Professional Janitorial Service of Houston, Inc. ***and*** **Service Employees International Union, Local 5.**
Cases 16–CA–25491 and 16–CA–25780

December 17, 2008

DECISION AND ORDER

BY CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN

On August 1, 2008, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party each filed answering briefs.

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

ORDER

The Respondent, Professional Janitorial Service of Houston, Inc., Houston, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain with Service Employees International Union, Local 5, as the exclusive collective-bargaining representative of its employees employed at 580 West Lake Park Boulevard, Houston, Texas, 1415 Louisiana, Houston, Texas, and 5177 Richmond, Houston, Texas.

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

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

(a) Recognize and bargain with Service Employees International Union, Local 5, as the exclusive representative of the employees in the following appropriate units concerning terms and conditions of employment and, if an agreement is reached, embody the understanding in a signed agreement:

> All non-supervisory janitorial employees employed at 1415 Louisiana, Houston, Texas, but excluding all other employees, including office employees, guards, managers and supervisors as defined in the National Labor Relations Act.
>
> All non-supervisory janitorial employees employed at 5177 Richmond, Houston, Texas, but excluding all other employees, including office employees, guards, managers and supervisors as defined in the National Labor Relations Act.

(b) Within 14 days after service by the Region, post at its principal office at 2303 Nance Street, Houston, Texas, as well as at the Louisiana and Richmond buildings in Houston, Texas, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 16, 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 January 31, 2007.

(c) The Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by the Respondent at any time since January 31, 2007, in the following appropriate unit:

> All non-supervisory janitorial employees employed at 580 West Lake Park Boulevard, Houston, Texas, but excluding all other employees, including office employees, guards, managers and supervisors as defined in the National Labor Relations Act.

[1] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

[2] We shall modify the recommended Order and substitute a new notice to accord with the judge's findings, which we affirm, that the Respondent was obligated as a successor to recognize and bargain with the Union as the exclusive representative of three separate units of employees. Inasmuch as the Respondent has ceased performing janitorial services at the 580 West Lake Park building in Houston, we shall also order the Respondent to mail copies of the remedial notice to bargaining unit employees who formerly worked at that location.

[3] 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."

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

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to recognize Service Employees International Union, Local 5 (the Union), as the exclusive bargaining representative of our employees employed at 580 West Lake Park Boulevard, 1415 Louisiana, and 5177 Richmond, Houston, Texas.

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

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

All non-supervisory janitorial employees employed at 1415 Louisiana, Houston, Texas, but excluding all other employees, including office employees, guards, managers and supervisors as defined in the National Labor Relations Act.

All non-supervisory janitorial employees employed at 5177 Richmond, Houston, Texas, but excluding all other employees, including office employees, guards, managers and supervisors as defined in the National Labor Relations Act.

PROFESSIONAL JANITORIAL SERVICE OF HOUSTON, INC.

Jamal Allen, Esq. and *Kelly Pagan, Esq.,* for the General Counsel.

Mark Jodon, Esq. and *Timothy Rybacki, Esq. (Littler, Mendelson, P.C.),* for the Respondent.

Alexia Kulwiec, Esq. and *Leslie Ward, Esq.,* for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me on April 30 and May 1, 2008, in Houston, Texas. The consolidated complaint herein which issued on February 29, 2008, was based upon unfair labor practice charges that were filed on March 13, 2007,[1] and August 29 by Service Employees International Union, Local 5 (the Union). It alleges that on about October 1, 2006, Professional Janitorial Service of Houston, Inc. (the Respondent), was awarded the janitorial services contract at 580 West Lake Park Bolevard, Houston, Texas (West Lake), which work was formerly performed by the employees of Sanitors Services of Texas, L.P. (Sanitors), and that the Respondent has since continued to operate the business of Sanitors at West Lake in basically unchanged form, and has employed as a majority of its employees individuals who were previously employees of Sanitors, and based upon these operations, Respondent is a successor to Sanitors. The complaint next alleges that all nonsupervisory janitorial employees employed by Sanitors excluding all other employees, including office employees, guards, managers, and supervisors as defined in the Act constitute an appropriate unit for collective-bargaining purposes, and that on about November 29, 2005, a majority of these employees selected the Union as their collective-bargaining representative, and from about November 29, 2005, to November 6, 2006, based upon Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of these employees employed by Sanitors. On about January 31, the Union requested that Respondent recognize and bargain with the Union as the bargaining representative of these employees, but since about February 16, the Respondent has failed and refused to recognize and bargain with the Union as the collective-bargaining representative of the West Lake unit.

The complaint next alleges that all nonsupervisory janitorial employees employed by OneSource Facility Services, Inc. (OneSource), at 1415 Louisiana, Houston, Texas (Louisiana and/or the Wedge Building), excluding all other employees, including office employees, guards, managers, and supervisors as defined in the Act constitute an appropriate unit for collective-bargaining purposes, and that on about November 29, 2005, a majority of these employees selected the Union as their collective-bargaining representative, and from about November 29, 2005, to November 13, 2006, based upon Section 9(a) of the Act, the Union has been the exclusive bargaining representative of the employees employed by OneSource at the Wedge. On about January 31, the Union requested that Respondent

[1] Unless indicated otherwise, all dates referred to herein relate to the year 2007.

recognize and bargain with it as the bargaining representative of these employees, but since about February 16 the Respondent has failed and refused to recognize and bargain with the Union as the collective-bargaining representative of these employees.

It is further alleged that all nonsupervisory janitorial employees employed by ABM Janitorial Services (ABM), at 5177 Richmond, Houston, Texas (Richmond), excluding all other employees, including office employees, guards, managers, and supervisors as defined in the Act constitute an appropriate unit for collective-bargaining purposes, and that on about November 29, 2005, a majority of the ABM employees at Richmond selected the Union as their collective-bargaining representative, and from about November 29, 2005, to December 1, 2006, based upon Section 9(a) of the Act, the Union has been the exclusive bargaining representative of the employees of ABM at Richmond. It is alleged that at all times since about December 1, 2006, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of Respondent's employees in the unit, and that on about April 3 the Union requested that the Respondent recognize and bargain with it as the bargaining representative of these employees, but since about April 3 the Respondent has failed and refused to recognize and bargain with the Union as the collective-bargaining representative of these employees. It is alleged that by refusing to recognize and bargain with the Union as the collective-bargaining representative of the employees in each of these three units, the Respondent violated Section 8(a)(1) and (5) of the Act. Respondent's principal defenses herein are that it is not a successor to Sanitors, OneSource, or ABM in that it did not employ a majority of the existing employees in each of these three locations and, additionally, that each individual location does not represent an appropriate unit, and therefore there can be no finding of a violation herein.

FINDINGS OF FACT

I. JURISDICTION

Respondent admits, and I find, that it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION STATUS

Respondent admits, and I find, that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. BACKGROUND

This case involves the janitorial employees at West Lake, the Wedge Building, and the Richmond facility, all large office buildings located in Houston, Texas. For many years the Union has conducted campaigns in major cities of the United States whose purpose is to organize commercial office maintenance employees. The campaign is entitled "Justice for Janitors" and has been successful in approximately 27 cities across the country. In 2004, the Union targeted Houston and the major janitorial contractors employed in the city. On August 3, 2005, the Union signed a neutrality agreement with the five of the largest employers in the area. Stated briefly, the agreement provided that a card check would be conducted by the American Arbitration Association (the AAA), and if it was determined that if a majority of the unit employees of any of the signatories signed authorization cards for the Union, that employer or those employers were obligated to recognize and bargain with the Union as the collective-bargaining representative of the employer's unit employees. This agreement states that it covers nonsupervisory janitorial employees employed in commercial buildings in excess of 100,000-square feet in the "Houston area market." As part of the agreement, the Union agreed not to solicit employees while they were at work. Sanitors, OneSource, and ABM signed this agreement along with two other employers not involved herein; the Respondent did not. The only unit exclusions are route janitors, who perform work at multiple locations, office, and supervisory employees.

A card check was conducted for the employees of Associated Building Service GCA, an employer not involved herein, on November 16, 2005; on November 17, 2005, for the OneSource employees; on November 21, 2005, for the Sanitors employees; and on November 29, 2005, for the ABM employees. On November 29, 2005, the vice president for Elections for the AAA issued a Certification of Results stating: "Upon counting valid representation cards from employees of the four contractors, it was determined that SEIU Local 5 met the 50% plus one filing threshold with each contractor as outlined in the Neutrality Procedure Agreement." These four employers created an association and bargaining began in early April 2006; a collective-bargaining agreement (the Agreement), was entered into later in the year and was ratified by the union membership on about November 21, 2006. Although the four employers bargained through an association, and signed the same agreement, that Agreement states:

> It is recognized that this agreement is between each company individually and the Union, and the parties specifically agree that neither the Agreement nor the negotiations leading thereto shall constitute evidence, or create any claim, of a multi-employer bargaining association or multi-employer bargaining unit. To the contrary, the parties agree that multi-employer bargaining does not exist among the parties.

The recognition clause of the Agreement states that each employer recognizes the Union as the exclusive bargaining agent for "certain non-supervisory janitorial employees in the Houston, Texas Area Market" employed at office buildings in excess of 100,000-square feet, but excluding other designated properties, as well as route janitors who work at multiple locations, office employees, and supervisors as defined in the Act. Dan Schlademan, vice president of Service Employees International Union No. 1, testified that, although the Agreement does not specifically refer to day porters/maids, who perform cleaning and maintenance work during the day, sometimes at the request of the tenants, they are included in the unit along with full-time or part-time employees, and day and evening employees. The Agreement further states that seniority shall be determined by job location.

In about late summer or early fall of 2006 there was some discussions during bargaining about the possibility that some of the newly organized contractors might be replaced at some buildings by a nonunion contractor. The contractors told the

union representatives that by raising wages and other benefits their cost of doing business would increase and make it easier for nonunion employers to take work away from them. Shortly thereafter, the Union received notice from Sanitors that they had received notice of termination of their contract at West Lake, and in about October 2006 the Union received notice from OneSource that they were losing the contract at the Wedge Building and that the Respondent had obtained the contract to perform the maintenance work at both buildings. In both situations, the Union employed its "normal protocol," instructing the unit employees at these facilities to apply for employment with the Respondent. On January 31, 2007, Schlademan wrote to Brent Southwell, CEO of the Respondent:

> As you should know, SEIU is the exclusive bargaining representative of the janitorial employees at the following locations in Houston, Texas: [the Wedge Building, West Lake and four other buildings not involved herein].
>
> As you also know it has come to our attention that PJS has obtained the cleaning accounts at these locations, previously cleaned by Union Signatory Employers. PJS is accordingly a successor employer, and is obligated under law to engage in collective bargaining with SEIU.
>
> Please contact me within 10 business days so that we may begin the bargaining process. Please do not hesitate to contact me should you have any questions or need additional information.

Southwell responded to Schlademan by letter dated February 16, 2007:

> I am in receipt of your January 31, 2007 letter. PJS is not a successor employer. PJS has no obligation to bargain with the SEIU. PJS has no obligation to recognize the SEIU as the exclusive bargaining representative of the PJS employees who work in the locations identified in your letter.
>
> Furthermore, the SEIU never had majority support of these employees at the time PJS started cleaning the locations identified in your letter.

In about January or February 2007, the Union was notified by unit employees at the Richmond Building that ABM had lost the contract to perform janitorial services at the building, and that the Respondent would be performing the work at the building. As a result, on April 3, 2007, Schlademan sent a letter to the Respondent that was, basically, identical to his January 31, 2007 letter, except that it named the Richmond Building. The Union received no response to this letter.

IV. THE FACTS

A. Preliminary Issues

The issue herein is whether the Respondent is a successor to Sanitors at West Lake, OneSource at the Wedge, and/or ABM at the Richmond Building. This determination is initially dependent upon whether the Respondent employed a majority of the unit employees at each of these facilities on the appropriate date, and whether certain job classifications, such as day porters and maids and floaters, should be included or excluded from this determination. Finally, the Respondent defends that even if it employed a majority of the predecessor's employees on the appropriate date, it is not obligated to recognize and bargain with the Union because the Respondent's operation lacked substantial continuity with the predecessors' operations, and the unit is an not an appropriate one. In making these determinations, each of the three buildings employee complements will be discussed separately, and comparisons of the employee complements will be made as of the dates of the transfer of operations, as well as the dates when the Union requested recognition.

A further preliminary issue requiring discussion is the existence of two summaries of employees employed at West Lake, Louisiana, and Richmond on the date it commenced operations at these facilities, as well as a listing of "Present Day" employees at these facilities that was prepared by the Respondent. Glenda Agietos, Respondent's human resources manager, provided an affidavit to the Board during the investigation of this matter. Attached to her affidavit were lists of nonsupervisory employees that Respondent employed when it commenced operations at West Lake, Louisiana, and Richmond, as well as lists of the "present day" complement of employees at these locations. These lists were received in evidence as General Counsel's Exhibits 20, 22, and 24–27. Agietos testified that in compiling these lists, she reviewed the payroll records and consulted with Jose Menjivar, Respondent's vice president of operations, who agreed that these documents "were true and correct." In addition, by letter dated May 9, counsel for the Respondent provided the Board with its statement of position in this matter. Attached to this statement of position were the identical employee lists that were attached to Agietos' affidavit (GC Exhs. 20, 22, and 24–27). At the hearing, however, the Respondent, through Agietos, moved into evidence (as R. Exhs. 3, 4, and 5) three different lists that she identified as the staffing at West Lake, Louisiana, and Richmond. Counsel for the General Counsel and counsel for the Charging Party objected to these summaries arguing that the prior summaries represented the correct listing of employees at these buildings. Briefly stated, I found Agietos' attempted explanation for the latter lists unclear, at times, contradictory, and not credible. It is clear that Respondent's Exhibits 3, 4, and 5 include employees not previously included on General Counsel's Exhibits 20, 22, and 24–27, but Agietos never satisfactorily explained why they were included on the former, but not the latter lists, and why the original list prepared by the Respondent needed to be corrected. Further, counsel for the Respondent attached the original employee lists to its statement of position to the Board on May 9. As I can find no convincing explanation as to why the original lists (GC Exhs. 20, 22, and 24–27) were incomplete and had to be corrected, and as of May 9 the Respondent continued to believe that these lists were correct, I have used these lists prepared by the Respondent as the true and correct lists of employees at these locations, rather than the lists it later prepared–(R. Exhs. 3, 4, and 5).

Another issue that needs discussion prior to an analysis of the composition of the units before and after the Respondent obtained the contracts to perform the maintenance work at these locations, is the inclusion or exclusion of day porter/maids. While a large majority of the maintenance employees work in

the evening from about 5:30 to 9 p.m. or 10 p.m., in the absence of the tenants of the building, a few employees work at each of these buildings during the day to perform repair or maintenance work at the request of, or for the immediate benefit of, the tenants. So, for example, if the air-conditioner malfunctions, a toilet gets clogged, or light bulbs need replacing, the tenant will notify building management, who will notify the day porter/maid of the maintenance problem and the employee will, presumably, repair the malfunction. Although the Agreements do not refer to day porter/maids, Schladerman's credible uncontradicted testimony establishes that the units included them, as well as day and evening employees, full- and part-time employees.

Maria Dominguez, Enrique Sapon, Alejandro Hernandez, and Rogelio Alcantar, were each employed as day porters/maids by the Respondent, as well as the predecessor employers—ABM for Dominguez and Sapon, and OneSource for Hernandez and Alcantar. They testified that they continued to perform the same work for the Respondent that they performed for OneSource and ABM. Their testimony establishes that the principal differences in their work and the work of the other maintenance employees is that they work during the day, usually 8 a.m. to 5 p.m. or 9 a.m. to 5 p.m., take orders from an employee of the building, rather than their employer, and use supplies and tools supplied by the building. There is no evidence that these day porters/maids have any contact, or interchange with, the evening janitorial workers at the buildings. Dominguez testified that she cleans the doors and the elevator, checks to make sure that the bathroom has its required supplies, and performs other jobs requested by the building engineer. Sapon testified that he picked up the trash in the parking area, changed light bulbs when necessary and answered calls from the secretary of work that needed to be done. Hernandez testified that his principal responsibility was maintenance of the air-conditioning, electrical, and plumbing. In this regard, he repairs sinks and other plumbing issues, and fixes the thermostats and the air vents. Alcantar testified that he performs electrical work at the building, plumbing work in the bathrooms, checks the air-conditioning system, moves furniture, and picture frames. He does not clean restrooms, vacuum, or wax floors.

Determining whether day porters/maids are a part of the bargaining unit of the janitorial service employees at each of the buildings depends on whether they have a community of interest with each other. I find that they do. Although they work different shifts and have different supervision (the day porters/maids are supervised by the building manager), they basically perform the same work at the same location, with the same equipment. In addition, the uncontradicted credible testimony of Schlademan and Christine Prescott, human resources director for ABM, and Kari Huber, a manager for OneSource, establishes that they were included in each of the units prior to the Respondent obtaining the contracts to perform the work at these locations. I therefore find that day porters/maids should be included in the unit at each of these locations.

There is also an issue of the inclusion or exclusion of "floaters." Menjivar testified that floaters go ". . . from building to building, wherever we need him. I guess that's where the term 'floater' comes in." Floaters cover for the housekeepers who are out sick, on vacation, or are absent for any other reason. In addition, some of the floaters are trained to perform specialty work, such as waxing, and perform that work at whatever building requires it. Because the floaters do not work in any one location, and replace absent employees, I find that they do not have a community of interest with the other employees in the building and should not be included in any of the units discussed below.

In addition to the obvious mathematical determination of majority status, it must be determined at what date/dates to determine majority status and what group or groups of employees represent an appropriate unit herein. As to the first issue, the law is clear and was stated succinctly in *Royal Midtown Chrysler Plymouth, Inc.,* 296 NLRB 1039, 1040 (1989):

> Successorship does not automatically carry with it the obligation to bargain with the union that represented the predecessor's employees. Nor does the fact that the union represents a majority of the successor's employees in an appropriate unit operate alone to invoke the bargaining obligation; and this is so even when the successor has attained a 'substantial and representative complement' of employees. The bargaining obligation—albeit potentially present when successorship and representative complement are established—must be triggered by a demand for recognition or bargaining.

The Supreme Court stated in *Fall River Dying Corp. v. NLRB,* 482 U.S. 27, 52 (1987): "The successor's duty to bargain at the 'substantial and representative complement' date is triggered only when the union has made a bargaining demand." Similarly, the administrative law judge in *Paramus Ford, Inc.,* 351 NLRB 1019, 1023 (2007), stated: "The Board will normally assess whether an employer is a successor as of the time a union makes its demand for recognition and bargaining, provided the employer has already hired a substantial and representative complement of employees." Based upon the above, as the Union's bargaining request for West Lake and Louisiana was dated January 31, and its bargaining request for Richmond is dated April 3, those are the dates for determining the Union's majority status among the employees at those locations, as it seems clear that by those dates the Respondent employed a substantial and representative complement of employees at each of these locations.

B. West Lake

Sanitors had the janitorial service contract for West Lake until November 6, 2006, when the Respondent obtained the contract to perform the work at that facility.[2] The Respondent identified the following 16 employees as being employed at West Lake when it commenced operations there on November 6, 2006:

Cruz Ardon	Vacuum Specialist
Alejandra Barrios	Restroom Specialist
Douglas Cruz	Cleaner
Maria Flores	Night Time Cleaner

[2] The Respondent lost the contract to perform this work at West Lake in November 2007. It therefore claims that the successorship issue relating to West Lake is moot.

Claudia Garcia	Cleaner
Martha Gonzales	Light Duty
Elmer Guevara	Cleaner
Esmeralda Guevara	Night Time Cleaner
Samuel Hernandez	Utility Specialist
Jose Linares	Vacuum Specialist
Eduardo Palomera	Floor Man
Omar Perez	Floor Man
Maria Reyes	Day Porter/Maid
Ricardo Rios	Cleaner
Juvel Vargas	Light Duty
Cindy Velasquez	Day Porter/Maid

Sanitor's records state that, of these employees, it employed the following employees at West Lake at the time that it lost the contract to perform the maintenance work at the facility on November 6, 2006:

Douglas Cruz
Maria Flores
Claudia Garcia
Martha Gonzales
Elmer Guebara, a/k/a Guevara
Jose Linares
Eduardo Palomera
Ricardo Rios
Juvel Vargas

In addition, as alleged by counsel for the General Counsel in his brief, Sanitors issued a W-2 to a Maria Reyes in 2006 setting forth wages of almost $16,000. The address and social security number from her W-2 match those from Respondent's records.

As stated above, the Union's request for recognition at West Lake is dated January 31. Pursuant to the Respondent's summary, two of its employees at West Lake when it commenced operations on November 6, 2006, Esmerelda Guevara and Samuel Hernandez left the Respondent's employ at West Lake prior to January 31. I therefore find that on November 6, 2006, when the Respondent took over the maintenance work at West Lake, 10 of the 16 employees that it employed at that facility had previously worked at that facility for Sanitors. I further find that on January 31, when the Union requested recognition at that facility, 14 employees were employed at West Lake, 10 of whom had previously been employed there by Sanitors.

Counsel for the General Counsel, in his brief, alleges that the situation at Louisiana and Richmond was different than West Lake in that when the Respondent commenced operations at these two locations, its initial employee complement was not composed of a majority of employees previously employed by the predecessor employers, OneSource and ABM, but that by the time the Union requested recognition at these locations, January 31 for Louisiana and April 3 for Richmond, a majority of the employees at these buildings was composed of former employees of OneSource and ABM at these locations.

C. Louisiana

OneSource had the janitorial service contract for Louisiana until November 13, 2006, when the Respondent obtained the contract to perform this work. The Respondent identified the following 12 employees as being employed at Louisiana when it commenced operations at that facility on November 13, 2006:

Martha Aburto	Light Duty
Cruz Ardon	Vacuum Specialist
Rosalva Arias	Day Porter/Maid
Irma Barajas	Light Duty
Guillermo Garza	Vacuum Specialist
Norberto Mata	Cleaner
Juan Mejia	Utility Specialist
Diana Moreno	Light Duty
Rosa Moreno	Light Duty
Omar Perez	Floor Man
Imenda Torres	Vacuum Specialist
Dalia Villeda	Light Duty

OneSource's payroll records state that, of these employees, it employed Garza and Mejia prior to losing the contract to Respondent. Of these 12 employees listed above, Barajas (on Jan. 30), Diana Moreno (on Jan. 17), and Torres (on Nov. 28, 2006) left the Respondent's employ at Louisiana prior to January 31. Respondent's "Present Date" employment list for Louisiana lists the following 15 employees:

Lazara Almanza	Light Duty
Rosalva Arias	Day Porter/Maid
Ana Campos	Light Duty
Trinidad Contreras	Light Duty
Walter Coronado	Utility Specialist
Guillermo Garza	Vacuum Specialist
Maria Medina	Restroom Specialist
Juan Mejia	Utility Specialist
Rosa Moreno	Light Duty
Arturo Ramirez	Utility Specialist
Mark Ramirez	Vacuum Specialist
Ramiro Rodriguez	Vacuum Specialist
Samuel Ruiz	Vacuum Specialist
Orlando Savacay	Vacuum Specialist
Cristina Uribe	Light Duty

In addition to Garza and Mejia, of these employees, the following employees had been employed by OneSource prior to losing the contract at Louisiana: Lazara Almanza, Arturo Ramirez, Samuel Ruiz, and Orlando Saracay. Further, although not contained on the Respondent's present day list for Louisiana, Jesus Fuentes had been employed by OneSource as a day porter at Louisiana from October 2005 until it lost the contract at Louisiana, and the parties stipulated that Fuentes has been continuously employed by the Respondent at Louisiana since November 13, 2006, when Respondent obtained the contract to service the building. Also not contained on Respondent's "Present Day" list for Louisiana, Alejandro Hernandez testified that he had previously been employed by OneSource as a day maintenance employee at Louisiana for about 2 years and when they lost the contract, he began working for the Respondent, taking direction from the same supervisor as when he was employed by OneSource. Hernandez also testified that he is familiar with employee Yane Campos, and that she was employed by OneSource at Louisiana prior to his employment at the building and continued to work there "for a few months" after the Respon-

dent took over the maintenance at the building. Regilio Alcantar testified that he was employed by OneSource as a day maintenance employee at Louisiana for about 10 months until they lost the contract. At that time he began working for the Respondent at Louisiana performing the same work that he had done for OneSource.

Based upon the above, I find that at the time that the Union made its request for bargaining on January 31, the Respondent employed 19 unit employees at Louisiana: the 15 on the list, plus Fuentes, Alejandro Hernandez, Yane Campos, and Regilio Alcantar, and that 10 of them had previously been employed at that location by OneSource.

D. Richmond

The Respondent acquired the contract to perform maintenance work at Richmond effective December 1, 2006; the Union's letter to the Respondent requesting recognition is dated April 3. The Respondent identified the following 18 employees as those whom it employed when it began operations at Richmond on December 1, 2006:

Gloria Aguirre	Lead Cleaner
Heriberto Alvarado	Vacuum Specialist
Marina Benites	Light Duty
Ancelmo Castro	Vacuum Specialist
Rosalva Cruz	Light Duty
Jesus Gonzales	Vacuum Specialist
Teresa Gutierrez	Light Duty
Carmen Hernandez	Light Duty
Virginia Hernandez	Day Porter/Maid
Maria Luna	Restroom Specialist
Adriana Manchu	Light Duty
Diego Mazariegos	Vacuum Specialist
Vincent Medrano	Vacuum Specialist
Fredy Rosales	Light Duty
Bacillo Ruiz	Light Duty
Lorena Solorzano	Light Duty
Juan Tax-Tzoc	Vacuum Specialist
Maria Vallecios-Hernandez	Vacuum Specialist

The following employees in the original complement of employees of the Respondent at Richmond were previously employed by ABM at that location:

Rosalba Cruz (Martinez)
Heriberto Alvarado
Marina Benites
Carmen Hernandez
Maria Luna
Diego Mazariegos

Of these employees, the following separated their employment at the facility prior to April 3: Castro (Dec. 22, 2006), Gutierrez (Dec. 5, 2006), Mazariegos (Feb. 21), Medrano (Dec. 19, 2006), Ruiz (Mar. 17), Solorzano (Dec. 5, 2006), Tax-Tzoc (Mar. 19), and Vallecios-Hernandez (Jan. 3).

The "Present Day" complement of employees at Richmond compiled by the Respondent lists the following:

Heriberto Alvarado	Vacuum Specialist
Marina Benites	Light Duty
Jesus Cardozo	Day Porter/Maid
Francisco Caxaj	Vacuum Specialist
Rosalva Cruz	Light Duty
Carmen Hernandez	Light Duty
Virginia Hernandez	Day Porter/Maid
Maria Luna	Restroom Specialist
Adriana Manchu	Light Duty
Juan Morales	Vacuum Specialist
Santos Robles	Vacuum Specialist
Omar Rodriguez	Vacuum Specialist
Fredy Rosales	Light Duty

Of these 13 employees of the Respondent, the following 7 had been employed by ABM at Richmond: Alvarado, Benites, Cardozo, Cruz, Hernandez, Luna, and Juan Morales. As regards Morales, Christine Prescott, the regional human resources director for ABM, testified that he was employed by ABM at Richmond until mid-September 2006 and was not employed by ABM at that facility at the time that they lost the contract on November 30, 2006. However, an examination of the payroll records of ABM and the Respondent establish that the Juan Morales who was employed by ABM at Richmond until mid-September 2006, is the same individual who was hired by the Respondent at that facility on December 20, 2006. Morales was not employed at Richmond by ABM immediately prior to the Respondent obtaining the contract to perform the work at Richmond on December 1. In fact, he had ceased his employment with ABM over 2 months earlier. The Board counts employees such as Morales toward a union's majority status of the successor employer if the employee's absence was "not a self-initiated withdrawal from the work force" or "an abandonment of interest in the unit." *Derby Refining Co.,* 292 NLRB 1015, 1016 (1989). As counsel for the General Counsel did not elicit any evidence explaining Morales' absence from mid-September through December 20, 2006, I agree with counsel for the Respondent in his brief and find that he should not be included in determining the Union's majority status at Richmond. In addition to the named employees, both ABM and the Respondent employed day porters/maids at Richmond. Maria Dominguez and Enrique Sapon each testified that they originally worked for ABM as a porter at Richmond and continued performing the same job for the Respondent when it obtained the contract to perform the maintenance work at Richmond. I therefore find that at the time that the Union requested recognition and bargaining at Richmond, Respondent employed 12 janitorial employees and 2 day porters/maids, for a total of 14 employees. Eight of these employees had previously been employed by ABM. I therefore find that a majority of the Respondent's employees at Richmond had previously been employed by the predecessor, ABM.

V. ANALYSIS

There are numerous issues herein that must be analyzed in determining whether the Respondent is a successor to Sanitors at West Lake, OneSource at Louisiana, and/or ABM at Richmond.

In *NLRB v. Burns Security Services,* 406 U.S. 272, 283 (1972), the Supreme Court found that where the bargaining unit

was unchanged from predecessor to the successor, and a majority of the successor's employees had previously been employed by the predecessor, the Board could not be faulted for ordering the new employer to bargain with the union. In *Fall River,* supra at 43, the Supreme Court stated that the focus of these cases should be "based on the totality of the circumstances of a given situation," whether the successor employer has ". . . continued without interruption or substantial change, the predecessor's business operations." The Court further stated that in determining whether there has been "substantial continuity" between the operations of the predecessor and successor employers, the Board should examine a number of factors: whether the business of both employers is essentially the same, whether the employees are performing the same jobs for the same supervisors and under the same working conditions, and whether the successor employer is employing the same production process, and producing the same product for the same customers. There can be no doubt that the Respondent's operations at the three locations satisfies all of these factors. The "business" of Sanitors, OneSource and ABM was to clean office buildings; Respondent's business is the same. A number of the employees testified about the work they performed for the Respondent as well as their former employer.

Maria Dominguez who initially worked for ABM and then for the Respondent at Richmond, testified that the work was "the same" for both and she reported to the same building supervisor while employed by both ABM and the Respondent. Heriberto Alvarado, who was employed at Richmond by ABM, then by the Respondent, testified that his job responsibilities and tools were the same for both employers. The only difference was that he worked an extra half hour a day for the Respondent. He had never transferred to work in another building and, to his knowledge, neither had other employees at the facility. Juan Mejia, who had been employed at Louisiana by OneSource, then by Respondent, testified that his work at both was: "The same. Vacuum and mop the kitchen." His work days were the same for both, but he worked an additional half hour a day for the Respondent. During his employment with the Respondent, neither he nor any other employee, as far as he knows, was transferred to work in another building. Enrique Sapon, who was also employed at Richmond by ABM, then by Respondent, testified that the work he performed for both was "essentially the same." Alejandro Hernandez, who was employed by OneSource then by the Respondent at Louisiana, testified that the work that he performed for both was "exactly the same" with the same building manager supervising him. Regilio Alcantar, who had been employed first by OneSource and then by the Respondent at Louisiana, testified that the work for both was ". . . all the same, doing the same thing." It is clear from the above that the employees are performing the jobs and under the same working conditions for the Respondent as they did for Sanitors, OneSource and ABM. It is also clear that the Respondent is producing the same product (cleaning) for the same customers (West Lake, Louisiana, and Richmond) as did Sanitors, OneSource, and ABM.

As for the remaining factor in *Burn,* supra, whether the alleged successor is employing the same production process, the Respondent alleges a difference in this area because of its unique cleaning system, its OS1 Cleaning system. Menjivar testified that the Respondent employs this uniform cleaning system, companywide, and it is the only company in the Houston area employing the system. It is employed at all its locations, including the ones involved herein. The system employs unique equipment, such as vacuums and vacuum bags, as well as mop buckets, wringers, and chemicals. Further, all of its employees receive approximately 2 hours training in the operating system which has distinctive features not employed by any other cleaning contractor in the area. Unlike other cleaning contractors whose employees perform all the cleaning tasks in a certain area, known as zone cleaning, the Respondent's employees spend all their time on specific tasks. Some employees vacuum for the entire 4 hours, others are on light duty, responsible for picking up trash and doing the dusting, and the utility specialist sweeps and mops the floors. Although this OS1 system may be unique to the area, even if it is superior to the zone cleaning system apparently employed by other cleaning contractors, something I am not competent to rule on, its purpose is still to clean office buildings. Further, the individuals referred to above who were employed by both ABM and the Respondent testified that their work was the same under both employers. In *Tree-Free Fiber Co.,* 328 NLRB 389 (1999), the Board stated: "The Supreme Court has made it quite clear that the 'substantial continuity' analysis in successor cases is to be taken primarily from the prospective of the employees, i.e., whether 'those employees who have been retained will understandably view their job situations as essentially unaltered.'" Citing *Fall River,* supra at 43, and *Golden State Bottling Co. v. NLRB,* 414 U.S. 168. 184 (1973). See also *Lincoln Park Zoological Society,* 322 NLRB 263, 264 (1996).

On the basis of all of the above, including the fact that a majority of the employees of the Respondent at the critical time had previously been employed by Sanitors, OneSource, or ABM, and viewed their work as, basically, unchanged, I find that the Respondent is a successor employer to Sanitors at West Lake, OneSource at Louisiana, and ABM at Richmond. *Burns* and *Fall River,* supra. The Respondent defends, however, that even if it employed a majority of the predecessors' employees at each of these three locations, and even if there is a substantial continuity between the predecessors' operations and its operations, it is not a successor employer obligated to recognize and bargain with the Union because West Lake, Louisiana, and Richmond are not, individually, appropriate units, i.e., because of the unified nature of the Respondent's operation, only a Houstonwide unit of Respondent's locations is appropriate.

In *Trane,* 339 NLRB 866, 870 (2003), a representation case, the Board stated that it has long held that a petitioned-for single-facility unit is presumptively appropriate ". . . unless it has been so effectively merged into a more comprehensive unit, or it is so functionally integrated, that it has lost its separate identity." The party opposing the single location unit bears a heavy burden of rebutting its presumptive appropriateness. The factors that the Board examines to determine whether this burden was satisfied include (1) central control over daily operations and labor relations, including the extent of local autonomy; (2) similarity of employee skills, functions and working conditions; (3) the degree of employee interchange; (4) the distance be-

tween the locations; and (5) bargaining history, if any exists. In November or December 2006, the Respondent employed approximately 850 employees in the 150 buildings that it serviced in the Houston area. As regards the central control of labor relations, Agietos testified that the Respondent has a centralized HR department in its main office in Houston; the Respondent does not maintain any HR office, or HR employees at West Lake, Richmond, or Louisiana. Respondent's payroll department is also centralized with common payroll practices, policies, vacations and holidays, and wage ranges for all its locations, including the three involved herein. Further, Respondent maintains its payroll records centrally, rather than at any of the buildings that it services and employs a standard employment application for all locations.

At each of these three buildings Respondent employs a project manager with an office at the building in which they are employed. Received in evidence were five employee warning notices for attendance violations that were issued to employees at Louisiana by the local supervisors in June. Other than these warning notices, there is no clear evidence of what authority, if any, is held by these local supervisors, although Agietos testified that the building supervisors and area managers ". . . will come to me for counsel . . . to determine if there's misconduct and disciplinary action is warranted." As regards the similarity of skills, there is little or no question that this is present in the three buildings involved herein as well as all of the buildings that the Respondent maintains. Agietos testified that all employees receive the same orientation and training and the work of all seems to be quite similar. The degree of employee interchange is not as clear cut. Menjivar testified that the Respondent occasionally receives requests from employees to transfer to a different building; this usually occurs if the employee moved and found a building closer to where he/she lives. In those situations, the Respondent reviews the request and honors the request if a position is available. He testified that employees Anna Ramirez and Gloria Aguirre were given temporary transfers from the buildings that they had been employed in to work in the Wedge Tower for about 2 weeks, but he cannot recall why they were transferred. Arias, Alvarado, and Mejia testified that they have never been transferred to work in another building by the Respondent, and Alvarado and Mejia also testified that they know of no other employee of the Respondent who has transferred to another building. Counsel for the Respondent, in his brief, refers to Respondent's Exhibit 9 to establish an interchange of employees to different buildings maintained by the Respondent, in particular employees Virginia Hernandez and Jesus Cardozo. I note that although both Hernandez and Cardozo worked in more than one building maintained by the Respondent, some of the work performed in particular buildings was "Tag Work,"[3] and for both, a large percentage of their work was in a single building.

The next category, the distance between the locations, clearly works in the Respondent's favor. It had approximately 150 cleaning accounts in the area, some a mile or 2 from the Richmond and Louisiana buildings. The final category, bargaining history, is more difficult. The employers originally involved in the Union's organizational attempt formed an association that bargained with, and eventually agreed upon a contract with the Union. However, that contract specifically stated that multiemployer bargaining does not exist among the parties, and it was in effect for a short period of time at West Lake, Louisiana, and Richmond, when the Respondent obtained the contract to perform the maintenance work at these locations.

I find that the Respondent has not sustained its burden of rebutting the appropriateness of the West Lake unit, the Louisiana unit, and the Richmond unit. The cases are clear that it is not necessary that the requested unit be the most appropriate unit, or that there are no others that are more appropriate. All that is required is that the requested unit be *an* appropriate unit. *Phoenix Resort Corp.,* 308 NLRB 826, 827 (1992); *Hartford Hospital,* 318 NLRB 183, 191 (1995); *J. C. Penny Co.,* 328 NLRB 766 (1999). I believe that it is clear from the above that while a Houston areawide unit of the Respondents maintenance employees would be *an* appropriate unit, West Lake, Louisiana, and Richmond each also represents *an* appropriate unit. In addition, as the evidence establishes that the Respondent maintained, at least, local autonomy at each of these buildings that is an additional reason for finding them to each be appropriate units. *North Hills Office Services,* 342 NLRB 437 fn. 3 (2004).

Based upon all of the above, I find that the Respondent has violated Section 8(a)(1)(5) of the Act by failing to recognize and bargain with the Union as the bargain representative of the maintenance employees at West Lake, Louisiana, and Richmond facilities.

CONCLUSIONS OF LAW

1. The Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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

3. The Respondent is a successor to Sanitors, OneSource, and ABM at each of the following: the West Lake facility, the Louisiana facility, and the Richmond facility.

4. The following employees of the Respondent constitute an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

(a) All nonsupervisory janitorial employees employed at 580 West Lake Park Boulevard, Houston, Texas, but excluding all other employees, including office employees, guards, managers and supervisors as defined in the National Labor Relations Act.

(b) All nonsupervisory janitorial employees employed at 1415 Louisiana, Houston, Texas, but excluding all other employees, including office employees, guards, managers and supervisors as defined in the National Labor Relations Act.

(c) All nonsupervisory janitorial employees employed at 5177 Richmond, Houston, Texas, but excluding all other employees, including office employees, guards, managers and supervisors as defined in the National Labor Relations Act.

5. By failing to recognize or bargain with the Union, the collective-bargaining representative of the employees in the above

[3] "Tag work" is work requested by the customer that is outside the scope of the work specified in the contract. For the most part it is specialty work performed by special service personnel, and the customer pays extra for this work.

described appropriate units, the Respondent violated Section 8(a)(1) (5) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I recommend that it be ordered to cease and desist therefrom and to take certain affirmative action necessary to effectuate the policies of the Act. In that regard I recommend that the Respondent be ordered to recognize and bargain with the Union as the collective-bargaining representative of the unit employees at the locations involved herein, and if an agreement is reached, reduce the agreement to writing. However, the evidence establishes that effective November 16, 2007, the Respondent ceased performing the janitorial service at West Lake. Counsel for the General Counsel in his brief argues that this does not foreclose me from issuing an effective remedy herein for the West Lake facility. I disagree. While the remedy for Louisiana and Richmond clearly would be an order to recognize and bargain with the Union, that remedy would be a charade for West Lake because the Respondent has had no employees there for over 9 months and there would be nobody to bargain *with,* or to bargain *for*.

[Recommended Order omitted from publication.]