

AM Property Holding Corp., Maiden 80/90 NY LLC and Media Technology Centers, LLC, a single employer, a joint employer with Planned Building Services, Inc. and Local 32BJ, Service Employees International Union.¹ and United Workers of America.

AM Property Holding Corp., Maiden 80/90 NY LLC and Media Technology Centers, LLC, a single employer, a joint employer with Servco Industries, Inc. and Local 32BJ, Service Employees International Union. Cases 2-CA-33146-1, 2-CA-33308-1, 2-CA-33558-1, 2-CA-33864-1, and 2-CA-34018-1

August 30, 2007

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS
LIEBMAN AND KIRSANOW

This case arose in the context of Respondent AM Property Holding Corporation's² (AM) purchase of an office building at 80-90 Maiden Lane (80 Maiden Lane) in the Wall Street section of New York City. Prior to the purchase, AM had determined that it would not hire the employees of the building's incumbent cleaning contractor, who were represented by Local 32BJ, Service Employees International Union (32BJ). Instead, AM entered into a contract with Respondent Planned Building Services, Inc. (PBS) to provide maintenance services for the building.

Shortly after receiving the cleaning contract, PBS recognized the United Workers of America (UWA) as the bargaining representative of its employees at 80 Maiden Lane.

Approximately 1 year later, AM replaced PBS with Respondent Servco Industries, Inc. (Servco) as the cleaning contractor. At no time relevant to these proceedings did any of the Respondents recognize Local 32BJ as the bargaining representative of the employees at 80 Maiden Lane.

The General Counsel alleges that the Respondents committed numerous violations of the Act in an effort to avoid a bargaining obligation with 32BJ. The judge found that (1) AM and PBS, and subsequently AM and Servco, were joint employers of the building's maintenance employees; (2) AM and PBS were joint successors of the predecessor cleaning contractor, and AM and

Servco were joint successors of AM and PBS; (3) the Respondents violated Section 8(a)(3) and (1) by refusing to hire employees represented by Local 32BJ; (4) the Respondents violated Section 8(a)(5) and (1) by refusing to recognize and bargain with 32BJ; (5) PBS violated Section 8(a)(2) and (1) by recognizing the UWA as the collective-bargaining representative of its employees at 80 Maiden Lane; and (6) the Respondents, as joint employers respectively, were jointly and severally liable for various violations of Section 8(a)(1) and (2) of the Act.³

For reasons discussed below, we reverse the judge's finding that a joint employer relationship existed between AM and PBS, or between AM and Servco. We also reverse the judge's findings that the Respondents were joint successors as alleged, that they had an obligation to recognize and bargain with 32BJ, and that they violated Section 8(a)(5) and (1) by refusing to bargain with that Union. Further, we reverse the judge's finding that PBS violated Section 8(a)(2) and (1) by recognizing the UWA at 80 Maiden Lane. Finally, we find that each Respondent is solely responsible for its own violations of the Act.⁴

³ On May 13, 2003, Administrative Law Judge Steven Davis issued the attached decision. The General Counsel and Respondent Planned Building Services, Inc. filed exceptions, supporting briefs, answering briefs, and reply briefs. Respondents AM Property Holding Corporation and Servco Industries, Inc. filed exceptions, supporting briefs, and reply briefs. The Charging Party filed cross exceptions and an answering brief.

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

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

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

⁴ We agree with the judge, for reasons stated in his decision, that Respondent PBS, by its counsel, violated Sec. 8(a)(1) and (4) by threatening a witness during the hearing that he would "have to get an investigator" and "find out whether she's here in this country illegally." We find no merit in PBS's argument that the statements were not coercive because counsel was addressing the judge and not the witness. Whether counsel was addressing the witness directly is irrelevant, as the statements were made in the presence of the witness and were likely to influence her testimony. See *Iowa Beef Processors, Inc.*, 226 NLRB 1372, 1372-1373 (1976), *enfd.* in relevant part 567 F.2d 791, 796 (8th Cir. 1977).

We also reject PBS's contention that there was no violation because the witness testified through an interpreter and there is no evidence that she understood the statement. Although the witness testified in Spanish, the record shows that she does speak and understand some English,

¹ We have amended the caption to reflect the disaffiliation of the Service Employees International Union from the AFL-CIO on July 25, 2005.

² It is undisputed that AM Property Holding Corporation, Maiden 80/90 NY LLC, and Media Technology Centers, LLC constitute a single employer within the meaning of the Act.

I. FACTS

The relevant facts are set forth more fully in the judge's decision. On April 25, 2000, AM purchased 80 Maiden Lane from the Witkoff Group. That same day, AM entered into a contract with PBS to provide maintenance services for the building. In addition to contracting with PBS for maintenance services, AM directly employed three engineers, two day porters, and an elevator operator.⁵

Prior to the sale, maintenance services at the building had been provided by Clean-Right, Witkoff's in-house cleaning contractor. Witkoff was a signatory to a multi-employer collective-bargaining agreement with Local 32BJ, and the Clean-Right employees were represented by 32BJ pursuant to that agreement. The agreement provided that if the employees were not offered employment upon sale of the building, they were entitled to 6 months of severance pay. AM had determined, prior to the closing, that it would not hire the Clean-Right employees. Consequently, as a condition of the sale, AM agreed to indemnify Witkoff for the cost of severance pay and placed the money in an escrow account.

On the day that AM purchased the building, the Clean-Right employees were told that the building had been sold, that the new contractor was bringing in its own employees, and that there were no applications for them. A number of Clean-Right employees subsequently sought employment at the building with PBS, and eight employees were interviewed in May. The employees were told that there was no available work at that time, but that PBS was in the process of obtaining other contracts and would contact them when positions became available. Some time in July, PBS offered employment to all eight employees; two were offered positions at 80 Maiden Lane, and the rest were offered positions in various other buildings for which PBS had cleaning contracts. PBS hired 15 employees at 80 Maiden Lane before making job offers to the Clean-Right employees.

and there is no indication that she was not able to understand the comment.

32BJ has excepted to the judge's refusal to grant its posttrial motion to reopen the record to allow the admission of certain evidence obtained by the United States Attorney's Office during a racketeering investigation. We agree with the judge that the evidence is not material to the issues in this case and affirm his denial of the motion.

We also affirm the judge's denial of 32BJ's request to admit into evidence a transcript of PBS official Michael Francis' testimony in a prior Board proceeding, which was offered for the purpose of establishing antiunion animus on the part of PBS. The admission of the transcript is unnecessary, as the Board may directly take notice of its findings of animus in the prior case.

⁵ AM retained the building's engineers, who had been employed at 80 Maiden Lane for a number of years. AM transferred workers from its other buildings to fill the elevator operator and day porter positions.

On May 11, 2000, PBS received notice from the UWA that the Union had obtained a majority of authorization cards at 80 Maiden Lane and that it was requesting recognition as the bargaining representative of PBS employees at that site. The UWA and PBS then entered into a collective-bargaining agreement effective from May 1, 2000, through April 30, 2003. The agreement contained a dues-checkoff provision and a union-security clause. Less than a year later, on February 15, 2001, the UWA disclaimed interest in representing the employees.

On April 23, 2001, almost all of the PBS employees at Maiden Lane went on strike. On May 15, 2001, AM informed PBS that it was terminating the service contract as of June 15 for economic reasons. AM then contracted with Servco to replace PBS.

On June 14, having heard rumors that PBS had lost the contract, a group of the striking employees entered the building and spoke to AM Night Supervisor Dennis Henry.⁶ Henry told the employees that a new company was coming in and that it was bringing its own employees. When employees suggested that Henry could help them get jobs with the new company, he replied that "they don't want anyone from the strike." Additionally, AM Building Manager Jack Constantine told the employees he could not help them because they had made trouble and had not listened when they were told to go back to work.

Servco began cleaning the building the next day. Although Servco brought in many of its own workers, it provided employment applications to all PBS employees who were not on strike. Servco Sales Manager Mark Giacoia told the PBS employees that it was not certain that Servco would hire them, and that he would have to wait and see how it went with his workers. He also warned employees that they would be fired on the spot if they talked to the Union. Servco hired eight of the former PBS employees, none of whom had participated in the strike.

II. THE ALLEGED JOINT EMPLOYER RELATIONSHIPS

The Board will find that a joint employer relationship exists between two or more separate business entities where those entities "share or codetermine those matters governing the essential terms and conditions of employment." *Laerco Transportation & Warehouse*, 269 NLRB 324, 325 (1984) (citing cases). To establish this relationship, there must be evidence that one employer "meaningfully affects matters relating to the employment rela-

⁶ Henry was referred to by the parties and the witnesses as a supervisor; however, the judge concluded that he is not a supervisor within the meaning of Sec. 2(11) of the Act. The parties have not excepted to the judge's finding.

tionship such as hiring, firing, discipline, supervision and direction” of the other employer’s employees. *Id.* The question of joint employer status turns on the facts of each particular case. *Southern California Gas Co.*, 302 NLRB 456, 461 (1991).

A. AM and PBS

The judge found that AM and PBS were joint employers because he found that AM exercised control over the hiring and firing of PBS employees at 80 Maiden Lane, and also directed their work. As discussed below, the evidence does not support the judge’s findings.

1. Hiring and firing authority

In finding that AM exercised control over the hiring and firing of PBS employees at 80 Maiden Lane, the judge relied on the following: (1) a provision in AM’s contract with PBS that subjected PBS hires to initial approval by AM; (2) AM’s alleged refusal to allow PBS applicant Zoila Gonzalez to work in the building; (3) AM official Jack Constantine’s statements to former Clean-Right employees regarding employment with PBS; (4) Constantine’s statement to PBS employee Jorge Cea that Cea would no longer work in the building; (5) AM’s role in PBS’s hiring of Dennis Henry and in the determination of Henry’s wages and benefits; and (6) AM’s later transfer of Henry to its payroll. Contrary to the judge, we do not find that this evidence establishes that AM exercised control over PBS’s hiring and firing decisions.

First, we find that the contractual provision giving AM the right to approve PBS hires, standing alone, is insufficient to show the existence of a joint employer relationship. In assessing whether a joint employer relationship exists, the Board does not rely merely on the existence of such contractual provisions, but rather looks to the actual practice of the parties. See *TLI*, 271 NLRB 798, 798–799 (1984), *enfd. mem.* 772 F.2d 894 (3d Cir. 1985) (employer’s actual role in supervising and directing employees insufficient to establish joint employer relationship despite provision in lease agreement that employer would maintain “operational control, direction, and supervision” of employees). See also *Goodyear Tire & Rubber Co.*, 312 NLRB 674, 677 (1993).

Second, we disagree with the judge’s finding that AM exercised its contractual right of approval by rejecting Zoila Gonzalez as a PBS employee. The evidence shows that when Gonzalez first reported for work at 80 Maiden Lane, Dennis Henry informed her that she would have to mop floors as part of her duties. Gonzalez told Henry she had medical problems that prevented her from mopping. Henry then went into the building manager’s office, and when he came out he told Gonzalez that she could not work there if she did not mop. Based on this evidence,

the judge inferred that AM’s building manager or his designee told Henry that Gonzalez could not have the job if she refused to mop. However, as the judge conceded, there is no evidence concerning whom, if anyone, Henry spoke when he went into the office. Because there is no evidence that an AM official vetoed Gonzalez’ hire, we reverse the judge’s finding that AM exercised its contractual right of approval.

Third, we do not find that Constantine’s statements to the former Clean-Right employees regarding employment with PBS demonstrate that AM was involved in PBS’s hiring decisions. On the day after AM bought the building, the former Clean-Right employees returned and told Constantine that they wanted to apply for jobs. Constantine informed them that PBS was the new cleaning contractor and that there were no positions available. He then took their names, addresses, and phone numbers, and said that he would contact PBS and see what he could do. He also told the employees that he would call them if jobs became available. There is no evidence that Constantine ever followed through on his promise to contact PBS about the matter, or that he ever contacted the employees afterwards.

Unlike the judge, we do not find that this evidence demonstrates that Constantine influenced PBS’s hiring decisions. There is no indication that Constantine had been given any hiring authority to act on behalf of PBS, that he was authorized to speak on the Company’s behalf, or that he had input into PBS’s hiring decisions. Moreover, a number of the employees who had met with Constantine subsequently went to PBS’s main office to apply for jobs and were interviewed for positions by PBS officials. In these circumstances, we do not construe Constantine’s statements as evidence that he played a role in PBS’s hiring decisions.

Fourth, we do not find that Constantine’s termination of PBS employee Jorge Cea from a day porter’s position at 80 Maiden Lane evinces any control by AM over PBS’s firing process. As set forth in Section I, the day porters worked directly for AM and were not PBS employees. In September 2000, when one of the day porters quit unexpectedly, AM contacted PBS and requested that PBS provide someone to temporarily fill the vacancy. In response to AM’s request, PBS transferred Cea to the building from one of its other worksites.⁷

After Cea had been on the job for a few days, Constantine told Cea that he would consider him for the position on a permanent basis as an employee of AM. At the end of Cea’s first week, however, Constantine told him that

⁷ There is no evidence that AM specifically requested that Cea be assigned to fill the position.

the position would be filled by someone else. Cea was then reassigned by PBS to another location.

Although Constantine's decision resulted in Cea's transfer out of the building, Cea remained an employee of PBS. Thus, Cea's status as an employee of PBS was not affected by Constantine's actions. Accordingly, we reject the judge's conclusion that Constantine's actions demonstrate that AM significantly influenced PBS's employment decisions. See *Flav-O-Rich, Inc.*, 309 NLRB 262, 265 (1992) (employer's statement to temporary employee that employment was going to end was not evidence of a joint employer relationship where employee was reassigned by employment agency).

Finally, we affirm the judge's finding that AM affected the hire, wages, and benefits of PBS employee Dennis Henry, but we give that finding little weight. Henry was employed by AM as a night porter at 75 Maiden Lane when AM purchased the building at 80 Maiden Lane. A few days before the purchase, Henry was informed by his supervisor that he was going to be transferred to the new building. On the first day that Henry reported for work at 80 Maiden Lane, Constantine told him that he was going to work for PBS. Henry then spoke with Gilbert Sanchez, a PBS supervisor, who explained that Henry's duties were to prepare the supplies for the cleaning crew and check to see that their work had been done.

Henry was unhappy with the change, particularly the lower salary he received as a PBS employee, and complained to AM official Paul Wasserman. Wasserman assured Henry that his benefits would remain the same as those he had received from AM. As a result of Wasserman's intervention, PBS increased Henry's salary and gave him a paid holiday. We agree with the judge that this evidence demonstrates that AM played an integral role in PBS's hiring of Henry, and that AM significantly influenced Henry's wages and benefits. As stated above, however, the evidence does not establish that AM played any significant part in the hiring of other PBS employees.

2. Direction of PBS employees

In late July, Henry was transferred back to AM's payroll, but his position and duties remained the same. The judge concluded that Henry's continued oversight of PBS employees after having been transferred back to AM's payroll established that AM was extensively involved in directing the work of PBS employees. We disagree.

The Board has held that evidence of supervision which is "limited and routine" in nature does not support a joint employer finding. See, e.g., *G. Wes Limited Co.*, 309 NLRB 225, 226 (1992). The Board has generally found supervision to be limited and routine where a supervi-

sor's instructions consist primarily of telling employees what work to perform, or where and when to perform the work, but not how to perform the work. See, e.g., *id.* at 226; *Island Creek Coal Co.*, 279 NLRB 858, 864 (1986).

Here, we find that Henry's oversight of PBS employees is of the type that the Board has found to be limited and routine.⁸

Henry's duties included distributing keys and cleaning supplies to employees at the start of the shift, preparing and signing employee timecards,⁹ and ensuring that employees did their work properly. If the work was not properly done, Henry asked employees to do it over. There is no specific evidence, however, that Henry trained employees or instructed them how to perform their tasks.¹⁰ Accordingly, we do not find that Henry's direction of PBS employees while employed by AM is sufficient to establish a joint employer relationship.¹¹

For similar reasons, we reject the judge's finding that the occasional assignment of work by AM officials to Diana Vasquez, who was employed by PBS as a day matron, is evidence of a joint employment relationship. The record shows that Constantine or another AM employee sometimes asked Vasquez to redo work that was not done properly, or asked her to perform tasks that were not part of her regular duties, such as cleaning a floor that had been recently rented. As with Henry, we find that this oversight was limited and routine, and therefore not indicative of joint employer status.

⁸ AM and PBS argue that, in assessing whether a joint employment relationship existed, the judge's finding that Henry was not a statutory supervisor precludes any reliance on Henry's role in directing PBS employees. We find it unnecessary to address this argument because even assuming that Henry was a statutory supervisor, we find that the extent of his direction of PBS employees is insufficient under Board law to establish that AM and PBS were joint employers.

⁹ When employees called in sick, Henry reassigned their work to others, who received overtime pay. The record indicates that employees could refuse to work overtime, and that Henry obtained the consent of a PBS supervisor for the assignments either before or after he made them. Compare, *Computer Associates, International*, 332 NLRB 1166, 1169 (2000), *enf. denied on other grounds* 282 F.3d 849 (D.C. Cir. 2002) (finding joint employer relationship where one employer's supervisor exercised discretion in authorizing overtime requests by employees of second employer).

¹⁰ PBS Supervisor Sanchez initially instructed employees on how to perform their jobs. There was general testimony by employee Ana Guzman that either she or Henry told new employees "what to do."

¹¹ See, e.g., *Service Employees Local 254 (Women & Infants Hospital)*, 324 NLRB 743, 746-749 (1997) (finding no joint employer relationship where respondent regularly directed maintenance employees to perform various tasks, but did not instruct employees how to perform work); *Southern California Gas Co.*, 302 NLRB at 461-462 (respondent's direction of porters and janitors insufficient to establish that it was a joint employer where respondent did not engage in the bargaining process, resolve grievances or disputes, or affect wages, benefits, and hiring or firing of employees).

3. Conclusion

In sum, we find that the totality of the evidence fails to establish that a joint employer relationship existed between AM and PBS. Despite AM's role with regard to Henry's hire by PBS and AM's involvement in setting his terms of employment, we find that evidence, by itself, is insufficient to establish that AM and PBS were joint employers. Compare, *Bonita Nurseries Inc.*, 326 NLRB 1164, 1167 (1998) (evidence that single employee performed some payroll and accounting tasks for one employer while employed as a controller for another employer insufficient to establish joint employer relationship where employee did not meaningfully affect matters relating to employment relationship). Unlike Member Liebman, we find nothing here that presents a compelling case for revisiting the Board's joint employer standard, which has been well-settled law for approximately 20 years. See *Airborne Express*, 338 NLRB 597 fn. 1 (2002). Accordingly, we reverse the judge's finding of a joint employer relationship.

B. AM and Servco

The judge concluded that AM and Servco were joint employers because (1) AM's contract with Servco provided that AM would supervise Servco employees; (2) Henry supervised the Servco employees; (3) Constantine supervised the day matron employed by Servco; and (4) Henry played a role in Servco's hiring process and in the determination of employee wages. As discussed below, the evidence does not support the judge's conclusions.

1. Direction and supervision

As set forth above, the Board's inquiry with regard to the direction and supervision of Servco employees is properly focused on the practice of the parties, not the language of the contract.¹² The evidence shows that the direction of Servco employees by Constantine and Henry was similar to their direction of PBS employees as discussed above. The evidence also shows that Servco provided its own onsite supervision, initially by Servco Supervisor Isaac Paredes.¹³ Although Paredes was not present on a daily basis, he had the overall responsibility for seeing that the employees' work was done properly, and had instructed employees that if they had a problem they should go to him, not Henry. In these circumstances, we find that AM's direction of Servco employees was limited and routine, and therefore not indicative of a joint employment relationship.

¹² In finding that the contract provided for AM's supervision of Servco employees, the judge relied on a provision stating that Henry would continue as a night supervisor in AM's employ.

¹³ Paredes was replaced in December 2001.

2. Hiring of former PBS employees

We also reverse the judge's finding that Henry's role in the hiring of former PBS employees demonstrates that AM and Servco are joint employers. When Servco took over the cleaning contract, Henry suggested the names of employees that he felt Servco should retain. Servco then independently interviewed the employees before making any hiring decisions. In these circumstances, we do not find that Henry meaningfully affected Servco's hiring decisions. See *Martiki Coal Corp.*, 315 NLRB 476, 478 (1994) (employer's role in providing employment forms to applicants and making recommendations insufficient to establish joint employer relationship).

32BJ argues that AM involved itself in Servco's hiring process by taking steps to ensure that Servco did not hire the former PBS employees who were on strike at the time that Servco was awarded the cleaning contract. As explained in section I, the record shows that when the striking employees sought applications from Henry and Constantine, they were told that they were ineligible for employment because of their participation in the strike.¹⁴ 32BJ contends that these statements by Constantine and Henry establish that AM was involved in the hiring process and that a joint employer relationship existed. We disagree.

In support of its argument, 32BJ relies on *Le Rendezvous Restaurant*, 332 NLRB 336 (2000), in which the Board found that a hotel's involvement in keeping a union work force out of an independently operated restaurant on the hotel's premises was indicative of joint employer status. We find, however, that *Le Rendezvous Restaurant* is distinguishable on its facts. In that case, the hotel's management was actively involved in the restaurant's hiring of a nonunion work force, and also exercised its authority under an agreement with the restaurant to discipline restaurant employees. Here, there is no evidence that Servco had authorized either Constantine or Henry to make any representations on its behalf, or that Servco had involved them in its hiring process. Further, there is no evidence that AM otherwise affected the terms and conditions of Servco employees. In the absence of such evidence, we find that the statements by Constantine and Henry do not demonstrate the existence of a joint employer relationship.

3. Determination of wage rates

Further, we find no evidence that Henry had an effective role in determining the wages of Servco employees. On the day that Servco began servicing 80 Maiden Lane, Sales Manager Mark Giacoia met with employees and

¹⁴ As discussed below, we affirm the judge's finding that the statements by Henry and Constantine violated Sec. 8(a)(1).

told them that they would be paid \$6 per hour. Henry then said that the employees were good employees, that they had been making \$7 per hour, and that it would only be fair to continue to pay them the same wage. Giacoia said he would have to think about it. The final decision concerning the wage rates was made by Servco President Cestaro, who ultimately decided to pay the employees at their prior rate. There is no evidence that Henry was consulted or had any input into that decision. Consequently, we find that Henry did not meaningfully affect employee wage rates. Compare, *Quantum Resources Corp.*, 305 NLRB 759, 760–761 (1991) (joint employer relationship found where respondent designated wage rates, authorized changes in rates, and pushed through raises for employees).

4. Other considerations

The General Counsel cites additional evidence, not relied on by the judge, in support of the argument that a joint employer relationship existed between AM and Servco. First, the General Counsel argues that Henry's role in preparing and signing the timecards of Servco employees demonstrates that AM exercised control over the hours of its employees. We find no merit in this argument, as there is no evidence that Henry had any responsibility for determining employee work hours. Rather, the evidence shows that Henry's role in this regard was limited to recordkeeping.

The General Counsel also argues that the inclusion of Servco employee Zoila Henry's name on a flyer that was distributed by AM in December 2001 demonstrates that AM held itself out as the employer of the Servco employees. The flyer, which was distributed to the building's tenants, stated that "Building Management & Staff Extend Their Warmest Greetings of the Season & Prosperity in the New Year," and listed the names of the day shift employees and their titles. We reject the General Counsel's contention that AM's failure to specifically identify Zoila Henry as a Servco employee demonstrates that AM held itself out as her employer. The flyer did not purport to be a representation of AM employees; rather, it appears to have been the equivalent of a holiday greeting card. Thus, we find no merit in the General Counsel's argument.

5. Conclusion

We find that AM's role in overseeing the work of Servco employees, in recommending employees for hire, and in recommending Servco wage rates is insufficient to establish the existence of a joint employer relationship. Accordingly, we reverse the judge and dismiss the allegation that AM and Servco were joint employers.

III. SUCCESSORSHIP

The judge found that AM and PBS, as joint employers, were joint successors to Clean-Right because they refused to hire the former Clean-Right employees to avoid a bargaining obligation with 32BJ. The judge further concluded that, as joint successors, the Respondents were obligated to recognize and bargain with 32BJ, and that they violated Section 8(a)(5) and (1) by refusing to honor the bargaining obligation.

As explained in section IV below, we agree with the judge that AM and PBS independently violated Section 8(a)(3) and (1) by refusing to hire the former Clean-Right employees or to consider them for hire. However, we reverse the judge's findings that AM and PBS were joint successors to Clean-Right, that they had an obligation to bargain with 32BJ, and that they violated Section 8(a)(5) and (1) by refusing to honor their bargaining obligation.

The General Counsel has litigated the 8(a)(5) refusal-to-bargain allegation solely on the theory that AM and PBS, as joint employers, refused to hire the Clean-Right employees because of their support for 32BJ, and therefore were joint successors obligated to recognize and bargain with 32BJ.¹⁵ Because we have found that AM and PBS are not joint employers, we find that the General Counsel has failed to establish that they are joint successors to Clean-Right. AM and PBS therefore did not have a joint obligation to bargain with 32BJ.

We further find that we are precluded from considering whether either AM or PBS individually was a successor to Clean-Right with an obligation to recognize 32BJ because the General Counsel has not litigated a violation based on that theory. Because AM and PBS each took over only a portion of Clean-Right's business, a key question in determining whether either entity independently may be a successor is whether the employees in that entity's conveyed portion of the business constituted a separate appropriate bargaining unit. See, e.g., *Louis Pappas' Restaurant*, 275 NLRB 1519, 1519–1520 (1985); *Stewart Granite Enterprises*, 255 NLRB 569, 573 (1981) (and cases cited therein). However, the General Counsel did not allege or establish the appropriateness of the separate units. Consequently, we find that the issue of whether AM and PBS were independent successors to Clean-Right is not now properly before us. See, e.g., *Sierra Bullets, LLC*, 340 NLRB 242, 243 (2003) (declining to consider theory of violation not litigated

¹⁵ See *Love's Barbeque Restaurant No. 62*, 245 NLRB 78 (1979), *enfd.* in relevant part sub nom. *Kallman v. NLRB*, 640 F.2d 1094 (9th Cir. 1981).

because respondent was not on notice that it would have to defend against theory).

The judge also found that AM and Servco, as joint employers, were joint successors to AM and PBS because Servco continued the cleaning operation in essentially the same manner, employed some of the former PBS employees, and refused to hire the striking PBS employees because of their support for 32BJ. For the reasons discussed above, we reverse. Consequently, we also reverse the judge's findings that AM and Servco had an obligation to bargain with 32BJ, and that they violated Section 8(a)(5) and (1) by refusing to recognize or bargain with that Union.

IV. THE REFUSAL TO HIRE ALLEGATIONS

A. AM and PBS

Applying the analytical framework set forth by the Board in *FES*, 331 NLRB 9 (2000), *enfd.* 301 F.3d 83 (3d Cir. 2002), the judge found that AM and PBS independently violated Section 8(a)(3) and (1) by refusing to hire the Clean-Right employees or to consider them for hire.¹⁶ We affirm the judge's findings of the violations for the reasons set forth in his decision.

AM has excepted to the judge's finding on the basis that it did not hire any employees when it purchased 80 Maiden Lane, but rather transferred employees from its other locations to fill the vacant day shift positions. We find no merit in this exception. It is undisputed that the day shift positions became vacant upon AM's purchase of the building, and that the employees who filled those positions were employed by AM. Whether AM ultimately hired new employees or transferred employees from another building is irrelevant: the question here is whether AM's failure to hire former Clean-Right employees to the vacant positions was based on an unlawful motive.¹⁷ We agree with the judge that AM refused to consider or hire the former Clean-Right employees because of their support for 32BJ.¹⁸

¹⁶ The Board has recently held that *FES* is not applicable in cases in which a successor employer refuses to hire the employees of its predecessor because of their union sympathies. Rather, in such cases the Board's traditional analysis under *Wright Line*, 251 NLRB 1083 (1980), *enfd.* on other grounds 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), is appropriate. See *Planned Building Services*, 347 NLRB 670 (2006) (*PBS III*). Here, however, the question of whether PBS and AM were individual successors to Clean-Right was not litigated. Thus, we find that the judge's application of *FES* is appropriate.

¹⁷ See, e.g., *PBS III*, *supra* at 707 (finding a refusal to hire violation where respondent transferred employees to fill available positions to avoid hiring predecessor's employees).

¹⁸ We reverse the judge's finding that AM unlawfully refused to consider for hire former Clean-Right day matron Maria Hernandez. The evidence shows that the day matron was employed by PBS, not AM.

AM also argues that the former Clean-Right employees gave up their right to employment in the building and their right to file unfair labor practice charges by arbitrating a claim for severance pay under the collective-bargaining agreement with the Witkoff Group. As mentioned above in section I, the agreement between Witkoff and 32BJ provided that employees would receive severance pay if they were not retained by Witkoff's successor. A separate clause in the agreement provided for termination pay in the event of a reduction in force. The arbitration upon which AM bases its argument arose as a result of a dispute over whether the Clean-Right employees were entitled to termination pay. The sole issue addressed by the arbitrator was whether the sale of the building resulted in a reduction in force as defined by the collective-bargaining agreement. The arbitrator found in favor of the employees and awarded the termination pay.

Relying on *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), AM argues that the arbitration award provides an affirmative defense to its refusal to hire the employees. We disagree. The alleged contractual breach—Witkoff's denial of termination pay—has not been alleged as a violation of the Act. And AM's refusal to hire the employees was not presented to the arbitrator as a breach of the collective-bargaining agreement—nor could it have been because AM was not a party to the collective-bargaining agreement. Because its refusal to hire the former Clean-Right employees was not before the arbitrator, we reject AM's arbitration-based defense.

Finally, AM contends that the Clean-Right employees waived their right to continued employment at 80 Maiden Lane by accepting the termination pay. We find no merit in this contention. The employees had specifically reserved their rights under article XV of the collective-bargaining agreement, which provides that nothing in the agreement shall be deemed to limit the Union's right to enforce the agreement "against any transferee pursuant to applicable law concerning the rules of successorship or otherwise" or to "limit or diminish in any way the Union's or any employee's right to institute proceedings" under Federal labor laws. In light of this provision, we reject AM's waiver argument.

B. Servco

The judge found that Servco violated Section 8(a)(3) and (1) by refusing to hire the striking PBS employees or to consider them for hire. The judge based his finding on (1) his conclusion that Servco departed from its usual hiring practices; (2) the antiunion statements made by Constantine and Dennis Henry to the striking PBS employees; and (3) Servco Manager Giacoia's threat to fire employees for talking to union representatives. For reasons discussed below, we reverse.

First, we find that the judge's conclusion that Servco deviated from its usual hiring practice is not supported by the evidence. Giacoia testified that there was a "mixed group of employees" who staffed 80 Maiden Lane on the first day Servco took over, that "a lot of them were brand new employees that Servco had hired" and that "there were some from the previous company that was there." Giacoia was then asked by counsel what the hiring process was "with respect to the new employees that you said Servco had hired." He responded that people generally would come to Servco's main office in the Bronx to fill out applications, which were then screened by Servco's office manager in charge of hiring.

Based on this testimony, the judge apparently concluded that Servco typically hired employees for *all* of its facilities through its Bronx office and had thus deviated from its routine practice by retaining the nonstriking PBS employees at 80 Maiden Lane. In our view, however, Giacoia's testimony, considered in context, refers solely to how the new employees *at 80 Maiden Lane* were hired. Moreover, there is no evidence as to whether Servco typically hires incumbent employees upon taking over a building in which there is a preexisting work force. In the absence of such evidence, we reject the judge's conclusion that Servco departed from its usual hiring procedures at 80 Maiden Lane.

Second, we find that, in the absence of a joint employer relationship between AM and Servco, there is no basis for attributing to Servco the antiunion statements made by Constantine and Henry to the striking PBS employees. Based on these statements, and on Giacoia's statement to Servco employees that they would be fired if they talked to union representatives, the judge concluded that it would have been futile for the PBS employees to apply for positions with Servco. There is no evidence, however, that Servco had authorized Constantine or Henry to communicate with the employees on its behalf, or that Servco had done anything to lead the employees to believe that Constantine and Henry were acting as its agents. Consequently, we find that the judge could not properly rely on these statements in finding that it would have been futile for the strikers to apply for positions with Servco.

Third, although we agree with the judge that Giacoia's statement violated Section 8(a)(1), we find that this statement, by itself, is insufficient to establish that it would have been futile for the PBS strikers to apply for positions with Servco. The statement was made to the nonstriking PBS employees, and there is no evidence that it was disseminated to the strikers. Thus, there is no basis on which to conclude that the strikers failed to apply

for jobs because Servco indicated to them that it would have been futile to do so.

We disagree with our colleague that assertions by AM officials to the strikers that Servco did not want anyone from the strike are sufficient to excuse their failure to apply. That the strikers may have acted on what they had been told by Constantine and Henry is irrelevant. The question is whether Servco did anything to discourage the strikers from applying or to ensure that applying would be futile, and it did not. See, e.g., *E. S. Sutton Realty Co.*, 336 NLRB 405, 408 (2001) (violation found where employer took steps to ensure that workers could not make timely application for positions); *Systems Management*, 292 NLRB 1075, 1097 (1989). Accordingly, we reverse the judge and dismiss the complaint allegation.

V. PBS'S RECOGNITION OF THE UWA

We affirm the judge's findings that PBS violated Section 8(a)(2) and (1) by (a) soliciting authorization cards for the UWA; (b) requiring employees to authorize the deduction of union dues from their paychecks; (c) deducting union dues from employee paychecks without their authorization; and (d) deducting union dues for the UWA after it had disclaimed interest in representing employees. However, we reverse his finding that PBS's recognition of the UWA as the bargaining representative of the employees at 80 Maiden Lane violated Section 8(a)(2) and (1).

As discussed above, the judge found that the recognition was unlawful because it occurred at a time when PBS, as a joint successor (with AM) to Clean-Right, had a duty to recognize and bargain with 32BJ. Because we have rejected the judge's findings that PBS had an obligation to bargain with 32BJ as a joint successor employer, we reverse his finding that PBS's recognition of the UWA was unlawful because it was obligated to bargain with 32BJ.

The General Counsel also alleged and argued to the judge that the recognition was unlawful because the UWA did not represent an uncoerced majority of employees at the time of recognition. The judge found it unnecessary to reach this argument because of his successorship finding.

The General Counsel has not excepted to the judge's failure to rule on the alternative argument. PBS, in its brief in support of its exceptions, argues that it recognized the UWA based on a majority of lawfully obtained authorization cards. In his answering brief, the General Counsel argues that the UWA did not represent an uncoerced majority of the bargaining unit at the time of recognition because PBS had unlawfully assisted the UWA in obtaining the authorization cards.

Contrary to our colleague, we find that the issue of whether the UWA represented an uncoerced majority at the time of recognition is not properly before us. The General Counsel failed to raise a timely exception to the judge's failure to rule on the issue, and the Board's Rules and Regulations do not permit a party to assert cross-exceptions in an answering brief. *American Red Cross Missouri-Illinois Blood Services Region*, 347 NLRB 347, 354 (2006) (finding that issue raised by cross-exception in answering brief was not properly before the Board); *Teddi of California*, 338 NLRB 1032 (2003) (refusing to consider issue raised in answering brief in the absence of timely exception). Therefore, we dismiss the allegation that PBS's recognition of the UWA was unlawful.

VI. AM'S TERMINATION OF THE CONTRACT WITH PBS

We reverse the judge's finding that AM's termination of its contract with PBS violated Section 8(a)(3) and (1) because the violation is contingent upon the existence of a joint employer relationship between the two Respondents. Although the judge found that AM terminated the contract because of the strike by PBS employees, it is well established that an employer who refuses to do business with a subcontractor because of the protected activities of the subcontractor's employees does not violate the Act. *Plumbers Local 447 (Malbaff Landscape Construction)* 172 NLRB 128, 129 (1968). Thus, in the absence of a joint employer relationship there is no basis for finding a violation.

We also reverse the judge's finding that AM violated Section 8(a)(5) and (1) by terminating the contract without first bargaining with 32BJ over the termination, as we have concluded that AM had no such bargaining obligation.

VII. AM'S ALLEGED RESCISSION OF A JOB OFFER TO JORGE CEA

The judge found that PBS employee Jorge Cea had been offered a position by AM Building Manager Constantine, and that the offer was unlawfully rescinded after Constantine had observed Cea speaking to a representative of 32BJ. AM contends that the evidence does not support the judge's finding that Constantine observed Cea talking to the union representative or that Constantine offered Cea a position. We affirm the judge's findings regarding Constantine's observation of Cea;¹⁹ however, we agree with AM that the evidence does not demonstrate that Cea received a job offer from Constantine.

¹⁹ We hereby grant the General Counsel's request to strike the judge's purported dismissal of an allegation that Constantine created the impression of surveillance by observing Cea, as there is no such allegation in the complaint.

The credited testimony shows that a few days after Cea began working at 80 Maiden Lane, Constantine told Cea that he liked the way Cea worked and asked Cea if he wanted to continue working in the building. Cea replied that he would like to continue to work there. Constantine then asked whether Cea would prefer to work for PBS or work directly for him. Cea told Constantine that he would rather work for him because he would make more money. Constantine told Cea that he had a positive feeling about Cea's work, that he was doing a good job, and that he would consider Cea for a job in the building.

Some time after this conversation took place, Constantine observed Cea talking to a 32BJ representative while sweeping the sidewalk in front of the building. The next day, Constantine told Cea that although he liked Cea's work, he was going to hire a relative of one of the building's engineers for the position.

Although Constantine indicated that he was considering Cea for a position, there is nothing here to indicate that an offer of employment was ever made. Accordingly, we reverse the judge and dismiss the complaint allegation.²⁰

VIII. THE INDEPENDENT 8(A)(1) VIOLATIONS

A.

The judge found the following violations of Section 8(a)(1):

(1) AM official Stanley Cunningham threatened employees that they would lose their jobs if they joined 32BJ.

(2) AM official Terry Donahue interrogated Diana Vasquez about her intention to strike.

(3) Jack Constantine created the impression of surveillance by telling Diana Vasquez that she had been seen talking to a striker; asked Vasquez to let him know if she heard anything about a strike against PBS; and told former PBS employees that he could not help them in obtaining jobs with the new contractor because of their strike activities.

(4) Dennis Henry told PBS employees that they would be taken out of the building if they joined 32BJ, and told former PBS employees that Servco did not want anyone from the strike.²¹

(5) Mark Giacoia told prospective Servco employees that they would be discharged immediately if they spoke to representatives of 32BJ.

²⁰ The General Counsel did not allege or attempt to prove that AM refused to hire Cea. Rather, the complaint alleged only that AM rescinded a job offer to Cea in retaliation for his support for the Union.

²¹ Although the judge found that Henry was not a supervisor, he found, and we agree, that Henry was an agent (at least of AM), and therefore that his actions are attributable to AM.

We affirm the violations for reasons set forth by the judge. However, we reverse the judge's findings that AM and PBS, or AM and Servco, respectively, were jointly and severally liable for the violations as joint employers. Instead, we find that the violations by Cunningham, Constantine, Henry, and Donohue are attributable only to AM, and that Giacoia's violation is attributable only to Servco.

B.

The General Counsel has excepted to the judge's failure to make specific findings as to some of the complaint allegations, findings that would follow logically from the facts and the violations he did find. Because the issues were alleged and fully litigated, and the violations are directly associated with violations found by the judge, we grant the General Counsel's exceptions and find these additional violations of Section 8(a)(1):

(1) PBS supervisor Al Hernandez threatened employees with job loss and indicated that support for 32BJ would be futile by telling employees that it would be difficult to organize 80 Maiden Lane because PBS's contract stated that PBS would have to leave the building if it accepted the Union.²²

(2) Terry Donohue indicated that support for 32BJ would be futile by telling employees that the Union would not enter the building.²³

(3) Dennis Henry unlawfully assisted the UWA by directing employees to attend UWA meetings and by escorting them to the meetings.²⁴

(4) Dennis Henry and Gilbert Sanchez were present at or near the place where employees met with union representatives.²⁵

C.

We reverse the judge's finding that PBS Supervisor Al Hernandez engaged in unlawful surveillance of employee union activities in July 2000, as the surveillance was neither alleged in the complaint nor litigated during the hearing. Rather, the judge's finding was based solely on the content of a memo written by Hernandez and included in a personnel file that was introduced into evidence by 32BJ. The memo is dated July 19 and states, "Last night these three new workers were speaking with

²² See, e.g., *Mr. Z's Food Market*, 325 NLRB 871, 889 (1998), *enfd.* in relevant part 265 F.3d 239 (D.C. Cir. 2001) (employer statements communicating that organizing drive would result in job loss and store closure found to be unlawful threats).

²³ See, e.g., *T & J Trucking Co.*, 316 NLRB 771, 779 (1995), *enfd.* 86 F.3d 1146 (1st Cir. 1996) (employer statement that it would not permit the union to come in found to be unlawful).

²⁴ See, e.g., *Famous Castings Corp.*, 301 NLRB 404, 407 (1991).

²⁵ See *id.*

... 32B&J People ... Will Monitor." There was no testimony regarding the memo or the circumstances surrounding it, nor was it offered for the purpose of establishing unlawful surveillance. In these circumstances, it cannot be said that the issue was fully litigated; accordingly, we reverse. See *Desert Aggregates*, 340 NLRB 289, 292–293 (2003) (issue was not fully litigated where facts giving rise to issue emerged incidentally during hearing).

IX. JOB OFFERS TO FORMER CLEAN-RIGHT EMPLOYEES

The General Counsel has excepted to the judge's failure to address a complaint allegation that the employment offers made by PBS to former Clean-Right employees for positions at other buildings were contingent upon the discriminatees accepting an unlawful bargaining relationship between PBS and the UWA.²⁶ The General Counsel argues that in *PBS III*, *supra*, the Board found that PBS's recognition of the UWA as the bargaining representative of the employees at those buildings²⁷ violated Section 8(a)(2) and (1), and that any job offers contingent upon accepting working conditions pursuant to the bargaining relationship are unlawful. We agree, and grant the General Counsel's exception.

The record shows that PBS sent each discriminatee a letter offering employment at a particular worksite. The letter also stated that "[t]he actual terms [of employment] are spelled out in the Collective Bargaining Agreement between Planned Building Services, Inc., and the United Workers of America."²⁸ In addition to the letter, the discriminatees received a separate attachment of "a Summary of Wages and Benefits governing [the] initial terms and conditions of employment."

We agree with the General Counsel that this offer makes clear to the discriminatees that if they were to accept the position, their working conditions would be subject to the terms of a bargaining agreement that we have previously found, in *PBS III*, to have been unlaw-

²⁶ The General Counsel has alleged that offers made to former Clean-Right employees at 80 Maiden Lane are unlawful for the same reason. However, because we have dismissed the allegation that PBS's recognition of the UWA at 80 Maiden Lane was unlawful, we find that subsequent offers made to applicants at that building under the terms and conditions of the UWA collective-bargaining agreement were not unlawful.

Because Member Liebman would find that the recognition was unlawful, as set forth below, she would also find that the offers made to applicants that were conditioned on the acceptance of the UWA agreement were unlawful.

²⁷ The buildings are located at 32–42 Broadway and 39 Broadway.

²⁸ The master collective-bargaining agreement between PBS and the UWA in effect at the time contained a union-security provision requiring the discriminatees to become members after 60 days of employment.

ful.²⁹ Consequently, we find that PBS has violated Section 8(a)(2) and (1). See *Fairmont Foods Co.*, 245 NLRB 915, 923 (1979) (finding violation where employer conditioned employment on acceptance of an unlawfully recognized union).

X. THE ALLEGED CONFLICT OF INTEREST

PBS argues that counsel for the General Counsel Lauren Esposito's participation in this case was improper because of her prior employment with a law firm that has represented 32BJ, and that it was entitled to a hearing on this issue. PBS also argues that Esposito's participation amounts to prosecutorial misconduct and that this misconduct is an affirmative defense to the alleged unfair labor practices. We find no merit in these arguments.

PBS initially raised the conflict of interest argument with the Regional Director, who investigated the matter and determined that Esposito did not do any work on behalf of 32BJ while employed by the law firm. The Regional Director also sought the advice of the Agency's Ethics Officer and the Division of Operations Management, who concurred that Esposito's participation in the case did not pose a conflict. The Regional Director informed PBS of her findings, and PBS moved for a separate hearing on the issue prior to the trial.

The motion went before Judge Biblowitz, who found no merit in the conflict of interest allegation. Judge Biblowitz found that under the applicable statute, an employee of the Agency may not participate in a matter involving a person with whom he or she has a "covered relationship." See 5 CFR § 2635.502. A covered relationship includes a person for whom the employee has, within the last year, served as an attorney or consultant. Based on representations by the Regional Director, Judge Biblowitz found that Esposito did not have a covered relationship with 32BJ and that there was no conflict of interest with regard to her participation in this case. He further found that, even if a covered relationship existed, there was no real or apparent conflict that would prevent Esposito from participating in the case. Thus, he denied the motion.

PBS again raised the conflict of interest argument with the trial judge, who, like Judge Biblowitz, found no conflict of interest in Esposito's participation in this case. The judge also struck PBS's affirmative defense of

prosecutorial misconduct, finding that it was not a valid defense to the complaint allegations.

For reasons set forth above, we affirm that Esposito's participation in this case posed no conflict of interest, and that PBS's contention that it was entitled to a separate hearing on the issue is without merit. PBS has presented no evidence throughout any of these proceedings to support its position that Esposito's participation in the case violated any government regulation. Indeed, in its motion for a hearing, PBS admitted that it could not "submit complete evidence of a violation" at that time, but rather asserted that was "the purpose of a trial." Given this admitted lack of evidence, we reject PBS's assertion that it was improperly denied a hearing on this issue.

We also affirm the judge's finding that PBS's asserted defense of prosecutorial misconduct is not a valid defense to the allegations in this case. Notwithstanding, we agree with PBS's contention that the judge's striking of the defense deprives PBS of an opportunity to preserve the issue for appeal. Thus, while we reject the Respondent's defense on its merits, we grant PBS's exception alleging that the defense was improperly stricken by the judge. See, e.g., *Purolator Products*, 272 NLRB No. 161 fn. 1 (1984) (not reported in Board volumes).

AMENDED REMEDY

Having found that AM, PBS, and Servco have engaged in various unfair labor practices, we shall order that they cease and desist from such acts and take certain affirmative action designed to effectuate the policies of the Act.

We have found that AM and PBS, as separate business entities, have violated Section 8(a)(3) and (1) by refusing to hire the former Clean-Right employees named in the Order below because of their support for Local 32BJ.³⁰ Accordingly, we will order that AM and PBS instate those employees, respectively, and make them whole for the discrimination against them. Whatever backpay is found to be due the employees shall be calculated in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Because PBS ceased providing maintenance services at 80 Maiden Lane before the start of these proceedings, we shall order PBS to offer the discriminatees substantially equivalent positions at the other facilities that it services. We shall leave to compliance the issue of whether the discriminatees would have been retained by

²⁹ We find no merit in PBS's argument that we may not rely on *PBS III* in finding a violation here. The Board may rely on specific findings from prior decisions involving the same party in determining whether that party has committed additional violations of the Act. See, e.g., *Beverly Health & Rehabilitation Services*, 346 NLRB 1319, 1328-1329 (2006) (relying on violations found in prior case in determining that employer unlawfully polled employees and withdrew recognition).

³⁰ We do not order instatement or make-whole relief for former Clean-Right employee Eva Sequinot, as there is no evidence that she applied for a position with either PBS or AM. Rather, Sequinot's status as a discriminatee is dependent on the judge's finding that AM and PBS were joint successors, which we have rejected.

PBS after the contract for 80 Maiden Lane was terminated. See, e.g., *Mark Industries*, 296 NLRB 463, 463 fn. 3 (1991); *Compuware Corp.*, 320 NLRB 101, 104 (1995), enfd. 134 F.3d 1285 (6th Cir. 1998).

We have also found that PBS violated Section 8(a)(2) and (1) by continuing to deduct union dues from employees' paychecks after the UWA had disclaimed interest in representing those employees. We shall therefore order PBS to reimburse the employees for any dues or fees that were unlawfully deducted.

Finally, for reasons set forth in the judge's decision, we shall issue a broad order against PBS in this case. We shall also order a corporatewide cease-and-desist Order and notice posting. This is the fourth in a series of cases in which the Board has found that PBS has violated Section 8(a)(2) and (1) by unlawfully soliciting union authorization cards.³¹ Additionally, the violations found to have been committed by PBS in this case are similar in nature to the violations found by the Board in *PBS III*. Where, as here, there is a clear pattern or practice of unlawful conduct by an employer, the Board may find it appropriate to issue a corporatewide order and notice posting. See, e.g., *Beverly Health & Rehabilitation Services*, 346 NLRB 1319, 1330 (2006); *Miller Group*, 310 NLRB 1235, 1235 fn. 4 (1993), enfd. 30 F.3d 1487 (3d Cir. 1994).

We find that absent a corporatewide remedy, Respondent PBS remains likely to commit unlawful actions at other facilities against other employees. Accordingly, we will issue a single, corporatewide remedial order addressing all of the violations found. We will also require the posting of two versions of the notice to employees - one to be posted at PBS's office that had been responsible for overseeing the contract at 80 Maiden Lane, and the other to be posted at each of the other facilities serviced by PBS and at PBS's other offices (if any) that oversee such facilities.³² *Beverly Health & Rehabilitation Services*, supra.

In addition to the remedies provided, 32BJ requests special access to nonwork areas at PBS worksites, a public reading of the notice, an order that PBS provide the union with names and addresses of its employees, and an order that PBS refrain from soliciting building owners to deny 32BJ access.³³ Although the Board may order extraordinary remedies where an employer's unfair labor practices are "so numerous, pervasive, and outrageous"

that ordinary remedies are not sufficient to overcome the coercive effects of the violations,³⁴ we find that the violations committed here by PBS do not warrant such extraordinary remedies. Accordingly, we deny the request.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below, and orders that

A. Respondent AM Property Holding Corp., Maiden 80/90 NY LLC, Media Technology Centers, LLC (collectively AM), a single employer, New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to hire employees, or to consider them for hire, because of their support for Local 32BJ, Service Employees International Union (Local 32BJ).

(b) Threatening its employees with discharge for supporting Local 32BJ.

(c) Interrogating its employees about their support for and their activities on behalf of Local 32BJ.

(d) Creating the impression that its employees' protected activities are under surveillance.

(e) Telling employees that engaging in protected activities affected their eligibility for employment.

(f) Indicating to its employees that support for Local 32BJ would be futile.

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

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

(a) Within 14 days from the date of this Order, offer reinstatement to Nehat Borova and Renier Sabajo to their former positions at its facility at 80/90 Maiden Lane, New York, New York, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges they would have enjoyed if they had been hired, if necessary terminating the service of employees hired in their stead.

(b) Make whole Nehat Borova and Renier Sabajo for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the amended remedy section of the Board's decision.

(c) 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, so-

³¹ See *PBS III*, supra; *Planned Bldg. Services, Inc.*, 330 NLRB 791 (2000) (*PBS II*); and *Planned Bldg. Services*, 318 NLRB 1049 (1995) (*PBS I*).

³² The notice shall be posted in English and Spanish.

³³ We find that 32BJ's other remedial exceptions are moot in light of our finding that AM and PBS are not joint employers.

³⁴ See *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 473 (1995) (and cases cited therein), enfd. in relevant part 97 F.3d 64, 74 (4th Cir. 1996).

cial 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.

(d) Within 14 days after service by the Region, post at its 80/90 Maiden Lane facility copies of the attached notice marked "Appendix A."³⁵ Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by Respondent AM's authorized representative, shall be posted by Respondent AM 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 Respondent AM 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, Respondent AM has gone out of business or closed the facilities involved in these proceedings, Respondent AM shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by Respondent AM at any time since April 25, 2000.

(e) 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 Respondent AM has taken to comply.

B. Respondent Planned Building Services, Inc. (PBS), Fairfield, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to hire employees or consider them for hire because of their support for Local 32BJ.

(b) Threatening its employees with discharge for supporting Local 32BJ.

(c) Indicating to its employees that support for Local 32BJ would be futile.

(d) Directing its employees to meet with representatives of the United Workers of America (UWA).

(e) Having company officials present at or near the place where union officials are meeting with its employees.

(f) Directing, ordering, or instructing its employees to sign authorization cards or dues-authorization forms for the UWA.

(g) Deducting dues for the UWA from the salaries of its employees who have not authorized such deductions.

(h) Deducting dues for the UWA after the union disclaims interest in representing its employees.

(i) Threatening employees with an investigation regarding their immigration status in retaliation for giving testimony at a National Labor Relations Board proceeding.

(j) Making employment offers contingent upon an applicant's acceptance of terms and conditions established under an unlawful collective-bargaining agreement with the UWA.

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

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

(a) Within 14 days from the date of this Order, offer to the following employees reinstatement to their former positions or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges they would have enjoyed if they had been hired, if necessary terminating the service of employees hired in their stead:

Ramon Cedeno	Elizabeth Zavala
Maria Hernandez	Trinidad Machado
Maria Marin	Virginia Matos
Mark Menzies	Marie Michel
Shah Uddin	Nehat Borova

(b) Make whole, in the manner set forth in the amended remedy, the employees listed above, and Zoila Gonzalez and Renier Sabajo, for any loss of earnings and other benefits suffered as a result of the discrimination against them.

(c) 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.

(d) Within 14 days after service by the Region, post at its office that was responsible for overseeing the contract at the facility involved in these proceedings copies of the attached notice marked "Appendix B."³⁶ Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by Respondent PBS's authorized representative, shall be posted by Respondent PBS and maintained for 60 consecutive days in con-

³⁵ 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."

³⁶ See fn. 35.

spicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent PBS to ensure that the notices are not altered, defaced, or covered by any other material. Because it is undisputed that Respondent PBS no longer performs services at the facility involved in these proceedings, Respondent PBS shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by Respondent PBS at that facility at any time since April 25, 2000.

(e) Within 14 days after service by the Region, post at all facilities it currently services and all of its offices that oversee those facilities copies of the attached notice marked "Appendix C." Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by Respondent PBS's authorized representative, shall be posted by Respondent PBS 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 Respondent PBS to ensure that the notices are not altered, defaced, or covered by any other material.

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

C. Respondent Servco Industries, Inc. (Servco), Bronx, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening its employees with discharge for speaking with representatives of Local 32BJ.

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

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

(a) Within 14 days after service by the Region, post at the facility involved in these proceedings, and its office that oversees that facility, copies of the attached notice marked "Appendix D."³⁷ Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by Respondent Servco's authorized representative, shall be posted by Respondent Servco 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 Respondent Servco 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, Respondent Servco has gone out of business or no longer services the facility involved in these proceedings, Respondent Servco shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by Respondent Servco at that facility at any time since June 15, 2001.

(b) 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 Respondent Servco has taken to comply.

MEMBER LIEBMAN, concurring in part and dissenting in part.

This case illustrates the shortcomings in the Board's current approach to determining which economic relationships are appropriate for collective bargaining, in the context of the subcontracting of work. Here, the Board finds *no* joint employment relationship between a building owner (AM Property Holding Corporation) and its successive cleaning contractors, Planned Building Services, Inc. (PBS) and Servco Industries, Inc. That finding seems correct under current law, whatever its flaws, and so I reluctantly concur that none of the respondents were successors to the unionized company (Clean-Right) that originally provided cleaning services at the building.

With the same reluctance, I concur in the application of controlling law to conclude that building-owner AM Property lawfully terminated its contract with PBS because PBS employees engaged in statutorily-protected activity.

But, in contrast to the majority, I would: find that Servco unlawfully refused to hire, or consider for hire, striking employees of PBS; find that PBS unlawfully recognized the United Workers of America; and grant extraordinary remedies against PBS. In all other respects, I agree with today's decision.

I.

Here, AM Property purchased an office building serviced by a unionized cleaning contractor, Clean-Right. Rather than hire Clean-Right's employees, who had been represented by Local 32BJ of the Service Employees International Union, AM Property engaged PBS, which brought in new employees. PBS then recognized the United Workers of America (UWA), which (in contrast to Local 32BJ) ultimately disclaimed interest in representing the workers. When some PBS employees went on strike, AM Property terminated its contract with PBS and engaged a new nonunion contractor, Servco. Servco, in turn, hired none of the striking PBS employees, although it did hire some nonstrikers.

³⁷ See fn. 35.

Today, the Board finds that AM Property and PBS violated Section 8(a)(3) of the Act by refusing to hire, or consider for hire, the former Clean-Right employees, represented by Local 32BJ. The Board also finds that AM Property was not a joint employer with either PBS or Servco, and accordingly that none of the companies were required to recognize and bargain with Local 32BJ, as joint successors. Finally, the Board finds no violation with respect to AM Property's termination of its contract with PBS or with respect to Servco's refusal to hire striking PBS employees.

II.

Commentators have persuasively explained the basic flaw in the Board's joint-employer doctrine, as applied in cases like this one:

[T]he restructuring of employment through the injection of a contractor between the client and the employees utterly insulates the client from the basic legal obligation to recognize and bargain with the employees' representative.

Craig Becker, *Labor Law Outside the Employment Relation*, 74 Tex. L. Rev. 1527, 1543 (1996). This is because under current Board law, the "emphasis is on the question of supervisory control, rather than on the provision of capital." Michael C. Harper, *Defining the Economic Relationship Appropriate for Collective Bargaining*, 39 Boston College L. Rev. 329, 348 (1998). This approach, Professor Harper and others argue, frustrates effective collective bargaining by permitting the real party in interest—the entity that provides the capital that employees, in turn, make productive—to avoid the bargaining table. See *id.* at 348–351.¹ Indeed, a client company may effectively prevent employees from unionizing by terminating its relationship with a contractor. *Id.* at 345 & fn. 82, 349 & fn. 90, citing *Plumbers Local 447 (Malbaff Landscape Construction)*, 172 NLRB 128 (1968). I have argued, and I still believe, that the Board

¹ Professor Harper offers the building-services industry as an example of how his alternative approach would work:

[A] building owner that engaged a cleaning services contractor would be legally required to bargain, along with the contractor, concerning the compensation and working conditions of the cleaning workers. The union could not insist on bargaining concerning the division of management authority or returns between the employees' two employers or on the ultimate source of the employees' compensation, but it could insist that both employers guarantee the level of that compensation. The building owner would not be allowed to transfer the cleaning contract because the contractor's employees had organized a union, or because they had demanded higher wages than the owner wanted to pay.

Id. at 349 (footnotes omitted).

should revisit this area of labor law. *Airborne Express*, 338 NLRB 597, 597–599 (2002) (concurring opinion).

In this case, it seems clear that AM Property was the dominant economic actor. It owned the building, and it determined who would clean it. AM refused to hire the unionized former employees of Clean-Right, unlawfully discriminating against them, as we find. It selected non-union PBS, discarded it after PBS employees struck, and replaced PBS with nonunion Servco. But AM was *not* a joint employer with either PBS or Servco. This result, I acknowledge, follows from the Board's current joint-employer doctrine, which focuses on the evidence of supervisory control by AM Property over the workers who were employed to clean its building by the contractors that AM chose.

Control over hiring, of course, may establish a joint-employer relationship. Yet while AM, in a very real sense, determined who worked at the building—that is, which contractor—the record evidence does not conclusively establish that AM was directly involved in actual hiring decisions with respect to individual employees. Under our law, moreover, it is *not* enough that AM had the contractual right to approve PBS hires.² That rule is open to question—surely the existence of contractual authority, whether or not it is actually exercised, demonstrates AM's superior role in the workplace—but the Board follows it.

As for a joint-employment relationship between AM Properties and Servco, the most significant evidence consists of statements by AM Property officials Dennis Henry and Jack Constantine to striking PBS employees that they were ineligible for employment with Servco because of their participation in the strike. That evidence, in my view, supports finding a refusal-to-hire violation with respect to Servco, as I will explain. But I agree with my colleagues that the statements alone do not compel the inference that AM, despite its established antiunion animus, was directly involved in Servco's actual hiring decisions, which is what the Board's joint-employer standard demands.

Finally, as the Board's decision explains, because AM Properties was not a joint employer with PBS, it was privileged to terminate its relationship with PBS, even if that decision was in response to the statutorily-protected activity, striking, of PBS employees. That is the rule of the Board's much-criticized decision in *Malbaff*, *supra*, which I have questioned. See *Airborne Express*, *supra*, 338 NLRB at 598 fn. 1.

² See *TLI Inc.*, 271 NLRB 798(1984), *enfd. mem.* 772 F.2d 894 (3d Cir. 1985).

III.

Although I concur with my colleagues that no joint employment relationship between AM Properties and its contractors has been proven here (and thus that no joint-successorship relation, as expressly alleged, has been established), I disagree with their view that Servco cannot be held liable for discriminatorily refusing to hire or consider the PBS strikers.

Our decisions make clear that such a violation will be found even if incumbent workers fail to apply for jobs, where a successor employer has obstructed their efforts for discriminatory reasons. See, e.g., *E.S. Sutton Realty Co.*, 336 NLRB 405, 408 (2001) (collecting cases). I would apply this principle here, notwithstanding our finding (for reasons explained by the majority) that Servco was not a joint successor. Considered in context, the statements of AM and Servco officials to PBS employees, taken together, establish that the PBS strikers were effectively precluded from seeking positions with Servco, as a means of preventing unionization.

First, the assertions of AM Property officials Constantine and Henry to the PBS strikers—that Servco did not wish to hire employees connected to the strike—reasonably tended to discourage them from applying. AM, of course, determined whether Servco worked at the building, a fact that could not have been lost on the PBS strikers. AM's antiunion animus, in turn, is established by its unlawful refusal to hire the Clean-Right employees, as found here. It is clearly reasonable to infer both that AM opposed unionization by employees of its cleaning contractor and that AM's contractors, including Servco, acted accordingly. Second, the statement by Servco official Giacoia to nonstriking PBS employees—that employees seen talking to the Union would be fired—confirms that Servco would not have hired the pro-union PBS strikers (and so jeopardized its contract with AM). It would have been futile in fact, then, for PBS strikers to apply to Servco, and the evidence strongly suggests that the PBS strikers knew as much. Under these circumstances, Servco is properly held liable for refusing to hire or consider for hire the striking PBS employees.

IV.

Despite correctly finding that PBS unlawfully solicited authorization cards for the UWA, the majority declines to find that PBS unlawfully recognized the UWA because that union lacked the support of an *uncoerced* majority of employees. Contrary to the majority, I do not believe that the General Counsel's failure to except from the judge's failure to rule on this theory of liability prevents us from finding the violation. Rather, that finding flows logically

from the determination that PBS unlawfully solicited authorization cards for the UWA and directed employees to meet with UWA representatives. Those actions tainted the UWA's supposed majority support. PBS would not be unfairly prejudiced if we found the violation: It addressed the question of UWA's majority support in its brief to the Board, arguing that it recognized the UWA based on a majority of lawfully obtained cards. The Board's rules are to be "liberally construed to effectuate the purposes and provisions of the Act." NLRB Rules and Regulations, Section 102.121. Under the circumstances, I would excuse the General Counsel's technical error in failing to except.

V.

Finally, I would grant the extraordinary remedies against PBS that Local 32BJ requests. This is the fourth time that the Board has found that PBS violated Section 8(a)(2) and (1) by soliciting employee support for a particular union. Given PBS's demonstrated propensity to interfere with the Section 7 right of its employees to freely choose their bargaining representative, special remedies are warranted.

APPENDIX A

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 LABOR LAW GIVES YOU THE RIGHT TO

- Form, join, or assist any union
- Choose representatives to bargain 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 hire employees or to consider them for hire because of their support for Local 32BJ, Service Employees International Union (Local 32BJ).

WE WILL NOT threaten our employees with discharge if they support Local 32BJ.

WE WILL NOT interrogate our employees about their support for and their activities on behalf of Local 32BJ.

WE WILL NOT create the impression that our employees' protected activities are under surveillance.

WE WILL NOT tell employees that engaging in protected activities affected their eligibility for employment.

WE WILL NOT indicate to our employees that support for Local 32BJ would be futile.

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

WE WILL, within 14 days from the date of the Board's Order, offer reinstatement to Nehat Borova and Renier Sabajo to their former positions at 80/90 Maiden Lane or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges that they would have enjoyed had they been hired, discharging if necessary any employees hired in their place.

WE WILL make whole Nehat Borova and Renier Sabajo for any loss of earnings and other benefits suffered as a result of the discrimination against them, less any net interim earnings, plus interest.

AM PROPERTY HOLDING CORPORATION

APPENDIX B

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 LABOR LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain 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 hire employees or consider them for hire because of their support for Local 32BJ, Service Employees International Union (Local 32BJ).

WE WILL NOT threaten our employees with discharge if they support Local 32BJ.

WE WILL NOT indicate to our employees that support for Local 32BJ would be futile.

WE WILL NOT direct our employees to meet with representatives of the United Workers of America (UWA).

WE WILL NOT have company officials present at or near the place where union officials are meeting with our employees.

WE WILL NOT direct, order, or instruct our employees to sign authorization cards or dues authorization forms for the UWA.

WE WILL NOT deduct dues for the UWA from the salaries of our employees who have not authorized such deductions.

WE WILL NOT deduct dues for the UWA after the union disclaims interest in representing our employees.

WE WILL NOT threaten our employees with an investigation regarding their immigration status in retaliation for giving testimony at a National Labor Relations Board proceeding.

WE WILL NOT make employment offers contingent upon an applicant's acceptance of terms and conditions established under an unlawful collective-bargaining agreement with the UWA.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer to the following employees reinstatement to their former positions or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges they would have enjoyed had they been hired, discharging if necessary any employees hired in their place:

Ramon Ceden	Elizabeth Zavala
Maria Hernandez	Trinidad Machado
Maria Marin	Virginia Matos
Mark Menzies	Marie Michel
Shah Uddin	Nehat Borova

WE WILL make whole the employees listed above, and Zoila Gonzalez and Renier Sabajo, for any loss of earnings and other benefits suffered as a result of the discrimination against them, less any net interim earnings, plus interest.

PLANNED BUILDING SERVICES, INC.

APPENDIX C

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 LABOR LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

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

WE WILL NOT refuse to hire employees or consider them for hire because of their support for Local 32BJ, Service Employees International Union (Local 32BJ).

WE WILL NOT threaten our employees with discharge if they support Local 32BJ.

WE WILL NOT indicate to our employees that support for Local 32BJ would be futile.

WE WILL NOT direct our employees to meet with representatives of the United Workers of America (UWA).

WE WILL NOT have company officials present at or near the place where union officials are meeting with our employees.

WE WILL NOT direct, order, or instruct our employees to sign authorization cards or dues-authorization forms for the UWA.

WE WILL NOT deduct dues for the UWA from the salaries of our employees who have not authorized such deductions.

WE WILL NOT deduct dues for the UWA after the union disclaims interest in representing our employees.

WE WILL NOT threaten our employees with an investigation regarding their immigration status in retaliation for giving testimony at a National Labor Relations Board proceeding.

WE WILL NOT make offers of employment contingent upon an applicant's acceptance of terms and conditions established under an unlawful collective-bargaining agreement with the UWA.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of this Order, offer to instate those employees whom we have unlawfully refused to hire to their former positions or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges they would have enjoyed had they been hired, discharging if necessary any employees hired in their place.

WE WILL make whole the employees we have unlawfully refused to hire for any loss of earnings and other benefits suffered as a result of the discrimination against them, less any net interim earnings, plus interest.

PLANNED BUILDING SERVICES, INC.

APPENDIX D

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 LABOR LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain 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 threaten our employees with discharge for speaking with representatives of Local 32BJ, Service Employees International Union.

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

SERVCO INDUSTRIES, INC.

Lauren Esposito and Olga C. Torres, Esqs., for the General Counsel.

Stephen A. Ploscowe and Dean L. Burrell, Esqs. (Grotta, Glassman & Hoffman, P.A.), of Roseland, New Jersey, for Planned Business Services, Inc.

Allen B. Breslow, Esq. (Frank & Breslow, P.C.), of Farmingdale, New York, for AM Property Holding Corp., Maiden 80/90 NYLLC, and Media Technology Centers, LLC.

Martin Gringer, Esq. (Franklin & Gringer, P.C.), of Garden City, New York, for Servco Industries, Inc.

Elizabeth Baker and Judith I. Padow, Esqs., of New York, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. Based on charges and amended charges filed in the above cases by Local 32BJ, Service Employees International Union, AFL-CIO (Union or Local 32BJ), an amended consolidated complaint was issued on January 11, 2002 in Cases 2-CA-33146-1, 2-CA-33308-1, and 2-CA-33558-1 against AM Property Holding Corp., Maiden 80/90 NY LLC, Media Technology Centers LLC, a single employer, a joint employer with Planned Building Services, Inc. The United Workers of America (UWA) was alleged as a Party in Interest. Based on charges and amended charges filed in the above cases by the Union, a consolidated complaint was issued on January 30, 2002 in Cases. 2-CA-33864 and 2-CA-34018 against AM Property Holding Corp.,

Maiden 80/90 NY LLC, Media Technology Centers LLC, a single employer, a joint employer with Servco Industries, Inc.¹

The complaint,² as amended at the hearing, alleges essentially that AM upon its purchase of the building at 80–90 Maiden Lane in April, 2000, engaged PBS as its cleaning contractor, and thereby became a successor to the previous building owner and cleaning contractor which had a collective-bargaining agreement with Local 32BJ.³ The complaint further alleges that AM and PBS, as a single employer and joint employers, together engaged in a “hiring scheme” in which they refused to hire and refused to consider for hire 13 employees who would have constituted a majority of their employees who had previously been employed at the building. The complaint further alleges that PBS made it more difficult for those employees to apply for work and also that it unlawfully recognized and signed a contract with UWA in April or May, 2000. Various unfair labor practices are alleged attendant upon that contractual relationship.

The complaint further alleges that as the successor to the previous employing entity, AM and PBS failed to recognize and bargain with Local 32BJ as the representative of the 80–90 Maiden Lane unit, and unilaterally set initial terms and conditions of employment for the employees working there. It is also alleged that PBS and AM rescinded an offer of employment to Jorge Cea in retaliation for his union activities, and thereafter, PBS caused his termination by offering him a work schedule it knew he would not be able to accept.

In April, 2001, certain employees at the building went on strike. Thereafter, in May, AM terminated the cleaning contract with PBS. The complaint alleges that the termination of the contract was because of the employees’ support of the Union and because they engaged in concerted activities, and further that the termination constituted an unlawful unilateral change in the employees’ conditions which resulted in the termination of 25 employees.

Following the termination of PBS’ cleaning services by AM, on June 15, Servco became the cleaning contractor. The complaint alleges that AM and Servco, as joint employers, became the successor to AM and PBS at the building, and failed to consider for employment and failed to hire 17 employees who had been jointly employed by AM and PBS and who were engaged in the strike. The complaint further alleges that AM and Servco unlawfully unilaterally set the initial terms and conditions of employment for the employees they employed at the building.

Finally, the complaint alleges that certain Respondents interfered with its employees’ rights by unlawfully telling employees that they would not be considered for work because of their activities in behalf of Local 32BJ and that they would be fired if they engage in union activities in behalf of the Union; threatening employees with discharge if they support the Union; interrogating employees concerning their union activities; cre-

ating the impression of surveillance of employees’ union activities; and promising employees wage increases. The complaint also alleges that on March 27, 2002, the attorney for PBS unlawfully threatened employees with an investigation regarding their immigration status.

The Respondents’ answers denied the material allegations of the complaint and allege certain affirmative defenses.⁴ On 17 days in March, April and May, 2002, a hearing was held before me in New York City.

Several post-hearing motions were filed:

1. PBS attempted to file a “reply brief” which purported to address certain alleged inaccuracies in the brief filed by Local 32BJ. I grant the motions of the General Counsel and the Union to strike the brief. No permission was given to file such a brief and it is accordingly struck. *A.H. Belo*, 285 NLRB 807, 810 fn. 1 (1987).

2. Local 32BJ filed a motion to reopen the hearing to receive in evidence transcripts of a criminal investigation purporting to contain conversations with certain individuals. All the other parties, including the General Counsel, opposed the motion and I denied the motion. The papers relating to the motion were placed in the Rejected Exhibit file as Charging Party Exhibit 40.

3. Local 32BJ moved to correct the testimony of Nehat Borova which referred to his starting date of employment and the first time he met Stanley Cunningham. AM has no objection to the motion. PBS objected. I overrule the objection and grant the motion. Based upon Borova’s testimony as a whole it is clear that the transcript should be corrected as moved. The motion and PBS’ objection are received in evidence as Charging Party Exhibit 41.

4. The General Counsel moved, without objection, to substitute two amended charges for those currently in evidence. The motion is granted and the two amended charges have been placed in the exhibit file.

5. The General Counsel moved to correct the transcript in certain respects. PBS objected to only one proposed correction, that of De La Cruz’ testimony. No other party objected to the motion. I grant PBS’ objection to the motion in that one respect since the proposed correction offers no more logical version than the recitation in the transcript. The motion and PBS’ objection are received in evidence as General Counsel Exhibit 1(iii).

¹ All the Respondents admit the filing and service of charges against them in each of these cases.

² The complaints will be referred to collectively.

³ The building may be variously referred to as 80–90 Maiden Lane or 80 Maiden Lane.

⁴ PBS asserted the affirmative defense of prosecutorial misconduct in that the Regional Office assigned counsel for the General Counsel Lauren Esposito to the investigation and prosecution of this case. PBS alleges that Esposito, who worked for a law firm which represented Local 32BJ, had herself represented Local 32BJ prior to her employment with the Regional Office. Subpoenas were served on Esposito and various officials of the Board. I revoked all of the subpoenas and I also struck the affirmative defense. I held that the subpoenas must be revoked because the written consent of the General Counsel for the production of documents or the testimony of individuals had not been obtained. I further decided that the Agency had satisfied its duties and obligations by obtaining the opinion of its Ethics Officer that no real or apparent conflict existed in Esposito’s participation in this case. I also held that the affirmative defense was not a valid defense to the complaint’s allegations. All the relevant documents are in evidence as PBS Exh. 1.

6. PBS moved to change an amended page of the transcript. Initially, there was no answer to a question posed to Elizabeth Zavala set forth on page 842 in the transcript. PBS requested that the court reporting service examine the transcript and determine if an answer was given. The reporting service reviewed the tape and determined that the answer was “no” and issued an amended transcript page on June 7, 2002. PBS moves that the answer be changed to “yes” because it believes that the amendment was incorrect and did not accurately reflect Zavala’s testimony. In the alternative, PBS moves to be permitted to review the tape to determine whether its proposed correction is appropriate. The General Counsel and Local 32BJ object to the motion. The motion is denied. At the request of PBS, the organization entrusted with the obligation to report this hearing and to accurately transcribe it has reviewed its tape and issued an amended transcript page. There is no reason to question its validity.

Upon the evidence presented in this proceeding and my observation of the demeanor of the witnesses and after consideration of the briefs filed by all parties, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent Planned Building Services, Inc. (PBS), a corporation having an office at 167 Fairfield Road, Fairfield, New Jersey, has been engaged in providing cleaning and maintenance services at various commercial and residential buildings. Annually, PBS performs services valued in excess of \$50,000 directly for enterprises located within New York State and purchases and receives goods valued in excess of \$5000 directly from suppliers located outside New Jersey.

Respondent AM Property (AM), a corporation having an office and place of business at 80 Maiden Lane, New York, NY, has been engaged in providing commercial property management services at various buildings. Annually, AM performs services valued in excess of \$50,000 directly for businesses located within New York and purchases and receives goods valued in excess of \$5000 directly from suppliers located outside New York State.

Respondent Maiden 80/90 NY LLC (Maiden 80/90), a corporation having an office and place of business at 80 Maiden Lane, New York, NY, has been engaged in the ownership of commercial properties, including 80–90 Maiden Lane, New York City. Annually, Maiden 80/90 performs services valued in excess of \$50,000 directly for businesses located within New York and purchases and receives goods valued in excess of \$5000 directly from suppliers located outside New York State.

Respondent Media Technology Centers LLC, (Media Technology) a corporation having an office and place of business at 80 Maiden Lane, New York, NY, has been engaged in providing publicity services for various commercial properties.

Respondent Servco Industries, Inc. (Servco), a corporation having an office and place of business at 1315 Blondell Avenue, Bronx, New York, has been engaged in providing janitorial services to commercial buildings in New York City. Annually, Servco derives gross revenues in excess of \$50,000 and receives goods valued in excess of \$5000 directly from suppliers located outside New York State.

Respondents PBS and AM admit and I find that they are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Servco admits the facts concerning jurisdiction, above, and I find that Servco is a statutory employer. Maiden 80/90 admits that is an employer of its employees within the meaning of the Act. Media Technology denies the jurisdictional facts and also denies that it is a statutory employer.

AM, Media Technology, and Maiden 80/90 admit and I find that they have been affiliated business enterprises with common officers, ownership, directors, management and supervision; that they have administered a common labor policy; have shared common premises and facilities; have provided services for and made sales to each other; have interchanged personnel with each other; and have held themselves out to the public as a single integrated business enterprise. They admit and I find that they constitute a single integrated business enterprise and a single employer within the meaning of the Act.

It is admitted and I find that Local 32BJ and UWA are labor organizations within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

1. The initial events concerning the ownership of the building and its cleaning contractor

a. *Ownership of the building by Witkoff*

The building located at 80–90 Maiden Lane is a large office building in the Wall Street section of Manhattan. Prior to the events at issue here it was owned by the Witkoff Group which is a member of the Realty Advisory Board on Labor Relations, Inc. (RAB), a multiemployer association.

The Witkoff Group is a signatory to a collective-bargaining agreement between RAB and Local 32BJ, and upon its purchase of the building in 1998 applied that contract to the employees working at the building. Witkoff had an “in-house” cleaning contractor called Clean-Right. Witkoff became subject to the successor contract between RAB and Local 32BJ which ran from January 1, 1999 to December 21, 2001.

b. *The purchase of 80-90 Maiden Lane by AM*

On January 6, 2000, Jeffrey Wasserman, a principal in AM, signed an agreement for the purchase of 80–90 Maiden Lane, and the closing was held on April 25, 2000. It is undisputed that at the time of the purchase, Wasserman and AM were aware that prior owner Witkoff had applied the RAB agreement to the building.

The contract of sale listed the names of the 12 cleaning persons then employed by Witkoff, noted the fact that they were members of Local 32BJ, and listed their rates of pay at \$16.43 per hour.⁵

Jeffrey Wasserman testified that, prior to the closing, AM decided not to accept the RAB-Local 32BJ contract, and also decided not to employ the Local 32BJ represented employees in the building. The Union-RAB contract provided that if the em-

⁵ Except for Ramon Cedeno who earned \$13.14 per hour. He had been employed only 4 months at the time of the building’s sale.

employees were not offered employment by the predecessor employer or hired by the successor, or if the purchaser failed to assume and adopt the Union contract, the employees were entitled to an additional 6 months' severance pay. Accordingly the building purchase contract specified an amount of \$300,000 as liquidated damages to be paid by AM to the Clean-Right employees.⁶ Wasserman stated that an escrow account was created if the purchaser did not want to accept the union contract. He also testified that his goal is to employ outside subcontractors to provide cleaning services to the buildings owned by his companies. It should be noted that none of the six buildings managed by AM has a contract with Local 32BJ. I note that Jeffrey Wasserman became aware of a successor company's obligation to bargain with the union that represented the employees of the predecessor. I reject his denial that he saw a Regional office dismissal letter, which was addressed to him in January, 1999, and which set forth that principle regarding AM's refusal to hire two employees at 65 Broadway.

AM's counsel stated at the hearing that "we paid over \$300,000 to the union, and the workers candidly testified that they got their money. Now if we are paying them money to go away, why do we still have them? They should be gone. This is one of the unique cases where the buyer or seller actually paid the employees to go away, and the employees are still there. 'I want to work again.'"

The complaint alleges that AM took over the building maintenance services in unchanged form and manner. AM argues that it did not take over the building maintenance services. Rather, it says that AM was the managing agent which then hired PBS to clean the building.

The complaint further alleges that AM set the initial terms of employment which were different than those under the collective-bargaining agreement with Witkoff. AM argues that there is no proof that it set any terms and conditions of employment at the building. Rather, it hired PBS at a set price and the terms of employment set by PBS were of no concern to AM.

Stanley Cunningham was employed as the building manager of 80-90 Maiden Lane by Forrest City Ratner from 1988 to 1998 when it was sold to the Witkoff Group. He therefore knew many of the building service employees who were employed at the building during that period of time.

Cunningham became employed by AM in February, 2000, showing space to prospective tenants in the building. While there he saw the Clean-Right employees, some of whom testified that they had heard rumors that the building would be sold and that they might lose their jobs.⁷ Prior to her leaving for vacation on April 19, 2000, employee Maria Hernandez told Cunningham that she hoped to see him again. He said "why not? Everything will be okay." In late March, employee Virginia Matos was introduced to Jack Constantine by Cunningham. Constantine became employed by AM on April 1, 2000,

as the building manager at 80-90 Maiden Lane. He was trained by Cunningham, the prior building manager. Matos told Constantine that she had worked in the building for many years. Constantine remarked that he would like to have people like her working for him.

c. AM contracts with PBS

On April 25, 2000 AM entered into a contract with PBS to provide cleaning services for AM at 80-90 Maiden Lane. In examining the circumstances surrounding that contract it is important to discuss the earlier relationship between the two companies.

In January, 2000, PBS contracted with AM to provide cleaning services for 65 Broadway. AM official Paul Wasserman stated that he negotiated the contract with Michael Francis, the chief executive officer of PBS, and Robert Francis, his son who is the vice president of PBS. However, Michael Francis, corroborated by Robert, denied being involved with that negotiation. However, Robert stated that he consulted with his father concerning problem areas or questions that he had.

Sixty-five Broadway was the first sale for Robert Francis, who had just become employed by PBS. He conducted a walk-through of the building in which he noted the number of common areas and bathrooms to be cleaned, and the types of cleaning necessary. He was also told by Paul Wasserman what cleaning was required. Robert Francis stated that the negotiation encompassed a period of 6 to 8 weeks, and PBS began cleaning services at 65 Broadway on January 17, 2000.

Robert Francis negotiated with Paul Wasserman in February, 2000 for the cleaning services at 75 Maiden Lane. Michael Francis was not involved in the negotiation but it was Robert's custom to inform his father prior to submitting a bid for the cleaning contract and discuss any issues that arose, such as staffing. Robert stated that the specifications used for 65 Broadway were used as a "template" for negotiations for 75 Maiden Lane. Raymond DeArmas, who was then the operations manager for PBS, did a walk-through of that building and told Robert the number of staff members needed to service the building. Robert stated that AM employed its own employees there so the number of workers needed was known. The negotiation for this building took about two months, and PBS began its work on April 19, 2000.

Before PBS signed the contract for 65 Broadway, Robert Francis became aware that AM was purchasing 80-90 Maiden Lane. He called Paul Wasserman more than one time requesting an opportunity to submit a bid for the cleaning work. Wasserman told him to wait until AM purchased the building. On April 24 or 25, he again called Wasserman who told him to submit a bid. In that conversation, Wasserman did not give him any specifications regarding what cleaning work was required because they incorporated the cleaning requirements from the ones they used for 65 Broadway and 75 Maiden Lane. They discussed the square footage of the building, the number of tenants, the occupancy of the building, the number of restrooms and floors and whether the lobby was marble, stone or granite. PBS did not conduct a walk-through of the building. Francis took the square footage needed to be cleaned and used a "formula" to calculate the number of employees needed. Francis

⁶ The Clean-Right employees later received the additional severance pay in an arbitration proceeding brought by Local 32BJ.

⁷ PBS asserts that, although the Union was aware of these rumors, it took no steps to learn the name of the new contractor or request that the employees be considered for hire by it until June 14 when the Union attorney wrote to PBS, as discussed below.

also consulted a real estate reference book, Yale-Robbins, which contains the physical specifications of buildings in Manhattan.

Stanley Cunningham, AM's building manager for 80 Maiden Lane, stated that he did not discuss with Paul Wasserman the fact that in the past the cleaning contractors at 80 Maiden Lane had a contractual relationship with Local 32BJ. Although he knew the Clean-Right employees because he had been involved in the building's operations for ten years prior to the sale to AM, and some of those employees had been continuously employed during that period of time, he did not speak to Paul Wasserman concerning the employees working at 80 Maiden Lane or the specific people who worked there prior to AM's acquisition of the property.

Regarding staffing, Robert Francis stated that he did not discuss staffing for 80-90 Maiden Lane with his father. Paul Wasserman stated that he probably told Robert Francis that he wanted at least the level of service provided by Witkoff, the previous owner. Wasserman did not know the number of service staff required, but Stanley Cunningham stated that he told Paul Wasserman the number of cleaning staff used by Witkoff.

Robert Francis submitted a bid on April 25 and received an acceptance 2 hours later. That evening, PBS began cleaning the building. Francis stated that he did not discuss anything regarding the building with his father prior to submitting a bid, and that his first conversation with Michael Francis was after the contract was signed. As set forth above, Michael Francis testified that ordinarily Robert discusses bids before him before submitting them, but he could not recall whether he did so for 80-90 Maiden Lane.

Robert Francis testified that when he submitted the bid he did not know that a union represented the employees who cleaned the building at that time. He stated that the situation was "very immediate." He submitted the proposal and it was immediately accepted. He was told that the building was "empty staff-wise." He stated that he "imagined" that people were cleaning the building but never thought about who was doing that work since it was not a "major concern." According to Robert, his father Michael did not become involved with any aspect of PBS providing services to the building, except that he handled the negotiations with UWA.

Robert Francis learned of the disputes between Local 32BJ and PBS 3 to 5 months after he began work with PBS in the Spring of 1998.

d. The contract between AM and PBS

The 4-year contract between AM and PBS provides for the following staff: 1 full-time night supervisor, 4 full-time night porters/matrons, and 12 part-time night porters who will perform the services contracted for "as well as any other chores and functions directed by your management." (Emphasis in original.) The contract further states that "all employees hired to perform services at your complex shall be subject to the initial approval of your management." Regarding supervision, the contract states:

The planning, organization, control and coordination of the daily and periodic cleaning requirements and maintenance services shall be determined and scheduled by our Site Man-

ager in conjunction with the directions, requests and suggestions of your management and maintained in accordance with the quality control of our Regional Supervisor.

The contract also contains the following footnote:

Any employee that is retained from your existing staff *at your request* who is receiving wages and/or benefits in excess of those contained with the wage rate structure and benefits within union collective agreement, shall continue to receive said rates differential and/or other benefits. In that event, PBS shall invoice Owner only for the actual differential plus a twenty-five percent direct labor overhead factor plus the actual costs of any additional benefits which are to be provided (emphasis in original).

The contract itself states that "at your request, the monthly rate incorporates the retention of one night supervisor @ \$10.00/hr., with single health coverage, holidays and sick days."

Michael Francis testified that the collective-bargaining agreement referred to was based upon the "premise that there will be a union agreement—any union agreement." It is clear that an agreement with Local 32BJ was not the union contemplated by PBS since its employees were paid \$7 to \$7.50 per hour according to Francis, which was far below Local 32BJ's \$16.34 hourly rates. It is also clear, as will also be seen below, that the intended union was UWA, which entered into a contract with PBS effective May 1, 2000, for the employees at 80-90 Maiden Lane, only 5 days after PBS began work there.

2. The alleged discrimination against the cleaning employees

a. The alleged refusal to hire

The complaint alleges that on about April 25, 2000, PBS and AM, by Stanley Cunningham, informed the 80-90 Maiden Lane employees that they would not be hired to perform building service work at the building.⁸

The heavy equipment such as buffers and shampooing machines used by Clean-Right had been removed from 80-90 Maiden Lane during the days prior to April 24, 2000.⁹ Clean-Right foreman Mark Menzies testified that even 2 weeks before that date he saw what he believed to be new cleaning employees entering the building. Building manager Vincent Baffa told them to leave because the building had not yet been sold. Menzies noted that he knew for some time that the building was for sale and he informed the Local 32BJ delegate of that fact.

Nehat Borova, the elevator operator at 80-90 Maiden Lane, testified that at about 3 p.m. on April 25, he and Frank Mayer, a Clean-Right manager, removed the timeclock and timecards from the sub-basement, and then Mayer asked the employees to "stand by." At about 4:30 p.m., Mayer told the employees that the building was sold to a new owner, and that they should leave the building.

⁸ Zoila Henry is listed in the complaint as having been terminated unlawfully. There was no evidence that she was terminated or refused hire and her name is struck from the complaint.

⁹ Zoila Gonzales testified that the equipment began to be removed on April 24.

When Menzies, the Clean-Right foreman arrived for work at about 4:30 p.m., he was told by Vincent Baffa, the building manager, that he should not punch in. Mayer told him that Clean-Right lost the contract, and Baffa told him the building was sold. Menzies testified that he asked Mayer if the new contractor would offer the employees work. Mayer said he did not know. AM official Jack Constantine was also present in the building at that time.

Menzies stated that he asked Constantine whether he had applications for work for the new company, whether the new contractor would be hiring the current workers, and whether the new employer had its own workers. Constantine replied that the new contractor had its own workers.

Menzies told the Clean-Right employees, as they arrived for work, that the building was sold and that the new contractor was bringing its own workers and they would not be given applications. Clean-Right employee Zoila Gonzales testified that upon arriving at work that evening she was told that the building was sold. Cunningham told her that the new cleaning company did not have the same union as she belongs to (Local 32BJ), and therefore the new salaries and benefits would not be the same. He suggested that she “try” to apply for work with the new company. She asked whether applications were available. Cunningham said no, and Constantine added that there were no applications in the building. Gonzales and employee Virginia Matos asked Mayer if there were jobs available and he told them to go to their union.

As testified by Cunningham and PBS night supervisor Dennis Henry, Gilbert Sanchez, the Regional Supervisor of PBS, was also present at 80 Maiden Lane at the time the employees sought applications. However, they did not address him, and Sanchez did not offer any applications or advice on obtaining them.

That evening, employees of PBS began bringing cleaning supplies to the building from 75 Maiden Lane, and began to work.

The following day, April 26, the former Clean-Right employees went to Local 32BJ and told delegate Mary Kertestan that they were “kicked out” of the building. Kertestan told them to apply for jobs at PBS at 65 Broadway, and they went there. Those employees included Nehat Borova, Shah Uddin, Maria Michel, Eva Seguinot, Trinidad Machado, and Renier Sabajo. A number of employees were admitted to the building management office, which was not PBS’ office, and were told to go to 80 Maiden Lane to apply for work. The secretary told them that PBS was the new contractor and gave them its phone number.

Several employees then went to 80 Maiden Lane. Borova stated that he and the group he was with went to the 19th floor of that building. He told AM official Constantine that they were told by Local 32BJ to apply for jobs there. They wrote their names, addresses and phone numbers on a sheet of paper which Constantine took. Constantine told them that PBS was the new contractor, and that he would contact that company and see if there were any jobs or if there was any other way he could help

them.¹⁰ According to employee Marie Michel, Constantine told them that no positions were then available but when there were jobs he would call them. Michel added that Constantine told her that the new company pays \$7 per hour and that it does not like Local 32BJ.

Constantine testified that Cunningham was involved with the list, and conceded that the only purpose of the list was to consider those employees for jobs. He stated that he told the employees that he and Cunningham would “see what we could do.” Constantine did not know what use was made of the list. Nevertheless, Constantine admitted that neither he nor Cunningham called any of the workers on the list for a job. However, as will be set forth below, certain employees applied for work with PBS and were given interviews.

b. Hiring at 80–90 Maiden Lane

i. The hire by AM

On April 26, 2000, AM directly employed the following day shift building service employees at 80–90 Maiden Lane: Edward Guerrero, who was transferred from another AM location at 65 Broadway; John Jones, who was transferred from 75 Maiden Lane; and Jesus Martinez, who was transferred from 75 Maiden Lane. Guerrero worked as the elevator operator at 80–90 Maiden Lane, and Jones and Martinez worked as porters. AM also directly employed the building engineers who worked in the building for many years.

By transferring Guerrero, Jones and Martinez from its other buildings, AM did not hire the two former Clean-Right employees who were employed at 80–90 Maiden Lane in the same classifications: elevator operator Nehat Borova and porter Renier Sabajo.

ii. The hire by PBS

(1) The cleaning personnel

On April 25, Robert Francis discussed staffing the building with Wasserman. Francis knew that PBS would begin cleaning the building that evening. Francis told Wasserman that he would do the best he could, considering the “immediacy” of the start-up. Wasserman told him to do the best he could but he would understand if less than a full complement of staff was employed that night. Wasserman said that he had a “stack of resumes downtown”, but that Francis should fill the positions in the best way he could.

Robert Francis testified that he and Paul Wasserman never spoke about the Clean-Right workers, and in fact Wasserman had not mentioned that Clean-Right was the prior cleaning contractor, and Francis did not know that Clean-Right was the former contractor. Francis denied speaking with Wasserman regarding the union representation of those workers. Further, Robert Francis denied knowing, in April, 2000, that if a majority of the PBS workers employed at 80 Maiden Lane had been employed by Clean-Right, PBS would be required to recognize Local 32BJ.

¹⁰ In this respect, I do not credit Borova’s hearing testimony that Constantine said that he would contact the workers if there were jobs at 80 Maiden Lane. That testimony contradicted Borova’s pretrial affidavit.

Francis stated that Wasserman told him that PBS was going into an “empty building staffwise,” and that Francis should bring his personnel in to work in the building. This appears to be the case as evidenced by Wasserman’s testimony that he did not intend to hire the cleaning personnel then servicing the building.

Nor did Francis discuss with Raymond DeArmas, the company’s operations manager whether those workers might have been represented by Local 32BJ. Similarly, Francis did not discuss the former building service workers with its Regional Supervisor Gilbert Sanchez.

Robert Francis also denied discussing the staffing for 80 Maiden Lane with his father, Michael Francis who was aware, in April, 2000, that if PBS hired a majority of its employees who were represented by Local 32BJ it would have an obligation to recognize and bargain with the Union. Michael discussed that principle with Robert, but could not recall when he did so. Michael Francis conceded that in the past, when staffing new building accounts, he made hiring decisions based upon whether an obligation to bargain with the Union would result. He had testified in an earlier Board case that he made a decision that he would not offer jobs to most employees because if PBS hired a majority of people represented by the Union PBS would be obligated to recognize it. At this hearing he stated that that consideration was not the primary reason why jobs were not offered, but was only one of several factors. The primary reason was economic—rate of pay; the performance of the work; change in the hours of work; the substantial benefits involved; and the fact that the employees would be asked to clean more area than they had, for less pay.

Even before the contract was signed with AM, Robert Francis contacted PBS Regional Supervisor Gilbert Sanchez and told him that PBS would be servicing 80 Maiden Lane that night, and directed him to “staff the building.” Francis denied knowing where Sanchez obtained the employees who were hired for 80 Maiden Lane, and did not know if PBS transferred them from other buildings it serviced. Francis described Sanchez as “scrambling to get staff.”

Robert Francis described the criteria used by PBS in considering for hire building service and maintenance employees. PBS is looking for people with a “willingness to want to work who are looking for work.” It will employ people willing to be trained if they do not know the basics of cleaning work, and those who will appear for work on time and “do their job.” PBS values loyalty and those who “stay at the job” since the industry suffers from a large turnover of employees.

Prior to April 25, Sanchez interviewed prospective employees at the other downtown locations serviced by PBS, and upon the start-up of work at 80 Maiden Lane, the following employees were assigned to that location by Sanchez: Xiomara Aguilera applied on April 12 and was hired on April 26; Else Andrade applied on April 18 and was hired on April 25 (when interviewed she told Sanchez she had no experience. One week later he told her to report for work in 30 minutes); Josefina Castellanos applied on March 15 and was hired on April 25. She was called on April 25 and told to report to work immediately. Maria de la Cruz was interviewed in February, 2000 and began work in early May. She was called for work and asked to

start work the same day. None of these employees were former Clean-Right workers.

On April 25, PBS employed a total of 11 employees at 80 Maiden Lane. There were seven new hires: Andrade, Jose Batista, Castellanos, Luis Colon, Alvaro Quiroz, David Ramirez and James Wilson. PBS also transferred the following four employees from other buildings to work at 80 Maiden Lane on April 25: Antonia Garcia, Amarilys Gonzalez Hance, Asuncion Navarro and Claudia Varela. Others were employed at 80 Maiden Lane immediately thereafter: April 26 - Sofia Gomez, a transfer; May 1—Ana Guzman, a new hire, and Juan Marte, a transfer.

(2) Dennis Henry

Prior to the purchase of 80-90 Maiden Lane, Dennis Henry was employed by AM at 75 Maiden Lane as a night porter and was a member of Local 2. He received family health insurance coverage and benefits such as vacation pay, sick days and paid holidays.

Paul Wasserman told Robert Francis that he should consider Henry for a “supervisory role” for the building. In fact, Francis included the footnote in the contract, set forth above, to cover the employment of Henry. This was apparently done even before Henry was interviewed by Gilbert Sanchez, the Regional Supervisor for PBS. A couple of days prior to April 25, 2000, Henry’s superintendent, Joe Corana, told him he would be working the day shift at 80—90 Maiden Lane.

On April 25, Henry was told by Constantine that he would be working for PBS at 80—90 Maiden Lane during the night shift, and asked him to meet with Gilbert Sanchez, PBS Regional Supervisor, at the building. Henry reported to the building at 4p.m. that day and found a cleaning crew ready to start work. He watched Sanchez assign the employees to jobs, train them, and instruct them concerning their duties. Sanchez told him that his duties were to prepare the supplies for the cleaning personnel and check to see that the work had been done. A payroll information document lists his title as “site supervisor nights. Non-union supervisor.” Henry did not write that information. Apparently a PBS employee wrote that note.

Henry was not happy being on the PBS payroll since he was not receiving certain benefits with PBS that he had enjoyed while on the AM payroll. Only one day after beginning his work with PBS he complained to AM official Paul Wasserman that he was not receiving enough money for the responsibilities he now had. Wasserman told him that his pay would be raised from \$9.75 per hour to \$11. Henry asked “why me?”—why had he been chosen for the night shift at 80–90 Maiden Lane. Wasserman complimented him on his fine performance and said he would receive the same benefits he had received while on the AM payroll.

Henry continued to be unhappy with his employment by PBS. In July, 2000, he complained to Wasserman that he did not get paid for the July 4 holiday. Wasserman called Robert Francis, telling him that he was entitled to be paid for the holiday. Henry continued to complain to Wasserman that the PBS health insurance was too expensive and he was not being paid for holidays. When he flatly refused to continue to work for

PBS. Wasserman transferred him back to the AM payroll in late July, 2000. He stated that his duties remained the same following his transfer from the PBS payroll to the AM payroll.

c. Clean-Right employees' attempts to obtain employment

i. The applications for work by the Clean-Right employees and their interviews

Menzies testified that union delegate Kertestan "recommended" that the former Clean-Right employees go to PBS in New Jersey in order to obtain applications. Zoila Gonzalez testified that she called PBS and told the receptionist that she had been employed at 80 Maiden Lane and wanted to continue to work there. Receptionist Felicia Woods offered to mail her an application. Gonzales asked if she could visit the office since she lived in New Jersey. Apparently, Woods agreed.

On May 2, certain Clean-Right employees traveled to PBS headquarters in New Jersey and were given applications. Some filled them out there and returned them at that time, and others took the applications and mailed them back. The following employees completed applications either in person or by mail which were received by PBS on May 2 or in about the first week in May: Ramon Ceden, Zoila Gonzales, Maria Hernandez, Trinidad Machado, Maria Marin, Virginia Matos, Mark Menzies, Marie Michel, Renier Sabajo, Shah Uddin and Elizabeth Zavala. Those who completed the application in the PBS office were told that PBS would contact them. Nehat Borova testified that about two to four weeks after April 25, he called PBS and asked for an application. He gave his name, address and phone number, but never received an application and did not pursue the matter.

Robert Francis became aware that the former Clean-Right employees applied for jobs, and he asked PBS operations manager DeArmas, to "interview them and give them jobs" wherever there were openings. He directed DeArmas to hire them if he believed that they were "suitable" to work. Francis stated that he was somewhat motivated in giving this direction by his attorney's advice that PBS hire these workers, who, Francis knew by that time, had been represented by Local 32BJ, and some of whom had been sent by that union to apply for work.

Although Francis stated that he was not involved in the interview or hiring process, he stated that he told "them", probably meaning DeArmas, that there were no openings at 80 Maiden Lane when he directed DeArmas to interview and hire for that building. However, Francis then stated that he did not know whether there were openings at 80 Maiden Lane when he spoke to DeArmas.

Receptionist Woods contacted five of the former Clean-Right employees who had submitted applications, and at DeArmas' request, told them to report to its New Jersey office for interviews.

DeArmas testified that the usual hiring procedure is that the prospective employee completes an application and speaks with the site supervisor—if the applicant was interested in lower Manhattan, he would speak to Sanchez. Sanchez gives the application to DeArmas who reviews it and returns it to Sanchez. DeArmas stated that PBS's New Jersey office is "very rarely" involved in the hiring process, and that it would have been easier for him and the applicants who live in the New York

City area to be interviewed at PBS' district offices in the various lower Manhattan buildings it services. But nevertheless, the applicants came to New Jersey despite some people having "problems" getting to New Jersey for the interview.

Another rarity was Woods' memo to DeArmas advising him that seven people, including Zoila Gonzales, came to New Jersey for applications. She ordinarily does not send such a memo but was told to do so by Ellen Rose, the PBS executive assistant. Although that was unusual, DeArmas believed that their trip to New Jersey showed their "eagerness to work." A further odd occurrence was DeArmas' suggestion that a comment made by applicant Hernandez to Woods be notarized. Hernandez told Woods that Local 32BJ told the applicants to go to the PBS office to apply for work, and that Hernandez said that she could not afford to work for PBS but the Union directed her to apply. DeArmas drew from this exchange that he got "mixed signals" with the people he interviewed. They were "very nice" but Hernandez' mention that the Union sent them indicated to him that "there is a different agenda." All these uncommon incidents caused DeArmas to question how he should proceed so he suggested to Robert Francis that their attorney become involved.

The interviews took place at PBS headquarters in New Jersey on May 10. The interviewees were Zoila Gonzales, Maria Hernandez, Virginia Matos, Renier Sabajo, and Elizabeth Zavala.¹¹ A Local 32BJ representative told them that the salaries offered would be lower than they had received at Clean-Right but they should accept any job offered and the Union would pay the difference in their wages. At the time the applications were pending, DeArmas was aware that the Union had sent the employees to be interviewed.

At the interview, DeArmas asked Gonzales how much money she earned, and she told him \$16.43 per hour. He asked if she was a supervisor and she said she was not. DeArmas asked if she preferred to work in New York or New Jersey and she said she wanted to return to work at 80 Maiden Lane. DeArmas told her that PBS would be obtaining other accounts in early June and he would call her.

DeArmas told Hernandez that there were no openings at 80 Maiden Lane, but the Company was trying to get more buildings to service and he would call as soon as it obtains more contracts. Hernandez stated that DeArmas told her that PBS was having a "hard time" at 80 Maiden Lane since the new crew "had no idea what to do in the building," and that "I wish they would keep you because you people seem to be a great crew, and the building is in very bad shape." DeArmas told Hernandez that the pay was \$5 per hour in New Jersey and \$7 or \$8 in New York. Hernandez said that she could not work for \$5 per hour, and could not drive to New York. DeArmas said he would try to find her a job in New Jersey that she could drive to.

Matos stated that DeArmas told her that he received good references from other people and that he "wanted to have workers like us," but there was no work at that time. However,

¹¹ According to PBS records, an interview with Shah Uddin was arranged but did not take place. His wife was called and told to contact PBS.

he expected that two buildings would be available and that he would call her in early June. DeArmas said that the salary would be \$7 per hour and Matos said that would be acceptable.

DeArmas asked Zavala if she could work in New Jersey. She replied that she lived in New York and it would be difficult to work in New Jersey. DeArmas said that he would have work in New York and that he would call her in June.

DeArmas testified that after their interviews, he decided that they were good employees and the kind of employees with the right kind of experience that PBS was looking for. They had experience in the industry, a very good attitude, they seemed positive and wanted to work and had long experience at 80 Maiden Lane. However, he stated that in May through July, 2000, PBS had already hired everyone it needed at 80 Maiden Lane. DeArmas sought authority from Robert Francis to “spread them around” to the other buildings even though 80 Maiden Lane was already fully staffed—because that would “at least put them to work and it would help me.” Following the interviews, DeArmas reported to Robert Francis that the interviewees “seemed like good people” and were “willing to work.” Robert told him to “put them to work.”

It should be noted that the following non-Clean-Right workers were hired for 80 Maiden Lane on the dates indicated following the filing of the applications by the former Clean-Right employees: Maria De La Cruz (May 5); Jacinta Tejeda (May 3); Meris Urena (May 8). All but Tejeda were new hires. Tejeda was transferred into 80 Maiden Lane from another PBS location.

Following the date of the interviews on May 10 of certain former Clean-Right employees, PBS first employed the following non-Clean Right workers at 80 Maiden Lane on the dates set forth: Marino Arias (May 12—transfer); Monica Batista (May 12—new hire); Cecilia Dacto (June 14—new hire); Felix Disla (May 24—transfer); Raymond Drayton (June 1—transfer); Ivellse Espinal (June 2—new hire); Maria Fernandez (July 24—new hire); Ingrid Gomez (June 19—new hire); Marily Green (May 25—transfer); Mayra Monnar (July 24—new hire); Edilberto Morillo Ponte (June 14—new hire); Yolanda Ronquillo (June 14—new hire); Alexander Rosario (June 7—new hire); Diony Tejeda (June 21—new hire). It should be noted that certain of the above people were employed for only 1 or 2 days.

On June 1, Zoila Gonzalez was participating in a demonstration of the former Clean-Right employees outside 80 Maiden Lane. She heard that interviews were being conducted at that building. In fact, PBS officials were interviewing at 80 Maiden Lane for jobs at other locations. She entered the building and was directed to the basement by Cunningham. Sanchez, who was conducting the interviews, received a phone call before speaking to her and then told her that he was told by the building manager that he could not interview people in that building. Sanchez gave her a phone number to call for an interview at a different location.

On June 2, Local 32BJ representative Ignacio Velez entered 80 Maiden Lane carrying a Local 32BJ flag and stationed himself where Sanchez was interviewing prospective employees. He introduced himself to Sanchez and remained there for a couple of hours, during which time he spoke to some inter-

viewees and succeeded in having two of them sign cards for the Union.

When the former Clean-Right interviewees had not been called by PBS, on June 14, the Union’s attorney wrote to the attorney for PBS, inquiring about DeArmas’ statement to the applicants that he expected that PBS would obtain work in early June. In reply, the PBS attorney said that additional jobs became available recently and that the applicants would be contacted shortly.

On July 3, DeArmas sent letters to former Clean-Right employees Ramon Cedeno, Trinidad Machado, Maria Marin, Mark Menzies, and Marie Michel saying that it had received their applications for employment by PBS and asking them to contact PBS for an interview. The letters noted that if they did not call within 10 days PBS would assume that he or she was no longer interested in employment with it.

The letter to Menzies stated that he had not returned several telephone messages. Menzies conceded that he received a phone call from PBS asking him to call for an interview. He did not respond because he obtained another job from Clean-Right at another location. DeArmas testified that Cedeno said that he could not come to New Jersey for an interview, so an appointment was set up in Manhattan. DeArmas stated that Cedeno did not appear, however he called PBS and another interview in Manhattan was arranged. According to DeArmas, Cedeno once again did not arrive. DeArmas testified that he interviewed in Manhattan any former Clean-Right employee who asked for an interview there. In fact, Trinidad Machado, Maria Marin and Marie Michel were interviewed in Manhattan on July 13 and 14.

DeArmas stated that he was not aware, at the time of his interviews or offers of employment, that a bargaining obligation arises if PBS hires a majority of its employees from the former Clean-Right workers. In fact, he was told by Michael Francis that the employees are permitted to choose their union.

ii. The offers of employment to the former Clean-Right employees

On July 5, PBS sent written offers of employment to the former Clean-Right employees it had interviewed: Zoila Gonzalez and Reinier Sabato, to work at 80 Maiden Lane; Maria Hernandez, for 32–42 Broadway; and Virginia Matos and Elizabeth Zavala to work at 39 Broadway. The letters offered them work for the 3:30 p.m. to 12 a.m. shift at a rate of pay of \$7 per hour. It asked the women to report for work on July 12.

Gonzales reported to work and was given employment papers by Gilbert Sanchez. Although her starting rate was supposed to be \$7 per hour, Sanchez spoke to DeArmas who offered her “up to” \$8.50 per hour. She was met by Dennis Henry who escorted her to the basement where two work carts were prepared for her, one containing a mop and materials for heavier work which the male porters did previously at 80 Maiden Lane. Gonzales asked why she was given two carts. Henry replied that she had to mop. Gonzales protested that she never did that heavier work but Henry said she had to do it. Gonzales said she had a medical problem and did not even mop her own house. They then went to the building manager’s office. Henry went inside and emerged later, telling Gonzales that he was

sorry but all the women employees mopped and if she could not do so, no other work was available. Gonzales then left.

On July 13, DeArmas wrote a memo to Ellen Rose, the PBS executive assistant. In it DeArmas listed the former Clean-Right employees who were hired in Manhattan. He also set forth the status of offers made to others. DeArmas asked Rose to check with the PBS attorney for the “tone” of the letter to be sent to those hired who did not appear to work. The memo also stated, following a note to call Shah Uddin, that he was part of the “80 Maiden crew or another site, he can apply with Al [Hernandez]. We will not continue to overhire since I only had authorization for five people – one in each building at 32, 42, 39 Broadway and 80 and 75 Maiden. Confirm with Dean [Burrell – an attorney for PBS] that this is ok—if not speak to MDF [Michael D. Francis] before asking Al [Hernandez] to hire anyone else.”

The memo also mentioned the following:

Please let MDF know of status and JD to make a note on the budget sheets as to the extra personnel so that when the sheets are looked at, it does not seem like the site is over hiring on purpose.

On July 13 and 14, Trinidad Machado, Maria Marin, and Marie Michel were interviewed in Manhattan.

On July 18, PBS sent a letter to Gonzales which stated that upon being informed of her job duties she declined to begin employment with the company and was no longer under consideration for employment with PBS.

Matos and Zavala also reported to work when requested. They both told Al Hernandez, who was the site supervisor at 39 Broadway that they could not accept the job. Matos said that she was already working and Zavala said that she expected to have surgery shortly. Hernandez told both women to contact him if they needed work in the future. Shortly thereafter, they received letters from PBS which stated that they had been offered positions by the company and declined them. Thereafter, in October, Zavala asked Hernandez for a job and he said that no positions were available at that time.

By letter dated July 14, Machado and Marin were offered jobs at 39 Broadway, and Michel was offered a position at 32–42 Broadway. Marin reported to 39 Broadway on July 17 but was told to go to 42 Broadway instead. She went there and began work that day, and continued working until April, 2001. On July 19, PBS Supervisor Al Hernandez wrote a memo which was placed in Marin’s file. The memo stated that “last night these three new workers were speaking with John Santos and two other 32BJ reps. I feel that these people are either plants or have been paid by Union to disrupt operations (no proof)—will monitor.” Michel began work on July 17 and continued working there until April, 2001.

All eight of the former Clean-Right employees who were interviewed by PBS received written offers of employment.

After being offered the night shift, Hernandez told DeArmas that she could not accept that shift because of her commute from New Jersey. DeArmas told her that when he got another job he would call. On July 18, PBS wrote to her saying that she was offered and declined a position in New York and was no longer under consideration for employment with PBS, but that

she should contact DeArmas if she was interested in work in New Jersey. Hernandez stated that 2 months later, PBS called and offered her a position in Paramus, New Jersey, about a 45-minute drive from her home. Hernandez declined that position because it was too far from her home, but asked for a job closer to her home, or a day position in New York.

d. PBS hiring for its other accounts

Astrit Gorana began work for PBS on June 1, 2000 as an account executive, replacing Gilbert Sanchez. Previously, he had been an account executive for Golden Mark Maintenance in charge of the Olmstead Properties buildings which consisted of six office buildings in Manhattan. Golden Mark had a route crew which cleaned those buildings on a regular basis. They were not represented by a union.

On June 1, PBS took over the cleaning responsibilities for the Olmstead buildings and distributed job applications to the Golden Mark employees at the Olmstead buildings when it began servicing those buildings. Gorana decided to hire the former Golden Mark route crew for PBS because they were experienced in all the Olmstead buildings. He communicated that decision to PBS official DeArmas, and the route crew was hired. Interviews for those positions were held at 80 Maiden Lane. In addition, the existing cleaning personnel were retained by PBS and further, it hired 21 new employees for the 6 Olmstead buildings.

3. PBS recognizes and signs a contract with the United Workers of America

PBS had a master collective-bargaining agreement with UWA which ran from May 1, 1997, through April 30, 2002. The agreement provides, where material, that PBS recognizes UWA as the exclusive collective-bargaining agent for all employees of PBS employed at all office buildings in New York where PBS has contracted to do the building service, maintenance and cleaning work. The contract provides that each individual site location of PBS shall have its own collective-bargaining agreement which shall be consistent with the terms and conditions of the master agreement.

On May 11, 2000, an attorney for UWA wrote to Michael Francis, stating that his client, Carmine Malgieri, had obtained a majority of the cards for the employees at 75 Maiden Lane and 80 Maiden Lane. Francis was asked to extend recognition to UWA and commence negotiations for a contract. Eleven authorization cards were enclosed with the letter. All the cards were dated May 9, 2000.¹² Cards were submitted from the following individuals: Xiomara Aguilera, Elsa Andrade, Josefina Castellanos, Luis Colon, Sofia Gomez, Amariliz Gonzalez, Alvaro Quiroz, David Ramirez, Madelin Santiago, Meris Urena, and Claudia Varela.

Four of the eleven card signers testified. Aguilera and Andrade testified that while at work they were asked by Dennis Henry to go to the basement. They saw a person from UWA and their coworkers. Aguilera heard the union agent say that by signing the card she would become a union member. Andrade

¹² The date of signature of the card for Claudia Varela was apparently cut off in the copying process but based upon the regularity of the other cards submitted I find that it too was dated May 9.

believed that the card was for medical benefits. Castellanos signed the card in Henry's office. Henry told her that "John" left it for her to fill out. Varela testified that Gilbert Sanchez told her that UWA was a "company union" and that a "regulation" required her to sign the card. Present were Henry and her coworkers, set forth above.

Maria de la Cruz testified that she signed a card but she apparently was not among those who were given and signed cards on May 9. She stated that 1 week after she began work Henry asked her to go to the basement. A UWA agent was present with about four of her coworkers. She noticed that Sanchez and Henry were in Henry's office about 10 steps from where she stood.

Michael Francis testified that he did not recall how he verified the signatures on the cards, and that he probably negotiated the contract on the phone or in a meeting with Malgieri. They bargained about the percentage of the wage increases and sick days. No written proposals were presented by either party. They agreed to the terms of a contract, Francis had it printed on his office computer, and Malgieri probably came to his office where they signed it. The contract covers 75 Maiden Lane and 80 Maiden Lane and is effective from May 1, 2000, through April 30, 2003.

The contract contains a checkoff clause, and a union-security clause requiring that employees become and remain members of UWA on or after 60 days following the effective date of the agreement.

Robert Francis testified that in about June, 2000, his attorney told the PBS payroll department that it had to have dues authorization cards signed by its employees. Francis directed the payroll department to send to 80 Maiden Lane and all buildings where unions represent employees those forms to be signed by the workers. Diana Vasquez testified that Henry gave her a dues authorization form, and said that Astrit Gorana, a PBS supervisor, had given it to him. Vasquez did not sign it and tore it up. Nevertheless, dues were deducted from her pay both before and after she was asked to sign the form. Ana Guzman and Maria de la Cruz testified that in August, 2000, Walter Nemecek, who was at that time substituting for Dennis Henry, gave them dues deduction forms which were attached to their paychecks. Neither woman signed the form, but dues were deducted from their pay.

By letter to Michael Francis dated February 15, 2001, UWA disclaimed interest in representing PBS "at all locations where UWA currently represents those employees and at any future locations that PBS may hereafter acquire." Francis was requested to stop deducting union dues or initiation fees from any unit employee's pay and return to any employees any sums that have been deducted but not yet sent to UWA. Nevertheless, by check dated March 1, PBS remitted dues to UWA, apparently for the February dues amounts.

Henry denied telling employees that they had to sign cards for a union, and also denied distributing cards for UWA. Nor did he encourage any workers to join a union or tell anyone that they had to join UWA. He further denied telling any employee that she would be fired if she signed a card for or supported Local 32BJ.

4. The meeting of September, 2000

PBS employees working at 80 Maiden Lane received the following note with their paycheck:

NOTICE TO ALL PBS EMPLOYEES

It has come to our attention that agents of Local 32B-32J are encouraging you to improperly and/or illegally walk off the job on or about September 18, 2000. This notice is to let you know that PBS believes that any such walkout would violate the no strike provision in the existing Union agreement and would otherwise be unprotected activity under the National Labor Relations Act. Employees engaged in such an action may subject themselves to discipline up to and including discharge. We suggest that you continue to work and not hurt our customers and their tenants by withholding your services. If you have concerns that you would like to address to Planned Building Services, we suggest that you inform your manager and ask him to arrange a meeting with you and PBS officials. Thank you for your anticipated cooperation.

PLANNED BUILDING SERVICES

At about the time that they received this notice, the workers were asked to attend a meeting. Present were AM officials Cunningham¹³ and Constantine. Henry testified that he brought the employees to the meeting and then left. A security guard employed at 75 Maiden Lane translated Cunningham's remarks into Spanish. Cunningham said he represented the owners. PBS employee Ana Guzman testified that Cunningham said that there were rumors that Local 32BJ would "win back" 80 Maiden Lane. He said that the Union was harassing the workers, and the company was attempting to sue it for harassment. Cunningham also said that if PBS lost its contract it would try to keep the workers and raise their salaries.¹⁴ He also mentioned that he did not want them to sign with Local 32BJ because they did not want the Union in the building, adding that if they did sign with the Union they would lose their jobs. He advised them not to speak to the Union's representatives in the building.

Maria de la Cruz stated that Cunningham said that a letter had been received stating that PBS was being removed from the building, and that another company was taking over and all the employees would be replaced. He said that if the workers signed with Local 32BJ, and that if the Union came in, they would be "thrown out," but if they did not sign, their continued work would be "guaranteed."

Claudia Varela stated that Cunningham said that Local 32BJ was "surrounding the building", and was not telling the truth to the workers. Cunningham said that he was happy with their work and did not want to lose them as workers, but that if they signed a paper for the Union they would automatically lose their jobs. He also said that he did not believe that a new company was taking over, but if it did they would be retained by the new employer.

¹³ Cunningham was described by the workers as the "man with the white hair." At the hearing it was clear that he fit that description.

¹⁴ Varela said that questions were asked by the workers concerning why their pay was so low, and Cunningham said that he would try to "fix that."

Diana Vasquez testified that when she was given the letter set forth above, she was called into a meeting with Constantine, AM director of commercial properties Terrence Donahue, and supervisor Gorana. Constantine told Vasquez that she had been seen speaking with Trinidad Machado.¹⁵ Machado was a former Clean-Right employee who was on strike. Vasquez admitted speaking with Machado but said that nothing of importance was discussed. Donahue said that Local 32BJ would not enter the building and PBS would not be leaving the building. He said he just learned that the PBS employees were going on strike, and asked if she would join the strike because if she was not working they would have to get another employee to perform her work. Vasquez also quoted Henry as saying at various times in the late fall of 2000 that if the workers joined the Union and organized themselves they would be “taken out of the building.”

Constantine testified that he was informed that the night cleaning crew heard that a new contractor might seek to obtain the 80 Maiden Lane account, and suggested that a meeting be held to allay their fears. During the meeting, Cunningham said that there would be no change in contractors, the workers’ jobs were safe, and they were doing a good job. Cunningham also said that he knew that Local 32BJ organizers were in the area, but that the workers were not permitted to speak to them “on your shift” but they could do so after their shift was over. Cunningham denied telling the employees that they would lose their jobs if they signed cards for Local 32BJ or if they supported that union, explaining that they were not his employees—they were the employees of PBS. Nor did he promise them a raise in pay.

Donohue testified that the meeting was held because the workers were concerned that they would lose their jobs if PBS was removed from the building. He told them that he was receiving proposals from new cleaning contractors, but reassured them that as long as they did their job nothing would happen to them. He denied telling the employees that if they signed a card for the Union they would be fired, or if they did not sign a card they would receive a wage raise. He also denied saying that the Union would never get into the building. He further denied that Cunningham promised any benefits to the workers or threatened to fire them if they signed a card for the Union. Constantine also denied that Cunningham said that the workers would lose their jobs if they signed cards for the Union.

Vasquez stated that in the following month, October, Constantine asked her if she knew anything about a big strike that Local 32BJ was planning against PBS. Vasquez replied she did not know anything about it. Constantine told her to let him know if she learns anything about it since the Union was giving him a “headache” and “driving him crazy.”

Vasquez testified that she spoke to Al Hernandez, a PBS supervisor, in December, 2000. A question was asked whether they should organize for Local 32BJ. Hernandez said that it would be difficult for those who worked for 80–90 Maiden Lane to do so because PBS had contracts with those buildings which stated that if PBS accepted the Union, it would have to leave the building after 30 days because the owners did not want the Union in that building.

¹⁵ There was some confusion in the record as to who Vasquez was speaking to. The PBS brief concedes that it was Machado.

5. The alleged unlawful conduct concerning Jorge Cea

Jorge Cea became employed by PBS on June 1, 2000 upon its acquisition of the cleaning contracts for the Olmstead buildings. He had previously been employed by Golden Mark Maintenance, which previously had that contract. Cea performed the same duties with PBS as he had with Golden Mark, which included, as part of a route crew, stripping and waxing floors, shampooing rugs, cleaning the stairs and lobby, and operating the elevator. Cea’s supervisor was Skender Neziri, who reported to Astrit Gorana. Gorana worked first for Golden Mark and then for PBS. Gorana hired employees to work at 80 Maiden Lane between November, 2000 and June, 2001.

Neziri believed that Cea was a good worker, apparently favoring him for continued employment by PBS over others at Golden Mark who had been discharged upon that company’s losing the contract.

When Cea began work for PBS, the former Clean-Right employees were engaging in a demonstration outside various buildings cleaned by PBS. He testified that during his first month of employment for PBS, Neziri told him that “we” have nothing to do with strikes or union related problems, adding that if Cea ever saw anyone signing cards for Local 32BJ they would “automatically” be fired. Neziri also told him that if he participated in a strike “or anything to do with the union” he would “not be working there.” Neziri did not testify at the hearing.

Cea testified that in the summer of 2000, he overheard Gorana tell Neziri that if anyone signs a card for Local 32BJ he (Neziri) should let him know immediately so that person can be discharged. Later that summer, Cea asked Neziri whether he should join Local 116 or Local 32BJ. Neziri told him not to “bother” with Local 32BJ because if he did so he would be “automatically” fired. Gorana testified, but did not deny having this conversation.

Cea stated that he first met Local 32BJ organizer Ignacio Velez when he was employed by Golden Mark. At that time, Velez gave him cards for that union and Cea distributed them to the service workers in the buildings.

In August, 2000, Cea was hurt while at work and was out of work for about 3 weeks. Upon his return to work he presented a physician’s letter to Neziri. Cea conceded that prior to his injury he had “attendance problems,” but was not warned regarding his absenteeism. In any event, Neziri told Cea to take as much time as he needed to recover from his injury.

In September, 2000, AM employee Jesus Martinez who was employed at 80 Maiden Lane went on vacation and never returned. Constantine called PBS Regional Supervisor Sanchez and asked him to assign a replacement for Martinez. PBS then assigned its employee Jorge Cea to work at 80 Maiden Lane.

Cea testified that on September 3, 2000, he asked Neziri for daytime work because he expected to attend school in the evening.¹⁶ Neziri told him to report to Constantine at 80 Maiden Lane. Neziri told Cea that he might stay at that job “forever.” It was a daytime job involving work at 80 Maiden Lane only and not on the route crew where he worked in various buildings

¹⁶ However, Cea stated that when PBS asked him to work at night he did not take day classes.

during his shift. Constantine told Cea that he would be working at 80 Maiden Lane for a few weeks.

Cea's job at 80 Maiden Lane consisted of general cleaning duties, moving furniture and operating the freight elevator. His supervisor was Constantine. Since he worked during the daytime he had no interaction with Dennis Henry who supervised PBS' evening employees.

Cea stated that a few days after being assigned to 80 Maiden Lane Neziri told him that he had to do a good job because Constantine said that he was doing a good job and he might be working in the building "forever." About 1 day later, Constantine told Cea that he liked the way he worked and asked if he wanted to continue working in the building. Cea said that he did and Constantine asked if he wanted to work directly for him in the building or for PBS. Cea replied that he wanted to work for him in the building since he would be making more money.

Constantine essentially corroborated Cea's testimony. Constantine stated that he had a "positive feeling" about Cea's work, and that he was a good worker. In fact, he told Cea that he was doing a good job and that he would consider him for a job at 80 Maiden Lane.

The same day as the conversation with Constantine in which Constantine spoke favorably to him about his work, Cea was assigned to sweep the sidewalk in front of 80 Maiden Lane. At that time, Local 32BJ was engaging in picketing the premises. The demonstration was "noisy and hectic" with pedestrian traffic and vehicular traffic. Cea testified that while sweeping, Union Representative Ignacio Velez approached him and asked how he was doing. Cea replied that he was happy working for PBS but the building manager told him that he might be working for the building. Cea added that he could not talk too much since he was working, but nevertheless spoke to him for about 10 minutes, with Cea sweeping and Velez following him. Cea stated that while sweeping with Velez standing next to him he saw Constantine with another person in front of a restaurant across the street. He saw Constantine looking at scaffolding attached to 80 Maiden Lane. He believes that Constantine saw him speaking with Velez. Cea had not joined that picket line and had never participated in a Local 32BJ picket line. The complaint alleges that Constantine created the impression of surveillance by this conduct.¹⁷

Velez testified that his conversation with Cea took place in the middle of a rally of about 20 persons who were spread out at the curb and in the street in front of 80 Maiden Lane. Velez quoted Cea as saying that he was afraid because he believed that he was being observed. Cea asked him to step back as he did not want to get into trouble. Cea did not say that someone was watching him at that time. Velez' pretrial affidavit contains no description of his conversation with Cea.

Constantine testified that he knew organizer Velez but denied seeing Cea in front of the building speaking to Velez.

Cea testified that the following day, Constantine told him that he liked the way he worked, but one of the building engi-

neers wanted to have a relative work in the building with him. Constantine said that the engineer's request carried greater weight than Cea's employment and accordingly told him that Friday would be his last day. Cea thus worked at 80 Maiden Lane for only 1 week—from September 11 through September 15. The complaint alleges that this conduct constitutes an unlawful rescission of an offer of employment. Constantine asked for Cea's address and phone number in the event that he was needed in the future. Constantine did not call Cea thereafter. Thereafter, Cea trained his replacement who he believed was the man the engineer recommended.

Constantine testified that he did not hire Cea because he was asked by the chief engineer for 75 Maiden Lane to hire his brother in law, Robert Amadei. Constantine stated that historically he has always given a company employee the "benefit of the doubt" in recommending a new worker. Accordingly, Amadei was hired and was still employed at the time of the hearing.

PBS argues that Cea knew that he would be working at 80 Maiden Lane for only a few weeks. This was done in order to fill an "emergency" opening, one which PBS did not expect to fill, to replace AM employee Martinez who went on vacation and never returned. PBS thus argues that Cea was properly terminated by Constantine when his assignment ended.

However, his assignment did not end, as shown by the fact that he was replaced by Amadei. Although Cea was told that he would be there only a few weeks, nevertheless the conversation he had with Constantine as supported by Neziri shows that he was well regarded and would have remained employed in the building but for his termination, which as will be discussed below, was for unlawful reasons.

It should be noted that AM hired two porters to work at 80 Maiden Lane at about that time, Amadei and Alejandro Ibarra. Amadei's new hire memo states that he was hired as a porter on September 12, and the new hire memo of Ibarra states that he was hired as a porter on September 19.

On his last day of employment, Cea called Neziri and told him what happened. Neziri remarked that he believed that Cea would remain employment at 80 Maiden Lane. Neziri assigned him to work at a building on East 62 Street where he worked during the day shift for about 2 weeks. That job ended because PBS' contract expired.

Cea then told Neziri that he wanted a daytime job because he was going to classes given by the Mason Tenders Union in the evening. Neziri assigned him to work at a building on Broadway during the night shift, from 5 p.m. to 1 a.m. Cea refused the job because he was attending evening school. Neziri told him that he was fired because he needed someone who is reliable and would follow orders. Cea testified that classes were given during the day and at night, and that following his discharge he enrolled in daytime classes.

On April 13, 2001, counsel for AM wrote to the Board agent that Constantine did not know Cea, did not discharge him, and had no interaction with him.

The complaint alleges that Constantine rescinded an offer of employment to Cea because of his activities in behalf of the Union, and failed and refused to restore the offer of employment to Cea. AM argues that although there were discussions between Constantine and Cea about future employment, there was no

¹⁷ I hereby dismiss that allegation. Cea was engaging in his activity in plain sight. This was the "mere observation of open conduct" and did not constitute surveillance or the creation of the impression of surveillance. *Days Inn Management Co.*, 306 NLRB 92 fn. 3 (1992).

offer to Cea. The complaint further alleges that in September, 2000, PBS, by Neziri, caused the termination of Cea by offering him a work schedule that it knew that he would be unable to accept. The date of discharge is on about September 20.

6. The events surrounding the strike and the replacement of PBS with Servco

a. The strike by PBS employees

On April 23, 2001, all the PBS employees at 80–90 Maiden Lane, with the exception of Zoila Henry, the wife of supervisor Dennis Henry, went on strike. There was picketing each day, accompanied by loud noise, through June 15, 2001, when AM terminated its contract with PBS. An average of 6 to 10 pickets demonstrated in front of the building, and Constantine recognized some former PBS employees on the picket line. Occasionally, police barricades were set up in front of the building.

The employees of 75 Maiden Lane did not go out on strike or picket. Those employees were not represented by Local 32BJ and the contract between PBS and AM for the cleaning work at that building continued in effect through the time of the hearing.

b. AM terminates its contract with PBS

By letter dated April 20, 2001, PBS official Robert Francis wrote to AM, advising it that beginning the second year of its contract it was raising its monthly charge 4 percent. Thereafter, as set forth above, PBS employees struck 80–90 Maiden Lane.

Robert Francis met with AM official Paul Wasserman to discuss the increase requested. Present were the labor attorneys for PBS and AM. Wasserman told Francis that he would terminate their contract for “economic” reasons. Francis stated that he would have negotiated a lesser increase than the 4-percent requested or no increase. Francis conceded that the presence of the attorneys was “unusual,” but stated that the strike was not a major issue. However, they discussed Local 32BJ, the noise generated by the demonstrators, and the establishment of a reserve gate.

On May 15, Wasserman sent a letter to PBS terminating its services at 80 Maiden Lane as of June 15 due to “several reasons not the least of which is economic.”¹⁸ Constantine testified that he believed that the contract was terminated because of economic reasons and because the “level of cleaning started to suffer” after the strike.¹⁹ On June 12, Michael Francis sent a letter to Wasserman protesting his decision to terminate the contract and questioning its legality, referring to the contractual language that it is for a period of four years. Francis further stated that “it is regrettable that a contract has so little meaning to you, especially when you are fully cognizant of the *astronomical legal cost* (both retroactively and prospectively) (emphasis in original). Michael Francis testified that his reference to the astronomical legal cost referred to his information that AM paid \$400,000 to settle with Local 32BJ because it did not

¹⁸ Employee Nehat Borova testified that in June, 2000, he noticed that the lobby and elevator were extremely dirty, appearing that they had not been cleaned in 1 month.

¹⁹ Constantine added that Wasserman would be the best person to explain why the contract was cancelled.

offer employment to the Clean-Right employees, and also the legal costs to PBS for the NLRB cases.

A similar increase of 4 percent was requested by PBS of AM for 65 Broadway and 75 Maiden Lane. A 2.5-percent increase was obtained for 75 Maiden Lane.

Paul Wasserman testified that prior to terminating the contract with PBS he did not notify Local 32BJ of AM’s decision to terminate its contract or that Servco would be the new contractor. On June 19, 2001, AM sent a letter to the Union stating that it has changed cleaning contractors. By letter dated June 29, the Union advised AM that AM breached its duty to bargain by changing subcontractors without prior notice and bargaining. The Union demanded bargaining concerning the decision to change subcontractors and the effect of that decision. On July 2, AM replied that it has never employed any employees represented by Local 32BJ and thus “has no liability to those employees by virtue of its unilateral decision, based upon economic factors, to discuss with you its decision to change contractors or to bargain over the effects of such a change.”

The complaint alleges that AM violated the Act by refusing to bargain with the Union over the termination of the PBS contract. AM argues that inasmuch as the Union did not represent the PBS employees, bargaining with the Union over the PBS contract levels would be futile.

c. AM contracts with Servco

Charles Cestaro, the president of Servco, testified that in about mid May, 2001, he was told by Paul Wasserman that he wanted a quote for the cleaning work at 80 Maiden Lane because he was unhappy with the services being performed, there was a lot of turnover in the building and the quality of the cleaning was deteriorating, resulting in many tenant complaints. Wasserman did not mention the fact that PBS employees were on strike at the building.

Cestaro did a walk-through of the property in early May. He stated that at that time he saw no demonstrators in front of the building and no police barricades. He met with Constantine who did not mention the strike. Cestaro first became aware that picketing was being conducted 4 to 6 weeks after he began servicing the building.

On May 29, Servco offered a proposal and contract and on May 31 it was signed. The contract provided for prices “without union” and “with union staff”. That clause refers to Local 348S, which is the only union having a contractual relationship with Servco. The contract also provides that “your present night supervisor is to remain as night supervisor and compensated by AM Property Holding Corp.” Cestaro testified that Dennis Henry was the night supervisor referred to in the contract.

The complaint alleges that AM and Servco unilaterally set the initial terms and conditions of employment for employees in the 80–90 Maiden Lane unit. AM argues that it hired Servco to clean the building at a fixed price and did not set any labor rates or any other provisions in its contract with Servco.

d. The striking PBS employees seek employment

As set forth above, on April 23, 2001, the employees of PBS at 80 Maiden Lane went on strike. Picketing and demonstrations took place outside the building.

During the picketing, the striking employees heard a rumor that PBS was losing the contract and a new company would be assuming the cleaning duties at 80 Maiden Lane. Local 32BJ asked the employees to apply for work with the new company. On June 14, 1 day before Servco was to begin work, a group of striking employees entered the building and spoke to Dennis Henry who told them that a new company was taking over. He told them that he believed that the new company would be bringing its own employees although he would prefer that it hire the old workers because new employees would not know the job. They asked for applications and Henry suggested that they return on Monday and speak with the owner. Claudia Varela suggested that since Henry had their phone numbers he could help them get jobs. Henry responded that “they don’t want anyone from the strike.”

Varela and Xiomara Aguilera then spoke with Constantine in the building. Varela asked if a new company was starting, and requested an application. Constantine said that a new company would be doing the cleaning work, but that he could “not do anything” for the workers because they “made trouble—in my place. That we had not listened when they had told us to get back to work, go back to work.” Aguilera stated that Constantine said that they were given an opportunity to return to work but they “preferred to create a disturbance outside the building.” Constantine suggested that they go to the Union and tell it to get them a job.

Varela did not return to the building on Monday as suggested by Henry since she believed that it would be futile to do so because of Henry’s comment that the new company did not want anyone from the strike. In any event, she testified that she did not return because she was a college student.

On Monday, June 18, a few employees returned to the building at Henry’s suggestion. Constantine told Ana Guzman that a new company was coming in. She asked for applications, and Constantine told her that it was out of his hands since the new company had its own workers. Constantine asked her if she remembered the meeting with Cunningham in which the workers were told that if PBS lost the contract it would have kept them under the new contractor if the Union had not found them jobs, but that they did not want the Union in the building. He said they made a “bad decision” to go out on strike, but offered to call them if jobs became available.

Constantine testified that he met with about four former PBS employees in June, 2001. Varela asked him for applications and he replied that he could not help them since he did not hire them when they first worked with PBS and that he could not hire them now. He said that they should contact Servco. He also told them that Local 32BJ took them out on strike, which “was not the best choice,” and perhaps that union could find them work.

It is undisputed that no applications were requested from Servco, and Local 32BJ did not contact Servco on or after June 15, 2001 regarding the striking employees at 80 Maiden Lane, notwithstanding that the employees and Local 32BJ knew the name of the new company shortly after June 14. It is the theory of the General Counsel that inasmuch as AM is a joint employer with Servco, the applications sought from AM consti-

tuted applications to Servco, or that filing applications would have been futile.

On June 18, Local 32BJ wrote to AM in behalf of 17 named striking employees who were employed at 80-90 Maiden Lane. The letter stated that the Union learned that AM was terminating its contract with PBS, and that the employees desire to continue their employment with AM or a new cleaning contractor retained by AM. On June 19, AM replied, stating that AM has not and does not employ building service employees at 80 Maiden Lane, it discharged its cleaning contractor the prior week, and that the employees are free to apply for work with the new contractor.

e. Servco begins operations

Denise Velez became employed by PBS at 80–90 Maiden Lane on April 25, 2001. In early June she was told by Dennis Henry that PBS was losing its contract and that Servco would be taking over. Henry asked her and the other workers to come in to work early on June 15, the first day of Servco’s work. Henry added that he was not certain that Servco would be hiring them, but in any event wanted them to train its employees.

On June 15, Velez reported to work and saw about 17 workers from Servco. Servco Sales Manager Mark Giacoia, and supervisor Isaac Paredes introduced themselves and distributed applications. Velez testified that Giacoia said that he wanted to inform all the workers that “nobody better not fucking talk to the union because if you do, you’ll be fired on the spot.” Giacoia said that he was not certain that Servco would hire them, and that he would have to “see how it went with his workers” and then advise them. Giacoia said that their salary was \$6 per hour for a 6-hour day. Dennis Henry said that the workers were good employees and had been earning \$7 per hour with PBS, and that it was only fair to pay them what they had been making. Giacoia said that he would think about it, and later paid them \$7 per hour.

The former PBS workers were told who to train that night, and thereafter Servco hired eight PBS workers.²⁰ The Servco workers brought the first night remained for only about 1 week.

Dennis Henry testified that when Servco took over, Giacoia and Paredes said they would keep certain PBS employees. Henry said that he had to give them the names of the best workers. He chose several, who were interviewed by a Servco manager who selected certain workers and then asked him who he wanted to stay. Giacoia asked Henry’s opinion regarding whether they were good workers, and Henry recommended them. Henry stated that Servco brought in most of the workers and it needed only five or six prior PBS employees. Henry stated that he could not recommend all the PBS workers, but selected those who worked on the floors in which the New York City Department of Investigation (DOI) was located. That agency required cleaning employees with no criminal record and who had undergone a screening process.

Giacoia testified that on June 15, the start-date for Servco, applications were given to all PBS nonstriking employees. Also

²⁰ Jose Beauchamp, Aquiline Devers, Carmen Gutierrez, Zoila Henry, Josefa Molina, Gladys Rodriguez, Maria Troche, and Denise Velez.

present were new employees interviewed and hired by Servco at its office, which was its usual process for hiring new workers. He spoke to Henry regarding the job duties of the employees. Giacoia denied asking Henry to identify the five best employees. Giacoia then asked the PBS employees where they cleaned—for example, who worked on the DOI floors, who did bathrooms and who operated the freight elevator. He then hired and assigned them to those positions. Giacoia denied interviewing any of the former PBS employees.

Giacoia denied speaking about Local 32BJ during his meeting with the employees. However, he admitted speaking about the Union to the workers the following week with Paredes and Henry present. Giacoia initiated the meeting because of the “loud, boisterous” picket line. He told the employees that if they felt any apprehension or believed that the picketing would be threatening they should enter the building from the rear entrance rather than come through the front of the building where the picketing was occurring. Giacoia specifically denied threatening them with discharge if they spoke to the Union.

Servco president Cestaro stated that he set the initial wages and benefits for employees working at 80 Maiden Lane without notification to or bargaining with Local 32BJ.

7. The supervisory status of Dennis Henry

a. When PBS had the contract

As set forth above, prior to AM’s purchase of 80–90 Maiden Lane, Dennis Henry was employed by that company at 75 Maiden Lane. With the purchase of 80–90 Maiden Lane, Henry was transferred to the payroll of PBS and worked at that building from April 25, 2000, to July 31, 2000. Thereafter, at Henry’s request he was reinstated to the AM payroll on August 1, 2000. Regardless of whose payroll he was on, his duties at 80 Maiden Lane remained the same—Henry was the night supervisor of the PBS night cleaning staff. A payroll information document lists Henry’s title as “site supervisor nights. Non-union supervisor.” In a memo dated July 17, 2000, Robert Francis refers to Henry as the “supervisor at 80 Maiden Lane.”

Henry denied that he hired, fired, suspended any employees, or wrote evaluations or issued discipline, or transferred employees from one building to another. The evidence supports this testimony. He assigned the cleaning personnel to work by telling them which floors to clean, and reassigned them to work on a different floor. If a worker was absent he asked them if they wanted to work overtime and assigned two workers to cover the absent employee’s work. It should be noted, however, that he reported the absence to PBS Regional Supervisor Sanchez who then told him to assign the additional workers.

During the time that PBS Regional Supervisor Sanchez was employed by PBS, Sanchez told Henry to ask specific employees to work overtime. However, after Sanchez left the employ of PBS in the summer of 2000, Henry decided who to ask to perform the additional work, and then asked the employee, and only then asked Gorana, Sanchez’ replacement, if it was all right. Henry stated that in this regard he selected those employees who he knew would do the job “best” since he knew who the capable employees were. Henry testified that during the period May and July, 2000, he operated the freight elevator all the time—which was only when employees needed to be trans-

ported to and from their floors at the start and conclusion of their shift. He distributed employees’ paychecks and initialed their timecards during his tenure at the building. Henry gave the employees at 80 Maiden Lane his pager number so that they could call him if they expected to be late or would be absent.

PBS employees testified that when they began their employment, Sanchez showed them their duties which took about one-half hour and Henry followed them as Sanchez explained their tasks. Sanchez and Henry twice told Guzman to train new workers.

Diana Vasquez was employed by PBS at 80 Maiden Lane when PBS took over the cleaning responsibilities in that building in April, 2000. She was the day matron who cleaned the bathrooms. She worked from 9 or 10 to 5 or 6 p.m. She was the only PBS employee who worked during the day. Her work time overlapped with that of Henry who arrived at about 4 p.m. She stated that at first Sanchez gave her assignments. However, following Sanchez’ departure in the summer of 2000, Henry continued to give her specific assignments, such as mopping a specific floor, and recleaning an area that required more dusting. Vasquez further stated that if her job was not done well or needed to be redone, Constantine or AM employee Edward Guerrero called her by radio so they would not have to search for her in the building.

Vasquez stated that if there were complaints about her work, or work had to be redone, Constantine and Henry would tell her. Constantine told her that a new floor was being rented and that she had to completely clean the bathroom on that floor. On one occasion, Henry told her to vacuum an area. She advised him that she was pregnant and such work was too hard. Henry responded that she must vacuum, and she did. Sanchez told Vasquez to give vacation request forms to Henry. She gave certain requests for time off for doctor’s appointments to Henry and Constantine. At times she called Constantine’s office to report that she was sick and could not come to work. Henry testified that employees gave him a written request for a leave of absence for a couple of days, a week or a month. He signed the form as supervisor. Henry stated that he then asked his supervisor whether the leave would be granted. Henry stated that in May, 2000, while still on the PBS payroll, an employee who expected to be absent called Supervisor Sanchez and not him. Following the departure of Sanchez, the employees call Henry who then calls the supervisor who authorizes him to obtain two employees to cover the work of the absent employee.

It should be noted that Vasquez was specifically supervised by PBS Supervisor Gorana who told her to take 1 week’s vacation on her last day at work when she became ill, and she asked Gorana for permission to return to work.

Vasquez’ replacement, Maria Gonzalez, began work as the day matron in January, 2001. She stated that Henry gave her forms for dependents, and that Henry and AM employee Guerrero told her to do certain things that were not part of her routine, and Guerrero told her to redo an area that had to be cleaned. Henry asked her to work overtime. She also requested time off from both men.

Varela testified that Sanchez had an office in the sub-basement of 80 Maiden Lane and was present there each day when she worked. She told Sanchez that she would be absent

for 1 week. She told Sanchez, and not Henry, although he too was present in the building, because she was Sanchez' friend.

Maria de la Cruz stated that she saw Sanchez each day. He checked the floors she cleaned and then after he left PBS, Henry began checking her work. If she called in sick she would call Henry on his pager and advise him. She also asked Henry if she wanted to leave work early. She stated that she stopped work for PBS in January or February, 2001 because her wages were too low. Ana Guzman stated that when she began work at 80 Maiden Lane she saw Sanchez only once or twice per week. He showed her how to clean and what materials to use. Elsa Andrade stated that Sanchez was at 80 Maiden Lane perhaps four times per week.

Claudia Varela stated that, while employed at 80 Maiden Lane, when she was going to be absent from work she called Sanchez and Henry. When she had to leave work due to illness she told Henry.

b. When Servco had the contract

Giacoa testified that Isaac Paredes was the overall supervisor for Servco who was responsible for maintaining the quality of the work and follow-up to ensure that the work was being done. He was the liaison between the employees and the main office. Giacoia also stated that Henry was the "eyes and ears" of building management. He directed Henry to present any problems or requests to him or Paredes. Henry testified that he did the same work as a Servco supervisor as he did when he worked for PBS.

Servco president Cestaro testified that early in its performance of the contract, Paredes arrived at the building at about 4 p.m., but then came later, at 6 or 7 p.m. Paredes was replaced by Tony Battista in December, 2001, who arrives at the building at about 4:30 p.m. and leaves at 11p.m. The evening shift employees of Servco are supervised by Dennis Henry who was on the AM payroll. The contract between the two companies, set forth above, provides that AM's night supervisor, which applies to Henry, is to remain as the night supervisor and would be compensated by AM.

Constantine stated that inasmuch as there are no Servco supervisors present during the day, Constantine's office tells the day matron to remedy any problems that arise. However, Constantine also stated that Paredes was present each day. Constantine would give him reports of complaints and Paredes followed up. Giacoia is at the building a couple of times per week. He stated that if there was a problem in a ladies' bathroom he or a member of his staff asks the day matron to take care of the problem.

Denise Velez, who was a PBS employee hired by Servco, testified that Henry continued to be her supervisor when she became employed by Servco. She stated that Henry checked her work, and that Giacoia did so if he received a complaint and would tell her to redo certain work. She saw Giacoia in the building twice per week. She also said that Henry relayed complaints about the employees' work to Paredes who checked the work. If she had a complaint with Henry regarding her hours she told Paredes. She asked Henry for equipment. She was asked by Henry, Giacoia, and Paredes if she wanted to work overtime if a coworker was absent. Paredes told Velez that if

she had any problems she should tell Paredes and not Henry. She saw Henry take out the garbage while employed by Servco. She did not see him perform cleaning work. Occasionally the workers finished work early—before their 11 p.m. quitting time, and Giacoia permitted them to punch out early. Henry was at the building each day when she worked for Servco, and she interacted with him about two times per shift.

Velez testified that prior to Thanksgiving, 2001, she asked Henry if the workers would be paid for the Thanksgiving holiday. Henry replied that the company "better" pay his wife Zoila who was then employed by Servco. Henry then wrote "holiday" on each time card for Thursday, Thanksgiving Day. Velez was not paid for that holiday. She stated that she was absent for work with Servco four to five times due to her son's illness. Although she brought in notes from her physician, Henry told her once to try not to miss any more days of work. He suggested that if her son becomes sick she should have someone else stay with him.

Velez stated that in the beginning of Servco's work at the building, Giacoia was present between once and twice per week, but later Giacoia increased his visits to the building by 1 more day per week. Paredes was there every other day or if he was not there his brother Felix would be present. After Paredes and his brother stopped work, Giacoia was at the building more often, perhaps four times per week.

After September, 2001, Henry worked from 3 p.m. to 11 p.m. He first checks with building management to see if there are new orders or new cleaning assignments and any complaints. At 4 p.m. he prepares supplies for the cleaning employees, gives them the keys to the floors, and identification cards. He visits each floor to ensure that the work is performed, and then locks the doors and collects the supplies and keys at the end of the shift. He stated that if the work was not being done he told the employees to perform the task they did not do.

Henry stated that if a Servco employee expects to be late or absent she calls the building manager's office which then notifies Paredes on his radio. Paredes would then tell Henry to assign two employees to cover the absent employee's assignment. If an employee wanted to leave early for an emergency, she called her supervisor, and he assigned that person's work to another employee.

8. The alleged threat to employees regarding Their immigration status

The complaint alleges that during the hearing, PBS attorney Stephen Ploscowe threatened employees with an investigation regarding their immigration status in retaliation for their support for and activities on behalf of Local 32BJ, and in retaliation for their giving testimony at a Board proceeding, in violation of Section 8(a)(1) and (4) of the Act.

This allegation relates to testimony of employee Diana Vasquez. On redirect examination, counsel for the General Counsel Olga Torres asked Vasquez questions relating to her receipt of a \$25 bonus for returning personal property to a tenant. The evidence was intended to support the credibility of the witness. Stephen Ploscowe, an attorney for PBS, objected to the question, and I overruled the objection. Torres then asked to go off the record which I granted. The following colloquy, as rele-

vant, ensued when the on the record hearing was resumed with Vasquez on the witness stand:

MR. PLOSCOWE: That now means that I have to get an investigator and I'll find out whether she's here in this country illegally, does she have ..

MS. BAKER (Union's attorney): Objection. (Multiple voices.)

....

MS. TORRES: Your honor, that comment was totally unnecessary.

JUDGE DAVIS: I think it was uncalled for.

MR. PLOSCOWE: They're addressed to you..

But these things are improper because on my own case I could go and I may find nothing. Nothing would preclude me from doing such an investigation.

MS. TORRES: Your Honor, it's unlawful to threaten employees with deportation because of their union activity.

MR. PLOSCOWE: Who's threatening them?

MS. TORRES: You just did.

B. Analysis and Discussion

1. The supervisory and agency status of Dennis Henry

The complaint alleges that Dennis Henry is a supervisor and/or agent of AM, PBS and Servco.

Section 2(11) of the Act provides:

The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Section 2(11) is phrased in the disjunctive. The exercise of authority requiring independent judgment with respect to any one of the actions specified is sufficient to confer statutory supervisory status. *Queen Mary*, 317 NLRB 1303 (1995). The party asserting that the individual is a supervisor has the burden of proving that issue. "The Board has observed that, in enacting Section 2(11), Congress stressed that only persons with 'genuine management prerogatives' should be considered supervisors, as opposed to 'straw bosses, leadmen . . . and other minor supervisory employees.'" *Chicago Metallic Corp.*, 273 NLRB 1677, 1688 (1985). The Board has a duty to employees "not to construe supervisory status too broadly because the employee who is deemed a supervisor is denied . . . rights which the Act is intended to protect." "An employee does not become a supervisor merely because he gives some instructions or minor orders to other employees. . . . Additionally, the existence of independent judgment alone will not suffice for the decisive question is whether [the employee has] been found to possess authority to use independent judgment with respect to the exercise . . . of some one or more of the specific authorities listed in Section 2(11) of the Act. In short, some kinship to management, some empathetic relationship between employer and

employee must exist before the latter becomes a supervisor for the former" *Chicago Metallic*, above, at 1689.

There is no question that Henry does not have the authority to hire, suspend, lay off, recall, promote, discharge, reward, or discipline employees. The work he performed while PBS and Servco performed their respective contracts was essentially the same.

Henry distributed keys and building supplies to the cleaners at the start of their shift and collected them at the end of the shift. He was responsible to ensure that the work was done properly. He inspected the areas that had been cleaned and directed the cleaning personnel to redo work that had not been cleaned properly.

The only authority Henry may be deemed to possess is the authority to transfer, assign or responsibly to direct employees, or effectively recommend such action. The employees had their basic work assignments. Henry occasionally assigned them to work in addition to those assignments when an employee was absent. In connection with such assignments he assigned overtime to those workers. I find, in connection with these duties, his assignment of daily jobs amounted merely to a routine implementation of assignments already known by the employees. Generally, the employees cleaned the same floors—those with DOI clearance cleaned those offices. The fact that he had to cover for absent employees by the assignment of additional workers is routine. In this regard, while employed during both the PBS and the Servco contracts, he reported the absences to his superiors and they authorized him to obtain additional workers. His request that employees work overtime could be accepted or not by those selected.²¹ Guzman's request to Henry for a change of assignment was referred to Sanchez. He did not become a statutory supervisor simply by implementing the orders of his supervisors, or giving minor orders to employees unaccompanied by the exercise of independent judgment. *Victoria Partners*, 327 NLRB 54, 61–63 (1998).

During Sanchez' employment by PBS, he told Henry which employees to ask to work overtime. However, following Sanchez' departure from PBS in June, 2000, Henry decided who would work overtime based upon who he knew would do the "best" job based upon his knowledge of their capabilities. In *Hausner Hard-Chrome of KY, Inc.*, 326 NLRB 426, 427 (1998), the Board found that such routine assignments were based on a skilled leadman's taking note of employees' skills and experience with respect to particular tasks. The same is true here.

The fact that Henry ordered Vasquez to perform heavy work when she complained that she could not do so because of her pregnancy, and she performed that work is not evidence of supervisory authority. There was no showing what may have occurred had she refused to do that work. He was directing her to do the work which is similar to other routine orders he gives. Similarly, when Zoila Gonzalez reported to work on July 12, 2000 following her interview, she told Henry that she could not mop because of medical problems. Henry went into the building manager's office while Gonzalez waited outside. Shortly thereafter, Henry emerged and told her that if she could not

²¹ Maria de la Cruz said that Dennis' request to work extra hours was voluntary.

mop she could not work, and Gonzales left. Gonzalez did not know who Henry spoke to. Thus, Henry did not on his own order Gonzales to work despite her refusal. He had to check with another person and relayed the message to Gonzales that she could leave if she refused to do that work.

Similarly, while employed during Servco's cleaning of the building his work remained the same. Accordingly, the above principles relate also to that time period. He told Velez, who had several absences due to her ill son, that she should "try" not to be absent, and have someone else stay with her son. He thus did not warn her that she would be disciplined if she missed work again. This was friendly advice from someone who had no authority to take disciplinary action against her or effectively recommend such action.

Regarding leaves of absences, Henry signed employees' forms. However, he did not approve them. His notation of "holiday" on time cards indicating that he wanted the workers paid for Thanksgiving was ignored by Servco management.

The relationship between Henry and the cleaning personnel could be compared to those of a superintendent in a building which employed porters. In *Cassis Management Corp.*, 323 NLRB 456, 457 (1997), the Board found that the porters' work was repetitive and routine, they knew their cleaning jobs, and that the superintendent did not assign or direct the employees in a manner requiring the use of independent judgment.

The General Counsel argues that two additional factors constitute evidence that Henry was a statutory supervisor. First, that Henry was referred to as "supervisor" by Sanchez and in memos given to the cleaning personnel, and second, because he was the only person responsible for the cleaners in the building during the night shift. It is argued that if he was not deemed a supervisor, the employees would have no effective supervision. Both factors are secondary indicia of supervisory status. However, where, as here, there is no evidence that Henry possessed any one of the several indicia of supervisory status set forth in Section 2(11) of the Act, these secondary indicia are insufficient to clothe him with such status since secondary indicia of supervisory status are not controlling. *Bay Area-Los Angeles Express*, 275 NLRB 1063, 1080 (1985). Here, it is clear that Henry's supervisor, Sanchez, was available by telephone, and indeed Henry communicated with Sanchez concerning replacements for absent employees. *First Western Bldg. Services*, 309 NLRB 591, 603 (1992).

There was disputed testimony regarding whether Henry recommended the best workers when Servco took over. He testified that he did, but even then stated that after his recommendations, those employees were interviewed by a Servco manager who then selected certain of those people. Further, he stated that his selections consisted of those who worked on the DOI floors. First, it is clear that even according to Henry's testimony his recommendations were subject to a separate, independent interview by Servco. In addition, no independent judgment was necessary to recommend those who had already been screened by DOI for work on those floors.

I accordingly find and conclude that Dennis Henry was not a statutory supervisor during his employment at 80-90 Maiden Lane.

The General Counsel argues that regardless of his supervisory status, Henry was an agent of PBS and AM from April 25, 2000, to June 14, 2001 when PBS and AM jointly employed the PBS employees, and also was an agent after June 15, 2001 when AM and Servco were joint employers of the employees. I agree.

Section 2(13) of the Act provides:

In determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

The Board applies common law principles of agency in determining whether a person is an agent under the Act. Such principles incorporate the doctrine of apparent authority.

Apparent authority is created through a manifestation by the principal to a third party that supplies a reasonable basis for the latter to believe that the principal has authorized the alleged agent to do the acts in question. Thus, either the principal must intend to cause the third person to believe that the agent is authorized to act for him, or the principal should realize that this conduct is likely to create such belief. Two conditions, therefore, must be satisfied before apparent authority is deemed created: (1) there must be some manifestation by the principal to a third party, and (2) the third party must believe that the extent of the authority granted to the agent encompasses the contemplated activity. Citations omitted. *Pratt Towers, Inc.*, 338 NLRB 61, 72 (2002).

The test is whether, under all the circumstances, the employees "would reasonably believe that the employee in question [the alleged agent] was reflecting company policy and speaking and acting for management." *Southern Bag Corp.*, 315 NLRB 725 (1994).

The public characterization of Henry as its supervisor establishes a "manifestation creating a reasonable basis" for the employees to have believed that Henry was authorized to speak for management. Thus, AM, PBS and Servco all referred to Henry as their supervisor, and Sanchez told employee Vasquez that Henry was her supervisor. *PCC Structural, Inc.*, 330 NLRB 868, 870 (2000). The employees also referred to him as their supervisor. They took orders from him, received assignments from him, had their work checked by him, submitted requests for leave to him, and he initialed their time cards and gave them their paychecks. They also asked him for job applications for Servco when PBS was terminated.

Henry was a conduit of information from management to the employees. Shortly before Servco began servicing the building, Henry told the PBS employees that Servco was replacing PBS as the cleaning contractor, and directed them to remove their personal belongings because the space was needed for new employees. He also gave Maria Gonzales forms to complete when she began work. *Victor's Café* 52, 321 NLRB 504 fn. 1 (1996).

Henry's comments were similar to those of management. It thus appeared to the employees that he was a spokesman for management's view of the Union. *Hausner*, above, at 428. It is true that, as noted by PBS, Henry told employee Elsa Andrade

that he wanted to join Local 32BJ but could not due to his position with PBS. That comment, however, does not establish that Henry would not have made an anti-union comment. Rather, it tends to prove that he regarded himself as a “company man” who, because of his status or perceived status with PBS, believed that he was obligated to adhere to company views on the subject of unionization regardless of his ability to join the Union.

I accordingly find that given the position in which the Respondents had placed Dennis Henry, it was reasonable for the cleaning employees to believe that he reflected company policy and acted for management when he made the comments found below to be unlawful. Accordingly, I find that his conduct is attributable to the Respondents. *Great American Products*, 312 NLRB 962, 963 (1993).

2. The alleged refusal to hire and consider the Clean-Right employees

a. Legal principles

The complaint alleges that AM and PBS unlawfully refused to consider for hire and to hire the former Clean-Right employees when they took over the operations of 80–90 Maiden Lane on April 25, 2000.

A new owner of an enterprise is not obligated to hire any of its predecessor’s employees, but may not refuse to hire the predecessor’s workers solely because they were represented by a union or to avoid having to recognize a union. *NLRB v. Burns Security Services*, 406 U.S. 272 (1972); *Howard Johnson’s v. Detroit Local Joint Executive Board*, 417 U.S. 249 (1974). As the Board stated in *U.S. Marine Corp.*, 293 NLRB 669, 670 (1989):

The Board has held that the following factors are among those that establish that a new owner has violated Section 8(a)(3) in refusing to hire employees of the predecessor: substantial evidence of union animus; lack of a convincing rationale for refusal to hire the predecessor’s employees; inconsistent hiring practices or overt acts or conduct evidencing a discriminatory motive; and evidence supporting a reasonable inference that the new owner conducted its staffing in a manner precluding the predecessor’s employees from being hired as a majority of the new owner’s overall work force to avoid the Board’s successorship doctrine.

The Board has also established new standards regarding refusals to hire:

To establish a discriminatory refusal to hire violation, the General Counsel must show: (1) that the respondent employer was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire; and (3) that antiunion animus contributed to the decision not to hire the applicants. Once the General Counsel has made this showing, the burden shifts to the employer to show that it would not have hired the applicants even in the absence of their union activity or affiliation. *Tim Foley Plumbing Service*, 337 NLRB 598, 599 (2002); *FES*, 331 NLRB 9, 12 (2000).

In order to establish a discriminatory refusal to consider employees for hire, the General Counsel must show that (1) the respondent excluded applicants from a hiring process; and (2) that antiunion animus contributed to the decision not to consider the applicants for employment. Once this is established, the burden shifts to the respondent to show that it would not have considered the applicants even in the absence of their union activity or affiliation. *FES*, above at 15.

The following analysis will involve both theories of the complaint. First, it is clear that AM was hiring for certain daytime positions, and that PBS was hiring for its new cleaning contract at 80–90 Maiden Lane. PBS interviewed and hired for cleaning positions at the time it assumed cleaning responsibilities for the building. It is also clear that the applicants, whenever they applied, possessed the experience or training relevant to the positions sought. They had worked in the building immediately prior to the takeover by AM and PBS.

b. The hire for daytime positions by AM

As set forth above, on April 26, AM transferred three building service workers from other buildings which it managed to work in daytime positions of porter and elevator operator. It did not hire and apparently did not consider for hire the daytime Clean-Right employees Nehat Borova, elevator operator, Maria Hernandez, matron, and porter Renier Sabajo. There can be no question that AM was aware of at least two of those workers since Cunningham conceded seeing Borova and Hernandez when he visited the building in February, 2000.

The explanation offered by AM for not considering or hiring the former Clean-Right workers essentially is that (a) it did not want to accept the Local 32BJ contract (b) it expected the employees represented by the Union to leave and (c) it sought to employ outside subcontractors to clean the building. Its first two arguments support a finding of unlawful motivation in refusing to hire or consider them for hire. Its third argument is undermined since AM did not employ an outside service for the daytime positions. Rather, it directly employed those three men.

Indeed, it could have considered the former Clean-Right workers. In fact, on the day the three AM workers were transferred into the building Constantine made a list of the inquiring workers, the purpose of which was to consider them for jobs. Nevertheless, neither Constantine nor Cunningham called any of the workers on the list for a job. In fact, the day before, April 25, Constantine told the Clean-Right workers that the new company was coming in with its own staff.

I find that, inconsistent with its stated purpose of contracting out its cleaning work, AM hired its own employees for work in the building. It could have hired or considered for hire the former Clean-Right employees but admittedly did not want to accept the Local 32BJ contract and expected them to leave the building.

Based upon the above, I find and conclude that AM had a discriminatory motive in refusing to hire or consider for hire the former Clean-Right employees for work at 80–90 Maiden Lane. *E.S. Sutton Realty Co.*, 336 NLRB 405(2001).

c. *The hire by PBS*

By the time union-represented workers sought jobs, none were left. It is clear, and I find, that AM and PBS “took steps to ensure that incumbent cleaning workers could not make timely applications for work as in-house employees, in order to avoid hiring union labor.” *E.S. Sutton Realty Co.*, supra at 408.

The former Clean-Right employees “had the experience and training relevant to the positions, and antiunion animus was a motivating factor in the decision not to hire them.” *E.S. Sutton*, ibid.

“The predecessor employees were not notified until just before [PBS] took over the contract and new employees had already been hired that their services were to be terminated.” *Systems Management*, 292 NLRB 1075 fn. 2 (1989).

The Respondents’ contention that the employees and the Union were aware of the “rumors” of the building’s impending sale and were somehow negligent in not inquiring as to the identity of the new owner is not the point. The question to be answered is the motivation for not hiring the former cleaning workers. An objective examination of the evidence compels the conclusion that it was for discriminatory reasons.

The speed with which the hiring took place is significant. PBS official Francis was told to begin cleaning the building the very first evening that the contract between AM and PBS was signed. Francis had been told that the building would be empty – without staff, and that he should bring his own workers in. Francis assured Wasserman that he would do “the best he could” but the work may not be adequate if less than a full complement of staff was employed that night. Francis described his Regional Supervisor Sanchez as “scrambling to get staff.”

Considering the immediate need for workers, and PBS’ interest in performing its assignment well, it would appear that it would first look at the former employees who worked in the building as a source of competent help. The fact that it did not is some evidence of a discriminatory motive. *Daka, Inc.*, 310 NLRB 201, 205 (1993); *Systems Management*, 292 NLRB 1075, 1097 (1989).

PBS gave the impression that the decision to employ its services was immediate and sudden, thereby necessitating a last-minute effort to obtain personnel. This would seem to support its argument that it had to acquire staff in great haste. However, it is significant, that despite PBS’ alleged immediate need for workers, Sanchez had been interviewing prospective workers, as early as March 15, six weeks prior to the start-up and immediately put them to work on April 25. Accordingly, it is clear that PBS was preparing for work at 80 Maiden Lane and building a supply of employees ready to begin work. During the period of time that it was interviewing an outside source of help, it could have considered the in-house workers who were then cleaning 80 Maiden Lane. That it did not shows a determined refusal to consider them for hire and a refusal to hire them. *Daufuskie Island Club & Resort*, 328 NLRB 415, 420 (1999).

The former Clean-Right employees would seem to fit Francis’ criteria of those it would hire: people willing to work who are looking for work. In this connection, there can be no doubt that PBS knew that they met its criteria in selecting workers for its staff. Sanchez, who was then “scrambling” for staff, was

present on April 25, the evening of the takeover, at the time that the Clean-Right employees were terminated. The other criterion sought by Francis was that employees be willing to be trained. Here the former workers were already trained and working in the very premises that new employees were being hired for. Another criterion was that PBS values “loyalty” and those who “stay at the job” since there is much turnover in the industry. Here, the Clean-Right employees would be considered loyal, many having worked during the tenure of various cleaning companies for many years in the building.

In addition, DeArmas told Hernandez that he wished PBS would keep the crew since they seemed to be a “great crew” and the building was in bad shape. Similarly, he told Matos that he wanted to have workers like them. He concluded that the interviewees were the kind of people with the “right kind” of experience that PBS wanted, including much experience in the building. In contrast, the initial people hired by PBS had no experience at 80 Maiden Lane.

PBS correctly argues that the training period for cleaning personnel would necessarily be short given the routine, uncomplicated nature of their duties. It also contends that the fact that these applicants had great experience in the building should not be given great weight since they could be replaced by workers who could learn the job very quickly. Theoretically that may be the case but in looking at PBS’ practice in other buildings when it assumed the cleaning responsibilities there, it retained the current workers in its other buildings based upon their experience in those buildings. *Waterbury Hotel Mgmt v. NLRB*, 314 F.3rd 645 (D.C. Cir. 2003); *Weco Cleaning Specialists*, 308 NLRB 310, 311 (1992). Thus, Gorana decided to hire the former Golden Mark employees because they were experienced in the Olmstead buildings. I am aware that the route crews did more specialized work, but nevertheless, the current cleaning employees who did routine cleaning work were also retained at those locations.

A serious question arises, therefore, that given the practice of PBS in retaining the current cleaning staff at other locations at about the same time it took over 80 Maiden Lane, and its interest in loyalty and having people remain on the job, why did PBS not immediately retain the current cleaning personnel at 80 Maiden Lane. I find that the reason was that it sought to avoid a bargaining obligation with Local 32BJ. Departing from its usual hiring practice can be evidence of antiunion motive.

Additional evidence of an unlawful motive is the fact that when PBS was hiring new employees and transferring its other employees into the building, it had on file the applications of the former Clean-Right. An extended interview process was conducted with them. They filed applications on May 2, were interviewed on May 10, and offered jobs nearly two months later, on July 5. Significantly, nearly all those jobs involved locations other than 80–90 Maiden Lane.

Michael Francis, the chief executive of PBS, was well aware that hiring a majority of its employees who were Clean-Right workers would result in an obligation to bargain with the Union. There was evidence that his son, Robert, handled the negotiation of the PBS contract with AM, and that Robert was not aware of this legal principle, nevertheless Robert was aware, prior to his negotiation for 80 Maiden Lane, of the litigation

before the Board involving PBS and the Union. That litigation involved the principles of successorship and refusal to hire predecessor employees in order to avoid a bargaining obligation with this same Union. *Planned Building Services*, 330 NLRB 791 (2000); *Planned Building Services*, 318 NLRB 1049 (1995).

d. More onerous application procedures and the hiring

The complaint alleges that in about early May 2000, PBS unlawfully required that the former Clean-Right employees undergo a more onerous application and interview process for positions at 80–90 Maiden Lane and at other locations.

The General Counsel claims that in order to obtain applications the prospective employees were “forced” to travel to Fairfield, New Jersey, PBS’s headquarters, when it was distributing applications at locations in lower Manhattan, and further that they were required to return to New Jersey for interviews even though PBS was interviewing applicants in lower Manhattan at that time.

PBS did not suggest or require that the applicants go its New Jersey office for applications. The suggestion was first made by Union delegate Kertestan who recommended that they travel to New Jersey to obtain the applications. In fact, the PBS receptionist offered to mail an application to Zoila Gonzales but she volunteered to come to the office to pick it up since she lived in New Jersey. Thereafter, on their own, the former Clean-Right employees traveled to New Jersey on May 2 and obtained applications there.

I find, however, that PBS could have given applications to the former Clean-Right employees at the building. Thus, Sanchez was present on April 25 when they were terminated, and the following day, the workers left their names and addresses with Constantine and Cunningham who could have given that list to Sanchez or other PBS officials. This is in contrast to the distribution, in late May, by PBS of applications at the respective buildings to current employees of Golden Mark which it retained to work at the Olmstead buildings.

I further find that the interviews could have been conducted in Manhattan which admittedly would have been easier for DeArmas and the applicants, and also consistent with its usual hiring procedure. In fact, DeArmas noted he was “rarely” involved in the interview process, and that some of the prospective employees had “problems” traveling to New Jersey for the interview. Nevertheless, DeArmas requested that the interviews be held in New Jersey. This is also in contrast to the interviews for the Olmstead buildings, which was done in late May at 80 Maiden Lane, and also to the interviews, conducted by Sanchez at lower Manhattan buildings, of non-Clean-Right employee-applicants for positions at 80 Maiden Lane. I accordingly find and conclude that, as alleged in the complaint, the former Clean-Right employees were subject to more onerous application procedures and interview requirements.

The interviewing process for the former Clean-Right employees was apparently given special attention. Thus, DeArmas informed Robert Francis that they had applied, and asked for instructions on how to proceed. This is in contrast to Sanchez’ interviews of non Clean-Right applicants apparently without such high intervention. Further, DeArmas’ interviews of those

people was tainted with his belief that they were applying for work but had a “different agenda”—meaning that they appeared to be applying in good faith but possibly had been sent by the Union just to see if they would be hired even though they had no intention of accepting a job with much lower pay than their prior job.

Hiring procedures which depart from a company’s usual practice may be evidence of antiunion motive. *Waterbury Hotel Management v. NLRB*, 314 F.3d 645 (D.C. Cir. 2003); *Galloway School Lines*, 321 NLRB 1422, 1424 (1996). Similarly, an application process which is designed to frustrate attempts of union-represented employees to obtain jobs is also evidence of union animus. *Capital Cleaning Contractors*, 322 NLRB 801, 807 (1966).

On June 1, PBS took over the cleaning responsibilities for the Olmstead buildings and distributed job applications to the Golden Mark employees at the Olmstead buildings when it began servicing those buildings. Gorana decided to hire the former Golden Mark route crew for PBS because they were experienced in all the Olmstead buildings.

In addition, beginning June 1, the existing cleaning personnel at the Olmstead buildings were retained and further, at that time, an additional 21 new hires were made by PBS for those locations. Earlier, on May 10, former Clean-Right employees Gonzales, Matos, and Zavala were told by DeArmas that he expected PBS to obtain new accounts in early June and would contact them. Nevertheless, not only were they not contacted for the positions at 80 Maiden Lane, they were not called for the openings at the Olmstead buildings which were staffed in early June.

As set forth above, 15 non-Clean-Right people were hired for or transferred into 80 Maiden Lane during the period following the filing of applications by the Clean-Right employees on May 2 through July 5 when offers of employment were made to them. Clearly, the Clean-Right employees could have been offered employment at 80 Maiden Lane. They were experienced in the building being staffed and met all the requirements set forth by principals of PBS for employment. However, their one disabling attribute was their membership in Local 32BJ. Given the above facts, it was inevitable that they would not be offered work at 80 Maiden Lane.

The former Clean-Right employees were first offered jobs in July 5. Two of the applicants, Zoila Gonzalez and Reinier Sabato, were offered jobs at 80 Maiden Lane. The other applicants were offered jobs at different locations.

As set forth above, one week after the initial offers of hire were made, DeArmas sent an internal memo asking that Michael Francis be made aware of the offers of work to the former Clean-Right personnel and asking that the budget department make a note as to the “extra personnel” so it does not appear that the site is “over hiring on purpose.” The note added that DeArmas would not “continue to overhire” since he had authorization to hire one worker in each of five buildings, including Maiden Lane.

The import of this memo is unclear. The General Counsel ascribes a sinister purpose—a scheme to overhire in anticipation of the applications from the former Clean-Right employees, and a plan to allocate the hire of the former Clean-Right

employees to buildings other than 80 Maiden Lane. At the least, it demonstrates that PBS hired more people than needed, “extra personnel”, possibly to thwart the Clean-Right applicants. It should be noted that at the interviews DeArmas told the applicants that there were no openings at 80 Maiden Lane.

I find, based on the above, that PBS refused to hire and refused to consider for hire the former Clean-Right employees in violation of Section 8(a)(1) and (3) of the Act. As to the refusal to consider for hire, I find that the General Counsel has made the showing pursuant to *Tim Foley Plumbing Service*, and that AM and PBS have not shown that they would not have hired the applicants even in the absence of their union activity or affiliation.

3. Joint employer status

a. Legal principles

The complaint alleges that AM and PBS are joint employers, and that AM and Servco are joint employers. The Respondents deny such status:

In determining whether a joint employer relationship exists . . . the Board analyzes whether putative joint employers share or co-determine those matters governing essential terms and conditions of employment. The essential element in this analysis is whether a putative joint employer’s control over employment matters is direct and immediate. *Airborne Express*, 338 NLRB 597 fn. 1 (2002).

The basic principle of joint employer status was set forth in *Laerco Transportation*, 269 NLRB 324 (1984), where the Board stated:

To establish joint employer status there must be a showing that the employer meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction.

In *Clinton’s Ditch Co-Op Co. v. NLRB*, 778 F.2d 132, 138–139 (2d Cir. 1985), the Second Circuit Court of Appeals weighed the following five factors in considering whether a joint employer relationship existed: Hiring and firing; discipline; pay, insurance and records; supervision; participation in the collective-bargaining process. The appropriate time period in analyzing whether employers are joint employers is the period surrounding the unfair labor practices. *Whitewood Maintenance Co.*, 292 NLRB 1159, 1161 (1989).

b. Joint employer status of AM and PBS

i. Hiring and firing of employees

Paul Wasserman of AM told Robert Francis that he should consider Dennis Henry for a “supervisory role” for the building, and the contract contains provisions reflecting that Henry was hired by PBS at the “request” of AM, which paid the difference between Henry’s prior wage rate at AM and the wage PBS was then offering. In addition, when Henry voiced his unhappiness at the wages paid by PBS, Wasserman told him his pay would be raised and directed Francis to do so. Wasserman also told Henry that he would continue to receive the same holidays, vacation and other benefits he enjoyed while at AM.

The Board has held that a putative joint employer’s playing a “direct role” in creating a supervisory position and hiring an individual to fill that position was evidence of the putative joint employer’s role in personnel matters. *Aldworth Co., Inc.*, 338 NLRB 137, 140 at fn. 20 (2002). It should be noted that in that case the finding of joint employer status was established by extensive involvement by the putative joint employer in the “management process” relating to the employees involved. Although I find that Henry was not a statutory supervisor, it is clear that both AM and PBS considered him as a person who exercised supervisory authority over the evening employees of PBS, and directed their activities. *Aldworth* is therefore applicable since AM played a direct role in creating a supervisory position for Henry and suggested that PBS consider him for that job.

Further, when Henry became dissatisfied with the wages and benefits paid to him by PBS, he complained to AM official Wasserman who first directed PBS to grant him a paid holiday, and then later transferred him to the AM payroll. Thereafter, Henry continued to supervise and direct the PBS employees. This demonstrates that AM had significant control over PBS employee Henry to the extent that it effectively and immediately removed a PBS employee from that payroll and from PBS supervision and transferred him to the AM payroll, where he continued to direct the PBS employees.

PBS argues further that Henry’s return to the AM payroll was an “administrative convenience” enabling him to receive the AM wage and benefit package, with the only change upon his return to the AM payroll being his uniform. He performed the same work after his return to the AM payroll as he had before. PBS thus contends that at all times when PBS cleaned 80 Maiden Lane, Henry represented the interests of PBS only. The evidence establishes more, however. First, the recommendation by AM that PBS consider Henry as its supervisor, and then his transfer back to its payroll shows that AM’s “control over employment matters is direct and immediate” and that it “shared or co-determined those matters governing essential terms and conditions of employment.”

In addition, the contract between AM and PBS provides that the employees hired by PBS “shall be subject to the initial approval of” AM. In *W.W. Grainger, Inc.*, 286 NLRB 94 (1987), the contract stated that Grainger “shall reserve the right to approve the employment of each driver at the time of assignment to its service and thereafter have the right to require Rentar to remove any such driver and/or to substitute another driver or to transfer any driver to other work.” The Board cited that factor among other factors supporting joint employer status. See *M.K. Parker Transport, Inc.*, 332 NLRB 547, 549 (2000).

The General Counsel cites Zoila Gonzalez’ experience as an example of AM’s exercise of its contractual right to approve employees. Upon reporting to work on July 12, 2000 following her interview with PBS, Gonzalez refused to mop because of medical problems. Dennis Henry went to the building manager’s office and later informed her that if she would not mop she could not work. Although there was no evidence as to who, if anyone, Henry spoke to at that time, a fair inference may be drawn that AM building manager Constantine or his designee made the decision to present the ultimatum to Gonzales that she

must mop or else not be hired. This, too, shows AM's involvement in the hiring process of PBS employees.

The contract between AM and PBS provides that the price that PBS charges for its services is fixed for the first year of the contract. However, following the first year, its price may increase or decrease "to reflect adjustments in the direct out-of-pocket costs of PBS for the performance of the services provided herein as a result of changes in wage and/or fringe benefit costs pursuant to applicable collective bargaining agreements...." The General Counsel relies on this provision to argue that this clause establishes that AM agreed to finance any increase in the wages of PBS employees, citing *Hoskins Ready-Mix Concrete*, 161 NLRB 1492, 1493 (1966). I do not agree. In *Hoskins*, unlike here, the putative joint employer, Hoskins, contracted with General to run the business of Hoskins. Hoskins agreed to advance operating expenses and payroll funds to General, which then disbursed them. This is far different than the situation here. PBS is not running AM's business. The change in cost due to a collective-bargaining agreement is a typical arrangement in a subcontracting situation where the general contractor agrees to a price increase in the event of a raise in costs to the subcontractor, and does not constitute evidence of joint employer status. *Goodyear Tire & Rubber Co.*, 312 NLRB 674, 678 (1993).

It should also be noted that on April 26, AM official Constantine told the terminated workers that no positions were available with the new company, but that they should put their names on a list and if jobs became available he would call. This illustrates that AM involved itself in the hiring process for PBS—and spoke for PBS with respect to its staffing needs.

PBS correctly argues that there was no interaction between the former Clean-Right employees and PBS supervisors or officials until May 2 when they filed applications. The reason for this lack of interaction was PBS' deliberate refusal to have anything to do with them until that time. This is evident in the fact that Sanchez was present on April 25 when PBS took over but did not communicate with them as to their desire to continue to be employed at the building for PBS. Further, even though applications were filed, PBS initially hired non-former Clean-Right employees to fill positions at 80 Maiden Lane.

As set forth above, Jorge Cea was transferred to 80 Maiden Lane by PBS and worked as a PBS employee performing general cleaning tasks, operating the freight elevator and moving furniture. He was supervised by AM official Constantine, who told him that he would be working at 80 Maiden Lane for a few weeks. Cea was terminated from the building by Constantine, not by any PBS official. This demonstrates AM's involvement with PBS employees.

The above facts support a finding that AM and PBS are joint employers. Certain of the above incidents occurred at the time of the unfair labor practices on April 25—the time that the former Clean-Right employees were refused hire or consideration for hire: The contract between AM and PBS providing that PBS hires are subject to the initial approval of AM; the creation of Henry's supervisory position by PBS at the recommendation of AM; the direction by AM that his pay be raised; and Constantine's advice to the former Clean-Right employees that no positions with PBS were available.

ii. Direction of the work

Extensive daily supervision and "considerable direct involvement in the supervision of unit employees" have been cited, among other factors, in a finding of joint employer status. *Quantum Resources Corp.*, 305 NLRB 759, 760 (1991).

Diana Vasquez worked as the day matron at 80 Maiden Lane. The majority of her work hours were performed before Dennis Henry came on duty. AM official Constantine or AM employee Guerrero told her to perform tasks that were not part of her regular work duties such as cleaning a new floor that was just rented or cleaning the elevators. They also asked her to re-do work that was not done properly.

PBS argues that the occasional assignment of work by AM to Vasquez was insufficient to create a joint employer relationship, particularly where "the significant functions of hiring and firing... the granting of vacations or leaves of absences, were retained by" PBS. *Southern California Gas Co.*, 302 NLRB 456, 462 (1991). Indeed, the Board has noted that "an employer receiving contracted labor services will of necessity exercise sufficient control over the operations of the contractor at its facility so that it will be in a position to ... see that it is obtaining the services it contracted for. It follows that the existence of such control, is not in and of itself, sufficient justification for finding that the customer-employer is a joint employer of its contractor's employees. *Southern California*, above, at 461. However, it is significant that no PBS supervisors were employed during the daytime when Vasquez worked, and that Vasquez was directed by AM supervisors or employees.

As set forth above, Henry's job was ensuring that the cleaners did their work properly. He checked their work, and asked them to re-do their work. It is clear that when Henry was on the payroll of AM, beginning on August 1, 2000, he supervised their work.

Employees calling in sick called Henry, and those who became sick while at work informed him. He reassigned their work to other employees who received overtime pay. He selected the workers and then reported to Gorana that an employee was absent and he found replacements. The authorization of overtime is a "strong factor" in establishing joint employer status. *Computer Associates, International, Inc.*, 332 NLRB 1166, fn. 2 (2000). In that case, the Board found a joint employer relationship where there was an "ongoing, close and substantial supervision of the employees by the respondent's managers." The putative supervisor assigned work, made daily tours of the facility and wrote up deficiencies in work orders.

In *Syufy Enterprises*, 220 738, 740 (1975), the Board stated, in finding a joint employer relationship between a theater owner and a janitorial contractor, that the theater managers exercised "actual control over work activities, personnel problems and even contract scope difficulties arising at the theaters." The Board noted that "while janitorial tasks may be routine they often also are of such a nature that they require a meticulous attention to detail and vigilant if not continuous supervision." Here, too, it appears that the tenants made complaints about the work done which required more than superficial supervision of the cleaners' work. Henry's specific job was to check their work and make sure that it was done correctly.

AM and PBS argue that at the time PBS began cleaning the building, in April, 2000, the two companies were separate entities and not joint employers. They state that inasmuch as the General Counsel cannot prove that they were joint employers at the beginning of their relationship, the strategy of the complaint is to find that they became joint employers sometime later and relate back that status to the outset, thereby finding joint liability for the failure to hire the former Clean-Right employees. Specifically, AM argues that even if it is found that it and PBS became joint employers of Dennis Henry when he returned to the AM payroll in August, 2000, he was their only joint employee, and AM cannot be liable for any alleged unfair labor practice which occurred prior to August, 2000, including the alleged failure to hire employees which took place in April, 2000. Moreover, according to AM and PBS, even if Henry is considered a joint employee as of August, 2000, his function in the building is not sufficient to establish a joint employer relationship since he exercised no supervisory functions but was merely present to ensure that AM obtained the services it paid for. *Southern California Gas Co.*, 302 NLRB 456, 462 (1991).

Although Henry did not exercise supervisory authority in behalf of AM over the PBS employees for the first 2 months of his employment at 80 Maiden Lane, he nevertheless did so beginning on August 1 as an employee of AM. This 2-month period is not so remote in time to negate a finding of joint employer status. This is particularly true inasmuch as it is obvious that the failure to hire or consider for hire the Clean-Right employees continued through at least July when the former Clean-Right employees were first offered jobs by PBS. Accordingly, evidence of joint employer status was concurrent with the unfair labor practices.

I accordingly find and conclude that AM and PBS are joint employers and that AM meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction of the employees of PBS. *Laerco*, above.

c. AM and Servco

As set forth above, Henry suggested to Servco the names of PBS employees who he believed were the best workers. Although I found that Servco independently conducted interviews of those employees, it appears that Henry played some role in at least their initial interview by Servco. Further, upon employee Velez' complaint to Servco that Servco was offering to pay her less than she had been receiving with PBS, Henry suggested to Servco officials Giacoia and Paredes that the workers should be paid at their old rate. That ultimately was done.

In addition, Henry, as an AM employee, continued to supervise the Servco night crew as he had the PBS employees. The contract between AM and Servco provides that AM would supervise the Servco workers. During the day, AM official Constantine continued to supervise Servco's day matron as he had the matron employed by PBS.

I accordingly find and conclude that AM and Servco are joint employers and that AM meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction of the employees of Servco. *Laerco*, above.

d. Joint liability of the joint employers

AM and PBS argue that, assuming that they are found to be joint employers, each may not be held liable for the other's alleged violations of the Act, because any unfair labor practices committed by the other was outside the scope of the joint employer relationship and was committed without knowledge by the other. *Southern California Gas*, above, at 462; *Capitol EMI*, 311 NLRB 997, 999-1000 (1993).

In *Capitol EMI*, above, at 1000, the Board considered the question of whether one joint employer may be held liable for the unfair labor practices of another. It reasoned that it would be proper to hold each joint employer liable if they had a mutual interest in warding off union representation from the jointly managed employees particularly where each joint employer has representatives at the worksite, even if only on an occasional basis, and shares the supervision of the jointly employed employees. In such circumstances, each joint employer would be in a position to learn of its co employer's unlawful actions. The Board adopted the following burdens of proof:

The General Counsel must first show (1) that two employers are joint employers of a group of employees and (2) that one of them has, with unlawful motivation, discharged or taken other discriminatory actions against an employee or employees in the jointly managed work force. The burden then shifts to the employer who seeks to escape liability for its joint employer's unlawfully motivated action to show that it neither knew, nor should have known, of the reason for the other employer's action or that, *if* it knew it took all measures within its power to resist the unlawful action.

The General Counsel argues that AM had a "mutual interest" with PBS in avoiding having unionized employees in the building, and that AM and PBS acted in furtherance of that interest. The General Counsel further asserts that AM participated in the discrimination by determining that it would not hire any of the Clean-Right employees, and on April 25 and 26, misleading those employees who inquired about jobs of AM's officials. AM knew that if PBS hired a majority of its employees who had previously been employed by Clean-Right, that PBS would be obligated to bargain with the Union. AM did not consider any of the former Clean-Right employees for positions with it even though it directly hired three employees to perform the same work done by the prior workers.

Further, the General Counsel argues that AM assisted PBS in its efforts to evade a bargaining obligation with the Union by interrogating and threatening employees and promising them higher wages.

In addition, the General Counsel asserts that even if AM did not know of the alleged unlawful refusal to hire the former Clean-Right employees, the evidence establishes that it should have known of such conduct. It asserts that the picketing and distribution of flyers in front of 80 Maiden Lane should have put AM on notice that the Clean-Right employees protested the refusal by PBS to hire them, and sought work with PBS. Given this publicity, the General Counsel argues that AM had an obligation to inquire about the employees' claims and would therefore have become aware of the alleged unlawful conduct by PBS. *Action Multi-Craft*, 337 NLRB 268, 269 (2001). The Gen-

eral Counsel finally argues that AM did not meet its final burden, assuming it knew of PBS' unlawful conduct, to resist such action since it participated in the unlawful conduct.

I agree with the General Counsel's arguments. I do not believe that AM was an innocent bystander in the broader refusal to hire and refuse to consider for hire the former Clean-Right employees. In the first instance it refused to recognize Local 32BJ or hire any Union represented employees.

For similar reasons, Servco as the joint employer of AM, was not an innocent in its "partnership" with AM to staff the building. Dennis Henry, an AM employee, told the inquiring striking PBS employees that Servco was bringing in its own workers and that they did not want anyone from the strike. Similarly, Constantine told them that he could not do anything for them because of their participation in the strike. Servco official Giacoia's threat to immediately fire anyone if they spoke to the Union is evidence of Servco's antiunion animus.

4. The successorship issue

The complaint alleges that the following actions establish the successorship of AM and PBS to the Witkoff Clean-Right operation at 80 Maiden Lane: (a) beginning on about April 25, 2000, AM and PBS took over building maintenance services at 80 Maiden Lane in a basically unchanged form and manner (b) AM and PBS through Cunningham, informed the 80-90 Maiden Lane employees that they would not be hired to work at that building (c) but for the conduct set forth in (b) above, AM and PBS would have employed, as a majority of its employees at 80-90 Maiden Lane, individuals who were previously employees of Witkoff and Clean-Right.

"A mere change in ownership of the employing business enterprise does not itself absolve the new owner from the obligation to recognize and bargain with the labor organization that represented the employees of the former owner." *Premium Foods, Inc.*, 260 NLRB 708, 714 (1982). In determining whether there is substantial continuity between the predecessor business and the new employer sufficient to obligate the new employer to bargain, assuming a majority of its new employees had been represented or, as alleged here, but for the alleged unfair labor practices, a majority of its new employees would have been hired from those represented by the Union, the Board looks at the following factors: (a) there has been substantial continuity of business operations (b) the new employer uses the same plant with the same machinery, equipment and production methods; and (c) the same or substantially the same employees are used in the same jobs under the same working conditions and supervisors to produce the same product or provide the same service. This approach is primarily factual in nature and is based on a consideration of the totality of the circumstances in any given situation." *M.K. Parker Transport, Inc.*, 332 NLRB 547, 549 (2000).

Here, the Clean-Right employees were replaced by AM and PBS employees performing essentially the same work in the same building in the same manner with no hiatus in operations.

Having concluded that AM and PBS violated Section 8(a)(3) of the Act by refusing to hire or consider the former Clean-Right employees for employment at 80-90 Maiden Lane, the question of whether they violated Section 8(a)(5) of the Act by

refusing to bargain with Local 32BJ turns on whether they are successor employers to Clean-Right.

The threshold test developed by the Board and approved by the Supreme Court in *NLRB v. Burns Security Services*, 406 U.S. 272 (1972) and *Fall River Dyeing v. NLRB*, 482 U.S. 27 (1987) for determining successorship is: (1) whether a majority of the new employer's work force in an appropriate unit are former employees of the predecessor employer; and (2) whether the new employer conducts essentially the same business as the predecessor employer. *Sierra Realty Corp.*, 317 NLRB 832, 835 (1995).

"It is well settled that where . . . an employer is found to have engaged in a discriminatory refusal to hire its predecessor's employees, the Board infers that all the former employees would have been retained, absent the unlawful discrimination. Under such circumstances the Board presumes that the union's majority status would have continued." *Sierra Realty*, above, at 835.

The complaint alleges that on April 25, 2000, Cunningham informed the workers that "they would not be hired to perform building service and maintenance work at 80-90 Maiden Lane," and that "but for" such conduct, PBS and AM would have employed, as a majority of its employees at 80-90 Maiden Lane, the former Clean-Right employees. AM and PBS allege that no such conversation occurred. As set forth above, on April 25, Constantine told the workers that the new contractor had its own workers, and the following day told them that no positions with the new company were available. On April 25, Cunningham told them that no applications were available. Regardless of whether Cunningham precisely told them that they would not be hired, the message, given by both officials was clear—the new company had its own workers and therefore there were no openings for them, and no applications were then available. This was in fact the case—PBS rushed to hire and transfer other workers into the building, and in fact continued to hire from those sources even though the former Clean-Right workers had applied for work, were available for work, and met the hiring criteria established by its top official, Robert Francis.

PBS further argues that it could not have been a successor because a majority of the Clean-Right employees was not interested in employment with it. That fact has not been proven. Moreover, it is clear that employees overcame obstacles placed in their path in order to obtain applications and attend interviews held in New Jersey. Although it is true that the Union told them to accept whatever wages were offered and it would pay the difference in their pay rates, that does not prove that employees were not interested in work with PBS. It is also true that one employee told PBS that she could not afford to work at the PBS rate, but that was not the sentiment of the other workers.

PBS contends that it did not discriminatorily refuse to hire a majority of its employees from the former Clean-Right employees, and claims that prior to its start of operations at 80 Maiden Lane, it was not given any information from Witkoff, Clean-Right, AM, or the Union concerning the workers who were cleaning the building "or even their existence," and therefore acted properly in bringing its own crew to staff the building when AM gave it about 2 hours' notice to begin its work. As set forth above, PBS supervisor Sanchez was present at the

start-up of operations and was well aware that the former Clean-Right employees were being terminated that night. In addition, AM official Constantine was also well aware of the former workers and in effect acted as a PBS agent in advising them that no jobs were available.

PBS further argues that of the 16 former employees of Clean-Right, only eleven filed written applications and only eight attended interviews. It notes that all eight received job offers, but not to positions at 80 Maiden Lane. Its theory then, is that even assuming all eight were offered and accepted jobs at 80 Maiden Lane that still would not have constituted a majority of the PBS workforce.²² Inasmuch as I find that the former Clean-Right employees were unlawfully refused hire or considered for hire, it is inferred that all the former employees would have been retained, absent the unlawful discrimination, and the Union's majority status would have continued. *Sierra Realty*, above, at 835.

It is clear that AM and PBS are the successor employers to Clean-Right. AM and PBS employees immediately began cleaning the building upon the departure of the Clean-Right employees. They worked in the same building using similar equipment with no hiatus in their work.

As successors, AM and PBS had a duty to bargain with Local 32BJ over the terms and conditions of the employees employed at 80–90 Maiden Lane. See *Whitewood*, above. It is undisputed that neither offered to bargain with the Union. Accordingly, by failing to recognize and bargain with the Union, and their unilateral imposition of new terms and conditions of employment for the employees, AM and PBS violated Section 8(a)(1) and (5) of the Act. *E.S. Sutton Realty*, above, 336 NLRB 405, 408 (2001).

I find also, as alleged in the complaint, that AM and Servco is the successor to the AM – PBS operation inasmuch as Servco has continued the operation of its cleaning service in the same building in essentially the same manner, with certain of the same employees, and the same supervisor, Dennis Henry.

As set forth above, I have found that AM and Servco have unlawfully refused to hire or consider for hire the striking PBS employees. Accordingly, the same principles as set forth above apply to the Servco operation.

Where an employer unlawfully discriminates in its hiring in order to evade its obligations as a successor, it does not have the otherwise normal right of a successor to set initial terms of employment without first consulting with the union. It is also unlawful for such an employer to unilaterally change its employees' terms and conditions of employment if the employer has a legal duty to bargain with a union. I accordingly find that AM, PBS, and Servco were not entitled to set the employees' initial terms of employment or make unilateral changes in their

²² PBS asserts that the Board has not adopted the concept of "joint successors," citing *Mason City Dressed Beef, Inc.*, 231 NLRB 735 (1977) and *United Food & Commercial Workers*, 267 NLRB 891 (1983). Neither case supports its position. In *Mason City*, the Board noted that inasmuch as it agreed with the judge's conclusion that the two employers were successors, it found it unnecessary to decide whether they were also joint employers. 231 NLRB 735, fn. 3. In *United Food*, the Board stated that neither the joint employer nor the successor principles were applicable to the facts therein. 267 NLRB at 893.

terms and conditions of employment. By making such unilateral changes, they violated Section 8(a)(1) and (5) of the Act. *Daufuskie*, above, at 422; *Galloway School Lines*, 321 NLRB 1422, 1427 (1996).

5. The violations concerning UWA

The complaint alleges that AM and PBS unlawfully assisted UWA by informing workers that they were required to join UWA, by distributing and soliciting authorization cards for UWA, and by recognizing UWA, and signing and enforcing a collective-bargaining agreement with it, notwithstanding that UWA did not represent an uncoerced majority of the unit employees, and notwithstanding that AM and PBS were obligated to bargain with Local 32BJ regarding the unit employees.

a. Solicitation of authorization cards and dues deductions

In June, 2000, Robert Francis directed that the PBS payroll department send UWA dues-deduction authorization forms to 80 Maiden Lane and that the employees sign them. That was done. Dues-checkoff authorizations must be made "voluntarily." An employee cannot be compelled to execute them regardless of the existence of a valid union-security clause. By directing its employees to sign UWA dues authorization forms, PBS violated Section 8(a)(1) and (2) of the Act. *Gloria's Manor Home for Adults*, 225 NLRB 1133, 1143 (1976).

Dennis Henry gave Diana Vasquez a dues-authorization form to fill out. Ana Guzman and Maria de la Cruz testified that in August, 2000, Walter Nemecek, who was at that time substituting for Dennis Henry, gave them dues-deduction forms which were attached to their paychecks.

As set forth above, while at work, employees Aguilera, Andrade, and de la Cruz were asked by Dennis Henry to go to the basement. They saw a person from UWA and their co-workers. Castellanos signed the card in Henry's office. Henry told her that "John" left it for her to fill out. Varela testified that Gilbert Sanchez told her that UWA was a "company union" and that a "regulation" required her to sign the card. I credit Varela's uncontradicted testimony. By soliciting its employees to sign cards for a union, and requiring employees to do so, PBS violated Section 8(a)(1) and (2) of the Act. *Sound One Corp.*, 317 NLRB 854, 858 (1995).

Ana Guzman refused to sign a card but nevertheless dues were deducted from her pay in violation of Section 8(a)(1) and (2) of the Act. *Laidlaw Transit*, 315 NLRB 509, 513 (1994). By

b. Execution and enforcement of the collective-bargaining Contract with UWA

The General Counsel argues that PBS was obligated to recognize and bargain with the Union by virtue of its unlawful refusal to hire or consider for hire the former Clean-Right employees, and therefore PBS could not have validly recognized or executed a contract with UWA.

Alternatively, the General Counsel argues that the execution and enforcement of the contract between PBS and UWA is unlawful because UWA independently did not represent an uncoerced majority of the employees of 80–90 Maiden Lane. I need not consider this alternative argument inasmuch as I find that PBS was obligated to recognize and bargain with the Union because of its unlawful refusal to hire or consider for hire

those workers, and because it was a successor employer to the Clean-Right operation. I accordingly find and conclude that PBS was not free to recognize or sign a contract with UWA as the representative of its employees. *Shortway Suburban*, above, at 328–329.

A further violation has been proven in that PBS rendered unlawful assistance to UWA by remitting dues deductions to UWA one month after that union disclaimed interest in representing the employees and requested that PBS cease deducting dues and return to any employees any sums that have been deducted but not yet sent to UWA. *Mashkin Freight Lines*, 261 NLRB 1473, 1481 (1987).

Inasmuch as I find that the contract between PBS and UWA was not lawfully entered into, I also find violative the Notice given to the PBS employees in September, 2000, which stated that a strike would be in violation of the no-strike provision. *Midwestern Personnel Services*, 331 NLRB 348, 353 (2000).

6. The alleged interference with employees' section 7 rights by AM and PBS

The complaint alleges that AM and PBS engaged in conduct in violation of Section 8(a)(1) of the Act.

At the time of the September, 2000 meeting, there were rumors that PBS would lose its contract, and the former Clean-Right employees were engaged in picketing. PBS gave the workers a notice which said that it learned that Local 32BJ was encouraging them to strike.

I credit employees de la Cruz, Guzman and Varela regarding Cunningham's statement at the meeting that they would lose their jobs if they signed for Local 32BJ, and Henry's statement to Vasquez that if the workers joined Local 32BJ they would be "taken out of the building." Although there were minor variations in their recitations of the comments, the testimony of the employees was similar and consistent on a subject that was of vital concern to them. I accordingly find that the threats of discharge made by Cunningham and Henry violated Section 8(a)(1) of the Act.

Vasquez was also asked by AM official Donahue if she intended to join the strike because he would have to get another employee to perform her work if she was not working. I find that this comment constituted an unlawful interrogation and the creation of the impression of surveillance as alleged in the complaint. Questions about employee strike intentions are not per se unlawful but must be judged in light of all the relevant circumstances. Where the question is coupled with threats, the interrogation is unlawful. *Mosher Steel Co.*, 220 NLRB 336 (1975). Donahue's question of Vasquez was conducted in the presence of top officials of AM, and was accompanied by his remark that Local 32BJ would not enter the building. At the same time, Constantine told Vasquez that she had been seen speaking to Machado, a former Clean-Right employee who had been striking. Under these circumstances, I find that Donahue's question of Vasquez concerning her strike intentions reasonably interfered with her Section 7 rights. *Mosher*, above; *Mobile Home Estates, Inc.*, 259 NLRB 1384 (1982). I further find that the question concerning Machado constituted the impression that Constantine had engaged in surveillance of the union activities of Vasquez. *Zimmerman Plumbing Co.*, 325 NLRB 106,

110 (1997). I further find that PBS engaged in unlawful surveillance of its employees' union activities as set forth in the July 19, 2000 memo in which supervisor Hernandez recorded in Marie Michel's file that three new workers were seen speaking with three Local 32BJ agents, and that he believed that they were "plants" or paid by the Union. He noted that he would "monitor."

I also find that Constantine's request that Vasquez inform him of anything she learns about a big strike planned by the Union against PBS, constitutes unlawful interrogation and a request to inform on union activities. *Tony Silva Painting Co.*, 322 NLRB 989 fn. 1 (1997).

Guzman, supported by Varela, stated that Cunningham said that if PBS lost the contract, the workers would remain in the building and their salaries would be increased. I cannot find that this statement is a violation in view of the employees' question about why their salaries were so low. Cunningham's response related only to PBS losing the contract and his comment that he would either try to "fix" that or raise their salaries was not tied to the Union's organizing the workers.

7. The alleged threat of an immigration investigation

As set forth above, during General Counsel's examination of witness Vasquez, PBS counsel objected to a question concerning a line of inquiry relating to good acts of the witness. In the course of the objection, PBS counsel stated that based upon the offer of such evidence he would "have to get an investigator and I'll find out whether she's here in this country illegally." The complaint alleges that this comment was an unlawful threat to institute an immigration investigation in violation of Section 8(a)(1) and (4) of the Act.

In *Stuart Bochner*, 322 NLRB 1096, 1102, the Board found that attorney Bochner had acted inappropriately in stating to the witness that he would wait to see if the Board reported him to the INS (for obtaining a work permit under another name), and if not, he would tell the INS. In *Commercial Body & Tank Corp.*, 229 NLRB 876, 879 (1977), the Board found that an official of the respondent told a witness outside the hearing room that he was surprised that he was in a government building, and asked him what would happen if the immigration service came in. The Board held that such comments were a threat, and were calculated to induce the witness either not to testify or to give false testimony in violation of Section 8(a)(1) of the Act. In *Iowa Beef Processors, Inc.*, 226 NLRB 1372, 1374–1375, the Board found that an attorney's statement on the record in front of witnesses that no immunity to criminal prosecution applied to their upcoming testimony, and that if new evidence was adduced concerning an alleged theft, it would be obligated to investigate and "take whatever action" was necessary. The Board found that this comment constituted intimidation of the witnesses and an interference with the witnesses and their right to testify in violation of Section 8(a)(1) of the Act. The Board noted that if counsel had "merely made his point to the Administrative Law Judge and the General Counsel, then there would be no cause for concern on our part."

The immigration status of Vasquez was not at issue in this hearing. PBS correctly argues that the employment application legitimately asked about the prospective employee's immigra-

tion status, but that matter was not at issue here. Although PBS counsel made an evidentiary objection, it was phrased in a way that was more than an objection. The comment was not as much as an objection as it was the mention of an intended action he would take against Vasquez—“that now means that I have to get an investigator and I’ll find out whether she’s here in this country illegally.”

It is true that PBS counsel was suggesting that if the pending question was permitted, allowing evidence of unrelated prior good acts, he should also be permitted to offer evidence of bad acts, that Vasquez was in the U.S. illegally. Unfortunately, the choice of his analogy could, objectively, only be viewed as a threat to Vasquez that he would uncover her allegedly illegal status.

Such a comment served not only as a threat to Vasquez that her immigration status would be investigated, but also served to discourage her interest in testifying in this proceeding. I accordingly find that the statement by PBS counsel violated Section 8(a)(1) and (4) of the Act.

8. Jorge Cea

a. The alleged unlawful rescission of a job offer to Jorge Cea

As set forth above, on September 3, 2000, Cea was assigned to work for AM at 80 Maiden Lane. During his first week of work Cea spoke to Union agent Velez for about 10 minutes outside the building. I credit Cea’s testimony that while he spoke to Velez he noticed Constantine across the street looking at him. I have considered the fact that there were demonstrators in the immediate area as well as vehicular traffic, but I credit Cea’s testimony that he saw Constantine. He told Velez that he believed that he was being watched. Later events support this finding. The following day, Constantine told Cea that he would be replaced by a person recommended by a building engineer.

The complaint alleges that AM rescinded its offer of a job to Cea. AM argues that no offer was made. The theory of the complaint is not that Cea had already been hired by AM. Indeed, Cea conceded that Constantine told him when he began work that he would be working at the building only for a few weeks. That view was apparently changed in view of Constantine’s testimony that he had a “positive feeling” about Cea’s work and believed him to be a good worker. Accordingly, I find that Constantine offered Cea employment and, in accordance with Cea’s credited testimony, asked him if he wanted to work for him in the building or for PBS. When Cea replied that he wanted to work for AM in the building because he would be making more money, the offer was effectively made.

The offer was immediately withdrawn only the following day when Constantine told Cea that he would be hiring someone recommended by the building’s engineer. Nevertheless, Constantine took Cea’s contact information and said he would call if he was needed.

I find that the General Counsel has made a prima facie showing that the offer to Cea was rescinded because of his union activity in speaking with Velez during a Union demonstration which was observed by Constantine. *Wright Line*, 251 NLRB 1083 (1980). An offer of a job in the building was made to Cea accompanied by a statement that he was doing a good job and would be considered for a job at the building. The fact that the

offer was withdrawn immediately upon Cea engaging in the open activity of speaking to Union agent Velez is extremely suspicious. I have found, above, that Constantine exhibited animus toward the Union by violating Section 8(a)(1) of the Act by requesting that employee Vasquez inform him if she learns of the Union’s plans to engage in a strike against PBS.

AM’s defenses to this allegation and the record of its later hire of Alejandro Ibarra raises further suspicions. Thus, in his opening statement, counsel for AM stated that Cea was discharged for absenteeism. However, at hearing its defense was that Cea was replaced by an individual recommended by the building’s engineer. Further, and significantly, only one week later, on September 19, a new employee, Alejandro Ibarra was hired as a porter by AM. The question immediately arises as to why Cea was not hired in view of Constantine’s satisfaction with his work and his statement that he would be contacted if needed in the future.

b. The alleged constructive discharge of Cea

The complaint alleges that PBS constructively discharged Cea termination by offering him a work schedule it knew he could not accept. The two-part test for proving such a discharge was restated by the Board in *Manufacturing Services*, 295 NLRB 254, 255 (1989):

First, the burdens imposed upon the employee must cause, and be intended to cause, a change in working conditions so difficult or unpleasant as to force him to resign. Second, it must be shown that those burdens were imposed because of the employee’s union activities.

The Board has held that when an employer assigns employees to work shifts when it knows that by doing so it will conflict with an employee’s educational programs, the first factor required in proving a constructive discharge has been proven. *Olympic Limousine Service*, 278 NLRB 932, 938–939 (1986); *Ingalls Shipbuilding*, 242 NLRB 417, 421–422 (1979).

The evidence establishes that early in his tenure, Cea informed his supervisor Neziri that he needed day work in order to take classes with the Mason Tenders Union in the evening, and that Neziri accommodated that request by assigning him to day work at 80–90 Maiden Lane, and upon his removal from that job, was assigned to day-shift work at another location. Upon the ending of that job, Neziri assigned him to an evening position and when Cea protested that he could not work that shift because of his evening classes, he was fired.

In addition to the above, the General Counsel must also show that Cea was assigned to the evening shift because of his union activities. That burden has not been met. The General Counsel asks that I infer knowledge by PBS of Cea’s activity behalf of Local 32BJ while employed at 80–90 Maiden Lane. It is argued that knowledge of employee activities in general in behalf of the Union at 80–90 Maiden Lane must be taken to include knowledge of Cea’s alleged activities in its behalf. However, the evidence does not permit such an inference to be drawn. I have found that AM official Constantine rescinded an offer of employment for Cea because he was seen speaking with a un-

ion agent. There is no evidence that PBS supervisor Neziri knew of that activity or was told of it by Constantine.

I therefore cannot find that PBS or Neziri was aware of the minimal union activity of Cea at 80–90 Maiden Lane. The absence of animus toward Cea is further shown by Neziri's assignment of Cea to a day position on 62nd Street following his departure from 80–90 Maiden Lane. Upon the completion of that job Neziri again assigned Cea to another job, but this time Cea refused to accept it because of his school schedule. Neziri discharged him saying that he needed someone who was reliable and who would follow orders. In the absence of evidence that PBS or Neziri was aware of Cea's union activities I cannot find that he has been constructively discharged.

The General Counsel's evidence concerning the availability of daytime work for Cea does not withstand scrutiny. While it is true that certain employees were transferred into certain buildings serviced by PBS, that occurred prior to Cea's discharge by Neziri. General Counsel's argument that Cea could have worked the 10:30 p.m. to 7 a.m. shift since that would not have conflicted with his school schedule is not relevant since Cea asked for daytime employment.

9. AM's termination of its subcontract with PBS

The complaint alleges that the termination by AM of its cleaning contract with PBS violated the Act because the 80–90 Maiden Lane bargaining unit supported Local 32BJ. The complaint further alleges that AM's decision to terminate the contract was a mandatory subject of bargaining, and by not bargaining with the Union concerning that decision it violated the Act.

A *Wright Line* analysis will be applied in determining whether AM terminated its subcontract with PBS for unlawful reasons. *Whitewood Maintenance Co.*, 292 NLRB 1159, 1165 (1989). Under such an analysis a joint employer may be held liable for terminating its subcontract. *Whitewood*, above.

Only about 1 month after the employees at 80–90 Maiden Lane began a strike with accompanying noisy picketing, AM terminated its contract with PBS. It is clear that AM was opposed to having any relations with Local 32BJ as evidenced by its refusal to accept the Local 32BJ contract or retain any Clean-Right employees represented by the Union. In addition, it expected, in its counsel's view, that the Union and the employees would leave the building and not return. In addition, the unlawful threats of discharge by Cunningham and Henry, set forth above, provide further proof that it was opposed to the Union's presence at the building. It is clear that the strike and picketing were related to the decision to terminate the contract. I accordingly find that the General Counsel has shown that the Union's presence and activities at the building were a motivating factor in the cancellation of the PBS contract by AM. *Wright Line*, above.

The burden then shifts to AM to prove that it would have terminated the contract even in the absence of the Union activity. AM has not done so. Aside from the vague letter explaining the reason for the termination, no credible evidence has been adduced which would prove a valid reason for the termination of the contract. *Wright Line*. I accordingly find that the termination of its contract with PBS violated the Act.

PBS offered to begin the second year of its contract with a 4-percent increase. AM's letter of termination was vague—it stated that the contract was terminated for "several reasons, not the least of which is economic." Accordingly, the disturbance to tenants may have been one reason. AM official Constantine said that the level of cleaning began to "suffer" when the strike began. I do not believe that the reason was totally economic. PBS offered a lesser increase for a renewal at another, non-Union AM building which was accepted by AM. Accordingly, if the reason was purely economic it appears clear that agreement would have been reached. In addition, there is no evidence that any complaints that AM might have had with the level of cleaning service was brought to the attention of PBS. *Computer Associates International*, 324 NLRB 285, 286 (1997).

I accordingly find and conclude that the cancellation of the PBS contract by AM violated Section 8(a)(1) and (3) of the Act. *Whitewood Maintenance*, above.

AM, as the joint employer, was obligated to bargain over the decision to terminate the subcontract. *W.W. Grainger*, 286 NLRB 94, 96 (1987). Inasmuch as AM did not do so, its failure to bargain with Local 32BJ violated Section 8(a)(1) and (5) of the Act.

10. The alleged interference with employee rights by AM and Servco

As set forth above, on June 14, 2001, striking PBS employees asked Henry and Constantine for applications for the new contractor. Henry said that the new company did not want anyone from the strike. Constantine told the former PBS workers that he could not do anything for them since they made trouble and refused to return to work when asked. On June 18, Constantine reminded them that he had told them that the Union was not wanted in the building. Both men, then, essentially told the striking PBS workers that they were ineligible for work with Servco because of their union activity. I credit the testimony of the workers which was consistent with what I believe to be the overall plan of AM to avoid having Union-represented workers employed at 80–90 Maiden Lane.

I credit the testimony of prospective Servco employee Velez, that on June 15 Giacoia threatened prospective Servco employees with immediate discharge if they spoke to Local 32BJ representatives. Giacoia's testimony was discredited in similar circumstances involving this Union in *Citywide Service Corp.*, 317 NLRB 861, 875 (1995), where he testified that if he could avoid a union contract he would do so. *Citywide*, at 876. Credibility determinations in a prior proceeding may be considered in assessing the credibility of a witness in the instant hearing. *Adams Delivery Service, Inc.*, 237 NLRB 1411, 1417, 1418 (1978).

11. The alleged refusal to hire or consider for hire by AM and Servco

I find above that that Henry and Constantine, as an agent and supervisor, respectively, of AM, which is a joint employer of Servco, thereby speaking in behalf of Servco, told the striking employees that they would not be considered for hire because of their involvement with the Union or because they were en-

gaged in strike activity. Those comments coupled with Giacoia's threat to discharge employees if they speak with the Union establish that Servco would not hire or consider for hire the PBS employees because of their Union activities.

It is clear that at the time of these comments, Servco was hiring, the applicants had experience in the positions for hire, and that antiunion animus contributed to the decision not to hire the applicants. Once the General Counsel has made this showing, the burden shifts to the employer to show that it would not have hired the employees even in the absence of their union activity or affiliation. *Tim Foley* and *FES*, above.

While discouraging the striking PBS employees from applying for work at Servco, at the same time, Servco hired non-striking PBS employees. This procedure differed from its ordinary hiring routine which was to interview, screen and hire applicants at its Bronx office. In addition, "when it is futile for employees to file applications, an employer is barred from asserting that it lawfully failed to hire them because of the absence of applications." *Shortway Suburban Lines*, 286 NLRB 323, 326 (1987).

12. The alleged refusal to bargain with the Union by Servco

It is clear that Servco is the successor employer to AM and PBS. Upon the termination of the PBS contract by AM, Servco immediately began cleaning work in the same building in the same manner as PBS. It continued the employ of Dennis Henry as its supervisor.

As the successor to PBS and as a joint employer with AM, Servco had a duty to bargain with Local 32BJ over the terms and conditions of the employees employed at 80-90 Maiden Lane. See *Whitewood*, above. It is undisputed that Servco did not bargain with the Union.

Servco hired its employee complement on June 15 and began work that day. On June 18, 2001, the Union wrote to AM seeking positions with the new contractor for the employees it represented. AM wrote that those workers were free to seek jobs with the new contractor. Apparently, the Union did not learn the name of the new contractor, Servco, until it had hired its employees.

Servco argues that the Union did not demand bargaining with it and therefore it had no obligation to do so. Under the circumstances presented above, where the Union first learned that Servco would be taking over the cleaning responsibilities after June 14 and Servco began its service on June 15, Servco had by then hired its new employees and set the terms and conditions for those employees on that date. Moreover, "no bargaining demand was necessary, as the Respondent's unlawful refusal to hire . . . its predecessor's employees rendered any request for bargaining futile." *Smith & Johnson Construction Co.*, 324 NLRB 970 (1997).

Accordingly, by failing to recognize and bargain with the Union, and its unilateral imposition of new terms and conditions of employment for the employees, Servco violated Section 8(a)(1) and (5) of the Act. *E.S. Sutton Realty*, above, 336 NLRB at 408.

CONCLUSIONS OF LAW

1. Planned Building Services, Inc. (PBS), AM Property Holding Corp., Maiden 80-90 NY LLC, Media Technology Centers LLC, a single employer (AM), and Servco Industries, Inc. (Servco) are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 32BJ, Service Employees International Union, AFL-CIO (Local 32BJ) and United Workers of America (UWA) are labor organizations within the meaning of Section 2(5) of the Act.

3. All service employees employed at 80-90 Maiden Lane, New York, NY, constitutes a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. By refusing to hire employees and by refusing to consider for hire employees who had been previously employed at 80-90 Maiden Lane because those employees had been represented by Local 32BJ and in order to avoid an obligation to recognize and bargain with Local 32BJ, AM, PBS and Servco have violated Section 8(a)(1) and (3) of the Act.

5. By refusing to recognize and bargain with Local 32BJ as the collective-bargaining representative of their employees in the 80-90 Maiden Lane unit, AM, PBS and Servco have violated Section 8(a)(1) and (5) of the Act.

6. By unilaterally changing the terms and conditions of employment of the employees in the above unit without notice to or bargaining with Local 32BJ, AM, PBS, and Servco violated Section 8(a)(1) and (5) of the Act.

7. By recognizing and executing a collective-bargaining agreement with UWA when Local 32BJ was the exclusive representative of its employees in the above bargaining unit, PBS has violated Section 8(a)(1) and (2) of the Act.

8. By executing and maintaining the above collective-bargaining agreement which contains a union-security clause, and by deducting dues and remitting them to UWA, PBS has violated Section 8(a)(1), (2) and (3) of the Act.

9. By directing its employees to sign authorization cards and/or dues deduction forms for UWA, and by deducting dues from the wages of employees who had not authorized such deductions, PBS has violated Section 8(a)(1) and (2) of the Act.

10. By interrogating employees concerning whether they intended to work during a strike by Local 32BJ, PBS has violated Section 8(a)(1) of the Act.

11. By threatening employees with discharge if they support Local 32BJ, AM, PBS, and Servco violated Section 8(a)(1) of the Act.

12. By creating the impression of surveillance of employees' support for and activities on behalf of Local 32BJ, AM and PBS violated Section 8(a)(1) of the Act.

13. By threatening employees with an investigation regarding their immigration status in retaliation for their giving testimony at a National Labor Relations Board proceeding, or in retaliation for their support for and activities in behalf of Local 32BJ, PBS violated Section 8(a)(1) and (4) of the Act.

14. By terminating its cleaning contract because of the cleaning contractor's employees' membership in or activities in behalf of Local 32BJ, thereby causing the employees' loss of employment, AM violated Section 8(a)(1) of the Act.

15. By rescinding an offer of employment to Jorge Cea in retaliation for his support for and activities in behalf of Local 32BJ, AM violated Section 8(a)(1) and (3) of the Act.

16. By telling employees that they would not be hired or considered for hire because of their support for and activities in behalf of Local 32BJ, AM violated Section 8(a)(1) of the Act.

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

THE REMEDY

Having found that AM, PBS, and Servco have engaged in various unfair labor practices, I shall order that they cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Inasmuch as I have found that PBS violated Section 8(a)(1), (2) and (3) of the Act by recognizing and executing a collective-bargaining agreement with UWA when it was obligated to recognize and bargain with Local 32BJ, I shall recommend that PBS withdraw recognition from UWA unless and until UWA is certified as the exclusive representative of the employees at 80-90 Maiden Lane, and to cease giving effect to the collective-bargaining agreement it executed with UWA, or any modification, amendment, extension or renewal of the agreement, provided however that nothing in this Order shall require PBS to vary or abandon any wage increase or other benefit, terms and conditions of employment which may have been established pursuant to the performance of that agreement.

I shall also recommend that PBS and UWA jointly and severally reimburse all former and present employees employed by PBS at 80-90 Maiden Lane for all initiation fees, dues and other moneys which may have been deducted from their wages pursuant to the union-security provision of the collective-bargaining agreement signed by PBS and UWA, with interest as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

I agree with the request of Local 32BJ that a broad order be issued against PBS. In previous Board cases under similar circumstances it has demonstrated its animus toward that Union, has recognized UWA, and has refused to hire employees. See the cases cited above. In addition, Administrative Law Judge Steven Fish has found that PBS violated the Act in similar circumstances as alleged here. *Planned Building Services, Inc.*, JD(NY)-61-00, currently on appeal to the Board. I accordingly find that a broad order against PBS is appropriate.

I reject the Union's request that AM be the subject of a broad order. The Union's basis for the request is that AM has been engaged in a protracted course of conduct in this litigation. I know of know basis, and the Union does not cite any, where such conduct would warrant the issuance of a broad order.

Inasmuch as I find that AM and PBS are joint employers, I shall order that they take appropriate action for the period April 25, 2000 through June 15, 2001, when they were joint employ-

ers and when PBS provided cleaning services at 80-90 Maiden Lane. Specifically, the order will require that they reinstate and make whole the former Clean-Right employees due to their refusal to hire them or to consider them for hire.

Specifically, I shall also order that AM and PBS be ordered to recognize and bargain on request with Local 32BJ with employees at 80-90 Maiden Lane. Additionally, PBS shall on request of Local 32BJ, rescind any departures from the terms of employment that existed before PBS's takeover of the cleaning responsibilities at that location, and to retroactively restore preexisting terms and conditions of employment, including wage rates and payments to benefit funds, for the period April 25, 2000 through June 15, 2001, that would have been paid absent the unlawful conduct of AM and PBS. *Weco*, above, at 321; *Daufuskie*, above, at 422. The basis of the wages and benefits must be those in effect during the term of the RAB-Local 32BJ contract. *Galloway School Lines*, 321 NLRB 1422, 1427 (1996). The remission of wages shall be computed as in *Ogle Protection Service*, 183 NLRB 602 (1970), plus interest as prescribed in *New Horizons*, above. They shall also remit all payments they owe to employee benefit funds in the manner set forth in *Merryweather Optical Co.*, 240 NLRB 1213 (1979), and reimburse their employees for any expenses resulting from their failure to make such payments, as set forth in *Kraft Plumbing and Heating*, 252 NLRB 891 fn. 2 (1980).

A separate Order against PBS only shall be issued, ordering that it cease and desist from threatening employees.

A separate Order against AM only shall be issued, ordering that it, as a joint employer, remedy the refusals to hire or consider for hire the former Clean-Right employees, and the former PBS employees who were employed by PBS but then dismissed when AM unlawfully cancelled its contract with PBS.

As to AM and Servco, which I have also found are joint employers, I shall order that appropriate action be taken regarding the refusal to hire employees when Servco commenced the cleaning operations. In order to remedy their refusal to bargain with Local 32BJ, I shall order that they rescind the changes made to the terms and conditions of employment of the employees, rescind any departures from the terms of employment that existed before PBS's takeover of the cleaning responsibilities at that location, and to retroactively restore preexisting terms and conditions of employment, including wage rates and payments to benefit funds in the manner set forth above. I shall also order that Servco reinstate the former Clean-Right employees as well as the PBS employees who were refused hire or refused consideration for hire. The specific employees to be reinstated shall be a part of the compliance part of this proceeding.

I shall recommend that posting be made at all of PBS' facilities. See *Planned Building Services*, 330 NLRB 791, 793 (2000).

[Recommended Order omitted from publication.]