the Union. Whether or not those efforts may have been futile, they still constitute protected, concerted activities.

D. The Changes in Working Conditions

1. The Requirement that the Superintendents be in Their Buildings Eight Hours per Day

Bryant testified that in early 2003, the superintendents were permitted to leave their buildings during the work day whenever they wanted. He stated, however, that after the May 7 meeting, Scharfman told him that all the workers were full-time employees, and therefore were required to be in their buildings eight hours per day. Although Bryant believed that some superintendents were part-time, he reasoned that if the superintendent was not in the building he is not maintaining it properly, and told the superintendents that, in order to maintain their buildings at a “higher level” they must be in their buildings eight hours per day. He noted that this was not a change – just an enforcement of the company policy, in which he could not give them as much “latitude.” Indeed, Bryant said that in 2001 or 2002, tenants complained that the superintendents were not in their buildings but there was no policy change or enforcement at that time. He noted that after May or June, 2003, several of his superintendents were still absent from their buildings for several hours during the work day doing supplemental repair work notwithstanding the enforcement of the policy.

De los Santos stated that in May or June, 2003, Bryant told him that he had to be in his building eight hours per day doing his superintendent’s job, unlike his then practice. Bryant told him that he had to have permission to leave the building, even to go to a doctor. Prior to that time, de los Santos would just leave without calling anyone.

I credit Nina’s testimony that Scharfman told him in mid June, 2003, that he could not

leave his building, and that Bryant would monitor his presence.

5 Jose Canales, a building manager, testified that in the Spring of 2003, his supervisor and manager Bernard de Chalus told him that all the superintendents and porters must be in their buildings during the entire work day in order to take care of the buildings, and “because of the union also.” According to Canales, prior to that time, if the superintendent had jobs in other buildings he first took care of repairs in his own building and then could go to other buildings to perform supplemental repair work.

10 Scharfman stated that after May 7 and for the remainder of 2003, the Employer’s managers told him that they had difficulty locating some or all of the four superintendents during regular business hours. Scharfman stated that he gave the superintendents Nextel phones because managers were unable to reach them on their home phones. The workers also had beepers and radios.

15 Canales stated that at about this time, the superintendents were required to obtain permission to leave their building for a short time, other than their lunch break. He noted that this policy began after Local 32 began organizing.

20 Scharfman and Ramirez stated that prior to and after the meeting on May 7, 2003, if a superintendent wanted to leave the building other than for a meal break or a brief period of time, they were supposed to advise the office staff where they were going and the length of time they would be away from the building. He denied changing that policy after May 7 to require superintendents to get permission before they left the building for reasons other than a meal break. Scharfman denied increasing the number of hours the employees were required to work. 25 He explained that the superintendents had regular work days and days off, and he was permitted, under the contract, to change the days off and modify their working hours. Nevertheless, he denied changing their work hours in 2003 and 2004.

30 Millet stated that after the May meeting, his scheduled hours of work increased from seven to ten hours per week, and also that he was required to tell his manager or the office when he was leaving the building. In contrast, he stated that between 1997 and 2003, he did not have to ask anyone for permission to leave the building, and could leave without telling anyone as long as all his work was done.

35 De los Santos stated that prior to the Local 32 campaign, he saw Bryant only once every two weeks. However, after the employees began the organizing campaign, de los Santos saw Bryant pass his building very frequently – sometimes ten times per day which he believed was done to ensure that he was in the building. Medina stated that between March 3 and May 7, 40 2003 his manager visited his building once to three times per day, an unusually large number of visits.

45 Manager Ramirez stated that following the May 7 meeting, she was not told that she should increase the frequency of manager’s visits to Medina’s building. In fact, she did not visit his building very often in 2007, only visiting when there was a problem or a major job being done. She rarely saw him when she visited. She further stated that after the May 7, 2003 meeting, and in 2003, she had trouble locating Medina. She conceded that she did not have a prearranged time to visit the building because the superintendents were expected to be at their buildings during work hours. She noted that occasionally she would call Medina in advance on 50 his Nextel phone and advise him that she was coming. On those occasions she sometimes could not reach him. She was not told that his Nextel phone was not working.

2. The Change in Policy Regarding the Superintendents' Helpers

Historically, the superintendents were permitted to employ helpers, or porters, at the superintendents' own expense to assist them with repairs in the buildings or to help them when they performed supplemental repair work. Depending on the superintendent, the helper would perform cleaning work while the superintendent did the supplemental repair work, or the helper worked with the superintendent in performing such supplemental work. As part of their payment, or in exchange for their work, the helpers were permitted to live in the basement of the superintendent's building. For example, Medina stated that Scharfman approved of Medina's employing a porter and also permitted him to live in Medina's basement. The porter that he used who helped him clean the building has lived in the basement since Medina began work for the Employer.

Knowledge of this practice was established by the testimony of Scharfman and Bryant. Scharfman stated that he was aware that some superintendents, including Medina and Nina, employed their own employees to do supplemental repair work, and also performed the superintendent's regular duties, and that they were paid by the superintendent. He stated that prior to May, 2003, he did not prohibit the superintendents from performing supplemental repair work, and they were permitted to do so. Scharfman did not recall whether his policy concerning the employment of helpers changed after May, 2003. The Employer's managers observed people living in basements with no windows, and determined that the superintendents permitted them to live there.

Ramirez stated that on occasion superintendent Carvajal "borrowed" other employees who worked with superintendent Marte. Ramirez noted that those superintendents who did large renovation supplemental repair work usually had a group of non-Beach lane employees who worked with them. She had no objection to the use of such helpers, stating "we did not care who did the work."

Scharfman stated that he could not recall if he considered it a "problem" if a superintendent hired someone to do his regular duties, adding that it was a problem in "other buildings" because the Employer did not provide insurance for them as they were not employees and were not responsible to anyone. However, Scharfman noted that he did not recall telling any of the four superintendents that they could not hire others to perform their regular duties while they did supplemental repair work.

This practice changed in the Summer of 2003. Scharfman testified that he told superintendent Carvajal, perhaps in 2003, that he could not engage someone to perform his regular duties while he did supplemental repair work. He further noted that in the summer of 2003, he may have told Carvajal that he had to "remove" the people living in the basement of his building who were doing their regular work because the Employer was not insured for other workers.

Bryant stated that effective in about June, 2003, a change in policy prohibited the superintendents from permitting their helpers to live in their buildings. Bryant testified that he was aware that the superintendents gave the helpers a free room in their basement in exchange for help with work in the buildings – either the superintendent's regular work or in supplemental repair work. Bryant said that he was directed by the Employer's office to stop this practice and he told the superintendents that no one could live in the basement outside the superintendent's apartment. He also objected to people other than the superintendents cleaning the building. He saw a helper clean Nina's building, and he told Nina that he must remove that person.

5 Bryant further testified that he first became aware in 2003 that de los Santos had a helper living in his basement. In June, 2003, he was directed by Scharfman that the superintendents could not have helpers work in the building and could not live in the building since they were not Beach Lane employees and because of insurance issues. He told de los Santos these reasons and asked him to remove the helper.

10 Manager De Chalus testified, in contrast, that Angel Cordero, a contractor who renovated apartments for the Employer, was not a Beach Lane employee. Nevertheless he lived in a basement apartment of a Beach Lane building and was paid to take out the garbage. In late 2003 or early 2004 he still did contracting work, and did not pay rent for the apartment. When the Employer received complaints that the garbage was not being taken out he was asked to leave and to vacate the apartment.

15 Superintendent Marte stated that when he did large renovation jobs he used helpers who he paid himself. He noted that occasionally the four superintendents and others used some of his helpers. He further stated that the property manager saw him use helpers, and that the Employer did not object to his use of helpers because he needed those men to work on large jobs. His use of helpers continued after 2003 into 2007. Bryant testified that Reyes was permitted to have helpers assist him in renovation work.

20 Scharfman was aware that Nina employed helpers to perform supplemental repair work that he agreed to perform, and denied telling Nina to discharge them. On April 10, 2003, the Employer sent a letter to the tenants advising them that Nina would be on vacation from April 17 to April 22, and during that time his wife would be "taking care of the premises. She will be distributing work to his workers."

E. The Alleged Assistance to Local 187

30 Superintendent Nina testified that in 1994 a manager told him to sign a card for Local 187, and thereafter union dues were deducted from his salary. He added that prior to 2003, he had no contact with that union. He attempted to obtain medical benefits from Local 187 in 1999 but was unable to because such benefits were not provided by the contract between the Employer and Local 187.

35 Manager Canales, who was hired by the Employer in 1999, stated that he was unaware that any union represented the employees until 2003, when, following the employees' interest in Local 32, he first heard of Local 187.

40 Canales stated that in June, 2003, manager de Chalus told him that most of the superintendents and porters were trying to join a union. De Chalus gave him a few cards for the "other union" – Local 187, and asked him to have the employees sign them. Canales asked him "what other union," and de Chalus said that "32BJ, that is no good Union...." Canales replied that he wanted to speak to the employees and learn the difference between the two unions, and provide them with "paperwork" so that they could decide which union to join. De Chalus replied
45 that he should "make sure they sign for 187." Canales responded that he could not make them sign; that it was their decision. De Chalus answered "I thought you were one of us" or "you are not one of us. I told you you can help us out." Canales stated that he gave his superintendents the Local 187 card and told them that they had the paperwork and must decide for themselves
50 which union to join. Of the ten superintendents he spoke to, only two, whose names he could not recall, signed Local 187 cards. The others chose Local 32. De Chalus denied telling Canales to distribute cards for Local 187. However, he conceded that Scharfman called him and said that Local 187 would be having a meeting in the courtyard of one of the buildings in 2007

and that such a meeting was all right.

5 Manager Burrell stated that in the summer of 2003, superintendent Marte asked him to accompany him when he asked superintendents to sign cards for Local 187. Marte asked for this assistance because he did not know all the superintendents. They went to 5 to 10 buildings and asked the superintendents there to sign cards for Local 187. On one such occasion, Burrell visited superintendents Cortez, Perez and Javier Covido with Marte and Local 187 president Joseph D'Onofrio, who introduced himself and told them that he was sent by Scharfman to have them sign "enrollment cards." They asked Burrell whether their signing would be a problem, and "how does the Employer feel about this." Burrell said that there would not be any problems, and that "Mark would be very pleased with them ... very pleased about it." After about one week, Covido signed the card and Burrell asked Scharfman what he should do with it. Scharfman told him to leave it on Scharfman's desk, and Burrell did. Burrell also stated that he told Covido that "there could be a problem if he signed up with 32BJ... I don't know what will happen." Burrell offered that opinion based on his observing the "effects of it by the supers that were very active in it ... not given extra work...."

20 Scharfman denied telling Bryant or any other managers, after May, 2003, to have their superintendents and other employees sign cards for Local 187.

25 Marte stated that sometime after May 7, 2003, D'Onofrio came to his building and told him that Local 187 represents him and that if he joined that union he would receive certain benefits immediately, including a pay raise every five years. Marte signed a card for Local 187 at that time. D'Onofrio asked him to accompany him to other Beach Lane buildings to try to have other superintendents sign cards for Local 187. D'Onofrio did not speak Spanish and wanted Marte to translate for him. Marte called manager Ramirez and asked if he could do so during work hours and she said that he could go with D'Onofrio if he (Marte) wanted. Their visits took place during the work day.

30 The Respondent's records establish that dues in behalf of Local 187 were not deducted from the pay of Medina and Millet until the pay period beginning August 8, 2003. They stated that prior to that time, union dues had not been deducted from their salary and they never signed an authorization card for Local 187. However, Local 187 records indicate that dues had been paid by the Employer for Medina and Millet beginning in January, 2003.¹¹ The Respondent did not offer in evidence cards signed by Medina or Millet in behalf of Local 187, and indeed, Ramirez stated that the Respondent's office had no cards for those men.

40 **F. The Employees' Withdrawal from Membership in Local 187 and their Discharges**

45 On April 12, 2004, de los Santos, Medina and Millet wrote identical letters to Local 187 revoking their authorization for payment of their union dues to that union by dues check-off. The Employer received copies of those letters and ceased checking off dues from their wages.¹²

De los Santos stated that two weeks later, and again in mid May, the three letter writers met with D'Onofrio and spoke about benefits. De los Santos, Medina and Millet stated that, prior to their discharges, no one told them that they could be fired if they did not pay union dues, and during their meetings in April and May, D'Onofrio did not tell them they could be discharged for

50 ¹¹ G.C. Exhibit Nos. 25-27; Respondent's Exhibit No. 119.

¹² Nina did not write such a letter since he had been discharged on November 7, 2003.

that reason. Nor did they receive any correspondence saying that they would be fired for not paying dues. Medina and Millet stated that at the meeting, D'Onofrio told the workers that if they signed cards for Local 187 they would receive a raise in salary, health coverage for their family, and those employed for seven years would get five weeks vacation. D'Onofrio asked the men to sign a card for Local 187 and they refused.

However, de los Santos admitted receiving a phone call from D'Onofrio in late October, 2004, telling him to pay his dues or he would be fired for not paying dues. De los Santos asked him to send a letter outlining how much he should pay and he would do so, but such a letter was not received by de los Santos.

On October 16, 22, and 29, 2004, Local 187 sent letters to the Employer informing it that "after several attempts by [Local 187], the superintendent[s] has failed and refused to submit payments to Local 187. These payments... are for union dues or agency fees. Payment is required as a condition of employment, under the current collective bargaining relationship. Based on this refusal of payment, Local 187 is requesting that [they] be terminated from the superintendent position immediately."

On October 29, the Employer sent letters to the three men stating that it had received requests from Local 187 to discharge them for failure to remit their union dues or agency fees, and that they were discharged, effective immediately. The letter stated that "if you believe [Local 187] has sent this request in error... please notify [me] immediately." No response to the letters was received by the Employer. Scharfman stated that he discharged the men based on the letters received from Local 187.

The collective-bargaining agreement covering Medina's building had expired on May 31, 2004. No further agreement was in effect at the time of his discharge five months later, and according to Respondent's attorney's position statement, upon the expiration of the contract "there was no showing of support for Local 187 at that building."¹³

G. The Settlement Agreement and the Reinstatements

In late April, 2005, a Settlement Agreement was entered into between the Respondent, Local 32 and the Board pursuant to which the four superintendents were reinstated. De los Santos, Medina and Millet returned to work in April, 2005 and continued to engage in activities in behalf of the Union. Nina did not return to work until November 1, 2005.

The Respondent agreed to pay the four superintendents certain sums of backpay and also agreed to reinstate them "to their former positions, or substantially equivalent positions, with full seniority rights and privileges" and agreed to "allow employees to return to any previously vacated Employer-provided apartment." The agreement also provided that the Respondent "will not deprive employees of supplemental repair work or fail to pay employees for repair work because of their" union activities.

Some question arose concerning the meaning of the Settlement Agreement. As set forth below, the four superintendents believed that the agreement guaranteed that they would be offered supplemental repair work.¹⁴ The Employer believed that the agreement simply obligated

¹³ G.C. Exhibit No. 49.

¹⁴ During the hearing I ruled that what the employees believed they were entitled to pursuant to the Agreement was irrelevant. The operative document is the Agreement itself. I affirm that

Continued

it not to withhold such work from them because of their union activities, but did not guarantee them supplemental repair work. Scharfman testified that the standards for the offer of supplemental repair work were based on the same criteria after the Settlement Agreement as before.

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H. The Nature of Supplemental Repair Work

It must first be noted that the superintendent's regular work, in which he makes routine, minor repairs such as fixing a minor leak, changing a light bulb or replacing a battery in a smoke detector is part of the superintendent's duties for which he is paid a salary by the Employer. Such work is not included in supplemental repair work for which the superintendent is paid in addition to his regular salary.

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There are two types of supplemental repair work, and upon performing the work the superintendent is paid extra by check, in addition to his regular superintendent's salary check. The first consists of work that is beyond the regular duties of the superintendent, such as painting, installation of a sink, or sheetrocking. Such repair work is usually done in an apartment which is occupied by a tenant.

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The second consists of work such as a complete remodeling of an apartment, called a "gut renovation" or simply a "renovation" which would involve the installation of a new bathroom, kitchen, and floors. Such work is usually done in a vacant apartment.

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It must be noted that Bryant stated that after the superintendents returned to work pursuant to the Settlement Agreement in April, 2005, Scharfman issued an order that they would not do renovations, but could continue to do smaller supplemental repair work.

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Supplemental Repair Work Offered to the Superintendents

The Respondent and the employees testified differently concerning the procedure used in offering or assigning supplemental repair work, and the payment for work performed.

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There was agreement that the work to be done was examined by the superintendent and manager, and the manager gave Scharfman a description of the work needed. Essentially, the Respondents' witnesses testimony was that the manager and Scharfman would decide whether the superintendent was competent to perform the work, whether he had the time to do it, and whether his building was clean. Other considerations were whether the building was "close to violation free" and whether it had violations which had to be remedied, thus preventing the superintendent from doing the supplemental work. Further factors were the price requested by the superintendent, and whether the tenants were satisfied with the building's state of repair. Scharfman stated that these factors and the Employer's system for offering supplemental repair work remained the same from 2003 to 2008.

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Regarding the price wanted for the repair, Scharfman stated that the superintendent informed the manager the price he wanted to do the work before doing the work. He said that usually the worker asks for a high price, Scharfman refused, and an "exhausting negotiation" takes place. He noted that prior to May, 2003, a superintendent would ask a "ridiculous" price for a simple job, and he would refuse such a request and select someone who would do the job for less money. If the superintendent's price was acceptable, he did the job, but would at times

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ruling and do not rely on what the employees believed that they were entitled to.

be paid less than he asked, because he did not do all the work agreed on or did it improperly and another contractor had to re-do it. Scharfman noted that there was a “discussion” between the superintendent and the office in which agreement is reached on the final amount to be paid. As set forth below, the superintendents denied that negotiation over the price took place.

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Bryant stated that there were set prices for such work, including \$50 per room for painting, and \$40 for a new faucet. He stated that 60% of such work had a set price, and 40% was negotiable depending on the type of work to be done, for example, whether a large hole in a ceiling had to be repaired in addition to painting it, or if the job description changed. Bryant stated that the superintendents were unhappy with the amount of money they received for the repair work since the check they received was less than what they asked for.

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The four superintendents’ testimony differed from Scharfman’s. They stated that they were directed to make certain repairs. De los Santos testified, for example, that that on some occasions, he was directed to make the repairs or do the renovations or he would be fired. After the superintendent completed the work he submitted a work order with the amount of money requested, and was not asked to give a price prior to performing the work. They stated that in many cases they received less money than the amount asked for. De los Santos stated that in 2003 he was paid for some, but not all jobs he performed. Nina’s pre-trial affidavit stated that the issue regarding payment for the work existed long before the Union made its appearance.

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There was testimony that Scharfman considered using only licensed contractors for supplemental repair work. De los Santos and Millet stated that Scharfman said at the May 7, 2003 meeting that he was “chang[ing]” the assignment of supplemental repair work by using licensed contractors on jobs such as those involving electric and plumbing work. None of the superintendents had contractors’ licenses. Further, De los Santos stated that in mid May, 2003, Scharfman visited an apartment in his building and told him that this would be the last renovation he would do because “now we have to survive with the money that we make as superintendents, and he’s going to contract in the future with another company. A licensed company to do.” Scharfman paid him the amount he offered for the work he did in the apartment.

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Manager Bryant stated that in about May or June, 2003, the Employer implemented a policy in which only licensed contractors could perform renovation work. He noted, however, that superintendents Marte, Soto, and Cano were not licensed yet they still did renovation work as of the time he left its employ in August, 2006. Bryant also stated, however, that the “licensed contractors only” policy was in existence only briefly, for two or three months, and thereafter, if buildings were in good order he could offer renovation work to de los Santos or Nina. The change was caused by workload – the Employer had only two licensed contractors, and as more apartments needed renovations, the two contractors could not handle the workload. Bryant noted that after the “licensed contractors only” policy was withdrawn, he was free to offer renovation work to the superintendents.

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As to who would be selected to do the work, Scharfman testified that in 2005 and 2006, depending upon the nature of the work to be performed, if a vacant apartment needed to be painted, “traditionally” the superintendent is asked if he wanted to paint it. Ramirez stated that the Employer “always offered the superintendents work because they know the building and they know what to do. So it’s always offered to them. If it’s a court ordered repair, or problem tenant that the superintendent got along with” she would also offer that job to the superintendent. Manager Sosa stated that during his 2½ year tenure with the Employer from April, 2005 to September 2007, there were more repairs than renovations performed in the buildings he managed. He stated that it was the Employer’s practice to first offer the repair jobs

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to the superintendent in whose building the repairs were needed. However, he did not offer those jobs to Medina, Millet and Nina. De los Santos did perform some repair work in his building. Burrell testified that, generally, supplemental repair work was first offered to the superintendent in the building because the work gets done and the tenants are kept happy.

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As to the extent of the work available, Scharfman stated that in the 1990's there was much renovation work to be done and the Employer was not that selective as to the quality of the work done. After that time, the amount of such work declined. Later, when the areas in which Medina's and Nina's buildings were located became more desirable, higher rents were charged, and the tenants demanded higher quality work and that the superintendents maintain their buildings better. Consequently, the renovations performed had to be of higher quality which required more skilled craftsmanship. He noted, however, that that change occurred over time and may have begun in 2003 or 2004. Later, he said that this change began in 2000.

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Scharfman stated that in 1995, the Employer acquired eight buildings, and in 1996, supplemental repair work became available in those buildings. In 1997, some of the supplemental repair work projects begun in 1995 were nearing completion. Scharfman stated that, beginning in 2000, a New York City regulation required that plans be filed for sheetrock installation and changes in wiring. As a result, the Employer had to hire people who could perform the work to the standards of the New York City Buildings Department in conformance with Code regulations.

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Scharfman stated that in 2001 and 2002, as more apartments were renovated, less work was available, especially in the four buildings involved here. In 2002, the amount of work declined further. All four superintendents were asked to do gut renovations at that time. Nina and Millet did much of this work, but Medina and de los Santos did less. Scharfman and Ramirez stated that after the "initial phase" of supplemental repair work was completed, similar work in the newly acquired building declined dramatically, noting that the first two to three years of a new building's acquisition constituted the greater amount of work that needed to be done.

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Scharfman testified that when a superintendent was offered the work and agreed, he was paid a certain amount for the work. He noted that if the superintendent declined to do the work he would not be disciplined for refusing, but if the superintendent "continually declined" to accept the offer of supplemental repair work, the Employer assumed that he did not want to do any other work, and such work was not offered to him. However, Scharfman withdrew from that statement somewhat by stating that even if the employee declined often the Employer may continue to offer him work, but if the employee flatly stated that he no longer wanted such assignments, it would not continue to offer that work, but perhaps it might. Scharfman denied knowing if any of the four superintendents declined work prior to May, 2003.

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Scharfman testified that prior to March, 2003, the four superintendents received supplemental repair work if they were capable of performing it. He noted that the quality of the work of some of the superintendents was not good, adding that certain work had to be redone with more competent workers who were licensed electricians and plumbers. If, however, the apartment required a renovation which would include new sheetrock, mouldings, baseboards, the leveling of floors, and replacement of plumbing, such work was not within the ability of the superintendents nor did they have the time to perform such work.

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Manager Burrell flatly testified that those superintendents who were very active in behalf of Local 32 were not given supplemental repair work. He testified that Scharfman told him in the spring of 2003 not to give certain employees supplemental repair work. Accordingly, he stopped offering Medina such work. However, inasmuch as Burrell was not the manager for de los

Santos, Millet or Nina, Scharfman's order did not affect those superintendents.. Significantly, Burrell stated that he had stopped offering Medina supplemental repair work long before this directive from Scharfman because he was not a capable worker. So "Scharfman's directive did not impact any supplemental repair work I offered Medina." Manager Burrell stated that he had
5 the authority to authorize the payment of up to \$1,000 to have a small repair done, but larger repairs had to be approved by Scharfman. However, according to Burrell, Scharfman told him in 2003 that he should not offer supplemental repair work to superintendents until he "ran it past him." Burrell noted that that directive changed his ability to offer such work and was a
10 "revocation" of his authority to offer such work up to \$1,000. He noted that even in 2000, before the Union campaign, the superintendents were paid less than the agreed price.

Burrell stated that in the summer of 2003 (later he said December, 2003) he told Scharfman that he wanted to meet with him and his fellow agents in order to discuss the union issues and their ability to have work performed. At the meeting, Scharfman advised that they
15 should not be speaking about unions with the superintendents. Burrell stated that Scharfman announced that any supplemental repair work had to be "cleared through" Scharfman. The agents complained that that policy was impacting on their ability to get the work done, including Burrell's complaint that it was taking longer to complete the jobs because he was told that the
20 "uptown superintendents" who had been active in behalf of Local 32 were not being permitted to do supplemental repair work. Burrell stated that at that time he did not notice that the amount of supplemental repair work had diminished in his buildings, noting that the amount of such work was "consistent" in the spring and summer of 2003, and in fact during his entire tenure.

Burrell testified that, generally, supplemental repair work was first offered to the
25 superintendent in the building because the work gets done and the tenants are kept happy. However, Scharfman's order in the spring of 2003 that he should not offer any work to the superintendents beyond the regular superintendent's job nullified his usual practice. For example, Burrell stated that when he submitted a bill for a job done by a superintendent who was involved with Local 32, Scharfman asked why he wasn't notified first. Then he was told not
30 to give supplemental repair work to that person or any of the other superintendents until he advised Scharfman. He stated that Scharfman was "very adamant" in telling him not to give any superintendents any supplemental repair work without getting his approval.

Manager Sosa testified that when he began work for Beach Lane in April, 2005,
35 following the reinstatement of the superintendents pursuant to the Settlement Agreement, he did not offer renovation work to the superintendents, but rather offered them smaller repair jobs, such as painting. Sosa further testified that when he began work, the four superintendents told him that the Employer was supposed to give them supplemental repair work, and that they were entitled to such work based on the Settlement Agreement. Sosa did not know what they meant
40 and he never found out since he never saw the Settlement Agreement. Nevertheless, Sosa stated that none of the four superintendents received renovation work. However, other superintendents occasionally performed renovations.

Scharfman denied telling his managers or other agents not to offer supplemental repair
45 work to the four superintendents because of their interest in the Union. Managers Bryant, de Chalus, Ramirez and Sosa denied that any Employer agent told them at any time that they should not offer supplemental repair work to the superintendents they managed. Ramirez stated that no Employer agent told her that she should reduce the amount of supplemental repair work offered to any superintendent, to increase the work load of any of them, begin visiting the
50 buildings more often to watch them, or more closely scrutinize their work product.

Superintendent Reyes Marte stated that following the May 7, 2003 meeting, he

continued to perform supplemental repair work and renovations despite the fact that he never had a contractor's license. He stated that occasionally he would explain that the job was larger than originally estimated and ask for more money, and the Employer would pay the increased amount. However, on other occasions where he asked for more money for a job, the Employer would not pay more.

Marte further stated that when the Employer mentioned a price for a job he could reject it if he did not want to perform the job, and he would do so. He found that the prices paid by the Employer were sometimes fair and sometimes too low.

Regarding the allegation that the superintendents were not offered as much supplemental repair work because of their union activities, Scharfman stated that Marte may have been offered more supplemental repair work in 2003 than before because his work was better and there was less work. Alternatively, he may have been offered the same amount of work but there was less work to be done. He admitted that in 2003, Marte was offered more work than Medina. Scharfman stated that Marte did supplemental repair work in 2003, and had helpers who assisted in his doing such work to which Scharfman did not object. The helpers did only supplemental repair work. He stated that he did not impose on Marte a one-mile limitation from the superintendent's building to the location of the supplemental repair work, but such work had to be "close enough" so that if there was a problem he could return to his building quickly. Scharfman also stated that in 2003, the Employer offered superintendents Alfredo Cano, Cologne, Marte and Diogenes Rosario more supplemental repair work than it had in the past, noting that as the amount of supplemental repair work decreased, there was less work available for the four superintendents.

In addition, Ramirez stated that, before 2004 and after 2006, Omar Cologne, who was not one of the Employer's superintendents, and Marte received more supplemental repair work, and that she was responsible for offering more such work to them. However, she noted that no Employer agent told her to offer more work to them. Rather, she did so because their work was excellent and they completed their assignments faster than others. Also, their prices were approved by the Employer and they were easier to work with than other superintendents, stating that there was no "conflict" – she was able to negotiate changes in prices easily.

I. The Offers of Money to Quit

Millet stated that during his organizing activities for Local 32 in July and August, 2003, manager David Alvarado told him that Scharfman wanted to pay him to quit his job, and asked him how much money he wanted. Millet replied that he had done nothing wrong to warrant resigning.

De los Santos testified that Sosa told him that he looked sick and should move out, and asked how much money he wanted to vacate the premises, adding that he should meet with Medina and Millet, decide on an amount, and he would inform Scharfman. In about May, 2005, they met and de los Santos said that the three men would quit their jobs for a total of \$200,000. Sosa refused, adding that he thought they would ask for \$10,000 each. Medina confirmed this testimony. Sosa said that he would advise Scharfman of their conversation. Medina stated that the men asked Sosa why they were not being offered supplemental repair work. Sosa said that he would ask Scharfman. One week later, Sosa told him that Scharfman refused to give them such work.

Medina testified that one or two weeks following that meeting, he and de los Santos met again with Sosa, who asked de los Santos why he did not find another job if Scharfman "was

5 already giving you problems.” De los Santos said that the men were only asking for the jobs that should have been offered to them as they were being given to other superintendents. Sosa replied that Scharfman did not want them doing such work, and that Scharfman would give Millet \$200,000 to quit his employment. Sosa denied offering de los Santos money to quit his job, and also denied directing employees to resign in or after July, 2005. He did not know that any employees were cooperating with the Board at that time.

J. The Four Alleged Discriminatees

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1. Eugenio de los Santos

15 De los Santos, who began work in April, 1995, was the superintendent at 614 West 152 Street, a building having 60 units. He employed a porter at his own expense. He stated that property manager Greg Goodman told him his was a part-time job – that he only had to work at his superintendent’s duties until noon, and then he was free to perform supplemental repair work with the help of his porter. De los Santos stated that he renovated apartments, including replacing ceilings and floors.

20 De los Santos stated that he signed a card for the Union in 2001, and again in late 2002 at the request of Marte, Medina, and Nina. His reasons for signing a card in 2003 included a low salary and not being paid properly for supplemental repair work. De los Santos was one of the four superintendents, who, together with about 15 others, met with a Local 32 agent in January, 2003. Thereafter, they solicited their fellow workers to sign cards for the Union. De los Santos stated that they visited about 100 of the Respondent’s buildings, and notified other workers of the March 3 Union meeting.

25 As set forth above, on March 4, manager Bryant told de los Santos that nothing would come of the Local 32 meeting because Scharfman would pay Nina to quit, to which de los Santos replied that there were three other heads of the snake. Bryant suggested that de los Santos resign if he was not happy. As noted above, de los Santos attended the May 7 Employer meeting where he requested health insurance and complained that he was not receiving as much supplemental repair work as before. As also noted, he appeared in the *Hoy* newspaper and engaged in public demonstrations with the other four superintendents in support of the Union.

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40 As noted above, Scharfman met with de los Santos on March 9, telling him to use the basement for himself and admitted to de los Santos that he knew that he was trying to organize for Local 32, and at the same time threatened to sell the buildings if the Union succeeded. At the meeting, de los Santos requested a pay raise, and shortly thereafter, effective April 18, he received pay raises retroactive from January 1, 2001, increasing his salary from \$407.30 to \$430.00. Bryant stated that he told Scharfman of de los Santos’ complaints regarding his wages, hours and working conditions, and Scharfman conceded speaking to de los Santos about those matters.

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As set forth above, on October 29, 2004, de los Santos was discharged allegedly for not paying dues to Local 187.

Supplemental Repair Work

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Regarding supplemental repair work offered to de los Santos, Bryant testified that prior to the May 7 meeting, he offered de los Santos repair and renovation work in his building and also a “ton of work” across the street in another building. There were no issues regarding the

quality of his work.

5 De los Santos testified that in 2003 he did most of the supplemental repair work for the building that adjoined his – 625 West 152 Street, but that after the 2003 organizing campaign began he was not offered 95% of the supplemental repair work that he would ordinarily have been offered. Instead, superintendent Miguel Soto and Soto's brother in law were being offered such work. As to those jobs he did perform, de los Santos mentioned that he was being paid less than the agreed-upon price, or not paid at all for work that he did, and that situation had existed since 1995, even before the Union organizing drive.

10 De los Santos stated that he complained to Scharfman about not being given supplemental repair work, and Scharfman replied that other superintendents were also entitled to such work, and that if there was no work in their buildings, he had to send them to his building. De los Santos agreed that that had been the practice before, but in those instances he was busy with other work and did not complain that others did the work that he should have done.

15 Manager Bryant stated that after de los Santos was reinstated in April, 2005, he (Bryant) had already been told by Scharfman that the superintendents were “no longer to get renovation work,” but he was still permitted to offer de los Santos additional repair work and he did offer him such work.

20 The thrust of the Respondent's witnesses' testimony, especially the testimony of Bryant, was that de los Santos was not satisfied with the amount of money he received for the jobs he did, and would decline jobs which did not pay enough. In fact, Bryant stated that before and after the May 7, 2003 meeting, de los Santos asked him to stop offering him such work because he would not do it because of the low payment, and that he therefore simply stopped offering work to de los Santos. Similar testimony was given by Scharfman and superintendent Reyes Marte, that de los Santos declined offers of work because he was not paid enough.

25 The thrust of the Respondent's witnesses' testimony, especially the testimony of Bryant, was that de los Santos was not satisfied with the amount of money he received for the jobs he did, and would decline jobs which did not pay enough. In fact, Bryant stated that before and after the May 7, 2003 meeting, de los Santos asked him to stop offering him such work because he would not do it because of the low payment, and that he therefore simply stopped offering work to de los Santos. Similar testimony was given by Scharfman and superintendent Reyes Marte, that de los Santos declined offers of work because he was not paid enough.

30 Nevertheless, Bryant continued to offer him such work through the summer of 2005 notwithstanding his complaints about prices, and at one point de los Santos began to accept those offers of work. Indeed, superintendent Marte testified that he (Marte) occasionally asked that he be paid more money for a job than what he received, but he was not denied additional supplemental repair work for that reason. Rather, he continued to receive large amounts of such work.

35 De los Santos was reinstated in April, 2005, following the Settlement Agreement. Manager Sosa, who was hired in April, 2005, was told by Ramirez that de los Santos had engaged in activities in behalf of the Union. De los Santos stated that manager Sosa, who was hired in April, 2005, told him that he was hired by the Employer “to get everything the way it was before.”

40 De los Santos stated that he asked Sosa “all the time” for supplemental repair work, but was not offered such jobs. He testified that the first time he was offered such work following his reinstatement was in September, 2005 when he filled a container with debris, and was not paid for doing so. He denied telling Sosa that he would not accept such work because the prices offered were too low. Sosa stated, in contrast, that when he began work in April, 2005, he offered de los Santos supplemental repair work. At first, he said that he was not interested but then said that he would accept such work and he did such work. In his pre-trial affidavit, Sosa stated that de los Santos had not done any supplemental repair work in his building because he said that he did not want to do such work. However, Sosa added that in September 2005, de los

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Santos said that he wanted to perform such work.

5 De los Santos testified that in September, 2005, Sosa asked him to do certain supplemental repair work in an apartment. Sosa told him that he was given that assignment because “they already know that I was coming to the Labor Board to complain about me not having this.” De los Santos stated that following September he did many small jobs but was not paid.

10 De los Santos stated that Sosa was angry because he asked de los Santos to pick up certain material for an outside contracting job that someone else was assigned to, and de los Santos refused. Sosa demanded that he follow his orders, adding that Scharfman reinstated him, not because he wanted to, but because the NLRB “made him to keep [him] in the building. But he really don’t want me in there, so I have to do what he’s telling me to do, otherwise he has to fire me.” De los Santos stated that manager Larry Wornum warned him to be careful with
15 Sosa because he was “doing something to [him] in the office.”

Property agent Sosa testified that it was well known that de los Santos was involved with the Union, but he was not told to treat him any differently than any other employee who did not engage in union activities. Indeed, Scharfman stated that he never directed office workers to
20 refuse to offer supplemental repair work to de los Santos.

An important comparison of de los Santos’ work records may be made based on the Respondent’s records of the work done in his building during the years 2002 to 2007.¹⁵ Work
25 was performed in his building by de los Santos and other individuals. I have compared the amount of work performed and the amount of money earned from such work by de los Santos and other individuals who performed work in his building during that time period.¹⁶

I have followed this procedure for the other three superintendents. In considering the amount of jobs done and money earned by people other than the four superintendents, I have
30 omitted work done by companies such as HL Repair, D.O. Refrig, and Jedco inasmuch as individuals such as the four superintendents would not have done such work.

Thus, in 2002, de los Santos performed 53 supplemental repair jobs in his building earning \$15,575. In that year, 95 jobs were performed at his building by people other than de
35 los Santos, paying \$13,825.

In 2003, de los Santos did 38 jobs in his building and earned \$9,340. A total of 53 jobs were done by others that year, valued at \$10,985.

40 In 2004, recognizing that de los Santos was discharged in late October that year, de los Santos did 2 jobs, earning \$125, while a total of 36 jobs were done by others from January to October, for which they were paid \$9,040.

45 In 2005, following his return to work in April pursuant to the Settlement Agreement, de los Santos did not perform any jobs until September. He did a total of 13 jobs from September to December, totaling \$3,125, while the total number of jobs done by others during that time was

50 ¹⁵ The documents cited, General Counsel’s Exhibits 96 and 97, are summaries of the Respondent’s records. I received the exhibits over the Respondent’s objections, but I note that the Respondent relied on those exhibits on page 39 of its brief.

¹⁶ GC Exhibit No. 97(c).

38, being paid \$11,735.

In the first five months of 2006, prior to his resignation on May 24, de los Santos did 5 jobs earning \$2,250, while other individuals did 31 jobs totaling \$11,350.

Regarding the supplemental repair work done by de los Santos including jobs done in his building and at other buildings, in 2002, he performed 64 jobs totaling \$18,825, in 2003, 40 jobs amounting to \$9,578, in 2004, no jobs, in 2005, 10 jobs totaling \$2,550, and in 2006, 6 jobs adding up to \$2,250.¹⁷

De los Santos quit his job on May 24, 2006 in exchange for the payment of \$5,000. His reasons for resigning were that he was not offered the renovation of a vacant apartment, was not receiving supplemental repair work, and thus was not making enough money.

Scharfman stated that, beginning in 2000, a New York City regulation required that plans must be filed for sheetrock installation, and changes in wiring. As a result, the Employer had to hire people who could perform the work to the standards of the New York City Buildings Department in conformance with Code regulations. Scharfman stated that de los Santos had "good skills" but was not familiar with the New York City Building Code.

2. Domingo Medina

Medina began work in November, 2000 at 709 West 176 Street, a building having 50 units. He employed a porter at his own expense.

Medina stated that in 2002, he and the other superintendents organized in behalf of the Union. As set forth above, in January, 2003, Medina and the four superintendents visited the Local 32 office, and thereafter solicited other employees to join the Union. He attended the March 3 meeting in Nina's apartment, and was present at the May 7 Employer's meeting where he complained that it seemed that only the "leaders" were invited. Thereafter, Medina distributed flyers at Respondent's buildings and was portrayed in a *Hoy* newspaper article which Scharfman acknowledged seeing.

Supplemental Repair Work

Medina stated that the Employer's unfair treatment of him including reducing the amount of work and not paying him began in early 2000 and continued through 2002 because of his activities in behalf of the Union. Medina stated that the amount of supplemental repair work offered him declined from 2000 to 2001 because, beginning in 2000, certain renovations that should have been assigned to him because they were located in his building, were not assigned to him. Medina supported that statement by saying that when he was hired, Scharfman told him that all the work in his building would be offered to him. However, he conceded that Scharfman was entitled to change his mind as to that "verbal agreement" and, as the owner, could assign the work to others. Medina noted that if Scharfman believed that he had too much regular superintendent's work he still was not entitled to offer the supplemental repair work to others because he (Medina) had other workers who could perform such work. He stated that when he did renovations he used other workers to help him. He did his regular superintendent's work on Saturdays and Sundays.

¹⁷ GC Exhibit No. 96(c).

Medina stated that Miguel Soto and perhaps others did supplemental repair work in his building even before the 2003 Union campaign. He stated that after the four superintendents began the Union campaign in 2003, he was not given supplemental repair work, noting that jobs that were normally done by him and Willie Lara were not offered to him.

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Scharfman admitted that in 2003, Marte was offered more work than Medina because Marte's work was better and there was less work to be done, or that Marte was doing the same amount of work as before, but there was less work available. Regarding the quality of his work, Ramirez stated flatly that, when she was in charge of his building from 2000 to 2004, and then from 2006 on, she had "no problems" with the way in which Medina performed his work. Further, Bryant, who was not Medina's manager but had visited his building a couple of times found that it was clean, and heard that he "maintained a good building." Similarly, Sosa stated that Medina's building was "very clean, safe. I have no complaint." Oddly, Scharfman testified that Medina could not do much work himself – he was incapable of doing sheetrock, plumbing or tile work, so he subcontracted such work to others, and his subcontractors' work was not of a high quality. However, he was never suspended or received a written warning from the time he was reinstated until his discharge.

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As set forth above, Medina was discharged on October 29, 2004 for allegedly not paying dues to Local 187. After Medina returned to work in April, 2005 pursuant to the Settlement Agreement he met monthly in his or Millet's apartment with other superintendents regarding the Union campaign. Those meetings occurred in November, 2006, and in July, October and December, 2007. In July, 2007 he told manager Sosa that the men were meeting.

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Sosa conceded that it was the Employer's practice to first offer supplemental repair work to the superintendent in whose building the repair was needed. However, he stated that this practice did not apply to Medina, Millet or Nina, who did not do any supplemental repair work during Sosa's term of employment from May, 2005 through September, 2007. Sosa was told by Ramirez that Medina had engaged in Union activities. De los Santos stated that Sosa told him that he looked sick and should move out, and asked how much money he wanted to vacate the premises, adding that he should meet with Medina and Millet, decide on an amount, and he would inform Scharfman. In about May, 2005, they met and de los Santos said that the three men would quit their jobs for a total of \$200,000. Sosa refused that amount, adding that he thought they would ask for \$10,000 each. Medina confirmed this testimony. Sosa said that he would advise Scharfman of their conversation. Medina stated that the men asked Sosa why they were not being offered supplemental repair work. Sosa said that he would ask Scharfman. One week later, Sosa told him that Scharfman refused to give them such work. Sosa denied offering de los Santos money to quit his job, and also denied directing employees to resign in or after July, 2005. He did not know that any employees were cooperating with the Board at that time.

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Sosa stated that he did not show Medina any large renovation jobs because Medina told him when Sosa began work in April, 2005 that he had no interest in doing large jobs. Sosa noted that Medina did not thereafter tell him that he changed his mind and would perform such jobs. In addition, Sosa stated that Medina told him that he did not want any supplemental repair work, advising that he simply wanted to do his regular superintendent's job.

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Medina stated that shortly after he was reinstated in April, 2005, he received only two or three supplemental repair jobs per month, with Pablo Checo and Reyes Marte doing all of such work in his building. He complained to Ramirez that Checo and Marte were doing supplemental repair work in his building instead of him. She replied that Scharfman did not want him and the others to do those jobs and he would not be offered such work. Ramirez testified that Medina

did not do much supplemental repair work because he was not interested in doing such work. If a big job became available, they would discuss it and if Medina decided that it was too much work for him he declined to do the work.

5 Medina stated that in October, 2005 he was offered supplemental repair work in an apartment. He checked the apartment and told Ramirez that he wanted \$300 to \$350 to do the work. Ramirez said that she would call him back. She did not do so, but had another worker do the job which was not done correctly. Ramirez asked Medina if he could re-do the job and Medina refused because the worker who did the work should fix his errors. He testified there
10 was one instance in which he was offered to do supplemental repair work but declined because of drug issues related to the tenant's son. Medina had called the police twice about the son's activities and the tenant was angry at him. Medina testified that, aside from his refusal to do supplemental repair work in that apartment, he never told the Employer that he no longer wanted to do supplemental repair work.¹⁸ In addition, Ramirez stated that she did not offer
15 Medina large supplemental repair jobs, and Burrell stated that he did not believe that he was "capable" of performing supplemental repair work.

Medina stated that when he did supplemental repair work he asked for a certain price. He received a check for the amount he requested only a few times. On the other occasions, he
20 received less than the amount he asked for. He never told Sosa that he did not want to do supplemental repair work in his building because the prices he received were too low. However, in his pre-trial affidavit, Medina stated that in November, 2005, he declined supplemental repair work because the Employer did not offer the proper amount of money. Superintendent Marte stated that Medina told him that he did not want to do supplemental repair work for the prices he
25 was being paid.

Superintendent Reyes Marte stated that he installed a light fixture in Millet's building which was ordinarily a superintendent's regular work. He asked Millet why he did not install the fixture and Millet replied that he did not get paid for such work and did not want to do it.
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Scharfman stated that the quality of Millet's work was not good; that was his "biggest problem," broadly stating that Millet's work was "incompetent." He also noted that Millet was "dissatisfied" with whatever price he was paid for the work he did.

35 Manager Valdet Prelvukaj who replaced Sosa and worked for the Employer from December 3, 2007 to April 30, 2008, was responsible for Medina's building. Prelvukaj's pre-trial affidavit stated that when he began work he offered at least one supplemental repair job to Medina, but he declined. At that time he was not aware that Medina had been involved in activities in behalf of the Union. Prelvukaj stated that Scharfman told him not to offer
40 supplemental repair work to Medina. Prelvukaj attempted to explain that inconsistency by stating that the one or two jobs offered to him were part of his regular superintendent's work.¹⁹

Prelvukaj drew an odd distinction between "supplemental repair work" which he agreed was extra, voluntary work for which the employee was paid, and "extra work" which he stated is
45 part of the superintendent's required duties for which he did not receive additional pay. Nevertheless, he stated that superintendents "usually have the first dibs on supplemental work," adding that if they cannot perform the work or if they did not want it such work was given to

¹⁸ Medina stated that he did perform his regular superintendent's duties in that apartment.

50 ¹⁹ Prelvukaj further explained that when he gave his affidavit he was on painkilling medication, was uncomfortable and was interviewed for more than five hours.

someone else.

Director of Repairs Seemer testified that, in the fall of 2007, he was not aware of any HPD²⁰ violations in Medina's building. However, apparently there were violations prior to that time. Seemer stated that he spoke to Medina about the number of violations in his building, and thereafter noticed that the number of violations was rising.

On December 13, 2007, Seemer sent an e-mail to Employer attorney Laurent Drogin stating that Scharfman asked him to bring to his attention the fact that Nina and Medina have "extremely high HPD violation counts at their buildings ... because they are not getting repairs done in the individual apartments and the building as a whole (common areas). Medina's building had over 80 violations." Seemer stated that 60 to 80 violations are considered high. In contrast, Medina testified that he resolved all the violations in his building. It must be noted that, notwithstanding that the violation notices are kept by the Respondent and are also available from the HPD, none were offered in evidence.

Prelvukaj stated that there were about 100 to 125 HPD violations in Medina's building, the most of any of the buildings he managed. Further, in December, 2007, Medina was not addressing or resolving the violations at a rate to his satisfaction - he "never took care of anything." Prelvukaj stated that he gave Medina a direct order to do his regular superintendent's work and Medina refused. Prelvukaj reported this act of insubordination to the office.

Prelvukaj stated that when he began work for Beach Lane in December, 2007, Scharfman told him that he should not offer supplemental repair work to Medina until he got his building "in shape." His pre-trial affidavit states, however, that he was never instructed by Scharfman or anyone else whether to offer supplemental repair work to Medina or not to offer such work to him. Thereafter, Medina asked for supplemental repair work and Prelvukaj replied that he should get his building in shape and once it is in "topnotch shape I don't mind offering you extra work." Prelvukaj explained that since Medina was doing "nothing" in the building there was "no point" in offering him such work. Prelvukaj noted that if the building was better cared for he could have offered him supplemental repair work, and that there was no other reason that Prelvukaj did not offer him such work. Accordingly, Prelvukaj did not offer Medina any supplemental repair work. Instead, Pablo Checo and Reyes Marte performed supplemental repair work in Medina's building.

In his second week of employment, Prelvukaj reported to Scharfman that he was unable to contact Medina. Scharfman told him to keep a log of the times he tried to reach Medina. One week later, Prelvukaj again reported to Scharfman that he could not reach Medina. Scharfman again told him to keep a log. Prelvukaj did not keep such a log despite being instructed to do so. He was unaware of any discipline given to Medina due to his inability to be contacted. It should be noted, however, that Prelvukaj stated that he saw Medina five times in our around the building when he visited the building during working hours in the five weeks he was employed. Prelvukaj termed an "excuse" Medina's complaint that he was unable to receive calls on the Nextel phone in his basement. Prelvukaj conceded that Medina could have been in the basement performing his duties when he tried to call him. It should be noted that manager Sosa conceded that de los Santos' Nextel phone did not work in the basement of his building.

²⁰ The New York City Housing Preservation & Development (HPD) agency issues notices of violation to owners of houses. The violations have deadlines by which the Employer must remedy them and notify HPD that that has been done.

Prelvukaj stated that he visited the building twice or three times per day and in nearly all of those visits did not find Medina in his building. His visits were so frequent because he wanted to ensure that it was maintained properly. Prelvukaj stated that of the 12 to 15 superintendents he managed, Medina was the only one he could not reach on his Nextel phone.

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Medina stated that prior to mid-2003 he performed supplemental repair work every week after he finished his regular superintendent's duties for the day. He stated that his average annual income for supplemental repair work was \$8,000 greater than his annual superintendent's salary, and that prior to mid-2003 he earned more by performing such work than he did from his regular salary. This is supported by the following analysis which compares the work done by Medina in his building during the years 2002 to 2007²¹ with the work done by other individuals.²²

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Thus, in 2002, Medina performed 49 supplemental repair jobs in his building earning \$14,640. In that year, a total of 72 jobs were performed at his building by other individuals, totaling \$19,990.

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In 2003, he did 50 jobs in his building and earned \$15,740. A total of 14 jobs were done by others that year, valued at \$8,175.

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In 2004, Medina did 2 jobs, earning \$1400, while a total of 29 jobs were done by others, which were paid \$14,405.

In 2005, following his return to work in April pursuant to the Settlement Agreement, he did no supplemental repair work at all that year. However, in the period May to December, others did 27 jobs and were paid \$7,430.

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In 2006, Medina also did no jobs, while the total number of jobs done by others was 55, earning \$8,442. In 2007, Medina did no jobs, while the total number of jobs done by others was 83, totaling \$36,775. He was fired in early January, 2008.

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Regarding the supplemental repair work done by Medina including jobs done in his building and at other buildings, in 2002, he performed 52 jobs totaling \$17,240. In 2003, he did 32 jobs amounting to \$8,515. In 2004, he did 2 jobs totaling \$1,400. In 2005, 2006, and 2007, he did no jobs.²³

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The New Years' Day Visit

Manager Prelvukaj stated that on January 1, 2008, a tenant called him complaining of no heat or hot water in her apartment. Prelvukaj tried several times to call Medina on his Nextel and also on his cell phone, and received no answer. He had not been given Medina's home phone number. Prelvukaj drove to Medina's building at 12:30 p.m. and phoned again with no success. Prelvukaj could not find him in the basement. He asked a man in the building to locate Medina and he did. Medina had just awakened.

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Prelvukaj told Medina that there was no heat or hot water in the building. Medina walked

²¹ The documents cited, General Counsel's Exhibits 96 and 97, are summaries of the Respondent's records.

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²² G.C. Exhibit No. 97(d).

²³ G.C. Exhibit No. 96(d).

to the boiler room and added water to the boiler. The boiler then began working and the problem was fixed. Medina stated that in late 2007 he began noting that the automatic pump in the boiler was not working, and the problem was remedied by adding water very frequently, every three to four hours. On December 31, water was added at 10:00 p.m. and at 5:00 a.m. the following morning. Medina said that the boiler's pump was repaired two to three days after his discharge in January, 2008.

The basement consists of a series of rooms connected by a hallway. The ceiling in the entire basement has exposed pipes and wires. In one area, the concrete floor is painted gray. In that area, there is a clothes washer and dryer, and a framed picture on the wall. The other area has a wood parquet floor, a freestanding upholstered bar, a refrigerator, a large audio speaker on the floor, a number of folding chairs, a disco ball on the ceiling, and an air conditioner installed in the wall of a room.²⁴ During his visit in the basement, Prelvukaj observed three to four liquor bottles on top of the bar, other liquor bottles in the room, and a large number of chairs.

Prelvukaj stated that he did not know if the washer or dryer were operational but he heard the refrigerator working. He believed that the area with the concrete floor was not the superintendent's living space because of the pipes and wires on the ceiling. Originally, Prelvukaj believed that the area with a parquet floor was Medina's personal living space, but on January 1 he was of the opinion that that area, too, was not part of his apartment because of the pipes and wires, the disco ball, paintings on the wall, and electric meters on the wall. Prelvukaj stated that he had never seen electric meters in the personal living space of any of the other superintendents' apartments.

During his visit, Prelvukaj did not ask Medina about the areas of the basement he had observed. Immediately upon leaving Medina's apartment, Prelvukaj called his senior property manager and reported the no heat-no hot water call, that he could not reach Medina before he visited the building, and that during his visit he observed liquor bottles in the basement. During his discussion with manager Jeffrey Carleton, Prelvukaj did not mention that he saw items being stored in the boiler room. He did not take any photographs of the boiler room on January 3. He stated that prior to January 1, he was in the basement about ten times but did not report any inappropriate items until he saw the liquor bottles. During those ten visits he saw the refrigerator, the bar area, and the framed pictures. Medina testified that he was in his apartment the entire day on January 1, and did not receive a call from Prelvukaj.

Prelvukaj stated that it was not his practice to contact his supervisor each time he visited a building unless such a call was necessary, and in this instance he believed that it was necessary because of the no heat-no hot water complaint, despite the fact that the problem was remedied. The following day, January 2, Carleton reported to the Respondent's attorney Drogin and to Scharfman that Medina "has converted the basement area outside of his apartment into a lounge area." Prelvukaj was asked to return to the basement on January 3 to take photographs of the area and to describe to Drogin the fact that Medina does not answer his phone and is not available for emergencies. Carleton noted that the electric usage "in his apartment" has increased dramatically recently "which suggests he may be using this electric for the public areas."

On January 3, Prelvukaj took photographs of the basement area, but not the boiler room, and sent the photographs to the Employer's office where they were seen by Ramirez, who

²⁴ Respondent's Exhibit No. 109 consists of photographs of the area taken by Prelvukaj.

testified that the washer and dryer depicted in one of the photos were in the same place when she saw them in 2007 during a visit to the basement. She did not tell Medina at that time that those appliances should be removed from the basement, nor did she report their presence to Scharfman. She last visited other areas of the apartment prior to 2004, and did not recall
5 whether a refrigerator was present at that time or whether the floor was parquet, and she did not recall seeing a bar there. She conceded that parquet floors are used in apartment areas.

The January, 2008 Discharge

10 On January 7, 2008 Medina was discharged by the following letter, which states in part:

Your termination is based solely on your unauthorized use of the Employer's property and your unsatisfactory work performance as set forth in this letter.

15 More specifically, without authorization from Management, you have converted the common areas of the basement of the building into what appears to be your own private lounge, including a bar, chairs, stereo speakers and a disco ball. You are not permitted to utilize the basement, outside of your Employer-provided
20 apartment, for your personal use or living space or for any use outside the scope of your superintendent duties. Unauthorized use of the Employer's property is construed as theft and cannot be tolerated.

25 The common areas of the basement are meant for storage use for building materials and supplies. However, you are storing these materials and supplies in the boiler room of the building, thereby creating an undue fire hazard.

30 In addition, as the superintendent for the building it is imperative that you advise someone, by calling or in some way communicating to management, as soon as is practicable, that you will be absent from the building. Management needs to know your whereabouts so that we can communicate with you both for routine matters and in the case of emergencies. Despite this, management was unable to locate your whereabouts on January
35 3, 2008. Leaving the building unattended is unacceptable and is a danger to the tenants.

40 Prelvukaj testified that he did not understand the reference that management was unable to locate Medina on January 3. He guessed that was perhaps when he was trying to "track him down." He noted that he was at the building two to three times that day. The first time he could not find Medina. Later that day he found Medina in mid-afternoon, prior to his taking the photographs.

45 Scharfman stated that he fired Medina because he put the building and tenants "in jeopardy" by having a party in the basement, erecting a disco ball and serving liquor. Scharfman claimed that Medina "converted" and "took over part of the public area of the basement into a party area," and moved certain unidentified building supplies into the boiler room which is supposed to be free of material of any kind.

50 Scharfman stated that based on the photographs of the basement and what Prelvukaj told him concerning the state of the basement, he decided to fire Medina whose interest in the Union did not affect his decision to discharge him. Scharfman stated that Medina was

jeopardizing the “quality of life” of the tenants by serving liquor there, and he did not want to be in violation of New York State Liquor Authority rules. He stated that the bar set up was located in the public, common areas of the basement which was not part of his apartment. Scharfman stated that he had not, in the past, permitted Medina to use that area for his personal
5 enjoyment, nor did Medina seek permission to use that area for a holiday party.

Scharfman stated that he had not prohibited superintendents from serving liquor in their apartments. However, according to information given him by manager Prelvukaj, Medina was doing so in the public area of the basement and using one or two refrigerators in which he was
10 “cooling beer” and entertaining people with music through loudspeakers.

Scharfman did not speak directly with Medina about his use of the basement in this way, and he did not instruct his managers to do so. On March 6, 2008, the Respondent began an
15 eviction proceeding against Medina.

Medina stated that when he was hired seven years earlier, he told Scharfman that some repairs were required in his apartment. Scharfman said that he would supply Medina with the materials to make the repairs. One of the materials supplied was parquet floor tiles, and he submitted a work order for the repair work which stated that he installed parquet floors in the
20 basement and bedroom for which he used 19 boxes of parquet tile. He testified that after he moved into the apartment he occupied the same space during his entire tenure there and did not take over additional space that had not been given to him at the time he was hired. Medina further stated that managers Ramirez, Sosa, Burrell and Prelvukaj visited his apartment frequently and no complaints were made to him that he was improperly occupying parts of the
25 basement

Medina stated that he owned the washer and dryer, having bought and installed them when he moved into the apartment. The framed pictures were his. His refrigerator was in the apartment for about seven years, and the bar and stools were there for four years. He stated
30 that he installed the disco ball in his living room on New Year’s Eve. The only time he used it was on December 31, 2007 when he and his family celebrated the New Year. He denied having other New Year’s Eve parties, but conceded having parties on Christmas and on other occasions. The audio speaker was also used on New Year’s Eve. No one, other than his family, had access to the area in question.

Medina further stated that no Employer agent told him that he was not allowed to occupy the apartment area in question which he occupied during his entire seven year employment with the Employer. Nor did any Respondent agent warn him about storing materials and supplies in the boiler room, and he did not store any materials there. He stated, however, that when he was
40 hired, supplies were kept in the boiler room and he was directed by office manager Evelyn Delgado to clean the boiler room. In February, 2001, he filled a container with such debris from the boiler room and was paid for doing such work.

Nor did he receive a warning from management that it could not communicate with him, or that he was hard to get in touch with, or that since he was reinstated in April, 2005,
45 management could not locate him. He would be called by manager Prelvukaj on his cell phone or his company phone or home phone, noting that the company’s Nextel cell phone did not work in the basement.

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3. Bolivar Millet

Millet began work for the Respondent in 1997 at 1265 Olmstead Avenue in the Bronx which has 87 units. A porter was employed who was paid by the Employer.

5 Millet testified that he first engaged in activities in behalf of Local 32 in 2002 or 2003, but according to his pre-trial affidavit he began such activities in about 2001.

10 Millet attended the March 3, 2003 Local 32 meeting in Nina's apartment. One month later, on April 4, he received a raise in pay. He stated that he was not told the reason for the raise. After the March 3 meeting he signed a card for Local 32, and also participated in meetings with de los Santos, Medina and Nina in which they distributed booklets and flyers for that union and also asked other workers to sign cards for Local 32.

15 Millet testified that after March, 2003, when he began engaging in activities in behalf of Local 32, he received few supplemental repair jobs. His pre-trial affidavit stated that since 2003 when he took part in activities in behalf of Local 32 and in NLRB proceedings, he did not receive supplemental repair work. He corrected that statement at hearing to the effect that he received supplemental repair work after March, 2003, but not as much as he had before that time, explaining that at the time he gave his affidavit he was not receiving such work. Similarly, he stated that from March, 2003 to October, 2004, when he was fired, he was engaging in activities
20 in behalf of Local 32 but was still receiving supplemental repair work although to a much lesser extent than he had received before March, 2003.

Supplemental Repair Work

25 Manager Ramirez conceded that Millet told her that he wanted to do more supplemental repair work and was not being offered such jobs, including renovations. Scharfman, too, stated that Millet wanted more work. Ramirez testified to several reasons why she did not offer him such jobs. First, she stated that Millet told her that he was "not comfortable" doing plumbing work. Thereafter, she did not offer him supplemental repair work which included plumbing, and
30 Millet did not complain that he was not getting such work. However, she conceded that he did much work in 2002 and 2003, but she did not know if such work included plumbing jobs. She also offered him light electrical jobs which were superintendent's work. Occasionally when she offered him an electrical job he said that he could not perform it because it was too big. He did not refuse any other jobs she offered him. Ramirez stated that she was not told that Millet
35 should be treated any differently when he was reinstated in 2005, or that she should not offer him supplemental repair work, or reduce the amount of such work she offered him.

40 Further, Ramirez stated that she did not offer Millet other jobs because she believed that he did not have the ability to perform them. She noted, in this regard, that he hired others to help him do certain apartment renovations, and at other times an apartment had to be renovated quickly and he needed help doing it. In addition, Ramirez added that she did not offer Millet larger jobs following his stroke because his wife said that he needed to "take it easy." In this regard, Millet stated that he had heart surgery, but had no medical issues when he returned to work in April, 2005 and was not medically restricted from any work.
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In addition, Ramirez stated that Millet was not offered work because he wanted too much money for the jobs. She claimed that when the Employer counter-offered with a lower amount Millet was then told of the lower price and was asked if he wanted to do the job for the lesser amount of money. Millet denied that any negotiation occurred when he gave a price for a
50 job. He simply was not given the job and it was assigned to Rodriguez or another contractor.

Finally, Ramirez stated that certain tenants refused to permit Millet to perform work in

their apartment. She stated that when she worked in the repair department from 2004 to 2006, she found that Millet would occasionally appear late for an appointment to make a repair or would not appear at all, or he would begin a repair and not complete it.

5 However, Ramirez stated that she would prefer to give the work to the superintendent in whose building the work was to be done, because of "convenience." Similarly, Sosa conceded that it was the Employer's practice to first offer supplemental repair work to the superintendent in whose building the repair was needed. However, he stated that this practice did not apply to Medina, Millet or Nina, who did not do any supplemental repair work during Sosa's term of
10 employment from May, 2005 through September, 2007.

An important comparison of Millet's work records may be made based on the Respondent's records of the work done in his building during the years 2002 to 2007. Work was performed in his building by Millet and other individuals.²⁵

15 Thus, in 2002, Millet performed 52 supplemental repair jobs in his building earning \$17,240. In that year, a total of 4 jobs were performed at his building by other individuals, totaling \$625.²⁶

20 In 2003, he did 102 jobs and earned \$18,850. A total of 17 jobs were done that year by other individuals, valued at \$6,430.

In 2004, Millet did 74 jobs until his discharge in October, 2004, earning \$12,820, while a total of 14 jobs paid \$6,650 were done by other individuals in that period of time.

25 When Millet returned to work in April, 2005 pursuant to the Settlement Agreement, he did not receive any supplemental repair work until October, at which time he did one job for \$75. Millet filed a charge against the Respondent in September, 2005 and he noticed that the amount of supplemental repair work he was offered declined drastically. He did no other jobs from
30 October to December, notwithstanding that extensive amounts of such work was being done in his building by others. Thus, in the months of May through December, 2005, 84 jobs were done by individuals in the amount of \$23,520.

35 In 2006, Millet did 1 job earning \$75 prior to being discharged in early February while other individuals did 22 jobs before his fire, earning \$2,590.

40 Regarding the supplemental repair work done by Millet including jobs done in his building and at other buildings, in 2002, he performed 158 jobs totaling \$24,910. In 2003, he did 100 jobs amounting to \$18,150. In 2004, he did 80 jobs totaling \$12,970. In 2005 and 2006, he did one job each and received \$75 for each job. In 2007, he did no jobs.²⁷

The Warning Letter of March, 2004

45 On March 5, 2004, Millet received a warning letter which stated that the oil burner

²⁵ G.C. Exhibit No. 97(a)

²⁶ G.C. Exhibit No. 97(a) mistakenly states that the total amount of money paid for supplemental repair work to all workers at Millet's building in 2002 was \$17,065. The correct amount is \$17,865. The exhibit also erroneously states that the total amount paid to Millet in
50 February, 2002 was \$500 whereas the correct amount is \$200.

²⁷ G.C. Exhibit NO. 96(a).

compressor motor had to be replaced due to lack of maintenance. Scharfman stated that the boiler was run without oil in the compressor motor which then seized and had to be replaced. On October 7, 2004, the Employer's oil burner company sent a letter to Scharfman advising that the burner needed a repair because it ingested a plastic bag. The company recommended that the superintendent keep the boiler room clean. Scharfman stated that he did not discipline Millet after receiving this letter, noting that he was aware, at that time, that Millet was a Union supporter, because he wanted to "avoid conflict or confrontation."

As set forth above, on October 29, 2004, Millet was discharged allegedly for not paying union dues to Local 187. He was reinstated in April, 2005 pursuant to the Settlement Agreement. Millet believed that the Agreement stated that he would receive a certain amount of supplemental repair work. In a conversation with Ramirez, she denied that that was the case. On April 13, 2005, Scharfman sent Millet a letter which stated that following his reinstatement on April 11, Millet told Ramirez that, pursuant to the Board Settlement Agreement, he believed that he would be "guaranteed supplemental repair work." The letter noted that superintendent Felix Rodriguez was offered supplemental repair work at Millet's building because the quality of his work was superior to Millet's and threatened "further disciplinary action" if Millet attempted to "direct or limit" the Respondent's right to offer supplemental repair work to those that it deems best qualified to perform such work.

Manager Bryant confirmed that he offered supplemental repair work to Rodriguez instead of Millet, but added that he "would have" offered renovation work to Millet under the condition that his superintendent's work had been completed, but at that time his regular superintendent's work had not been done. Bryant stated that although Scharfman directed that superintendents were not to be offered renovation work, superintendent Rodriguez was still being offered such work in Millet's building because Rodriguez' building was "immaculate." Similarly, Dio, Reyes and Cano's buildings did not have many violations and the buildings were well maintained so they were offered extra work. Bryant told Scharfman that these men did good work and their buildings were being maintained, and the work needed to be done, and asked whether they could do the work.

Millet was reinstated following the Settlement Agreement on April 11, 2005. One month later, Scharfman received a letter from his oil company referring to a May, 2005 incident in which the oil burner company informed Scharfman that the building's sump pump burned out because Millet put a brick on the pump's float, resulting in a \$2,000 repair. Scharfman stated that Millet received no discipline as a result of this incident because he tried "not to have a conflict or confrontation" with him and Local 187 and simply "let it pass." He stated that he did not want it to appear that the Employer was seeking to discipline him, especially since the Settlement Agreement had been signed only one month before, in April, 2005.

Sosa began to manage Millet's building in May, 2005, and was told by Ramirez that Millet had engaged in activities in behalf of the Union. However, he denied being told by any Employer agent that Millet should not be given supplemental repair work. In May, 2005, all the renovation work in Millet's building was being done by Felix Rodriguez. Sosa did not recall if he offered Millet supplemental repair work or small repair jobs, but stated that at times Millet said he would do such work, and at other times said that he was not interested. At those times when jobs were offered, they looked at the project and if Millet agreed, Sosa told him to call the office with a price. Sosa doubted whether Millet ever received any such work, speculating that the reason was that he charged too much money. Sosa's pre-trial affidavit stated that on a couple of occasions, Millet mentioned a price that was too high for the job's needs. Sosa further stated that Millet gave prices to the office regarding renovations, but he was not given the job because his price was too high.

Sosa further stated that he did not offer renovation work to Millet, but then stated that he showed Millet a couple of large renovation jobs, but then, according to Sosa, he was told that Sosa did not get those jobs because he asked for more money than other contractors. Sosa further stated that Millet would either not do needed repairs or was unable to do small repairs such as a leaky faucet, and that at times the Employer had to send someone else to make the repair. He noted that at times Millet makes repairs on a timely basis and at other times he did not.

Millet stated that he asked manager Sosa for the materials he needed to perform tenant repairs, but he did not receive them. Millet stated that in June, 2005, tenant association Leonardo Ruiz asked manager Sosa why Millet was not receiving the materials. Sosa replied that his job was to "get rid of me."

Millet filed a petition for a union deauthorization election on June 21, 2005 to rescind Local 187's union security clause in its contract with the Respondent. An election was held on August 9, and Millet and the porter voted to deauthorize Local 187's union shop authority.

The Respondent's Contacts with the Tenants' Association

Leonardo Ruiz, the president of the Olmstead Tenants' Association, had been complaining to Scharfman about the state of renovations and repairs in the building. He stated that in about June, 2005, manager Larry Wornum told him that "the problem was with Bolivar Millet, the super, and that if the tenants would help him by circulating a petition to get rid of Bolivar, that this would fix our problems. He told me that there was a court case with Bolivar, and that it could take three years to get rid of Bolivar, so it would help if we would all sign a petition to get rid of him. He told me that Scharfman had suggested to him that a petition would help get rid of Bolivar. I told Larry that I did not want to get involved." Ruiz further stated that in late summer, 2005, manager Sosa told him that "getting rid of Bolivar would fix the problems with the renovations. He asked me to discuss this with the tenants at the tenant association and to circulate a petition to get rid of Bolivar." Ruiz stated that in September, 2005 a petition was circulated in which 50 people signed in favor of Millet and seven signed against him.²⁸

Sosa stated that he spoke with tenant association president Ruiz in 2005. Sosa was told that some tenants were in favor of Millet being their superintendent, and some were not. Sosa denied soliciting complaints from tenants or asking them to sign a petition regarding his work performance. Rather, tenants approached him with complaints. A petition containing 41 signatures of tenants in Millet's building was received in evidence. The petition spoke about the employees' efforts to obtain representation by Local 32. In addition, on July 1, 2005, Ruiz sent a letter to Scharfman telling him that, although the tenants had complaints, and it was clear that "the agenda every manager has is to terminate Mr. Bolivar," he "is not the problem." Ruiz identified the problem as the Employer's emphasis in renovating empty apartments and not making repairs to the occupied apartments. Ruiz placed the blame on the Respondent's failure to provide Millet with the materials he needed to make the repairs.

The Offers of Money to Resign

Millet stated that in June or July, 2005, Sosa asked him how much money he wanted to

²⁸ The above quotations are from Ruiz' pre-trial affidavit which was received in evidence pursuant to a stipulation that he was unavailable to testify.

quit. Millet stated that he would accept \$50,000. Sosa replied that the Employer would give him \$25,000. Millet refused. Millet asked for that amount, knowing that it was too high because he did not want to leave, and he knew that the Employer would not give him that amount.

5 Manager Sosa denied speaking with Millet in the summer of 2005 regarding him leaving the job in exchange for a payment of money. However, Sosa stated that Millet told him "if they pay me for money, I leave." Sosa reported that remark to Scharfman who told Sosa to have Millet speak with him. At some point, Millet told Sosa that he wanted \$50,000 to resign. Sosa stated that in June 2005 he did not know that Millet cooperated with the Board. I credit Millet's
10 version that Sosa asked him how much money he wanted to resign. Significantly, Sosa admitted that he had a discussion with Millet concerning being paid to quit, and that he reported that conversation to Scharfman.

The Warning Letter of February, 2006

15 Sosa stated that he and the Employer's office had difficulty, from the beginning, in reaching Millet by phone. Ramirez testified that she had problems locating Ramirez after the May 7, 2003 meeting, and in 2003, she had trouble locating Millet. She conceded that she did not have a prearranged time that she visited the building because he was expected to be at his
20 building during work hours. She noted that occasionally she would call ahead of time on his Nextel phone and advise him that she was coming. On those occasions she sometimes could not reach him. She was not told that his Nextel phone was not working. In one instance, Sosa stated that he was told by the office that it could not reach Millet. Sosa went to Millet's building and, from his car, called Millet who was standing outside. He saw Millet check the phone but not
25 answer it. On February 3, 2006, Sosa gave Millet a warning letter as follows:

30 It has been brought to our attention that you have been turning off your cell phone and making yourself unavailable after your scheduled working hours. We write to remind you that as the superintendent of the building, it is your responsibility to be available at all times by telephone for case of emergency. Accordingly, please ensure that you company-issued cell phone is kept on at all times.

35 At the same time that Millet was given the letter, he again told Sosa that his phone was not working. Sosa told him to keep the phone on and not turn it off. Millet replied that he never shuts the phone but it is out of service.

40 Millet stated that in January, 2006, the screen of his phone said that it was out of service – he could receive a call but not dial an outside call. However, prior to January, 2006, the phone was in good working condition. The phone began to malfunction in late January, 2006. When that occurred, he called Sosa from his home phone. Sosa visited Millet who showed him the phone. Sosa dialed the phone and saw that it was not working. Millet asked him if he wanted
45 Millet's home phone number, and Sosa said that he was not interested, but the office had his home phone number. Millet stated that the Employer had his home phone number and could have called that number.

50 This was the first written warning given Millet following his reinstatement in April, 2005. Sosa stated that at the time the letter was sent, he did not believe that Millet was refusing to perform his regular superintendent's duties; however he still had problems with Millet not answering his phone. Scharfman stated that based on the February, 2006 letter, he believed that discharging him was justified, but did not want to do so since he did not want to be viewed

as doing anything that might be considered “retaliatory.”

Sosa reported to Scharfman that Millet did not listen to him, and instead did what he wanted. He was not present in the building, his cell phone was turned off and he was not answering the phone when tenants or the office called, he was not making repairs and that building violations were “accumulating.” Scharfman did not believe that his phone was broken, and if it was it would have been replaced immediately. Scharfman conceded that the office had Millet’s home phone number. Scharfman testified that the facts set forth in the letter were reported to him and he, Ramirez and manager Sosa jointly agreed that “enough is enough” and decided to fire Millet because he was not doing his job and his failure concerned “quality of life” issues. Scharfman stated that Millet’s support for the Union did not influence his decision to fire him.

The February, 2006 Discharge

On February 17, 2006, Millet took tenant association president Ruiz to the Regional Office where Ruiz gave an affidavit. When Millet returned home he was given the following discharge letter by Sosa, signed by Scharfman, which stated:

Despite repeated requests for improvement in your work performance, you continue to ignore our requests and fail to perform the duties attendant to your position as the superintendent. By letter of February 3, 2006, we advised you that as the superintendent of the building, it is your responsibility to be available at all times by telephone for cases of emergency. You have continued to fail to answer your phone, during and after business hours, when management attempts to call you regarding repairs and other superintendent work that needs to be done in the building.

Moreover, you have refused to do work that is within the scope of your job duties, and we have, subsequently, had to pay other individuals to perform such work. Additionally, you have taken it upon yourself to have other individuals perform your superintendent duties. Your continue failure to perform your job is unacceptable.

Millet stated that Sosa gave him that letter in person with the warning that “Eugenio [de los Santos] and Medina were next.”

As set forth above, the discharge letter states that Millet refused to do his superintendent’s work. His manager, Sosa, was asked whether, in February, 2006, Millet “was refusing to do certain work around the building that you felt were super duties” and he answered “No. I don’t think so.” The letter also states that he was unavailable. In this respect, Ramirez stated that she believed that the Employer’s office had Millet’s phone number, noting that the superintendents had Nextel phones and two-way pagers.

Millet stated that between April, 2005 when he was reinstated and February, 2006 when he was discharged again, he never refused to perform his superintendent duties, and in fact he did his work during that time, during which he was never warned by any Employer agent that he was not working properly. Between that time he was accused of hiring helpers to do his superintendent work, but none were doing his work during that time.

Alleged Post-Discharge Misconduct

5 The Respondent adduced certain evidence concerning alleged post-discharge conduct which, it contended, barred Millet's reinstatement. I received such evidence over the objection of the General Counsel.

10 Essentially, the Respondent asserted that, following his discharge, Millet removed materials owned by the Employer from the building in which he had worked as a superintendent, and used them in the renovation of a restaurant in which he had a financial interest.

15 The evidence does not support the Respondent's assertion. Thus, Ramirez gave hearsay testimony that Alberto Garcia, an owner of a restaurant in the Bronx, told her that Millet did some repairs in the restaurant with the Employer's materials. He further told her that he and Millet had a misunderstanding concerning money owed between them, and Garcia believed that he had an obligation to inform the Employer that Millet had used the Employer's supplies which included tiles, sheetrock, wood and perhaps garbage bags, and had seen him removing them from one of the Respondent's buildings. Garcia did not testify. Scharfman conceded that he did not keep an inventory of materials left at the building, and he did not know where the supplies were taken from.

20 Ramirez met with Garcia at the restaurant and saw beige wall tiles which appeared to be the same as those used in the Employer's buildings.. She reported what she saw to Scharfman. Ramirez testified that Garcia told her that Millet told him that since the landlord was trying to "screw" him, he "will screw" the landlord.

25 On October 28, 2007, the Olmstead Tenants Association sent a letter to Scharfman, stating, in part, that Millet had stolen materials from the building to use in outside work. Scharfman stated that after receiving that letter, he sued Millet for using the Employer's supplies to renovate the restaurant.

30 Millet testified that he first met Garcia in the summer of 2006, following his discharge by the Respondent, and that beginning in December, 2006, he did renovation work at Garcia's restaurant, which continued in January and February, 2007. He was helped by de los Santos and Medina. Millet denied taking or using any of the Employer's materials or supplies for the project. Rather, he stated that he bought the materials at Home Depot. He produced a large number of receipts from that store and other paint and hardware stores dated in January and February, 2007. The receipts detail the items bought, including 40 boxes of floor and wall tiles, sheetrock, metal studs, garbage bags and plumbing items. Millet denied telling Garcia that he obtained the materials from the Employer.

40 De los Santos stated that following his resignation in May, 2006, he helped Millet renovate a restaurant. Such work included building a partition, tiling a wall and floor, installing doors, and wiring and plumbing work. He stated that he bought sheetrock, tiles, and metal studs at Home Depot with Medina and Millet. They bought He stated that he never saw Millet take any materials from his building which he used for the renovation, nor did he see any such materials in the basement of Millet's building.

45 Ramirez and Scharfman remarked that it is the Employer's policy to limit the amount of material purchased for projects to just those needed. In that way, only the supplies that were actually to be used for specific jobs were stored.

4. Manuel Nina

Nina began work for the Employer in 1993 at 53-63 Hamilton Terrace in the Bronx - two adjoining buildings having a total of 108 units. A porter was employed in the building, paid by the Employer.

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As set forth above, Nina was very active in the Union's organizing drive. He attended the March 3 Union meeting. Scharfman warned him that he should not attend the March 3 meeting, and did not want such meetings held. Scharfman told Nina that he could solve his problems, and Nina told him he was looking for a union. Nina attended the May 7 Employer meeting, and shortly before the May 14 Union meeting promised to give Nina whatever he needed. Also as set forth above, on June 11 or 12, Scharfman changed his working conditions by telling him that he could not leave his building and would have to perform the porter's duties when he was off two days per week, and that he would be "continuously" watched by him and his manager.

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Manager Burrell further stated that in the spring of 2003, Bryant told him several times that Scharfman was very upset with Nina, that he was the "main force" behind the Local 32 campaign, and source of the "32 uprising." Burrell testified that manager Bryant told him that Scharfman wanted him (Bryant) to monitor Nina's work on a regular basis because Scharfman sought to "eventually" fire him, but because he was involved with Local 32, he wanted "specific justification." Bryant told Burrell that Scharfman wanted him to keep a logbook for Nina to "micromanage" him; to visit his building frequently, "daily if not hourly," in order to document his location and what he was doing, and the quality of his work to justify Manuel Nina's "eventual termination." Scharfman also ordered him to take photos of the poor-quality work.

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Burrell saw an "extensive meticulous" log that Bryant maintained as to Nina's work which included an improperly installed bathtub. According to Burrell, Bryant told him that the tub was not fixed because it was going to be used as "evidence to support the case they were trying to create against Nina." Burrell, who was employed from 2000 to 2003, testified that, although he did not manage Nina's building he supervised him on one project and believed that he was highly regarded by Scharfman and used by him when a major renovation had to be done or when supplemental repair work was needed in other buildings.

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Bryant denied making any of those comments to Burrell, and Scharfman also denied making those remarks or giving Bryant such orders. Rather, Bryant testified that he took photographs of Nina's work that he believed was "deficient" – and did the same for his other superintendents.

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Scharfman testified that he did not recall when he became aware that Nina was a leader in the Union's organizing drive, however he knew that Nina was the first of the four to file a charge on July 2, 2003 which Scharfman became aware of. However, Scharfman stated that he did not believe that he was aware that Nina was the leader, just that he was one of the charging parties.

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Burrell's credibility was called into question. He was terminated in November, 2003 for allegedly accepting money from the superintendents. Burrell denied the accusation and believed that superintendent Carlos Rivera falsely told Scharfman that Burrell was committing that misconduct because he required him to remove certain basement apartments that Rivera was renting improperly. Burrell gave two pre-trial affidavits to the Board. He stated that in giving the first, prior to his discharge, he was guided by the principle that he should not say anything "stupid" or put the Employer in a bad light. Rather, he should say that he did not recall certain events or should give vague answers. He gave the second affidavit, in which he quoted Bryant as being involved in an effort to document Nina in order to create a record for his unlawful

discharge, because employee Polanco reported to him that he (Burrell) was “getting the short end of what was going on.” Burrell testified that his second affidavit was truthful. Although he stated that he was “really upset” with the way he was discharged, he was not so upset that he would lie. Burrell conceded that, as to the first affidavit, no one told him to lie or refuse to answer any questions, however he conceded that he knew that the first affidavit was false. Bryant testified that Burrell told him that he changed his testimony from the first to the second affidavit because he wanted to “fuck Mark [Scharfman]” and “get back at” him.

As set forth above, I have credited Burrell’s testimony completely. As a manager, he had close contact with Scharfman and was aware of his animus toward the Union and the employees who supported it.

Supplemental Repair Work

Nina stated that from 1993 to June, 2003, he did extensive amounts of supplemental repair work including work in buildings other than where he worked as a superintendent, adding that he was the “main contractor for the company... the one that was mostly used for all the work that he had in the buildings.” Nina stated that prior to the Union campaign, Scharfman told him that he was his “best worker” – and was offered much supplemental repair work in buildings other than his own.

However, beginning in June, 2003, Nina was either offered no work or offered work but when he began the job he was told to stop work because an additional bathroom was being added to the plan, and someone else completed the job.

Nina denied telling Scharfman in their May, 2003 conversation, that he would no longer accept supplemental repair work, but conceded that in 2003 after Scharfman learned that he was supporting Local 32 he was offered renovation work but declined such work.

Nina stated that in about April, 2003, he was no longer offered supplemental repair work. Nina noted that he did much less supplemental repair work in his building from November, 2005 to September, 2007 than he had done before June, 2003, but as to such work that he did do, which consisted of volunteering to install lobby stairs, he was not paid for those jobs. He stated that during that period of time supplemental repair work was done by Marte, Soto, and others, noting that during that time there was more supplemental repair work being done in his building than before June, 2003.

Manager Bryant was responsible for the buildings in which Nina was the superintendent. He stated that during his tenure from August, 2001 to August, 2006, there were changes in rental trends in those neighborhoods including a higher demand for apartments, quickly rising rents, and more affluent tenants who were demanding higher quality work in their apartments and the buildings’ common areas, and in the service provided them. Bryant testified that several tenants told him that they did not want Nina to work in their apartments because they did not like the work he did, they could not locate him, his helpers did not listen to them, and in late 2002 and 2003, he installed old appliances or parts rather than new ones, and used the new ones in buildings other than those managed by the Employer. Also, Bryant stated that he spoke to Nina about his stealing materials. However, he was not otherwise disciplined for such misconduct.

Bryant stated that in 2003, Nina, who had asthma and a back ailment, said he could not lift anything heavy, could not carry more than 20 pounds, and could not do plumbing or electrical work, or paint and plaster. However, Bryant added that there were certain times that Nina could paint and plaster and other times when he could not. Bryant noted that these facts did not

influence him in deciding to offer him supplemental repair work.

5 In this respect, Nina stated that he was hospitalized for asthma in 1999, 2003 and perhaps in 2007, however, the amount of supplemental repair work he performed after the hospitalizations was the same as before. He did painting, plastering, sheetrocking and cutting tile, all of which created dust. He continued doing such work without restriction from 1999 through May, 2003. He noted that although his asthma was "very severe" in 2003, his disease was "under control," and he was able to work, including doing painting, refinishing floors and sheetrocking. During his employ with Beach Lane he went to the hospital three times for
10 asthma, in 1999, 2003 and perhaps in 2007. He gave Bryant a letter which stated that he would be out of work from April 17 to April 22, 2003 due to his asthma, and was unable to work due to asthma from July 28 to August 5, 2003.

15 Nina's testimony is suspect in one regard. He gave Bryant a note from his physician stating that he visited the doctor on July 28, 2003, yet his passport establishes that he entered the Dominican Republic on July 25 and left that country on August 8.

20 Bryant stated that he had problems with Nina since 2001 regarding his availability and tenant complaints about his work from 2001 through 2003. He gave Nina the "benefit of the doubt" and continued to give him renovation and repair work, and continued doing so after June, 2003. However, he stopped offering him renovation work in 2003 because he had much work to do in resolving violations in his building.

25 For example, Bryant conceded that Nina was willing to travel to do renovations, but that he stopped giving him such jobs in about March, 2003 because (a) Nina had much work to do in his own building correcting violations (b) when Nina did a renovation, he "let his building decline" by failing to do routine maintenance (c) Nina was often absent from his building and he had difficulty locating him and (d) the quality of his work was not up to Bryant's standards. Accordingly, Bryant offered renovation work to others including Dio DeRosario, Marte and
30 Alfredo Cano.

35 Nina stated that during the period November, 2005 to January, 2008, his managers, including Sosa and Prelvukaj praised his work. Prelvukaj told him that he was sorry that he was not being offered supplemental repair work but was happy that Nina was working there because he knew the work and worked fast. Nina stated that after his reinstatement on November 1, 2005, he was never offered supplemental repair work, and his asthma was no longer a problem.

40 Bryant stated that after the superintendents returned to work pursuant to the Settlement Agreement in April, 2005, Scharfman issued an order that they would not do renovations. Scharfman wanted the superintendents to do their regular superintendents' work first. Bryant stated that he followed that policy, which was not for the purpose of depriving superintendents who had supported Local 32 from getting lucrative renovation work. However, Bryant stated that he was still permitted to offer the superintendents the additional, smaller repair work. According to Bryant, when Nina returned to work in November, 2005, he offered him occasional repair
45 work but Nina declined such offers saying that he could not do such work due to his back and breathing ailments.

50 Bryant testified that in about 2005, Felix Rodriguez was offered extra repair and renovation work. Rodriguez asked for a certain amount, there was a negotiation, and agreement was reached on a price. Also, at times, the price that Rodriguez gave was rejected by the Employer who made a counteroffer, and a price was agreed to. Bryant denied that in those cases the negotiation ended where Rodriguez named a price and the Employer refused and

offered the job to someone else. Bryant stated that the same procedure applied to Nina and de los Santos, noting that there would be a negotiation as to the price for the jobs. Nina denied being offered any negotiation.

5 Nina stated that he spoke to Sosa in about September, 2007 about supplemental repair work. Sosa and Bryant said that "it was difficult for either to find me a cent from that office." On another occasion between November, 2005 and January, 2008 when he was fired, Sosa told him that "the company was preparing a case to fire me. The only way they would have that case was if I left the building unclean" because he was not permitted to be offered supplemental
10 repair work. Nina quoted Sosa as saying that he asked Scharfman why Nina was not being offered supplemental repair work, and Scharfman told him "don't even try him."

Sosa did not offer Nina the opportunity to do large renovations, although he conceded that there was much work available in his building. Sosa offered the opinion that he did not
15 believe that Nina had enough time to do a renovation because he had so much regular superintendent's duties to perform. Sosa stated that no Employer agent told him not to offer Nina supplemental repair work in his building.

Sosa conceded that it was the Employer's practice to first offer supplemental repair work
20 to the superintendent in whose building the repair was needed. However, he stated that this practice did not apply to Medina, Millet or Nina, who did not do any supplemental repair work during Sosa's term of employment from May, 2005 through September, 2007.

Director of Repairs Seemer stated that when he began work with the Employer he
25 offered supplemental repair work to Nina once or twice, who did not accept either offer. Seemer stated that he believed that Nina lied to him by telling him that certain work had been completed when it had not been done. Seemer could not recall specific instances, however, and his information came from tenants who said that the work had not been completed. He also mentioned the fact that the New York City Department of Health levied a large fine for the
30 improper installation of window guards. That occurred in January, 2007. He stated that Nina told him that he had completed that work. Apparently, according to Seemer, Nina had done the work but had improperly performed the work. He did not recall if Nina was disciplined for this incident.

Further, Seemer stated that on occasion in the fall of 2007 he tried to call Nina by cell
35 phone and found that he was out of the community for one to two hours. He said that Nina was "somewhat harder to reach" than other superintendents. Seemer conceded that that was the only time he could not get in contact with Nina.

Seemer also stated that tenants complained to him that Nina promised to do work in
40 their apartments and did not appear at the appointed time, or when he came he only did a little work but did not return to finish the repair. Seemer received more complaints from tenants about Nina than he received about other superintendents. Seemer stated that when he began work for the employer, Nina told him that he had a back ailment and could not lift heavy objects. Nina refused to accept a delivery of sheetrock and buckets of compound.
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Seemer testified that in the fall of 2007, there were a very high number of HPD violations
in Nina's building, about 400 in 2006. Seemer did not know the exact number, but the violations were the highest of all the buildings in the area managed by Beach Lane. Seemer stated that he spoke with Nina once or twice about his not being able to gain access to tenant's apartments for
50 repairs. Seemer stated that he was not told by any Employer agent that Nina had been a Union supporter, or that he should not be offered an opportunity to do supplemental repair work. On his occasional visits to Nina's building he noted a clean building but apparently the repairs were

not getting completed. On December 13, 2007, Seemer sent an e-mail to Employer attorney Drogin stating that Scharfman wanted him to be aware that Nina and Medina have “extremely high HPD violation counts at their buildings ... because they are not getting repairs done in the individual apartments and the building as a whole (common areas). Scharfman stated that it was very important that such violations be kept to a “minimum” because if there were too many violations the Employer was subject to fines and may be required to enter into an agreement with the City for their correction. He stated that a large number of violations also affects the tax abatements and exemptions the building was entitled to. He stated that he requires that all the violations be removed or as many as possible be remedied, acknowledging, however that at times it is not possible to remove all of them because the tenant refuses access to the inspector who could certify that the violation has been corrected.

Scharfman testified that he told Seemer to send the e-mail to Drogin regarding Medina and Nina, but he did not recall telling Seemer to bring the HPD violation accounts to his attention regarding any other superintendents at that time. Nor did he recall whether other superintendents had high or low HPD violation counts.

Ramirez stated that the Employer keeps a record of violations for each building. Some have more than others, noting that the number of violations each building has a strong relation to the area that the building is located in. She conceded that “oftentimes, the superintendent can’t help how many violations his building receives.” But of course the issue is not how many violations the building accumulates but how many are removed. It is the superintendent’s responsibility to cure those violations by making repairs to the areas deemed to be violations.

Manager Ramirez stated that in 2007, she visited Nina’s building a few times and saw him present in his building at those times. When she visited, she did not report to Scharfman that she had difficulty locating him. She flatly stated that she had no problem locating Nina in 2007. At that time she supervised renovations and a window installation project in that building. Her pre-trial affidavit stated that she visited Nina’s building “many times” during 2007.

Ramirez stated that the Employer had problems with Nina’s work in 2007, including failing to do certain repairs, the improper installation of window guards and some issues with the boiler.

Scharfman stated that any change in the amount of supplemental repair work given to Nina was based on the same criteria related to those who received such work, specifically, the ability to do the work. Scharfman stated that Nina was not capable of performing those jobs. Scharfman conceded, however, that Nina may have been offered such work but “continued problems” with his work performance demonstrated that he was incapable of doing that work. For example, a bathtub was installed incorrectly, and the pipes he installed leaked. Scharfman could not recall whether, when those two instances of improper work became known, the Employer stopped giving him supplemental repair work or if it reduced the offers of such work, or if the agent gave him work that he believed Nina was capable of performing. Scharfman stated that the quality of Nina’s work was not good; his plumbing repairs did not remain fixed and the floors he worked on were not leveled properly.

Scharfman stated that Nina was not competent prior to June, 2003, but he was, nevertheless given supplemental repair work which was checked. He admitted, however, that Nina could do certain jobs well or at least adequately. In explanation, Scharfman stated that Nina was given certain jobs, but as circumstances changed in which tenants were paying higher rents and demanded greater services, the Employer required a higher standard of work. Scharfman broadly stated that Nina’s work suffered a reduction in quality, while at the same

time the Employer sought to hire more competent workers.

5 Scharfman stated that Nina was offered supplemental repair work after May, 2003 which the manager believed he could perform competently. Those jobs which the manager did not expect him to perform adequately were not offered to him.

Burrell stated that Nina may have told him that he would not accept supplemental repair work because the prices were too low.

10 An important comparison of Nina's work records may be made based on the Respondent's records of the work done in his building during the years 2002 to 2007. Work was performed in his building by Nina and other individuals.²⁹

15 Thus, in 2002, Nina performed 164 supplemental repair jobs in his building earning \$53,595. In that year, a total of 21 jobs were performed at his building by other individuals totaling \$15,415.

20 From January, 2003 until his discharge in early November, 2003, Nina did 53 jobs and earned \$16,270. A total of 37 jobs were done in that period of time by other people, valued at \$10,377.

Nina and was not reinstated until November 1, 2005. He did no jobs in November or December. However, in those two months, six jobs were performed by others, totaling \$5,755.

25 Nina performed no supplemental repair work in the years 2006 and 2007, notwithstanding that 173 jobs were done by others in 2006, totaling \$84,675, and 157 jobs were done in 2007, earning \$93,235.

30 Regarding the supplemental repair work done by Nina including jobs done in his building and at other buildings, in 2002, he performed a total of 190 jobs totaling \$63,410, and in 2003, he did 68 jobs amounting to \$23,970. Following his reinstatement in 2005, through 2007, he did no jobs.³⁰

The Warning Letter

35 By letter dated June 13, 2003, Scharfman sent a warning letter to Nina which stated, in part, that he has "recently been regularly abandoning the building and leaving the premises unattended during your normal working hours. In view of your duties and obligations as superintendent of the building this behavior is entirely unacceptable. Please refrain from such activity immediately. To the extent that you continue to disregard your duties, and there is growing dissatisfaction among the building's tenants, this may form the basis for future discipline. This will also serve as a reminder that the days that the porter is not working it is your responsibility to maintain the cleanliness of the building, including putting out the garbage for collection. This is part of your responsibilities for the 5 days per week that you work."

45 Scharfman stated that when he sent the letter he knew that Nina was involved with the Union, but believed that the warning was necessary because "quality of life issues of cleanliness must be attended to." He stated that it was important to "make a stand" on such issues.

50 ²⁹ G.C. Exhibit No. 97(b).

³⁰ G.C. Exhibit No. 96(b).

5 Before the June 13 letter was sent, Bryant visited Nina's building once per week. Nina never received a disciplinary letter before the June 13 letter, nor was he told before then that he was "abandoning" his building. Nor did Scharfman tell him before the letter that his tenants were
10 dissatisfied with his work, and he was not aware of any tenant complaints in his building before June, 2003. Scharfman testified that manager Bryant called Nina intending to visit the building, and Nina did not answer his phone. Bryant visited Nina's building and could not find him, but saw him return to the building at which time he told Bryant that he had been there all the time. Bryant also told Scharfman that Nina was not cleaning the building, but only taking care of the garbage.

15 Nina stated that on about June 16, Bryant asked Nina to show him the June 13 letter and asked what time he works. Bryant told him: "What is wrong with you is that you are applying on behalf of Local 32, but Local 187 is in the Employer. Local 187 is your union. Nina replied that as a retired fire fighter, Bryant has benefits, and that Nina wanted retirement benefits also, calling Local 187 a "mafia union." Bryant agreed, but said that Local 32 is "another mafia."
20 Bryant asked for the keys to his workshop and Nina refused. Bryant told him that Local 187 was the union in the building when Nina was hired "and now you want to change it to another union." Nina replied that "it's not the same." Bryant said that "an action brings a reaction. Mark Scharfman has a lot of power. That is not that easy. Because in the end everything is Mafia."
25 Nina said that he refused to be a slave. Bryant called the police who directed Nina to turn over the keys. Bryant testified that Nina kept the Employer's equipment in the basement commingled with Nina's personal tools. Bryant wanted Nina to keep his equipment in his apartment, and Bryant removed Beach Lane's equipment on June 13 when he saw him using it for private jobs.

30 Bryant stated that on June 16, 2003, he told Nina that he had to be in his building eight hours per day and that he could not have a helper in the building because he did not work for Beach Lane and his helper did poor work. In a pre-trial affidavit, Bryant stated that he did not tell Nina that his helpers were not doing good work. Bryant also told Nina that effective immediately he could not employ helpers. Nina stated that, beginning in 2001 he had two helpers who helped him with outside contacting work. Nina stated that the Employer was aware that he used helpers. As set forth above, on April 10, 2003, the Employer's office advised the tenants that during Nina's vacation, his wife would be "distributing work to his workers." Bryant stated that tenants complained to him that the helpers who they did not know were working in the building, admitting that most superintendents had helpers. Bryant noted that Nina would not work in an
35 apartment with the helper. Rather, he sent the helper alone to do the work. However, Bryant admitted that Nina used the same helper or helpers and the tenants would become acquainted with them, adding that Nina's helpers were there "quite often."

40 Nina stated that prior to June, 2003, he did not have to obtain permission before he left his building to do personal errands and did not have to inform his manager.

45 Nina stated that on July 7, 2003, he dismissed his helpers. After his discussion with Bryant, his working conditions changed. He was required to clean the building twice per week since the porter had two days off. In addition, Bryant scrutinized his work much more carefully – criticizing him for a cigarette butt on the sidewalk, claiming that he did not clean the sidewalk. Nina noted that prior to June, 2003, Bryant visited his building once per week or less frequently. After June, 2003, Bryant visited four to six times per week, carefully examining whether the building was clean, and phoned him ten or more times per day in order to harass him, simply
50 asking what he was doing. Such close scrutiny was not made prior to June, 2003.

Indeed, Bryant confirmed his closer scrutiny of Nina, testifying that he visited Nina's

building more frequently than his other 14 buildings in order to determine where Nina was in an effort to have the superintendents be at their buildings regularly so that they could maintain them in a better manner. He stated that the Employer did not tell him to go to Nina's building more frequently. He was also at Victor Gonzalez' building frequently because many repairs,
5 including HPD violations had to be resolved.

Nina stated that in early August, 2003, manager Larry Wornum replaced Bryant and his working conditions got worse. He stated that Wornum called him or visited him 20 to 25 times per day, carefully examining the sidewalk for cigarette butts, checking the cleanliness of the yard, and checking each floor. Nina said that this routine continued until he was discharged, denying that he "abandoned" the building from June to October, 2003. Bryant stated that because of all the work being done in Nina's building and because Nina was not available, Wornum was "almost dedicated to the building." When Nina reported that he was going to a physician on a certain date, Wornum called the physician who said that Nina did not keep that appointment. Wornum reported that fact to Bryant who told Scharfman.
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Nina stated that from June, 2003 until his discharge in November, he continued his activities in behalf of the Union. He met with Local 32 and his fellow employees, appeared in the *Hoy* newspaper, met with politicians, and filed a charge against the Employer on July 2. On August 27, the Employer filed a Section 8(b)(1)(A) charge against the Union, alleging that Local 32 "by its officers, agents and representatives, including Manuel Nina restrained and coerced employees" by their actions in soliciting membership in Local 32 and discouraging membership in Local 187.
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On August 14, 2003, Nina hurt his back while removing a radiator. He had a series of visits to a physician and physical therapy. However, he was able to work for two weeks thereafter with pain medication before he went to the hospital. On September 3, he visited the hospital and was told to avoid heavy lifting, but he still renovated apartments. On October 3, a doctor's note stated that he could return to work on light duty but could not lift more than 20 pounds. However he stated that he could lift more than that weight after October 20. Nina stated that he told manager Wornum of his visits and gave Wornum letters from the physician or physical therapist setting forth the specific dates for the five day per week therapy sessions.
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Nina stated that when he hurt his back until he was fired in October, 2003, he did not tell the employer that he was totally incapacitated and could not perform his superintendent's duties. Rather, he stated that he told Wornum that he could perform his regular superintendent's duties.
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Nina testified that he met with manager Wornum in September, 2003. Wornum demanded that Nina not record their conversation and then asked why he did not call Scharfman before filing charges regarding the union. Nina replied that he was responsible for having the workers sign cards for the Union, and asked what would happen to them if he had a personal call with Scharfman? Wornum answered that he was correct "but think about yourself." The following day, Wornum and Bryant visited the building and asked for the keys to the buildings, and he surrendered the keys.
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The November, 2003 Discharge

Nina was discharged by letter of November 7, 2003, and was thereafter evicted from his apartment. The letter, signed by Scharfman, stated:
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As you are aware, there have been ongoing problems with your

work performance, including: your repeated absences and unavailability during your assigned workdays, your continued failure to adequately perform your superintendent duties, and your apparent act of dishonesty in lying to the building manager regarding visits to the doctor.

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Scharfman testified that the decision to fire Nina was made by him with input by Ramirez or manager Larry Wornum. At hearing, Scharfman had no recollection of any of the details of the reasons set forth in the letter for the discharge, but believed that the facts set forth in the letter, which were given to him by managers Bryant and Larry Wornum, were correct. He stated that he was "reluctant" to fire Nina because of the pending charges but could not tolerate Nina's misconduct. For example, Scharfman stated that Nina reported that he was going to his doctor between 11:00 am and 1:00 p.m. Wornum learned that the doctor saw him at 4:00 p.m. Scharfman stated that the fact that Nina was injured at work and was unable to work for six to eight weeks had nothing to do with the reason for his discharge. However, Scharfman added that, although the manager knew that Nina was seeing doctors and a physical therapist at the time, he (Scharfman) did not know that in September or October, 2003, when he was discharged.

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Bryant stated that he was aware, prior to Nina's discharge, that he was involved in organizing for Local 32, but that there were "ongoing problems" with his work performance, including his repeated absences from the building.

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Bryant stated that during the porter's two days off per week, Nina would not perform his duties, telling him that he was physically unable to do such work. Bryant stated that he did not require that Nina resolve all of the pending HPD violations, but some were not being addressed. Nina offered excuses such as he had no access to the apartments, no materials, and no helpers. He asked Bryant for permission to hire workers but Bryant refused because of the poor quality of workers he had in the past, and he did not want people working in the building who were not employees of the Employer. Bryant conceded, however, that certain people doing renovation work for Beach Lane did not work for that company, explaining that they were contractors and were accountable to the Employer. On the other hand, Nina's workers refused to acknowledge Bryant as the boss and refused to speak with him.

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Bryant said that the number of HPD violations in Nina's building was greater in 2003, than it was in 2001 or 2002, but conceded that he had no records concerning when the violations increased; simply that he was not aware of the number of violations in 2002.

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Nina testified that after he was fired he continued to engage in activities in behalf of Local 32, including rallies in front of his building, visiting politicians, and distributing leaflets. After Nina was fired, the Employer installed new superintendent Pablo Checo in the superintendent's apartment.

The Reinstatement

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After Nina's discharge, a Settlement Agreement was entered into with the Board in April, 2005, in which the Employer agreed to reinstate Nina and the three other employees. Discussions ensued between the Respondent and the Union's attorney concerning Nina's reinstatement. As part of these discussions, the Employer offered Nina reinstatement to a different building than the one he had worked at for 10 years and had been fired from. The offer was to 41-47 St. Nicholas Avenue, a building having about 63 units with no porter. Scharfman

stated that Nina was not offered reinstatement to 53-63 Hamilton Terrace because he “was not liked” in that building, and replacement superintendent Checo was already there.

5 On May 13, Scharfman wrote to all the tenants at 53-63 Hamilton Terrace that Nina declined reinstatement to another building and wanted to be returned to his original building. The letter stated that “in determining to which building Mr. Nina will be reinstated, we are requesting, but not requiring, your views in favor of or against reinstating Mr. Nina to the position of superintendent at 53-63 Hamilton Terrace.” The letter asked the tenants to inform Scharfman as soon as possible since the decision as to which building he would be reinstated to would be made in one week. The letter also noted that the responses would not be shared by the Employer directly with Nina.

15 Nina refused to be reinstated to the building on St. Nicholas Avenue because he claimed that drugs were sold in the basement, and he heard that it had many leaks and he was told by the superintendent there that tenants refused access to him to make repairs. In contrast, his original building was in good condition with few leaks and nearly all the violations had been corrected. Further, his original building had a porter whereas the St. Nicholas building did not. In addition, his children were enrolled in a school near his original building and he believed that they would have to transfer to a different school if he resided in the building on St. Nicholas Avenue. Finally, his original apartment was larger, having four bedrooms, whereas the offered building was much smaller and had only two bedrooms.

25 On June 2, the Regional Office wrote to Respondent’s attorney Drogin advising that its offer of a job at 14-47 St. Nicholas Avenue was not substantially equivalent to his former position at 53-63 Hamilton Terrace, and demanded that he be reinstated to his original building by June 10. Nina stated that during the period from October to early November, 2005, he was offered sums of money up to \$55,000 by Scharfman to quit his job. Nina refused the offers. The complaint alleges that the Respondent refused to reinstate Nina from November 7, 2003 to November, 2005, thereby refusing to reinstate him immediately to his former apartment. The Respondent asserts that the delay was caused by ongoing settlement negotiations that were taking place at that time. Nina denied telling the Board agent that he should “put a hold on the case” while he spoke with Scharfman about reinstatement in 2005.

35 On September 9, 2005, the Employer offered Nina reinstatement to 53-63 Hamilton Terrace. A meeting was held at the Employer’s attorney’s office in October in which the Employer, Nina and Local 187 spoke about the nature of his reinstatement. According to Scharfman, Nina wanted a helper in addition to the porter. Scharfman refused because the Employer did not have workers compensation insurance for a helper who was not on the payroll, and that the maintenance of the building was Nina’s job. The Employer further explained that Nina would not be denied supplemental repair work because of his activity in behalf of Local 32, but the Employer had the right to choose who is offered such work. Scharfman noted that if Nina priced the jobs appropriately, if he had the time to do the work, and if the violations in his building were remedied, he would be offered such work.

45 The Employer at first did not agree to restore Nina to the salary that he had been earning when he was discharged, about \$730, reasoning that he was a “replacement superintendent” according to the collective-bargaining agreement which provides for a lesser salary of about \$530. Thereafter, when Nina was reinstated he was given his former salary. Nina stated that at that meeting in late October, Scharfman told him that he could not do certain large outside contacting jobs because a plumbing company had to do them. However, Nina stated that he did plumbing and electrical jobs before June, 2003 for the Employer, adding that he was never told, prior to June, 2003, that he needed a license to perform such work.

On November 4, 2005, the Employer's attorney wrote to Local 187, advising that Nina's original apartment was ready for his immediate occupancy.

5 Sosa stated that after Nina's reinstatement in 2005, he adequately performed his regular superintendent's work. In fact, Sosa further stated that Nina "always did what he was supposed to do, or always did all that [Sosa told] him to do." Sosa never received a complaint that Nina was not doing his job. Despite the fact that there were many HPD violations in Nina's building, he was getting them done "one by one." Sosa had no problem locating Nina who always
10 answered the phone.

Nina stated that during the time that Bryant and Sosa were his managers from November, 2005 to September, 2007, they did not watch him closely as was done in the period June to October, 2003, and did not comment about his being absent from the building. Nor did
15 they complain that he was not at the building when he should have been there, and did not tell him that he needed prior permission to go on personal errands during the day. Thus, his treatment during this period of time was the same as he had enjoyed prior to June, 2003.

The Surveillance of Nina in late 2007

20 Fredrik Sachs, the president of the Sachs Group, a private investigation firm, has worked for the Employer for five years. He stated that he was hired by the Respondent in October, 2007 to surveil Nina, the first superintendent he was asked to surveil by the Employer. He stated that the Employer was trying to obtain evidence that Nina was not present at his building during work
25 hours. Although he testified that he did not know whether the Employer sought to fire Nina, his e-mail message to Scharfman on December 7 said that "we have to formulate what is a 'fireable offense' a pattern of not doing his duties which we can nail him on." Scharfman stated that he retained Sachs for the purpose of engaging in surveillance of Nina because manager Prelvukaj and other managers told him that whenever they visited Nina's building he was not present
30 when he should have been in the building. Nina was not advised that he was being watched.

"Human surveillance" began on October 31, 2007 and continued through November 15. Sachs' agents sat in a car near the entrance to Nina's building and watched as he left the building, videotaping him when necessary. They watched Nina on seven days during his work
35 hours, including one day in which he was followed. The surveillance resulted in only two "relevant observations" – that Nina was absent from his building for one hour and 15 minutes during which time he purchased lumber at a hardware store, made a few errands and delivered the lumber, and on November 13 he was absent for three hours during which time he withdrew cash from a bank and gave it to a man to which he delivered lumber the previous day.
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Sachs recommended that because of the expense of human surveillance and the results achieved, an alternate method be used. When human surveillance ceased, the Respondent provided Nina with a Nextel phone with a position-locating feature. Scharfman stated that Nina was the only superintendent given a Nextel phone which was fitted with a GPS device to track
45 his movements. Scharfman was provided with information as to his whereabouts.

On December 7, Sachs advised Scharfman that GPS phone monitoring had been done for four weeks "with little bad behavior on Manuel's part." Sachs testified to limitations in cell phone monitoring including it showing the subject at a location where he was, in fact, not
50 present. One notable example was where he was physically observed on Riverside Drive in Manhattan, but the Nextel phone monitoring placed him in Fort Lee or Edgewater, New Jersey, at the same time. Sachs explained this as being a "false positive based on the technology."

Sachs' conclusion was that on three occasions based on video and reports from his agents, Nina was away from his building – on two occasions he was absent for more than one hour.

5 On December 17, Sachs wrote to Scharfman that “Manuel has been behaving. He goes out on his meal hour every day and does stuff, but he is back within the hour or so.”

The Boiler Incident in November, 2007

10 At about 10:00 p.m. in the evening of November 21, 2008, the day before Thanksgiving Day, porter Willie Hidalgo opened the valve on the water inlet to the building's boiler in order to add water to the boiler. He then left the area to pick up some garbage and returned home, forgetting to close the valve. Nina was contacted by a tenant about one hour later who complained that water was coming through his radiator. Nina went to the boiler and saw the open valve. He contacted Hidalgo who admitted leaving the valve open.

15 Nina stated that he worked at removing water from the boiler from about 11:00 p.m. until 5:00 a.m. the next morning. He called the boiler company which said that it could not make a service call because the Employer was not buying oil from that company. He called manager Prelvukaj and union agent Lang for the phone numbers of manager Malone or Scharfman. Finally, the correct boiler company came and fixed the problem.

25 Nina stated that Hidalgo takes care of the boiler when he is on vacation and helps him with the boiler when Nina is present. Indeed, Scharfman testified that when Nina is on vacation, Hidalgo takes care of the boiler. Hidalgo stated that for two to three months prior to November, 2007, the boiler was defective in that it consumed and leaked too much water. As a result, he had to fill the boiler with water three to four times each day. It was his responsibility on Wednesday, November 21, 2007, to monitor the water level in the boiler and to add water if necessary.

30 Scharfman testified that Diogenes Rosario, a superintendent in a nearby building called and told him that Nina called him and said that the boiler was not working. Scharfman then called the boiler company which released water from the boiler and reset it. In his pre-trial affidavit, Scharfman stated that Nina told Rosario that he wanted to know who to contact because the boiler was broken. Scharfman did not speak to Nina or Hidalgo regarding that incident before he was fired. Scharfman did not instruct his managers to speak with Nina or Hidalgo regarding the incident.

40 On December 7, 2007, Scharfman sent a written warning to Nina for “what appear to be acts of retaliation against me, Beach Lane and the tenants in the buildings where you are the superintendent.” The letter asserted that the Thanksgiving Day boiler malfunction was caused by Nina; in that this was the third time that the boiler was flooded, and accused him of not calling anyone for assistance. The letter further stated that the water valve was left open and that it “appears that you intentionally flooded the boiler. I am left only to conclude that you have done this deliberately in an attempt to inconvenience me and the tenants on the Thanksgiving Day holiday. I am also concerned that you have done this because of the ongoing discussions between Beach Lane and Local 713 concerning your request to extend you upcoming vacation by using sick days. Manuel, I am simply running out of patience with you. Whatever our differences may have been, I will not permit you to take out your frustrations on the tenants. Further incidents such as this will be treated as vandalism and will result in the termination of your employment.”

50 Local 187 was merged into Local 713 in January, 2007. Randy Lang, the Local 713

business agent, testified that on Thanksgiving Day, 2007. Nina called him at 8:30 a.m. and stated that there was no heat in the building and that he tried to call the Employer and the boiler company, but received no response to his calls. Lang filed a grievance over the warning letter Nina received. Later, before the grievance meeting, Nina told him that porter Hidalgo left the water valve on causing the breakdown, but that he did not want to get Hidalgo in trouble.

The December, 2007 Vacation and the January, 2008 Discharge

10 In November, 2007, Nina told Local 187 official Randy Lang that he wanted to take a vacation in mid December to early January, 2008 in order to travel to the Dominican Republic to visit his sick child. He also told Lang that he wanted to use certain unused sick days as vacation days. Lang advised him to contact Employer office manager Lou Malone. Nina then told Malone that he wanted to use his sick days for a vacation from December 19 to January 2. Malone said
15 that he would do "everything possible" to enable Nina to take the vacation.

Before November 16, Nina told Lang that he wanted to change the dates of his vacation to December 20 to January 3. He asked to use two or three sick days for his vacation. The Employer refused, but offered him an opportunity to use one 2008 vacation day, requesting that
20 if he wanted to take that day as an unpaid FMLA day, he had to submit paperwork. Nina refused to use the 2008 vacation day, and Lang replied that he needed an FMLA form in Spanish which Nina would give to the physician in the Dominican Republic to complete.

The Employer's e-mails stated that it expected Nina to "return to work on January 3", but
25 that January 3 "is also a vacation day... when he returns on January 4." Lang wrote that because of the delay in working out the details, Nina obtained an airline ticket "whereby he returns on January 3rd. He will be in the building sometime that day. His flight is first thing in the morning of January 3rd." The Employer wrote back that since his work day begins at 8:00 a.m. and he is not expected to be in the building until after that time on January 3, the Employer will
30 treat that day as a vacation day, and expect him to "be available for work on January 4," and significantly, stated that "if he is not going to be able to resume work on January 4 then he should contact [Scharfman] or [Ramirez] as soon as he becomes aware that he is not going to be available for work on January 4."

35 Nina left on December 19 and returned on January 3. Porter Hidalgo stated that he saw Nina several times on December 19. In fact, the Respondent's surveillance conducted by Sachs identified Nina as being at home on 11:25 on December 19. Hidalgo also saw Nina in the morning of December 20, the day that he left for vacation.

40 Ramirez stated that she was asked to report the facts concerning Nina's whereabouts prior to his discharge, but that she was not "directly involved" in the decision to fire him. She was asked whether Nina had returned from vacation and said that he had not come back on the day that he was expected to return. She called him during the day that he was supposed to return because he was needed to look at a repair in an apartment. That repair was important
45 because the court had ordered it, and access had been directed by the court. Ramirez was aware that on the day he was to return, porter Hidalgo substituted for him since she had arranged for such coverage.

50 Scharfman conceded that, prior to this time, he was aware that Nina would occasionally not return from vacations at the specified time he was supposed to return. Scharfman spoke to Nina about such misconduct and Nina "had no answer." Scharfman did not recall that Nina received a written warning at those times. In March, 2006, Nina's request to take an "emergency

trip” was approved.

5 Scharfman in the past has denied employees’ requests to use sick days as a substitute for vacation days. He conceded, however, that sick days may have been used for that purpose in the past, but that was an improper use of sick days.

Local 713 agent Lang stated that the collective-bargaining agreement contains no provision for “personal days.” The Employer denied his use of sick days for vacation time.

10 Scharfman stated that when Nina is on vacation Hidalgo takes care of the boiler, makes repairs in the building, and Rafael Rodriguez was responsible for garbage removal.

By letter dated January 4, 2008, Nina was discharged, in material part as follows:

15 This decision is based on a number of factors but the “last straw” concerns your early departure for vacation and your failure to return from vacation on time and without notifying anyone that you would not be returning to work as scheduled.

20 As you are well aware from the dialog between the office and Randy Lang... you were scheduled to be out of work from ... December 20, 2007 through ... January 2, 2008, and were required to be back to work yesterday morning, ... January 3, 2008.

25 In fact, you left the building at noon on ... December 19, 2007 – one half day early... you abandoned your job in the middle of the day when you were supposed to be working.

30 More importantly, despite being made aware of the need to have you back to work yesterday morning, and your commitment to doing so, you did not appear for work until today and you failed to notify anyone from the office to explain your delay. This is especially troubling since the porter at your building was scheduled to be off yesterday (as you know) and without you there I had to scramble to get coverage for the buildings. I point out that this is not the first time that you have failed to return to work on time following a vacation but it is the last. You have previously been warned that your failure to report back to work from vacation would result in further discipline.

35 I am also aware that you have been “stealing time” by leaving the building during business hours in order to monitor a construction project that you are apparently overseeing. In doing so, you have absented yourself from the buildings for periods longer than your meal time and are attending to these personal matters on company time.

45 Scharfman testified that he decided to fire Nina a few days after he returned from vacation because his performance “threatened the well-being” of the tenants. The decision to fire Nina, according to Scharfman, was due to a “culmination of everything combined” – events including the boiler incident, he left early for vacation and returned one day later than expected; he was not present in the building “all the time” and took unauthorized absences from the building which he became aware of through the surveillance by the Sachs Group. He denied
50 that Nina’s activities in behalf of the Union played any role in the decision to fire him.

5 Nina testified that at the grievance meeting following his discharge, Scharfman asked him why he let Hidalgo “touch” the boiler. Nina replied that Scharfman told him that Hidalgo was his assistant and that when he (Nina) was on vacation Hidalgo could maintain the boiler. Scharfman replied that Nina created the boiler problem because he (Scharfman) “gave him a
10 problem” regarding his vacation. Nina answered that he lives in the building and would not deliberately damage the boiler. At the meeting, Scharfman also accused him of “stealing time, asking where he was on December 3 at 1:30 p.m. Nina replied that he did not know. In fact, Nina was pursuing obtaining free cable television hookup that the Employer promised. Nina quoted the Employer’s attorney as saying: “In the past he has created problems for the
15 Employer, Scharfman. He’s not welcome in this company any longer.” Scharfman conceded explaining the reasons for the discharge to Nina at the grievance meeting.

15 The grievance was denied and Local 713 filed for arbitration. Thereafter, Nina decided to abandon his grievance. Lang stated that Nina’s withdrawal of his grievance was not based on his belief that he could not win reinstatement.

20 Nina testified that Prelvukaj did not say anything to him about his allegedly not being at the building when he was supposed to be there. He was never accused of stealing time. In fact, Nina stated that in November and December, 2007, he told manager Prelvukaj when he would be away from the building for more than his meal hour.

25 Nina stated that it was possible that he did “private jobs” while employed by the Employer, which he defined as work he did in buildings not managed by the Respondent. However, he only did such work outside of his regular work time, and he further stated that he did not leave his building to do such work as he had his own employees who did those jobs. However, he conceded that Bryant and Ramirez caught him using a Beach Lane sander on a private job in June, 2003, but his use of that equipment was not stated as a reason for his discharge, and in any event he testified that his workers used the equipment to perform those jobs while he did not leave his building.

30 Local 713 agent Lang stated that he understood that Nina was a leader among several superintendents in support of Local 32. Lang was aware that Nina was unhappy with Local 187’s representation of the workers. Lang conceded that the Employer was aware of Nina’s support of Local 32, and, as a result, he believed it was “more lenient” with Nina, by permitting
35 him, at times, to take personal days or sick days as vacation days. Lang noted that it was the Employer’s right to deny Nina’s request to take sick days as vacation days when he was not sick, but Lang did not agree with the Employer’s denial, adding that such refusal could have been grieved. Lang stated that he was able to resolve any issue concerning Nina since he had unlimited access to Scharfman and the Employer’s attorney.

40 **Analysis and Discussion**

45 It is apparent that when the Respondent became aware that Local 32 was attempting to organize its employees, it engaged in a persistent, sustained effort to thwart and destroy that attempt, first by the use of enticements and then by threats, warnings, the imposition of difficult working conditions, withdrawing supplemental repair work, and discharge. As set forth below, the Respondent’s defenses to its conduct do not provide a valid explanation thereto.

50 De los Santos, Medina, Millet and Nina were active from the beginning of the Union’s organizing drive in January, 2003. They met with Local 32 and then energetically spoke with other superintendents in order to gain their support for the Union. They met with the Union agents and organized meetings, including one on March 3 with their co-workers and Union

representatives. Their activities in behalf of the Union became known to the Respondent. De los Santos credibly testified that on March 9 he told Scharfman that he was interested in Local 32, and Scharfman responded by offering him and the other superintendents a raise retroactive to 2002. The Respondent argues that the raises were authorized by various Local 187 contracts in effect at the time. Even if the raises were so authorized, no explanation, other than they were inadvertently not given when due, was offered at hearing. Clearly, the fact that the raises were not given when they were due, but were awarded only when Local 32 began to organize, supports the General Counsel's theory that the employees were given benefits in an attempt to dissuade them from continuing their support for the Union. Further, at the same time, in early March, Scharfman told de los Santos he could rent rooms in his basement and could hire a porter.

Similarly, Nina's credited testimony that at about the same time, Scharfman told him that he knew that a meeting was held in his apartment and offered him "anything" if "that" did not happen again, and also offered to resolve any grievance of his, support a finding that Scharfman opposed the Union drive.

About two months later, in early May, when it became apparent that the workers remained loyal to Local 32, the Respondent changed its tactic. Scharfman asked the men why they were "doing things behind" his back. I credit the employees' testimony that at the May 7 meeting, Scharfman told them that he would "fix" their problems but the "traitors" among them would suffer the "consequences." Significantly, Bryant identified the "heads" of the Union as those present at the meeting. Clearly, those "heads" were the four named alleged discriminates.

Animus toward the Union and toward the four named superintendents above has been amply shown in Scharfman's statements to de los Santos that he knew that he was trying to organize in behalf of the Union, and that those who did so were "traitors" who would "wait for the consequences," including his sale of "all these buildings." Further, his remark to Nina that he was doing things behind his back and that he had \$1 million to destroy the Union movement strongly support a finding of animus. Further, following the appearance of the men's picture in the *Hoy* newspaper, manager Bryant was credibly quoted as saying that Scharfman had water up to his neck and that every action would be met with a reaction by him, including his taking a "strong decision" if the men did not stop their organizing activity.

In addition, the Respondent's offers of money to the employees to quit, solicitations of the tenants to petition to have Millet discharged, the way in which it relentlessly surveilled Nina even after the security agency said that it was unable to obtain damaging evidence, and its later attempt to deprive Nina of his rightful reinstatement to his building at the proper salary, all strongly support a finding that the Respondent's actions in this case were motivated by intense union animus.

The activities, which occurred after the men were reinstated in 2005, also show that the Respondent sought to unlawfully undo the effects of their reinstatements by again unlawfully discharging them, again for reasons violative of the Act. I accordingly find that the General Counsel has established that the actions taken against de los Santos, Medina, Millet and Nina were motivated by their activities in behalf of the Union. *Wright Line*, 251 NLRB 1083 (1980).

I. The Alleged Onerous Conditions of Work

The complaint alleges that at various times in 2003 and 2004, the Respondent unlawfully imposed more onerous working conditions on employees de los Santos, Millet and Nina, by taking away supplemental repair work, increasing work loads, changing schedules, requiring

them to obtain permission before leaving their work places, failing to pay them for repair work, and more closely scrutinizing their work.

5 The complaint further alleges that from various dates in 2005, the Respondent refused to assign supplemental repair work to de los Santos, Medina, Millet, and Nina.

A. Failure to Offer Supplemental Repair Work

10 It was the Respondent's consistent policy to offer supplemental repair work to the superintendents in the buildings in which they resided because the superintendent was familiar with the building, the tenants and the work to be done.

15 Nevertheless, the Respondent's records, combined with the testimony of its witnesses and witnesses for the General Counsel, as set forth above, establish that the four superintendents were not offered supplemental repair work because of their activities in behalf of the Union. It is certainly true, as the Respondent contends, that during some of the periods of time included below, the superintendents were unavailable for offers of supplemental repair work due to vacations and illness. However, the statistics prove that notwithstanding such sporadic unavailability, the Respondent failed to offer them jobs which were available.

20 Thus, as to de los Santos, Medina and Nina, the Respondent's records, set forth in detail above, show that in 2002 and until their Union activities became known to the Respondent in mid March, 2003, they performed extensive amounts of supplemental repair work in their buildings and in other buildings compared to other individuals who did such work. However, 25 upon becoming aware of their Union activities, the Respondent offered them much less work and they performed much less work than previously.

30 Millet's work record must be addressed separately. It is true that he did more supplemental repair work than others in 2003 and 2004. However the jobs performed by him in 2002 were proportionately much greater, compared to work done by others, than the work done by him in 2003 and 2004. Thus, a fair finding may be made that, although he did more work in his building in 2003 and 2004 than others, the amount of such work in those latter years was less proportionately than he did in 2002 before the Union's advent.

35 The complaint further alleges that the failure to offer supplemental repair work to de los Santos, Medina, Millet and Nina following their reinstatements in 2005 because of their continued support for the Union and in violation of the terms of the Settlement Agreement. The record evidence supports these allegations, establishing that the four men did virtually no work following their reinstatements in 2005.

40 The explicit terms of the Agreement provides, in material part, that the Respondent "will not deprive employees of supplemental repair work" because of their union activities.

45 The above records confirming the amount of supplemental repair work performed following the employees' reinstatements in April, 2005 establishes that they were performed virtually no work. The Respondent argues, that they were offered such work and declined it. However, the evidence establishes that the Respondent's supervisors advised the employees that they would no longer be given such work notwithstanding that it was the Employer's policy to first offer such work to the superintendents for various reasons. Thus, manager Bryant quoted 50 Scharfman as directing him not to offer renovation work to the superintendents after their reinstatement. Burrell stated that employees who were active in the Local 32 campaign were not given supplemental repair work. Sosa stated that he did not offer renovation work to the

superintendents after their reinstatement.

5 That policy, combined with the fact that no material complaints concerning their work were made prior to the Union's organizing campaign, provided the Respondent with no legitimate reason, which will be discussed below, to refuse to offer them such work.

10 It is clear that the employees asked for supplemental repair work. De los Santos and Millet even filed charges alleging that they were not being offered supplemental repair work. Indeed, when de los Santos asked about more supplemental repair work, manager Sosa asked how much money he, Medina and Millet wanted to quit their jobs. Thus, the Respondent's reply to the requests for more work was an offer that they quit in exchange for money.

15 The Respondent offered numerous defenses to the decline in supplemental repair work performed by and offered to the four superintendents. It first suggests that as the areas in which the buildings were located became more desirable, tenants were paying higher rent and therefore were more demanding regarding the quality of the supplemental repair work and the cleanliness and repair of the buildings in which they resided. The testimony presented was simply the opinions of the witnesses, without supporting evidence that new tenants in those buildings were unhappy with the quality of the work performed, or that the work done by these
20 superintendents with long work records were the subject of complaints prior to the Union's advent.

25 The Respondent also offered as a reason for the decline in work that inasmuch as the buildings where supplemental repair work was being done were purchased years before, substantial renovations to vacant apartments were done at that time and therefore the amount of such work was less thereafter. However, the records show that other people did more work in those buildings than the employees at issue did. Thus, work was being performed. The question is why were the four superintendents not being given that work, and why were they not receiving the work to the same extent that they had before. The fact that the four superintendents were
30 not doing that work and others were undermines this defense.

35 Further, Scharfman announced at the May 7 meeting that only licensed contractors would perform supplemental repair work. However, he continued to use unlicensed superintendents including Marte, to perform the work. In addition, Bryant stated that the "licensed contractors only" policy lasted only two to three months because the Employer only had two licensed contractors who could not handle the workload. Thus, this policy was in effect only briefly but it is important to note that it was stated as a reason to deny the superintendents extra work.

40 Scharfman's testimony that beginning in 2000, a City regulation requiring that plans be filed for certain repair work caused him to hire people to work to City standards implies that the four superintendents were not qualified to perform such work. However, the record consistently shows that they performed the same type of work prior to and after 2000. If his testimony implies that only licensed contractors were permitted to do such work, the Respondent
45 nevertheless employed non-licensed people, including the four superintendents, to do such work.

50 In further defense, the Respondent argues that the superintendents were not competent to perform the types of supplemental repair work that they had done for years, apparently without complaint, and did not have their buildings in proper repair, or were the subject of large numbers of HPD violations. I am aware that the Respondent's witnesses testified that its criteria for deciding who should be offered supplemental repair work had not changed before or after

the employees' interest in the Union. However, these alleged criteria apparently were not taken into consideration since Medina and Nina, the superintendents allegedly with the highest number of violations, continued to receive large amounts of such work before the Union's arrival. In addition, the above records support a finding that the Respondent assigned large amounts of work to the allegedly incompetent superintendents before their interest in the Union became known to it. Further, although the Respondent maintained records of the HPD violations, no such actual records were offered in evidence, only round-number estimates by the Respondent's supervisors as to how many violations each of the superintendent's buildings amassed.

The Respondent further contends that supplemental repair work was not offered to de los Santos, Medina and Nina because they refused such work because they were not offered what they considered a proper payment for such jobs. First, it is unlikely that they would have refused work since they had accepted large amounts of work before the Union's advent. Second, such work constituted a large amount of their income. In some cases, they earned more money from those jobs than from their regular superintendent's salary. Indeed, when they performed such work in the past they received less money than they asked for, but they nevertheless continued to accept work. They testified that they continuously asked for more work, and filed charges alleging that they had not been offered such work, and, as noted above, one of their main complaints at the Employer's May 7 meeting was the Respondent's failure to give them more supplemental repair work.

It is true that Medina stated in his affidavit that in November, 2005, he refused such work because he was not being paid enough money for the jobs. However, this seems to be for a limited period of time, and there was no reason that the Respondent could not have continued to offer him such work. There was testimony from the Respondent's witnesses that they did not offer the superintendents supplemental repair work because the prices they requested were too high. Nevertheless, superintendent Marte stated that his prices were rejected, but he continued to be offered additional work.

It is important to recall de los Santos' testimony that in mid-May, 2003, Scharfman told him that a job he was doing would be his last because he now had to "suffer" with his superintendent's salary because the Respondent would thereafter be using licensed contractors. This is a clear indication that the Employer sought to punish the superintendents for their interest in the Union and to cause them to leave their employment. As set forth above, the instances of the superintendents being offered money to quit their employment, coupled with the failure to offer them supplemental repair work, had its intended effect. De los Santos stated that he accepted a payment of money and resigned because he could not afford to keep his employment without receiving additional income from supplemental repair work.

As set forth above, Manager Bryant testified broadly that Scharfman told him in 2005 that no superintendent was to perform renovation work, apparently seeking to explain the lack of offers of work to the four superintendents. However, superintendents other than the four did receive offers of renovation work at that time. When Bryant explained that only those superintendents whose buildings were "immaculate" and had few violations received such work, no supporting evidence was provided to prove this claim. Indeed, managers Ramirez, Bryant, and Sosa stated that, for example, Medina's building was well maintained, Sosa stating that it was "very clean, safe. I have no complaint."

While Bryant testified that superintendents who were willing to travel to do renovations were offered such work, he conceded that Nina was willing to travel. Nevertheless, as set forth above, the amount of work offered to Nina was much less following the Union's advent than

before. Further, Scharfman emphasized that in permitting the superintendents to travel to do renovations, such jobs were usually not too distant from their buildings so they could return in an emergency.

5 I accordingly find and conclude that the Respondent failed to offer supplemental repair work to the four superintendents in retaliation for their activities in behalf of the Union. As such, the Respondent violated the terms of the Settlement Agreement which provides that it “will not deprive employees of supplemental repair work” because of their union activities. Therefore, the Regional Director’s revocation of the Settlement Agreement and the reissuance of the
10 complaint on which the Agreement was based, were proper.

B. Other Alleged Instances of Imposing More Onerous Conditions of Work

15 The complaint alleges that the Respondent imposed more onerous conditions of work on de los Santos, Millet and Nina by increasing their work loads, changing schedules, requiring them to obtain permission before leaving their work places, failing to pay them for repair work, and more closely scrutinizing their work.

20 I credit the testimony of de los Santos and Millet that after the May meeting, they were told by their managers that they had to obtain permission and had to call the office prior to leaving their buildings, even for a short time. Before that time, neither superintendent was required to have permission before leaving the building.

25 In clear support of the allegation that employees had to be present in their buildings eight hours per day is manager Canales’ testimony that manager de Chalus told him of this requirement, adding that it was because they had to take care of their buildings and “because of the union also.” Thus, an unlawful motive has been clearly established.

30 I credit the testimony of manager Bryant, as set forth above, that after the May 7, 2003 meeting, Scharfman told him that employees were required to be in their buildings eight hours per day. Bryant’s testimony that this was not a change, but rather simply an “enforcement” of company policy, and that he could not give them as much “latitude” as in the past lends support to the General Counsel’s case that this requirement was not in effect prior to that time, or, if it was, it was not being enforced. Thus, it is apparent that the Respondent became aware,
35 certainly by May 7, that the superintendents were organizing in behalf of the Union and that it sought to minimize their opportunities to leave their buildings for the purpose of meeting with their co-workers. In this regard, I credit Nina’s testimony that Scharfman told him in mid June, 2003, that he could not leave his building and that Bryant would monitor his presence there, and de los Santos’ testimony that Bryant told him that he had to be in his building eight hours per
40 day, unlike the prior practice.

45 Further undermining the Respondent’s theory is that superintendents routinely were assigned renovation and other supplemental repair work in other buildings and, of necessity, had to leave their buildings. Such absences were undoubtedly authorized by the Respondent because it knew that its superintendents were performing work in buildings other than where they worked and thus could not have remained in their buildings eight hours per day.

50 I cannot credit the Respondent’s reason for this new policy. Scharfman’s testimony that after May 7 the managers had difficulty locating the four superintendents during regular business hours is not worthy of belief. The superintendents had Nextel phones, beepers, radios and cell phones with which they could be called. There is no showing that the Respondent had such difficulty locating the superintendents prior to May 7, necessitating this change in

procedure.

5 I credit the testimony of de los Santos and Medina that they were subject to greater scrutiny following the May, 2007 meeting in that their managers made much more frequent visits to their buildings than before. Indeed Nina's credited testimony confirms this. He stated that Scharfman promised that he and manager Bryant would be in his buildings "continuously." Clearly, the Respondent is entitled to monitor its employees' presence in the building and also to examine their work. However, the evidence establishes that the monitoring and scrutiny of the superintendents' work greatly increased in intensity following the Respondent's becoming aware of its employees' interest in the Union. Further, manager Burrell credibly testified that 10 Scharfman ordered manager Bryant to keep a detailed log book as to Nina in an effort to amass evidence to discharge him. I cannot credit Bryant's denial that he maintained the logbook. He testified that he was, indeed, asked twice by Scharfman to keep such a book, but he inexplicably failed to do so. If anything is clear in this record, it is that Scharfman demanded the utmost loyalty of his managers and they dutifully carried out his orders. Thus, it is unlikely that 15 Bryant failed to keep the logbook.

20 I find Burrell's testimony to be, in all respects, credible. He was a trusted manager having been employed for about three years. As such, he was intimately familiar with the Respondent's reaction to the Union campaign. His testimony concerning arriving at the Union meeting on March 3 particularly rings true. It is unlikely that he and Bryant would have simply met by chance at that time as Bryant stated. Rather, it is more likely, as Burrell testified, that the Respondent was aware of the meeting and sent Bryant and Burrell to learn what they could concerning it. As set forth above, Burrell was instructed by Scharfman to tell him what was 25 going on concerning the Union and the employees' involvement in it. Similarly, de los Santos stated that Scharfman questioned him about who was involved.

30 I also credit Nina's testimony that he was told by Scharfman in mid June, 2003 that during the porter's two days off he had to perform his duties. I also credit Millet's testimony to the same effect. The Respondent argues that this change, even if it occurred, did not represent any discrimination because the superintendent would have been working anyway during those two days. I disagree. It represents a change in the superintendent's conditions of employment. It was an onerous change since it was apparent that the Respondent expected that the superintendent would perform his duties in a timely manner. If he was unable to work at his 35 regular duties but was instead doing the porter's work, his own work would necessarily be delayed. I also credit the employees' evidence that at the May 7 meeting they were told that they would no longer be paid for buffing the buildings' hallways, for which they had previously been paid.

40 As set forth above, the Respondent has uniformly permitted superintendents to employ porters at their own expense to help with the superintendent's duties or to assist with supplemental repair work. Although there was certain testimony that the Respondent objected to the use of these porters because of insurance considerations, there was no prohibition of the use of such porters until the summer of 2003, after the Union began organizing, as seen in 45 Scharfman's direction to Carvajal. Bryant's order in June, 2003 to Nina that he could not have a helper clearly showed that this was a change in the superintendents' working conditions.

50 The issue concerning the alleged failure to pay for repair work is more complicated. The uniform testimony of the superintendents is that this practice began long before the Union began its organizing drive. As set forth above, one of the reasons for organizing was because of their complaint that the Respondent was not paying them for jobs they performed or was paying less than they asked. Given the long-standing nature of the Respondent's practice in this

regard, clearly preceding the Union's organizing effort, it cannot be said that the General Counsel has made a prime facie showing that the Respondent's failure to pay the superintendents for their work or has paid less than they asked was motivated by their activities in behalf of the Union. I accordingly recommend that the allegation that the Respondent failed to pay employees for repair work be dismissed.

II. The Alleged Unlawful Assistance to Local 187

The complaint alleges that (a) from March, 2003 to August, 2003, the Respondent rendered assistance to Factory and Building Employees Union Local 187 (Local 187) by paying dues to that union on behalf of employees in the absence of deductions for such dues from employees' paychecks (b) from August, 2003 to May, 2004, by deducting money from employees' wages and remitting it to Local 187 notwithstanding the absence of employee authorizations for the deductions and remittances and (c) from June, 2003 to August, 2003, by employing Respondent's supervisors and agents to solicit employees to sign cards for Local 187.

As set forth above, the evidence establishes that dues in behalf of Local 187 were not deducted from the pay of Medina and Millet in January through July, 2003, but dues had been paid by the Employer for them during that period of time. Such conduct violates Section 8(a)(1) and (2) of the Act. *Mar-Jam Supply Co.*, 337 NLRB 337, 353 (2001); *Regal Recycling, Inc.*, 329 NLRB 355, 376 (1999). The Respondent had no cards and presented no cards at hearing signed by those two men which authorized the deduction of dues for Local 187. Beginning in August, 2003, dues were deducted from the wages of Medina notwithstanding that he had not signed a card for Local 187. Such conduct violated Section 8(a)(1) and (2) of the Act. *Planned Building Services*, 347 NLRB 670, 706 (2006).

As set forth above, supervisor Burrell credibly testified that in the summer of 2003, he accompanied employee Marte to about 5 to 10 buildings where Marte asked the superintendents to sign cards for Local 187. On one occasion, Local 187 president D'Onofrio was present and announced that Scharfman sent him to have the workers sign cards. Burrell's testimony rings true as he quoted the workers as asking how the Employer felt about them signing. I cannot credit Scharfman's denial that he asked anyone to have the workers sign cards for Local 187. It is clear that Scharfman strongly supported Local 187, told the workers at the May, 2003 meeting that Local 187 was their union, and discouraged them from signing with Local 32. It is therefore likely that he strongly supported Burrell's accompaniment of Marte when the cards were signed.

In addition, Burrell credibly testified that he asked employees Cavido, Jimenez and Rivera to sign cards for that union, and told Cavido that he should sign with Local 187 rather than Local 32 or his immigration status could be affected.

Similarly, supervisor Canales credibly testified that his superior de Chalus gave him cards for Local 187 to distribute, and he asked about 10 superintendents to sign. The Respondent challenges the credibility of Canales on the grounds that he had a "strained relationship" with de Chalus, and sought to help the employees join Local 32B. Even if true, these factors do not negate his admitted conduct in asking employees to sign cards for Local 187. Such conduct violated Section 8(a)(1) and (2) of the Act. *Planned Building Services*, 347 NLRB 670, 704 (2006).

III. The October, 2004 Discharges of de los Santos, Medina, and Millet

The complaint alleges that the Respondent unlawfully discharged de los Santos, Medina, and Millet on October 29, 2004.

As set forth above, Local 187 president D'Onofrio met with the three men in mid 2004 in an effort to have them sign cards for Local 187, and to ask them to withdraw their pending charges against that union. At about the same time, in April, 2004, the three workers sent a letter revoking their dues deduction authorizations for Local 187. The Respondent received notice that the three men revoked their dues authorizations and discharged the men.

The Respondent argues that it was justified in discharging the three since it acted only in response to a valid request by Local 187. As set forth above, the three employees revoked their authorization for payment of their union dues by check-off. In October, the Union requested their discharge inasmuch as union dues or equivalent agency fees have not been paid and, according to the "current collective bargaining relationship," such payment is "required as a condition of employment." The Employer then discharged the men, advising them that if Local 187 was in error, they should contact the Employer.

I reject the Respondent's arguments. First, there was no proof that either Medina or Millet ever signed an authorization card for Local 187. As set forth above, I have found that the Respondent rendered unlawful assistance to that union by paying dues to it on behalf of the two men until August, 2003, when it began to unlawfully deduct dues from their pay without authorization to do so. In addition, the Respondent admits that the contract covering Medina's building expired five months before Local 187's request that he be discharged. The contract had not been renewed, and, the Respondent admits that "there was no showing of support for Local 187 at that building."³¹ It is well settled that "the obligation to pay dues under a union-security provision accrues from the date of the execution of the collective-bargaining agreement... a union-security clause does not survive the expiration of a contract and cannot be enforced after the contract has expired." *Flying Dutchman Park, Inc.*, 329 NLRB 414, 422 (1999). Regarding de los Santos, Scharfman was well aware of his refusal to support Local 187 and instead, his unwavering support of Local 32. Further, the Respondent has not been faithful to the union security clause in the contract for de los Santos' building where it has, in other cases, paid dues in behalf of employees and unlawfully deducted dues without authorization.

"An employer violates the Act when it discharges an employee at the request of the union when it has 'reasonable grounds for believing' that the request was unlawful." *Palmer House Hilton*, 353 NLRB No. 90, slip op. at 2 (2009). If it is aware of certain circumstances that make the request unlawful, it is "required to investigate the circumstances" of the termination request. *Planned Building Services*, 318 NLRB 1049, 10673 (1995).

Accordingly, the Respondent had reasonable grounds to believe that the request was unlawful since it had no dues-deduction authorization cards from Medina or Millet and that it knew that the contract in Medina's building had expired. Therefore, it was not even necessary for the Respondent to investigate the circumstances of the termination request since it was already well aware of the facts – that no basis existed for the union's unlawful request that they be fired. As to de los Santos, the Respondent was also informed by him that he did not support Local 187 in his one-person building. Accordingly, that union did not enjoy majority support.

I accordingly find and conclude that the Respondent's discharge of de los Santos, Medina and Millet in October, 2004, and the Respondent's refusal to reinstate them until April,

³¹ Respondent's position statement, page 3, G.C. Exhibit No. 49.

2005 upon the execution of the Settlement Agreement violated Section 8(a)(1) and (3) of the Act, .

IV. The Unlawful Threats to Employees and the Offers of Money to Them to Resign

The complaint alleges that in June, 2005, the Respondent threatened employees with discharge and directed them to resign because they engaged in activities on behalf of Local 32, and offered them money to resign because they engaged in activities on behalf of Local 32.

I have credited the testimony of de los Santos, Medina and Millet who stated that after their reinstatement pursuant to the Settlement Agreement Sosa asked them how much money they wanted to resign. I cannot credit Sosa's testimony that Millet raised the question by saying that if he would be paid he would resign. Millet specifically stated that in June or July, 2005, Sosa asked him how much money he wanted to resign. Millet said that he would accept \$50,000. Sosa said that the Employer would give him \$25,000 and Millet refused.

De los Santos testified that Sosa told him that he looked sick and should move out, and asked how much money he wanted to vacate the premises, adding that he should meet with Medina and Millet, decide on an amount, and he would inform Scharfman. In about May, 2005, they met and de los Santos said that the three men would quit their jobs for a total of \$200,000. Sosa refused, adding that he thought they would ask for \$10,000 each. Medina confirmed this testimony. Sosa said that he would advise Scharfman of their conversation. The offer of money to quit their employment is consistent with Nina's credited testimony that Scharfman offered him "anything he wanted" to cease his activities in behalf of the Union and supports the testimony of de los Santos, Medina and Millet.

Medina's later testimony that shortly after that meeting, Sosa told him that Scharfman would pay Millet \$200,000 to quit is somewhat odd, since the men had previously asked for a total of \$200,000 for all three to resign. Accordingly, there is some confusion as to this latter testimony. Nevertheless, I find that, apart from this latter statement, the testimony of de los Santos and Millet consistently set forth the Respondent's desire to induce the employees to quit by offering them money to leave.

I find that the offers of money to the superintendents were made because of their activities in behalf of the Union. In making these offers, the Respondent violated Section 8(a)(1) of the Act, *Tilden Arms Management Co.*, 276 NLRB 1111, 1118-1119 (1985). In addition, Sosa's remarks constitute a not too subtle direction that employees resign their employment and also a threat that the workers would be fired. I find that the threats were directed at de los Santos because of his activities in behalf of the Union.

V. The Solicitation of Complaints about Millet and his Discharge

The complaint alleges that in December, 2005, the Respondent solicited complaints from tenants about Millet's performance, and in February, 2006, discharged him, and in February, 2007, brought eviction proceedings against him.

Following his reinstatement in April, 2005, Millet told the Respondent that he believed that he would receive a certain amount of supplemental repair work pursuant to the terms of the Settlement Agreement. Of course, the Agreement only requires that the Respondent not deprive the superintendents of supplemental repair work. By letter of April 13, 2005, Scharfman threatened "further disciplinary action" if Millet attempted to "direct or limit" the Respondent's

right to offer such work to others. The letter overreacted to Millet's proper statement to the Respondent, which, in fact, turned out to be justified in that Millet was not receiving the proper amount of supplemental repair work.

5 As set forth above, when tenant association president Leonardo Ruiz complained to manager Larry Wornum in June, 2005, about the state of repairs in the building, Wornum said that the problem was with Millet and asked that the tenants help by signing a petition to oust Millet. It should be noted that Sosa later told Ruiz the same thing – that the state of repairs in the building would improve if Millet was terminated. A petition was circulated which actually
10 overwhelmingly supported Millet, and, in fact, Ruiz told Scharfman that the problem was not with Ruiz despite every manager's "agenda" to terminate him. Rather, according to Ruiz, the problem was the Respondent's emphasis on renovating empty apartments and its failure to repair the occupied units.

15 Clearly, the tenants did not believe that Millet's performance had anything to do with their complaints concerning the condition of the building or the state of repairs to their apartments. Rather, they blamed the Respondent's policy of renovating apartments as the cause of the lack of repair to their units.

20 The Respondent's attempt to obtain tenant support to terminate Millet occurred after his reinstatement in April, 2005, and was clearly done in order to justify his discharge by improperly placing the blame for the lack of repair of apartments on Millet.

25 I accordingly find and conclude that the Respondent unlawfully solicited unjustified complaints against Millet for the purpose of terminating him in violation of the Act. *Mar Del Plata Condominium*, 282 NLRB 1012, 1025 (1987).

30 Thereafter, in the summer of 2005, Millet filed a UD petition, and the General Counsel filed a petition for summary judgment which contained Millet's affidavit dated June, 2005, alleging, *inter alia*, that he had not been offered supplemental repair work in violation of the Settlement Agreement. Millet credibly testified that in June, 2005, tenants association president Ruiz asked manager Sosa why Millet was not receiving the materials for repairs, Sosa's reply that his job was to "get rid of" Millet was not denied by Sosa. Further, as noted above, in the following month, Sosa asked Millet how much money he wanted to quit, and offered Millet
35 \$25,000. In addition, I have found, above, that the Respondent unlawfully refused to offer Millet supplemental repair work to the same extent that it had before he became involved with the Union.

40 The real reason for Millet's discharge was exposed in Sosa's statement to him when he handed him his discharge letter on February 17, 2006, stating that "Eugenio [de los Santos] and Medina were next." Clearly, this is a reference to the fact that the three most active employees in behalf of the Union campaign were placed in the same category by the Respondent and were targeted with discharge, with Millet being the first.

45 As set forth above, the discharge letter states that Millet refused to do his superintendent's work. His manager, Sosa, was asked whether, in February, 2006, Millet "was refusing to do certain work around the building that you felt were super duties" and he answered "No. I don't think so." Indeed, Millet stated that between April, 2005 when he was reinstated and February, 2006, he never refused to perform his superintendent duties, and in fact he did his
50 work during that time, during which he was never warned by any Employer agent that he was not working properly. Thus, according to Scharfman, he based the letter on what Sosa told him, but if Sosa truthfully told him what he said at trial, that he did not believe that Millet refused to

perform his superintendent's duties, there was no basis for that statement in the discharge letter.

5 The termination letter also states that Millet was unavailable. In this respect, Ramirez stated that she believed that the Employer's office had Millet's phone number, noting that the superintendents had Nextel phones and two-way pagers. Further, Millet credibly testified that he told Sosa that his phone was not working.

10 I accordingly find and conclude that the General Counsel has made a prima facie case that Millet was discharged on February 17, 2006 because of his activities on behalf of the Union. *Wright Line*, above.

15 For the reasons set forth above, I find that the Respondent has not met its burden of proving that it would have discharged Millet even in the absence of his union activities. *Wright Line*, above. I accordingly find that the Respondent has violated Section 8(a)(1) and (3) by its discharge of Millet on February 17, 2006.

VI. The Discharges of Medina and Nina and their Evictions

20 A. Medina

25 As set forth above, following Medina's reinstatement in April, 2005 pursuant to the Settlement Agreement, he was not offered supplemental repair work. Medina was discharged on January 7, 2008 by letter which stated that he was fired "solely because of his unauthorized use of Employer's property" and his unsatisfactory work performance as noted in the letter, which referred only to his unavailability in the building on January 3.

30 First, as to his allegedly unauthorized use of his apartment, referring to the alleged use of the common areas of the basement as his "private lounge," the evidence is clear that he properly occupied that area of the basement as part of his apartment, and the Respondent knew that the area in dispute was part of Medina's apartment, inasmuch as the Respondent had approved his installation of a parquet floor in that area when he moved in more than seven years before. In addition, the Respondent's managers visited his apartment and must have known the area occupied by him. Indeed, manager Prelvukaj conceded that initially he believed that the area at issue was Medina's living space. Medina was never warned by the Respondent that he occupied the disputed area of the apartment without authorization as alleged in the discharge letter. He credibly denied storing materials in the boiler room as alleged, and no photographs were taken of any improperly stored items there.

40 As to the accusation that he was unavailable on January 3, even manager Prelvukaj, who visited that day, did not understand that reference in the letter since he found Medina in the building when he visited that day to photograph the basement area.

45 Of course, the eviction proceedings against Medina which were commenced upon his discharge was the product of the unlawful discharge, and constitute a further violation of the Act. Supporting a finding of unlawful discharge are the facts that I have already found that Medina has been the subject of unlawful actions taken against him, including that he was offered money to quit his job.

50 I accordingly find and conclude that the General Counsel has proven that Medina's discharge was motivated by his continued and active support of the Union. The Respondent has not met its burden of proving that it would have discharged Medina even in the absence of his

Union activities. *Wright Line*, above.

I reject the Employer's assertion that Medina committed post-discharge misconduct which bars his reinstatement. It is clear that Medina purchased whatever materials he used for the restaurant renovation. Extensive documentation of the timely purchases of the materials used was received in evidence. Further, the Respondent's policy of storing only such materials as needed for a specific job makes it highly unlikely that the great amount of material used by Medina was stored in the Respondent's building and thus available for Medina to steal.

B. Nina

The complaint alleges that the Respondent unlawfully issued two disciplinary warnings to Nina in 2003³², discharged him on November 7, 2003 and brought eviction proceedings against him, and refused to reinstate him from November 7, 2003 to November, 2005.

As set forth above, Nina was an active supporter of the Union and that the Respondent was aware of his activities in its behalf. Scharfman apparently recognized that Nina was a leader in the Union drive as he warned him on March 10, 2003 that he did not want union meetings to be held, and that he had a large amount of money to "destroy" the union movement. Scharfman also sought to persuade him to drop the campaign by offering improvement in his conditions of work including a wage raise and medical benefits, and providing for retroactive raise payments.

As set forth above, on June 13, 2003, Nina received a warning letter which stated that he had been regularly abandoning his building and leaving the premises unattended. The fact that this was the first warning letter of any kind in Nina's ten years of employment, and in view of Nina's credited testimony that prior to the receipt of the letter he had not been warned of his alleged absence from the building, the motivation for the letter is suspect.

The warning letter came on the heels of Bryant's advice to Burrell that Scharfman wanted Bryant to monitor Nina's work carefully in order to justify his "eventual" discharge, and Bryant's further remarks to Burrell that Scharfman was "very upset" with Nina as the "main force" behind the Local 32 "uprising."

I therefore find that the General Counsel has established a prima facie case that Nina's active involvement with the Union was the motivating cause of the letter. When shown the letter, Bryant's explanation to Nina destroys the Respondent's *Wright Line* defense. As set forth above, Bryant told Nina that what was wrong with him was that he was "applying on behalf of Local 32...." and that "an action brings a reaction."

Nina's activities in behalf of the Union continued unabated. He met with Local 32, appeared in the *Hoy* newspaper, met with politicians, and filed a charge against the Respondent on July 2. On August 27, the Respondent filed a charge against the Union alleging Nina as an agent or representative. In September, when Nina told manager Wornum that he was responsible for having the workers sign cards for the Union, Wornum told him to "think about yourself."

Nina was discharged in early November, 2003 allegedly for repeated absences, his unavailability, his failure to perform his duties and lying to the manager regarding doctor visits.

³² Only one warning, issued on June 13, 2003, was the subject of this hearing.

As set forth above, Nina's strong leadership role in the Union campaign, the unfair labor practices found above in the requirement that he remain in his building eight hours per day and other new, onerous working conditions, combined with the animus expressed in Nina's involvement in the Union effort all support a finding that the discharge was motivated by those activities.

Nina gave un rebutted testimony that he told Wornum, who did not testify, of his medical appointments. Bryant testified that he had problems with Nina's "availability" since Bryant began working for the Employer in August, 2001. However, no measures were taken, other than the unlawful letter two years later, to warn Nina of this alleged malfeasance. Accordingly, I find that the Respondent has not proven that it would have issued the letter in the absence of Nina's persistent, strong Union activities. As to the alleged lie to his manager concerning the physician's appointment, it does appear that Nina misstated his July 28, 2003 visit, having been out of the country on that date. Nevertheless, Bryant stated that he gave Nina the "benefit of the doubt" concerning his lack of availability. It is likely that he would have done so in this one instance also but for his Union leadership role. Accordingly, I find that the Respondent has not proven that it would have discharged Nina in the absence of his union activities.

The complaint alleges that the failure to reinstate Nina from the time of discharge on November 7, 2003 to November, 2005 violated the Act. As set forth above, following the Respondent's execution of the Settlement Agreement in April, 2005 in which it agreed to "where applicable, allow employees to return to any previously vacated Employer-provided apartment" the Respondent undertook a campaign to, first, offer him a job at a different building than the one he had been discharged from and in which he worked for ten years, and then solicited tenants to state their views as to whether Nina should be reinstated to his original building. Nina gave valid reasons for refusing the offer to the other building. Finally, it sought to reinstate him at a much lower, "replacement employee" pay rate than the rate he received when he was fired, notwithstanding the Agreement's language that he be reinstated "with full seniority rights and privileges."

Thereafter, certain "settlement discussions" ensued between the Respondent and the Union in which the Respondent sought to pay him a "buy out" to waive reinstatement. The discussions broke off, and on September 9, 2005, the Respondent formally offered to reinstate Nina and asked him to contact Local 187 to arrange for his reinstatement. Nina thereafter traveled out of the country for one week in early September, and one week in mid October, and finally began work at his original building with the proper pay in early November, 2005.

The evidence therefore clearly establishes that the Respondent unlawfully refused to reinstate Nina from the time of his unlawful discharge in November, 2003 to the time of the Settlement Agreement in April, 2005, and unlawfully failed to reinstate him from April, 2005 until he was actually properly reinstated in November, 2005.

The Respondent argues that the Agreement did not require the Respondent to reinstate Nina to the same building he worked in at the time of his discharge, relying on the language that it agreed to reinstate him to his "former position, or substantially equivalent position...." The Respondent thus argues that it properly offered him a substantially equivalent position in a different building. It contends that it "perceived that Nina was not liked by many tenants at his prior building, and it was thought that a new building would afford Nina a 'fresh start.'"³³ Further, a replacement superintendent had been living in the original building for two years and had

³³ Respondent's Brief, page 83.

been doing a good job. The Respondent further argues that the delay in reinstating Nina was due to “good faith negotiations” concerning his reinstatement.

5 I cannot agree with the Respondent. It was aware, as early as May 19, 2005 that Nina rejected the offer of reinstatement to a different building, and the reasons therefor.³⁴ Nina established that the offer was not to a substantially equivalent position because he believed that the offered building was a drug hangout, its distance from his children’s school might necessitate a change of school for them, and the sizes of the building and the superintendent’s apartment were different. Upon Nina’s rejection of the offer, the Respondent was obligated to
10 reinstate him immediately to his original building. The Respondent’s solicitation of tenants’ opinions as to Nina’s reinstatement illustrates the Respondent’s reluctance to reinstate him to his original building. Further, the offer of a “replacement” superintendent’s much lower salary, later corrected, supports a finding that the Respondent failed to offer him proper reinstatement.

15 I accordingly find and conclude that the Respondent’s failure to reinstate Nina upon the execution of the Agreement and its delay in reinstating him violated the Act.

20 Nina was again discharged by letter of January 4, 2008 in which a “number of factors” were said to have led to the decision to fire him. Such factors included his allegedly early departure for vacation and his failure to return on time without notifying anyone. The letter also mentioned his alleged “stealing time” by leaving the building during business hours to monitor a construction project he was supervising. To the extent that the Respondent relied on the Thanksgiving boiler incident in discharging him, the evidence shows that it was porter Hidalgo’s error in causing the boiler to overfill, and not Nina’s lack of attention. There is no evidence that
25 Nina deliberately caused the boiler flood problem as asserted in the Respondent’s letter of December 7. Nor was there any evidence that the Respondent sought to find out who caused the overfill.

30 As set forth above, the discharge letter asserted that Nina was scheduled to leave the building for vacation on December 20, but instead left on December 19, and was required to return to work on January 3. Indeed, the Respondent’s surveillance reported him as being home in the evening of December 19. The Employer was advised that Nina intended to leave on December 20 and the Employer’s e-mails further acknowledged that Nina was expected to be at work on January 4. Indeed, Nina’s flight was on January 3 and he was in the building on
35 January 3 and ready to work a full day on January 4.

40 In fact, the Respondent concedes that “the transcript and relevant documents reveals that there was confusion as to the precise date that Nina was to leave, return, and would be returning to work.”³⁵ If that was the case, why did the Respondent not investigate this “confusion” but instead rush to discharge him on January 4, his first day of work after his return from vacation? The answer may be found in the Respondent’s entire course of conduct, fully set forth above, which was to rid itself of an active, energetic supporter of Local 32B, despite his long, unblemished ten year record of service to the Employer.

45 Accordingly, there is no basis for the Employer’s assertion in the discharge letter that Nina was away from work without the Employer’s authorization or knowledge. Further, no evidence was presented that Nina stole time by monitoring a construction project. There was vague testimony that on one day he threw a garbage bag over a fence to someone where

50 ³⁴ Respondent’s Exhibit No.114.

³⁵ Respondent’s Brief, page 113.

construction was being conducted. Nina credibly testified that the bag contained some toys that were no longer of use to his children.

5 Supporting a finding of unlawful discharge are the facts that I have already found that Nina has been the subject of unlawful actions taken against him, and the fact that the Respondent's lack of good faith toward Nina is evident in seeking to prevent his reinstatement following the Settlement Agreement to his original building and its attempt, later corrected, to pay him at the salary for a replacement employee, rather than his proper, original salary.

10 I accordingly find and conclude that the Respondent has not met its burden of proving that it would have discharged Nina even in the absence of his Union activities. *Wright Line*, above.

15 VII. The Alleged Violations of Section 8(a)(4) of the Act

15 It is alleged that all of the discriminatory actions taken against the four employees following the Settlement Agreement of April, 2005 were, in addition to constituting violations of Section 8(a)(3), also violative of Section 8(a)(4) of the Act.

20 The same *Wright Line* standards apply to alleged violations of Section 8(a)(4) as to alleged violations of Section 8(a)(3). *Newcor Bay City Division*, 351 NLRB 1034, fn. 4 (2007). Thus, the General Counsel has the initial burden of proving that the employees' activity in utilizing its processes was a motivating factor in actions taken against the employee. Although Section 8(a)(4) limits the proscription to employees who have filed charges or given testimony under the Act, the Supreme Court has construed this language broadly in order to protect
25 employee access to the Board. *NLRB v. Scrivener*, 405 U.S. 117 (1972).

30 It is unquestionably true that de los Santos, Medina, Millet, and Nina had extensive involvement with the Board following the execution of the Settlement Agreement. They filed additional charges, gave supplemental affidavits, expressed their opinion to the Respondent as to their understanding of the terms of the Settlement Agreement and disagreed with the Respondent's interpretation of the Agreement. Further, in Nina's case, his reinstatement pursuant to the Agreement was the subject of negotiation and ultimately charges concerning the Respondent's failure to reinstate him to his original building. The General Counsel's petition for
35 summary judgment alleging the Respondent's failure to abide by the terms of the Settlement Agreement contained the affidavits of Millet and Nina which ultimately led to the revocation of the Settlement Agreement. In light of the above, the Respondent possessed knowledge of the employees' activities outlined above.

40 It is the General Counsel's burden to establish "the Respondent's animus against that activity" and that such animus was a "motivating factor" in such discriminatory actions taken against them. *Newcor*, above. The General Counsel argues that the Respondent must have had animus toward the employees due to their involvement with the Board's processes because the actions against them took place over a period of five years, from 2003 to 2008. However, that is
45 not enough to show that the actions against the four superintendents were motivated by such involvement. The mere fact that charges were filed and affidavits were given over the course of the long history of this case is insufficient to prove that the Respondent's discriminatory conduct was motivated by the employees' use of the Board's processes. Thus, there is no evidence that any statements were made by the Respondent that specific discriminatory conduct was
50 attributable to their filing charges, giving affidavits or testimony or becoming involved in the Board's proceedings. See *W.E. Carlson Corp.*, 346 NLRB 431, 434 (2006).

I accordingly find and conclude that no violations of Section 8(a)(4) of the Act have been proven.

Conclusions of Law

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1. In about March or April, 2003 until November 7, 2003, by imposing more onerous working conditions on Manuel Nina by refusing to offer him supplemental repair work, increasing his work load, changing his schedule, requiring him to obtain permission before leaving his work place, and more closely scrutinizing his work, the Respondent violated Section 8(a)(1) and (3) of the Act.

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2. In about March or April, 2003 until October 29, 2004, by imposing more onerous working conditions on Eugenio de los Santos by refusing to offer him supplemental repair work, increasing his work load, changing his schedule, requiring him to obtain permission before leaving his work place, and more closely scrutinizing his work, the Respondent violated Section 8(a)(1) and (3) of the Act.

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3. In about March or April, 2003 until October 29, 2004, by imposing more onerous working conditions on Bolivar Millet by refusing to offer him supplemental repair work, increasing his work load, changing his schedule, requiring him to obtain permission before leaving his work place, and more closely scrutinizing his work, the Respondent violated Section 8(a)(1) and (3) of the Act.

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4. By on about June 13, 2003, issuing a disciplinary warning to Manuel Nina, the Respondent violated Section 8(a)(1) and (3) of the Act.

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5. By discharging Manuel Nina on November 7, 2003, and Eugenio de los Santos, Domingo Medina, and Bolivar Millet on October 29, 2004, the Respondent violated Section 8(a)(1) and (3) of the Act.

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6. By failing to reinstate Manuel Nina from November 7, 2003 to November, 2005, the Respondent violated Section 8(a)(1) and (3) of the Act.

7. By failing to reinstate Eugenio de los Santos, Domingo Medina, and Bolivar Millet from October 29, 2004, to April 27, 2005, the Respondent violated Section 8(a)(1) and (3) of the Act.

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8. By rendering assistance to Factory and Building Employees Union Local 187 from about March 1, 2003 to about August 18, 2003 by paying dues to Local 187 on behalf of employees in the absence of any deductions for such dues from employees' paychecks, the Respondent violated Section 8(a)(1) and (2) of the Act.

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9. By rendering assistance to Local 187 by deducting money from employees' wages and remitting same to Local 187 notwithstanding the absence of employee authorizations for the deductions and remittances, the Respondent violated Section 8(a)(1) and (2) of the Act.

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10. By rendering assistance to Local 187 by employing the Respondent's supervisors and agents to solicit employees to sign authorization cards for Local 187, the Respondent violated Section 8(a)(1) and (2) of the Act.

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11. By offering its employees money to resign their employment with the Respondent and by threatening employees with discharge and directing them to resign because they engaged in activities in behalf of Local 32BJ, Service Employees International Union, the

Respondent violated Section 8(a)(1) and (3) of the Act.

12. By refusing to offer supplemental repair work to the following employees in about the following dates, the Respondent violated Section 8(a)(1) and (3) of the Act: Eugenio de los Santos – April, 2005 through May, 2006; Bolivar Millet – April, 2005 through February 17, 2006; Domingo Medina – April, 2005 through January 7, 2008; Manuel Nina – November, 2005 through January 4, 2008.

13. By soliciting complaints in about December 2005, from building tenants about Bolivar Millet's work performance, the Respondent violated Section 8(a)(1) and (3) of the Act.

14. By discharging Bolivar Millet on about February 17, 2006, the Respondent violated Section 8(a)(1) and (3) of the Act.

15. By discharging Manuel Nina on about January 4, 2008 and commencing eviction proceedings against him, the Respondent violated Section 8(a)(1) and (3) of the Act.

16. By discharging Domingo Medina on about January 7, 2008 and commencing eviction proceedings against him, the Respondent violated Section 8(a)(1) and (3) of the Act.

Remedy

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

The Respondent having discriminatorily discharged employees, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, 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).

The reinstatement order applies only to employees Domingo Medina, Bolivar Millet and Manuel Nina inasmuch as Eugenio de los Santos has resigned his employment. However, the backpay remedy applies to all four named employees. Backpay shall apply to all of the losses suffered by those employees as a result of the unfair labor practices, including, but not limited to, losses from the failures to reinstate them, losses from the failure to offer them supplemental repair work, and losses from eviction proceedings brought against them.

Because it is not known when or how often the employees visit the Hartsdale office of the Respondent, I shall recommend that the Notice be posted, in addition, at each of the four buildings at issue here, and that the Notice be posted in English and Spanish.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³⁶

³⁶ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Beach Lane Management, FSM Management, Inc., and Carpe Diem Management, LLC its officers, agents, successors, and assigns, shall

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1. Cease and desist from

(a) Discharging and failing to reinstate employees and bringing eviction proceedings against employees because of their activities in behalf of Local 32BJ, Service Employees International Union or any other union.

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(b) Imposing more onerous working conditions on employees by refusing to offer them supplemental repair work, increasing their work load, changing their schedules, requiring them to obtain permission before leaving their work places, and more closely scrutinizing their work because of their activities in behalf of Local 32BJ, Service Employees International Union or any other union.

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(c) Issuing disciplinary warnings to employees because of their activities in behalf of Local 32BJ, Service Employees International Union or any other union.

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(d) Rendering assistance to Factory and Building Employees Union Local 187 or any other union by paying dues to Local 187 on behalf of employees in the absence of valid deductions for such dues from employees' paychecks.

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(e) Rendering assistance to Local 187 or any other union by deducting money from employees' wages and remitting same to Local 187 notwithstanding the absence of employee authorizations for the deductions and remittances.

(f) Rendering assistance to Local 187 by employing the Respondent's supervisors and agents to solicit employees to sign authorization cards for Local 187.

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(g) Rendering assistance to Local 187 or any other union by discharging employees at the request of Local 187 because of non-payment of dues except pursuant to a lawfully applied union-security clause.

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(h) Offering its employees money to resign their employment with the Respondent because of their activities in behalf of Local 32BJ, Service Employees International Union or any other union.

(i) Threatening employees with discharge and directing that they resign because they engaged in activities in behalf of Local 32BJ, Service Employees International Union or any other union.

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(j) Soliciting complaints from building tenants about employees' work performance because of their activities in behalf of Local 32BJ, Service Employees International Union or any other union.

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(k) 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.

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

(a) Within 14 days from the date of the Board's Order, offer Domingo Medina, Bolivar Millet and Manuel Nina full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

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(b) Upon the reinstatement of the employees set forth above, offer them supplemental repair work without discrimination because of their activities in behalf of Local 32BJ, Service Employees International Union.

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(c) Make Eugenio de los Santos, Domingo Medina, Bolivar Millet and Manuel Nina whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

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(d) Withdraw, with prejudice, any eviction proceedings pending against Domingo Medina, Bolivar Millet and Manuel Nina.

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(e) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges of Eugenio de los Santos, Domingo Medina, Bolivar Millet, and Manuel Nina, and remove from its files any reference to the unlawful disciplinary warning issued to Manuel Nina, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges and the disciplinary warning will not be used against them in any way.

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(f) 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 designated 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.

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(g) Within 14 days after service by the Region, post at its facility in Hartsdale, New York, and at 53-63 Hamilton Terrace, New York, NY; 709 West 176 Street, New York, NY; 614 West 152 Street, New York, NY; and at 1265 Olmstead Avenue, Bronx, NY, copies in English and Spanish of the attached notice marked "Appendix."³⁷ 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 March 3, 2003.

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(h) 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

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³⁷ 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."

the Respondent has taken to comply.

Dated, Washington, D.C., November 12, 2009.

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Steven Davis
Administrative Law Judge

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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 a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT discharge and fail to reinstate employees and bring eviction proceedings against employees because of their activities in behalf of Local 32BJ, Service Employees International Union or any other union.

WE WILL NOT impose more onerous working conditions on employees by refusing to offer them supplemental repair work, increasing their work load, changing their schedules, requiring them to obtain permission before leaving their work places, and more closely scrutinizing their work because of their activities in behalf of Local 32BJ, Service Employees International Union or any other union.

WE WILL NOT issue disciplinary warnings to employees because of their activities in behalf of Local 32BJ, Service Employees International Union or any other union.

WE WILL NOT render assistance to Factory and Building Employees Union Local 187 or any other union by paying union dues to Local 187 on behalf of employees in the absence of valid deductions for such dues from employees' paychecks.

WE WILL NOT render assistance to Local 187 or any other union by deducting money from employees' wages and remitting same to Local 187 notwithstanding the absence of employee authorizations for the deductions and remittances.

WE WILL NOT render assistance to Local 187 or any other union by discharging employees at the request of Local 187 because of non-payment of dues except pursuant to a lawfully applied union-security clause.

WE WILL NOT render assistance to Local 187 by employing our supervisors and agents to solicit employees to sign authorization cards for Local 187.

WE WILL NOT offer our employees money to resign their employment with us because of their activities in behalf of Local 32BJ, Service Employees International Union or any other union.

WE WILL NOT threaten our employees with discharge or direct that they resign their employment because they engaged in activities in behalf of Local 32BJ, Service Employees International Union or any other union.

WE WILL NOT solicit complaints from building tenants about our employees' work performance because of their activities in behalf of Local 32BJ, Service Employees International Union or any other 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 within 14 days from the date of the Board's Order, offer Domingo Medina, Bolivar Millet and Manuel Nina full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL upon the reinstatement of the employees set forth above, offer them supplemental repair work without discrimination because of their activities in behalf of Local 32BJ, Service Employees International Union.

WE WILL make Eugenio de los Santos, Domingo Medina, Bolivar Millet and Manuel Nina whole for any loss of earnings and other benefits suffered as a result of the discrimination against them.

WE WILL withdraw, with prejudice, any eviction proceedings pending against Domingo Medina, Bolivar Millet and Manuel Nina.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Eugenio de los Santos, Domingo Medina, Bolivar Millet, and Manuel Nina, and WE WILL remove from our files any reference to the unlawful disciplinary warning issued to Manuel Nina, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges and the disciplinary warning will not be used against them in any way.

BEACH LANE MANAGEMENT, INC. AND FSM
MANAGEMENT, INC. AND CARPE DIEM
MANAGEMENT, LLC, SINGLE EMPLOYERS

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

26 Federal Plaza, Federal Building, Room 3614

New York, New York 10278-0104

Hours: 8:45 a.m. to 5:15 p.m.

212-264-0300.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 212-264-0346.