Planned Building Services, Inc. *and* Local 32B-32J, Service Employees International Union[1] and United Workers of America, Party in Interest

United Workers of America *and* Local 32B-32J, Service Employees International Union. Cases 2–CA–31245, 2–CA–31259, 2–CA–31268, 2–CA–31580, and 2–CB–17041

July 31, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN, SCHAUMBER, KIRSANOW, AND WALSH

This case presents two significant issues under the National Labor Relations Act: (1) the appropriate analytical framework to be applied in determining whether an alleged successor employer has unlawfully refused to hire its predecessor's employees to avoid a bargaining obligation; and (2) the appropriate make-whole remedy when a successor employer discriminatorily denies employment to its predecessor's employees and violates its duty to bargain by unilaterally setting initial terms and conditions of employment.

The judge found that the Respondent violated Section 8(a)(3) and (1) by refusing to hire the employees of its predecessor to avoid an obligation, as a successor employer, to recognize and bargain with the Union.[2] In finding the violation, the judge applied the analytical framework set forth by the Board in *FES,* 331 NLRB 9 (2000), which generally applies in cases involving a discriminatory failure to hire or refusal to consider for hire. For reasons discussed below in section I, we find that *FES* does not apply in the circumstances presented here.

The judge also concluded that the Respondent violated Section 8(a)(5) and (1) by refusing to recognize and bargain with the Union, and by unilaterally implementing initial terms and conditions of employment. Accordingly, consistent with the Board's established approach, the judge ordered the Respondent, among other things, to rescind its unilateral changes in the predecessor's terms and conditions of employment, and to make employees whole, as measured by the predecessor's terms, from the date on which the Respondent was obligated to bargain with the Union until the parties reach agreement or a bargaining impasse. The Respondent has excepted to the judge's findings and recommended order. We affirm the judge's finding of the violation, but modify the judge's order in certain respects, as explained in section II below.

Our decision also affirms the judge's findings that the Respondent unlawfully solicited union authorization cards and unlawfully interrogated a job applicant. Finally, we agree with the judge that a broad order, coupled with a corporatewide cease-and-desist order and notice posting, is appropriate.

I. THE APPROPRIATE ANALYTICAL FRAMEWORK FOR A REFUSAL-TO-HIRE VIOLATION IN A SUCCESSORSHIP CONTEXT

Initially, we address the issue of whether *FES* is applicable in cases where, as here, a successor employer refuses to hire the employees of its predecessor because of their known or suspected union sympathies. For reasons discussed below, we reverse the judge and find that an analysis based upon the *FES* framework is not required and that the appropriate analysis is that set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

[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] On September 18, 2000, Administrative Law Judge Stephen Fish issued the attached decision. The Respondent and the Charging Party filed exceptions, supporting briefs, answering briefs, and reply briefs. The General Counsel filed an answering brief to the Respondent's exceptions. The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions except as discussed below and to adopt the recommended Order as modified and set forth in full below.

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

The Respondent has excepted to the judge's characterization and interpretation of the Board's findings in *Planned Bldg. Services*, 318 NLRB 1049 (1995) (*PBS I*), and *Planned Bldg. Services,* 330 NLRB 791 (2000) (*PBS II).* We find no merit in this exception. We further find appropriate the judge's partial reliance on these prior cases in finding animus. See *Stark Electric, Inc.,* 327 NLRB 518 fn. 1 (1999); *Barnes & Noble Bookstores, Inc.,* 237 NLRB 1246 fn. 1 (1978).

The Charging Party has excepted to the judge's failure to order that the notice to employees be posted in Spanish. The Board will order a notice to be posted in a language other than English when necessary to address the needs of the affected employees. *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001), enfd. 354 F.3d 534 (6th Cir. 2004). Because there is no evidence here from which we may conclude that a notice in Spanish is necessary, we deny the Charging Party's request. Member Liebman and Member Walsh would grant the request.

On May 15, 2006, the Charging Party filed a motion to reopen the record, alleging that the judge's proposed remedy has been rendered moot by events occurring after the judge's decision issued. Both the General Counsel and the Respondent filed an opposition to the motion, and the Charging Party filed a response to the Respondent's opposition. We deny the Charging Party's motion, as the issue raised is a matter for the compliance proceeding and has no effect on our decision here.

A. Factual Background

The Respondent provides cleaning and maintenance services for residential and commercial buildings at various locations in New York and New Jersey. At various times in 1997 and 1998, the Respondent was awarded the cleaning contract at four buildings that are the subject of this litigation. The buildings are in New York City at the following locations: 71 Broadway, 19 Rector, 32-42 Broadway, and 39 Broadway.

At the time the Respondent was awarded the contracts at 19 Rector, 32-42 Broadway, and 39 Broadway, each building had an incumbent work force employed by various cleaning contractors.[3] These employees were represented by Local 32B-32J, Service Employees International Union (Local 32B-32J). The building at 71 Broadway, which had recently been converted from commercial to residential use, had been vacant for over a year and therefore had no incumbent work force.

The Respondent chose not to employ most of its predecessor's work force at any of the buildings, but rather to staff each building primarily with transferees from its other worksites.[4] The Respondent's principal owner, Michael Francis, admitted that one reason he decided not to hire most of the incumbent employees was that he knew that if he hired a sufficient number of the employees, he would be obligated to recognize Local 32B-32J as their bargaining representative. Although the Respondent hired a few of the predecessors' employees, they did not constitute a majority at any one building.

Vice President Joanne Stratakos, who was responsible for overseeing the startup of new accounts, met with the predecessors' employees at 19 Rector, 32-42 Broadway, and 39 Broadway at the time the Respondent began servicing the buildings. Stratakos informed employees that there were no jobs available in their respective buildings, but that she would interview those who might be interested in positions at other buildings serviced by the Respondent.

Prior to their meeting with Stratakos, employees at 19 Rector filled out application packets that had been distributed to them by Regional Supervisor Gilbert Sanchez. Stratakos told the employees that they had been given the packets by mistake and there were no jobs available in that building. The application forms were then torn up in front of employees, with the exception of the payroll information sheets, which were retained by Stratakos. Most of the employees left without interviewing.

At 32-42 Broadway, approximately 18 of the predecessor's employees submitted applications and interviewed with Stratakos. Most of the employees indicated that they would be willing to accept a job with the Respondent despite its lower wages. Stratakos informed employees that they would be contacted if openings occurred. After the interviews, Stratakos took the completed applications back to the Respondent's main office rather than leaving them with Sanchez, who was directly in charge of hiring for the various buildings in downtown New York serviced by the Respondent. Although the Respondent subsequently filled a number of positions at 32-42 Broadway and other buildings, none of the former employees who had filled out applications were offered positions.

The predecessor's employees at 39 Broadway also submitted applications and indicated during their interviews with Stratakos that they would be willing to accept any job the Respondent offered. Stratakos promised to place the employees on a preferential hiring list and to contact them when positions became available. Neither the preferential hiring list nor the employees' applications were provided to Sanchez for use in filling subsequent positions. Although Sanchez was aware of the hiring list, he did not ask for it or use it in filling available positions.[5]

[3] It is unclear from the record whether cleaning and maintenance employees at 19 Rector were employed directly by the building's owners or by the building's management company.

[4] The Respondent has excepted to the judge's exclusion of various personnel records that it sought to introduce in support of summary charts that chronicled the transfers of employees among its downtown buildings and that the judge had permitted the Respondent to introduce. The judge informed the Respondent that he would consider admitting individual records that the Respondent proffered as being particularly important, but saw no need to admit all of the underlying records. The Respondent did not object to the judge's refusal to admit the documents at the time, did not argue the relevance of the documents, and did not proffer any specific documents during the remainder of the hearing. Instead, the Respondent waited until approximately 2 weeks after the hearing closed to move to admit these personnel records. We find that the judge properly exercised his discretion to exclude cumulative evidence by denying the Respondent's posttrial motion.

In any event, it is well established that the Board will not grant a motion to reopen the record for admission of evidence where the evidence is not newly discovered or unavailable at the time of the hearing. *A. N. Electric Corp.,* 276 NLRB 887 fn. 1 (1985); *Lincoln Hills Nursing Home, Inc.*, 266 NLRB 740 fn. 1 (1983). The Respondent does not contend, and we do not find, that the records it sought to introduce by posttrial motion were unavailable during the hearing. We therefore affirm the judge's denial of the Respondent's posttrial motion.

[5] The Respondent has excepted to the judge's admission of an audio tape recording of employee interviews conducted by Vice President Joanne Stratakos at 39 Broadway. The tape recording, which was made without the Respondent's knowledge, contains the interviews of four applicants who were former employees of the Respondent's predecessor. The Respondent argues that the tape is unreliable and therefore the judge erred in allowing its admission. We find no merit in the Respondent's position.

The Board has admitted tape recordings on a case-by-case basis depending on their reliability and their probative value. See, e.g.,

The judge found that the Respondent's refusal to hire its predecessors' employees at 19 Rector, 32-42 Broadway, and 39 Broadway was motivated by its desire to avoid a successorship obligation to recognize and bargain with Local 32B-32J. The Respondent offered a number of reasons as to why it did not hire the employees; however, the judge found these reasons to be pretextual.[6] Accordingly, the judge found that the Respondent violated Section 8(a)(3) and (1) by refusing to hire the employees. The judge further found that the Respondent violated Section 8(a)(5) and (1) by refusing to recognize and bargain with Local 32B-32J.[7]

B. Legal Background

In *Wright Line*, supra, the Board set forth the standard to be applied to unfair labor practice allegations that turn on employer motivation. To establish a violation under *Wright Line*, the General Counsel has the burden to prove that an employer's actions were the result of its animus toward union or protected activity. Once the General Counsel has met this burden, the Board will find a violation unless the employer proves that it would have taken the same action even in the absence of the protected activity.

In *FES,* supra, the Board supplemented the *Wright Line* analysis to be applied in cases where an employer is alleged to have acted with a discriminatory motive in failing to hire an applicant. To establish an unlawful failure to hire under *FES*, in addition to demonstrating the employer's unlawful motivation, the General Counsel must establish the following facts during the hearing on the merits: (1) that the employer was hiring, or had concrete plans to hire at the time of the alleged unlawful conduct; and (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination. Once the General Counsel has met this burden, the burden shifts to the employer to show that it would not have hired the applicants even in the absence of their union affiliation or protected activity. 331 NLRB at 12. Additionally, in cases involving numerous applicants, the General Counsel must demonstrate the number of available positions when seeking a remedy of instatement and back pay. Id. at 13.

Prior to *FES,* the Board applied a traditional *Wright Line* analysis in cases where a successor employer was alleged to have unlawfully refused to hire its predecessor's employees. See, e.g., *Daufuskie Island Club & Resort,* 328 NLRB 415 (1999), enfd. 221 F.3d 196 (D.C. Cir. 2000); *Galloway School Lines*, 321 NLRB 1422, 1423 (1996). Since *FES*, the Board has decided a limited number of cases involving refusal-to-hire allegations in a successorship context. In some cases the Board has found a violation under a traditional *Wright Line* analysis.[8] In *Concrete Co.*, 336 NLRB 1311, 1311–1312 (2001), however, the Board found that the General Counsel had established a violation under *FES*, without directly addressing the issue of whether an *FES* analysis should be applied in a successorship context.

Because the hearing in this proceeding was held before *FES* issued, the parties litigated the case under the traditional *Wright Line* standard. The judge's decision, which was issued after *FES*, applied the *FES* standard in finding the refusal-to-hire violation and in fashioning a remedy for that violation. The parties have not challenged the judge's reliance on *FES* . Rather, they dispute whether the judge correctly found that the evidence presented was sufficient to meet the General Counsel's *FES* burden.

Given the mixed treatment of the question in our post-*FES* precedent, we have decided to clarify the applicable standard in successorship-avoidance cases. Our decision today will resolve any conflict in our precedent and will establish a clear standard to be applied in cases in which a refusal to hire occurs in a successorship context.[9]

Fontaine Truck Equipment Co., 193 NLRB 190 (1971). The Respondent admits that the voice on the tape is that of Stratakos, and we are otherwise satisfied that the tape here is a reliable representation of what occurred during the interviews in question. Although the tape contains some inaudible portions, we conclude that the judge, having considered evidence regarding the chain of custody of the tape, as well as testimony by an expert witness, had a legitimate basis for concluding that the tape was sufficiently accurate. We also agree with the judge's conclusion that the tape contained probative evidence. The tape indicates that Stratakos promised applicants that she would place them on a preferential hiring list and call them when openings occurred, which is something that Stratakos denied in her initial testimony. Additionally, the tape contradicted Stratakos' denial that during her interview with Julio Mosquera, she asked him if he would report to work if employees went on strike. We therefore find that the tape's admission was proper.

[6] The Respondent's proffered reasons for its failure to hire the employees are discussed fully in the judge's decision.

[7] Consistent with the complaint, the judge found no 8(a)(5) violation at 71 Broadway, which had no incumbent work force at the time the Respondent began servicing the building.

[8] See, e.g., *Waterbury Hotel Management LLC*, 333 NLRB 482 (2001); *Jennifer Matthew Nursing & Rehabilitation Center*, 332 NLRB 300 (2000).

[9] Moreover, the judge's recommended *FES* remedy concerning the instatement of the discriminatees at 19 Rector, where the number of discriminatees exceeds the number of positions in the Respondent's work force, conflicts with the Board's traditional remedy in these circumstances**.** Consistent with *FES*, the judge ordered that the compliance proceeding be used to determine which of these dis-

C. Analysis

In *FES,* the Board determined that discriminatory discharge cases and discriminatory refusal to hire cases should be treated somewhat differently because the nature of the issues to be resolved in each case is fundamentally different. In a discriminatory discharge case, the issue to be resolved is why the employer removed an employee from its work force. Unlike a job applicant, an employee who has been discharged "has been performing for the employer in the job," and therefore "presumptively meets the facial requirement for the job." *FES*, 331 NLRB at 13 fn. 9. In contrast, the issue in a refusal-to-hire case is why an employer refused to take an applicant into its work force. In that situation, where the applicant usually has no work history with the employer, it cannot be said that the applicant is presumptively qualified for the job. It is the applicant, not the employer, who is in the best position to demonstrate that he is qualified for the position he seeks. Thus, in *FES* the Board modified the General Counsel's *Wright Line* burden in a refusal-to-hire case to require proof that the employer was actually hiring at the time of the alleged unlawful conduct and that the applicant had the relevant experience or training for the position. See id. at 12–13.

The Board did not specifically address in *FES* whether the modified *Wright Line* analysis was appropriate where a refusal to hire is motivated by an employer's desire to avoid a successor's bargaining obligation. Having carefully considered the rationale that prompted the Board to supplement its *Wright Line* standard for refusal-to-hire cases, we find that the same concerns regarding hiring plans and applicants' qualifications are not ordinarily present where a refusal to hire occurs when an alleged successor employer does not retain employees of the predecessor. Rather, for reasons discussed below, we find a refusal to hire in a successorship context to be analogous to a discriminatory discharge situation, where *FES* has no application.

First, in successorship cases, the predecessor's employees presumptively meet the successor's qualifications for hire. Because a successor's business is generally a continuation of its predecessor's business, it follows that the predecessor's employees, if hired by the successor, ordinarily would continue to perform essentially the same type of work as they did for the predecessor. Therefore, it serves no purpose to require the General Counsel to demonstrate, in each successorship case, that the employees have relevant experience or training for essentially the same jobs in the successor's work force that they performed in the predecessor's work force.

Second, because a successor employer must fill vacant positions in starting up its business, it is similarly of little use to require the General Counsel to demonstrate that the employer was hiring or had concrete plans to hire.

Thus, we find that these additional elements that the Board added to the General Counsel's initial burden in *FES* are not appropriately part of the General Counsel's burden in establishing refusal-to-hire allegations in a successorship setting.

Consistent with *Wright Line*, our decision today provides the appropriate analysis for a refusal-to-hire allegation arising in a context not considered by the Board when it developed the *FES* framework. Thus, to establish a violation of Section 8(a)(3) and (1) in cases where a refusal to hire is alleged in a successorship context, the General Counsel has the burden to prove that the employer failed to hire employees of its predecessor and was motivated by antiunion animus.[10]

Prior to *FES*, the Board had long held that the following factors were among those that would establish that a new owner violated Section 8(a)(3) by refusing to hire the employees of the predecessor:

> [S]ubstantial 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.[11]

We find that these factors remain relevant in establishing a refusal-to-hire violation in the successorship context.

criminatees are entitled to immediate instatement, and ordered that the remaining discriminatees receive a more limited, refusal-to-consider remedy. The Board's traditional remedy in successorship cases—which we will grant here—is to order that the remaining employees be placed on a preferential hiring list. See, e.g., *Daufuskie Island Club & Resort*, 328 NLRB at 422. Although the parties did not raise the appropriateness of the proposed remedy, we may properly consider the issue sua sponte. See *Indian Hills Care Center,* 321 NLRB 144 fn. 3 (1996) (Board has authority to address remedial matters even in the absence of exceptions).

[10] Consistent with his previously stated position, Member Schaumber believes that *Wright Line* requires a showing of a causal nexus between the union animus and the refusal to hire. See, e.g., *North Fork Services Joint Venture*, 346 NLRB 1025, 1026 fn. 7 (2006).

[11] *U. S. Marine Corp.*, 293 NLRB 669, 670 (1989) (citations omitted), enfd. en banc 944 F.2d 1305 (7th Cir. 1991), cert. denied 503 U.S. 936 (1992).

Once the General Counsel has shown that the employer failed to hire employees of its predecessor and was motivated by antiunion animus, the burden then shifts to the employer to prove that it would not have hired the predecessor's employees even in the absence of its unlawful motive. In establishing its *Wright Line* defense, the employer is free to show, for example, that it did not hire particular employees because they were not qualified for the available jobs, and that it would not have hired them for that reason even in the absence of the unlawful considerations. Similarly, the employer is free to show that it had fewer unit jobs than there were unit employees of the predecessor.

D. Application to the Case at Bar

The Respondent argues that the General Counsel has failed to meet the burden set forth in *FES*. Because, as we have held, the *FES* framework is not applicable here, we need not reach the Respondent's contentions that would be relevant only in the *FES* framework, i.e., that the General Counsel failed to show that the Respondent was hiring or had plans to hire and that the alleged discriminatees had training or experience relevant to the jobs' requirements.[12] We find no merit in the Respondent's further contention that the General Counsel failed to show that the Respondent's refusal to hire the alleged discriminatees was motivated by antiunion animus. Rather, we agree with the judge, for the reasons set forth in his decision, that the General Counsel has established that the Respondent's decision not to hire its predecessors' employees was motivated by antiunion animus. We further agree that the Respondent has failed to meet its burden to establish that it would not have hired these employees absent its hostility toward the Union. Thus, we affirm the judge's finding that the Respondent refused to hire the employees of its predecessors in violation of Section 8(a)(3) and (1) of the Act.

II. THE UNILATERAL SETTING OF INITIAL TERMS AND CONDITIONS

In general, a successor employer has the right to set the initial terms and conditions of employment.[13] There is an exception where the successor employer "plans to retain all" of the predecessor's employees.[14] Further, under *Love's Barbecue*,[15] an employer who discriminatorily refuses to hire the employees of the predecessor may not unilaterally set the initial terms and conditions. Although it cannot be said with certainty whether the successor would have retained all of the predecessor employees if it had not engaged in discrimination, the Board resolves the uncertainty against the wrongdoer and finds that, but for the discriminatory motive, the successor employer would have employed the predecessor employees in its unit positions.[16] Here, the Respondent hired some of the predecessor's employees. Further, the judge found, consistent with extant Board precedent, that but for the discrimination, the Respondent would have filled all of its unit positions with employees of the predecessor.[17] Thus, the Respondent did not have the right to unilaterally set the initial terms and conditions of employment. Consequently, that unilateral action was unlawful under Section 8(a)(5).[18]

III. THE APPROPRIATE REMEDY FOR THE RESPONDENT'S DISCRIMINATORY REFUSAL TO HIRE THE PREDECESSORS' EMPLOYEES AND FOR ITS UNILATERAL IMPLEMENTATION OF TERMS AND CONDITIONS OF EMPLOYMENT

Where a successor employer has violated Section 8(a)(3) by unlawfully refusing to hire employees of the predecessor and has violated Section 8(a)(5) by unlawfully implementing initial terms and conditions of employment without bargaining with the union, the Board's traditional remedy requires the successor to "restore as nearly as possible the situation that would have prevailed but for the unfair labor practices." *State Distributing Co.*, 282 NLRB 1048, 1048 (1987).[19] Accordingly, to remedy the 8(a)(3) violation, the successor must:

(1) offer reinstatement to the discriminatees; and

(2) make the discriminatees whole for their losses.

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[12] In any event, we note that, in reference to the Board's revisions of the law in *FES*, the judge stated: "These slight modifications of prior law have little impact on the instant matter, since there is no dispute that PBS was hiring at the time of the alleged unlawful conduct, and that all of the alleged discriminatees had sufficient experience or training relevant to the positions for hire."

[13] *NLRB v. Burns Security Services*, 406 U.S. 272, 294 (1972).

[14] Id. at 295.

[15] *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).

[16] *Love's Barbeque,* 245 NLRB at 82.

[17] In *NLRB v. Burns,* supra at 295, the Supreme Court used the language "plans to retain all" of the predecessor employees. The Board has interpreted this language to include a situation in which the successor did not plan to retain literally *all* of the predecessor employees but, rather, "planned to employ a smaller work force consisting solely of predecessor employees." *Galloway School Lines, Inc.*, 321 NLRB 1422, 1427 (1996).

[18] Chairman Battista and Members Kirsanow and Schaumber note that the Respondent does not challenge the *Love's Barbecue* doctrine set forth above. Consequently, they do not pass on its validity.

[19] See generally *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941).

To remedy the 8(a)(5) violation, the successor must:

> (1) at the union's request, restore the terms and conditions of employment established by the predecessor, rescinding the unilateral changes made by the successor;
>
> (2) recognize and bargain with the union; and
>
> (3) make its employees whole for their losses.

See *State Distributing Co*., 282 NLRB at 1048, citing *Love's Barbecue Restaurant No*. 62, 245 NLRB 78, 82 (1979), enfd. in part 640 F.2d 1094 (9th Cir. 1981).

With respect to the make-whole aspects of the remedy, that arising from the 8(a)(3) violation runs to the discriminatees, i.e., those who were not hired, while that arising from the 8(a)(5) violation runs to those who were hired. For both the discriminatees and for the successor's employees, the make-whole remedy, including backpay and benefits, is measured with reference to the *predecessor's* terms and conditions of employment. It extends from the date of the successor's unlawful refusal to bargain until the successor, consistent with the Board's order, reaches a new agreement with the union or bargains to a lawful impasse. As we will explain, we have decided to refine the Board's traditional make-whole remedy in cases like this one to strike a better balance between two principles that guide the Board's remedial discretion: placing the burden of uncertainty on the wrongdoer and avoiding a remedy that is, in fact, punitive.

There is a substantial issue as to how long the backpay should run at the predecessor's rate. The make-whole aspects of the Board's traditional remedy rest on an uncertainty rationale. It is difficult to know what would have occurred if the successor had fulfilled its duty to bargain instead of unilaterally imposing terms and conditions of employment. In doubt are both *what* terms would have been reached through good-faith bargaining (whether by agreement or as the result of a bargaining impasse, allowing unilateral implementation) and *when* such terms would have been established.[20] The Board long has recognized that as a direct result of the successor's misconduct, we are "faced with a less-than-perfect set of remedial choices" in this situation:

> The remedy the Board has chosen has the drawback of retroactively imposing on the [successor] terms and conditions of employment that had been set by the contract negotiated by its predecessor, but it has the advantage of giving some recompense to the victims of the discrimination and preventing the [successor] from enjoying a financial position that is quite possibly more advantageous than the one it would occupy had it behaved lawfully.

State Distributing Co., 282 NLRB at 1049.

The majority of the Federal appellate courts that have reviewed this remedy have approved it as within the Board's discretion.[21] Other courts of appeals, however, have rejected the remedy as punitive to the extent that it orders restoration of the predecessor's employment terms for longer than a reasonable bargaining period. They believe that the Board should take into account the likelihood that the employer and union "would either have negotiated a new wage rate or reached impasse" after a reasonable period of bargaining. *Capital Cleaning Contractors, Inc. v. NLRB*, 147 F.3d 999, 1011 (D.C. Cir. 1998); see also *Kallman v. NLRB,* 640 F.2d 1094, 1103 (9th Cir. 1981); *Armco, Inc. v. NLRB*, 832 F.2d 357 (6th Cir. 1988).

The Act does not authorize the Board to impose punitive measures. *NLRB v. Strong*, 393 U.S. 357, 359 (1969). At the same time, as explained above, the remedy in successorship-avoidance cases is predicated on a basic uncertainty that is properly resolved against the wrongdoer.[22] After careful consideration, we believe that a more refined balance between the competing legal principles in play here is possible.

The Board's traditional make-whole remedy categorically resolves the uncertainty against the successor: the Board has rejected any effort to determine, as a factual matter, what would have happened had the successor bargained in good faith. The *State Distributing* Board concluded that this determination was "virtually impossible to calculate" and necessarily "involve[d] imposing contractual terms based on this Agency's conjecture without an adequate factual basis." 282 NLRB at 1049. But the Board, on at least one occasion, *has* been able to make such a determination,

[20] The terms and conditions initially imposed by the successor cannot serve as a presumptive standard, precisely because they were not reached through good-faith collective bargaining with a union supported by a majority of the successor's employees (i.e., the employees of the predecessor employer, who should have been hired).

[21] See, e.g., *Pace Industries v. NLRB*, 118 F.3d 585 (8th Cir. 1997), cert. denied 523 U.S. 1020 (1998); *NLRB v. Staten Island Hotel,* 101 F.3d 858 (2d Cir. 1996); *Horizon Hotel Corp. v. NLRB,* 49 F.3d 795 (1st Cir. 1995); *U.S. Marine Corp. v. NLRB*, 944 F.2d 1305 (7th Cir. 1991), cert. denied 503 U.S. 936 (1992); *Systems Management, Inc. v. NLRB*, 901 F.2d 297 (3d Cir. 1990).

[22] See *NLRB v. Staten Island Hotel*, 101 F.3d at 862; *U.S. Marine Corp. v. NLRB*, 944 F.2d at 1321. See generally *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 403 (1983) (endorsing principle in context of mixed-motive discharge); *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264 (1946) (The "most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of uncertainty which his own wrong has created.").

complying with a court's remand. See *Armco, Inc.*, 298 NLRB 416 (1990). There, the Board

> placed the burden of proof on [the successor] to establish that it would not have agreed to the monetary provisions of the predecessor employer's collective-bargaining agreement . . ., the date on which it would have bargained to agreement, and the terms of the agreement that would have been negotiated, or to establish the date on which it would have bargained to good-faith impasse and implemented its own monetary proposals. [Id. at 417.]

We believe that the approach followed in *Armco* preserves the core of the Board's traditional make-whole remedy, while at the same time helping to ensure that the Board's remedy does not, in fact, amount to a penalty, as applied in a particular case. Thus, although genuine uncertainty in successorship-avoidance cases will continue to be resolved against the successor as the wrongdoer, where the successor can provide the Board with an adequate factual basis for resolving the uncertainty created by its misconduct, it should be permitted to do so. Placing the burden of proof on the successor is both equitable (the successor is the wrongdoer) and practical (the successor has superior access to the relevant evidence).[23]

Accordingly, we will issue an order consistent with our traditional remedy in cases like this one. But we will then permit the Respondent, in a compliance proceeding, to present evidence establishing that it would not have agreed to the monetary provisions of the predecessor employer's collective-bargaining agreement, and further establishing either the date on which it would have bargained to agreement and the terms of the agreement that would have been negotiated, or the date on which it would have bargained to good-faith impasse and implemented its own monetary proposals.[24] If the Respondent carries its burden of proof on these points, the measure of the Respondent's make-whole obligation may be adjusted accordingly.[25]

IV. THE SOLICITATION OF UNION AUTHORIZATION CARDS BY SUPERVISOR GILBERT SANCHEZ

The Respondent began servicing 71 Broadway on September 2, 1997, staffing the building partly with transferees from its other sites and partly with new employees. Within the first week, Supervisor Sanchez gave four employees authorization cards for the United Workers of America (UWA) and instructed them to sign. Three of these were new employees who were given cards on the day they were hired. The fourth employee, who had been working for the Respondent for approximately a month as a temporary employee at another site, was given the card upon his transfer to 71 Broadway. There is no evidence that the employees had previously been members of UWA, and UWA was not recognized as the bargaining representative for employees at 71 Broadway at the time the employees were instructed to sign the cards. The Respondent recognized UWA as the employees' representative less than 3 weeks after it began servicing the building.

The judge found that Sanchez acted unlawfully by instructing employees to sign the authorization cards. We agree. An employer may not assist a union in its organizational efforts by requiring an employee to sign a union authorization card. See, e.g., *Fountainview Care Center*, 317 NLRB 1286, 1290–1291 (1995), enfd. mem. 88 F.3d 1278 (D.C. Cir. 1996); *Famous Castings Corp.*, 301 NLRB 404, 407 (1991); *Denver*

[23] This is the approach endorsed by the Ninth Circuit, one of the courts to have rejected the Board's traditional remedial approach in successorship cases. See, e.g., *NLRB v. Advanced Stretchforming International, Inc.*, 233 F.3d 1176, 1181–1183 (9th Cir. 2000). In *Capital Cleaning Contractors, Inc.*, supra, the District of Columbia Circuit suggested that the burden of proof would properly fall on the General Counsel. For reasons set forth here, we respectfully disagree with the court.

[24] Member Schaumber emphasizes that to avoid a penal remedy, the terms of the predecessor should be imposed "'only for a period allowing for a reasonable time of bargaining.'" *Capital Cleaning Contractors, Inc.*, 147 F.3d at 1011 (quoting *Kallmann*, supra, 640 F.2d at 1103). Moreover, in determining both the length of that period and the terms the Respondent would have agreed to, the Board's obligation is simply to "approximate what would have occurred," *Capital Cleaning Contractors, Inc.,* 147 at 1011, for, as the courts have cautioned us, "[n]o one can know with certainty what wage[s] [the Respondent] would have agreed to." Id. See also *Kallmann*, 640 F.2d at 1103 (recognizing that "in all probability" Kallmann's refusal to pay the rate established by its predecessor would have led to an impasse allowing Kallmann to reduce wages). Member Schaumber concurs with the D.C. Circuit that the best evidence of the wage a successor likely would have agreed to pay may well be the rate it actually did pay to secure labor to perform the work previously done by its predecessor's employees. *Capital Cleaning Contractors, Inc.,* supra at 1011.

[25] The adjustment to the make-whole obligation would apply in computing both any backpay and benefits due to the Respondent's employees (resulting from the Respondent's unlawful unilateral changes) and backpay and benefits due to the individuals whom the Respondent unlawfully refused to hire. It would be illogical to apply a different measure of backpay to each group.

We find that the compliance proceeding is the appropriate forum for adjudicating what would have occurred had lawful bargaining taken place. In the hearing on the merits, the focus of the Respondent is necessarily on defending against the unfair labor practice allegation. To require the Respondent simultaneously to offer evidence to establish what would have happened had bargaining occurred would be burdensome. Moreover, there would be no need to present such evidence if the Respondent is found not to have violated the Act. Thus, it is appropriate to utilize the compliance proceeding "as a means of tailoring the remedy to suit the individual circumstances" of each case. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 902 (1984).

Lamb Co., 269 NLRB 508, 510–511 (1984). Thus, we affirm the judge's finding of the violation.

V. THE INTERROGATION OF JULIO MOSQUERA

Julio Mosquera was employed as a concierge by the Respondent's predecessor at 39 Broadway. Mosquera also possessed a fire safety director's license. On or about June 13, 1998, Mosquera was offered a job by the son of Owner Michael Francis at the same salary and benefits paid by the predecessor. Although Mosquera accepted the job, the final terms of his hire were not settled at that time.

The Respondent began servicing 39 Broadway on June 24, 1998. On June 25, Stratakos interviewed the predecessor's employees, including Mosquera. Stratakos told Mosquera that she was aware of his conversation with Francis but she had to treat him like everyone else, and she required him to fill out an application. She then asked him if he intended to work if the employees went on strike. Mosquera's initial response was that he would fill out the application. Stratakos repeated the question, and Mosquera stated that he would "stay inside and work." Once Mosquera indicated that he would be willing to cross a picket line, Stratakos gave him an application to fill out and discussed the terms of his employment.

We agree with the judge, for the reasons set forth in his decision, that Mosquera's status at the time Stratakos questioned him about whether he would cross a picket line was that of a job applicant. We further agree with the judge that, under these circumstances, Stratakos' questioning of Mosquera was coercive and thus violated Section 8(a)(1). See generally *Rossmore House*, 269 NLRB 1176 (1984), affd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985).

The Respondent argues that Mosquera had already been hired at the time of the interview and that, given his status as an employee, the questioning was lawful because it was in anticipation of a strike. We disagree. It is clear that from the outset of the interview Stratakos conveyed to Mosquera the impression that he was no different from the other applicants. Indeed, Stratakos refused to permit Mosquera to fill out an application and did not discuss the terms of his employment until after he assured her he would cross a picket line in the event of a strike. We conclude that, in these circumstances, Mosquera would reasonably believe that his employment was contingent upon his answer to Stratakos' question, and that Stratakos violated the Act as alleged.

VI. THE BROAD AND CORPORATEWIDE ORDER

We agree with the judge, for the reasons set forth in his decision, that a broad order is appropriate in this case. We also agree that a corporatewide cease-and-desist order and notice posting is appropriate. This is the third in a series of cases in which the Board has found that the Respondent has violated Section 8(a)(2) and (1) by unlawfully soliciting union cards. See *PBS II*, 330 NLRB at 791*; PBS I*, 318 NLRB at 1049.[26] Further, the Respondent violated Section 8(a)(5), (3), and (1) at three different work sites in a period of less than 7 months by refusing to hire its predecessors' employees to avoid a successorship bargaining obligation. Where, as here, there is a clear pattern or practice of unlawful conduct by the 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 fn. 4 (1993), enfd. 30 F.3d 1487 (3d Cir. 1994).

We find that absent a corporatewide remedy, the Respondent 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 each of the facilities involved in this proceeding and at all of the Respondent's offices that oversee these facilities, and the other to be posted at each of the other facilities serviced by the Respondent and at the Respondent's other offices (if any) that oversee such facilities. *Beverly Health & Rehabilitation Services,* supra.

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

1. Cease and desist from

(a) Coercively interrogating applicants for employment concerning their sympathies on behalf of Local 32B-32J, Service Employees International Union (Local 32B-32J), or interrogating them as to whether they would cross a picket line established and maintained by Local 32B-32J.

[26] In *PBS II* the Board ordered a corporatewide posting of the notice based upon its finding that card solicitation by supervisors was a standard practice of the Respondent. *PBS II,* supra at 793.

(b) Directing, ordering, or instructing its employees to sign authorization cards or dues authorization forms for the United Workers of America (UWA).

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

(d) Refusing to recognize and bargain with Local 32B-32J as the exclusive collective-bargaining representative of its employees in the following separate appropriate units:

(1) All service employees employed by Respondent PBS at 19 Rector Street, New York, New York.

(2) All service employees employed by Respondent PBS at 32-34 Broadway, New York, New York.

(3) All service employees employed by Respondent PBS at 39 Broadway, New York, New York.

(e) Unilaterally changing wages, hours, and other terms and conditions of employment of the employees in the above-described units without first giving notice to and bargaining with Local 32B-32J about such changes.

(f) Recognizing and bargaining with the UWA as the exclusive collective-bargaining representative of its employees who are employed at 19 Rector Street, 32-42 Broadway, 39 Broadway, and 71 Broadway, New York, New York, unless and until UWA has been certified by the National Labor Relations Board as the exclusive collective-bargaining representative of those employees.

(g) Giving effect to or enforcing the collective-bargaining agreements that it executed with UWA with respect to any of the four locations described above, or to any extension, renewal, or modification of these agreements; provided, however, that nothing in this Order shall authorize or require the withdrawal or elimination of any wage increase, or other improved benefits or terms and conditions of employment, that may have been established pursuant to the performance of the above collective-bargaining agreements.

(h) Discouraging activity and support for Local 32B-32J by refusing to hire or in any other manner discriminating against employees with respect to their hours, wages, or other terms and conditions of employment in order to avoid having to recognize and bargain with Local 32B-32J.

(i) 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) Recognize and, on request, bargain collectively with Local 32B-32J as the exclusive representative of its employees at 19 Rector Street, 32-42 Broadway, and 39 Broadway with respect to wages, hours, and other terms and conditions of employment, and if agreements are reached embody such agreements in a signed document.

(b) At the request of Local 32B-32J, rescind any departures from terms and conditions of employment that existed prior to its commencing operations at the three above-mentioned facilities, restoring preexisting terms and conditions of employment until it negotiates in good faith with Local 32B-32J to agreement or impasse.

(c) Make whole, in the manner set forth in the remedy section of the judge's decision except as modified herein, the unit employees for losses caused by Respondent PBS's failure to apply the terms and conditions of employment that existed prior to its commencing operations at the three above-mentioned facilities, subject to Respondent PBS demonstrating in a compliance hearing that, had it lawfully bargained with Local 32B-32J, it would have, at some identifiable time, lawfully imposed less favorable terms than those that had existed under its predecessor.

(d) Withdraw and withhold all recognition from UWA as the collective-bargaining representative of its employees at 19 Rector Street, 32-42 Broadway, 39 Broadway, and 71 Broadway, New York, New York, unless and until UWA has been certified by the National Labor Relations Board as the collective-bargaining representative of Respondent PBS's employees at these locations.

(e) Jointly and severally with Respondent UWA, reimburse all present and former PBS employees at 71 Broadway for all dues, initiation fees, and assessments that those employees paid, plus interest as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), except for those employees who voluntarily joined UWA before Respondent PBS and Respondent UWA executed a collective-bargaining agreement covering employees at that location.

(f) Reimburse employees who are employed at 19 Rector Street, 32-42 Broadway, and 39 Broadway for all dues, initiation fees, and assessments that those employees paid, plus interest, except for those employees who voluntarily joined UWA before Respondent PBS and Respondent UWA executed collective-bargaining agreements at these locations.

(g) Within 14 days from the date of this Order, offer to all of the former employees of Jubilant Realties – BV Management at 19 Rector Street, to all former employees of Shepard Industries at 32-42 Broadway, and to all of the former employees of Perfect Building Maintenance at 39 Broadway whom the Respondent

did not hire, employment at the buildings at which they had previously worked or, if such positions no longer exist, offer them substantially equivalent positions without prejudice to their seniority and other rights and privileges previously enjoyed, discharging if necessary any employees hired in their place. If Respondent PBS does not have sufficient positions available, the remaining employees shall be placed on a preferential hiring list.

(h) Make the employees referred to in the preceding paragraph 1(g) whole for any loss of earnings and other benefits they may have suffered by reason of Respondent PBS's unlawful refusal to employ them, in the manner set forth in the remedy section of the judge's decision except as modified herein.

(h) Make Kimble Kalarsian and Howard Angus whole for losses suffered as a result of the discrimination against them as set forth in the remedy section of the judge's decision.

(i) 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.

(j) Within 14 days after service by the Region, post at each of the facilities involved in this proceeding, and at its offices overseeing these facilities, copies of the attached notice marked "Appendix A."[27] 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. In the event that, during the pendency of this proceeding, Respondent PBS has gone out of business or closed the facilities 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 any time since September 6, 1997.

(k) Within 14 days after service by the Region, post at all of its other facilities, and at its other corporate offices, copies of the attached notice marked "Appendix B."[28] 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 the Respondent PBS to ensure that the notices are not altered, defaced, or covered by any other material.

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

B. Respondent United Workers of America (UWA), its officers, agents, and representatives, shall

1. Cease and desist from

(a) Acting as the collective-bargaining representative of the employees of Respondent PBS at 71 Broadway, New York, New York, unless and until certified by the Board as the collective-bargaining representative of such employees.

(b) Maintaining or giving force or effect to any collective-bargaining agreement with Respondent PBS that covers PBS employees at 71 Broadway, unless and until it is certified by the Board as the collective-bargaining representative of such employees.

(c) Accepting and retaining money in amounts equal to union initiation fees and dues that have been wrongfully deducted from the pay of the employees of PBS.

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

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

(a) Jointly and severally with Respondent PBS, reimburse all former and present PBS employees at 71 Broadway for all dues, initiation fees, and other assessments that those employees paid, plus interest as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), except for those employees who voluntarily joined UWA before Respondent PBS and Respondent UWA executed a collective-bargaining agreement covering employees at this location.

(b) Within 14 days after service by the Region, post at its offices and meeting halls copies of the attached

[27] 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."

[28] See fn. 27, supra.

notice marked "Appendix C."[29] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by Respondent UWA's authorized representative, shall be posted by Respondent UWA 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 UWA to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Sign and return to the Regional Director sufficient copies of the notice for posting by Respondent PBS at all places where notices to employees are customarily posted.

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

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 LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT coercively interrogate applicants for employment concerning their sympathies on behalf of Local 32B-32J, Service Employees International Union (Local 32B-32J), or interrogate them as to whether they would cross a picket line established and maintained by Local 32B–32J.

WE WILL NOT direct, order, or instruct our employees to sign authorization cards or dues authorization forms for the United Workers of America (UWA).

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

WE WILL NOT refuse to recognize and bargain with Local 32B-32J as the exclusive collective-bargaining representative of our employees in the following appropriate units:

(a) All service employees employed by us at 19 Rector Street, New York, New York.

(b) All service employees employed by us at 32-34 Broadway, New York, New York.

(c) All service employees employed by us at 39 Broadway, New York, New York.

WE WILL NOT unilaterally change wages, hours, and other terms and conditions of employment of our employees in the above-described units without first giving notice to and bargaining with Local 32B-32J about such changes.

WE WILL NOT recognize and bargain with the UWA as the exclusive collective-bargaining representative of our employees who are employed at 19 Rector Street, 32-42 Broadway, 39 Broadway, and 71 Broadway, New York, New York, unless and until UWA has been certified by the National Labor Relations Board as the exclusive collective-bargaining representative of these employees.

WE WILL NOT give effect to or enforce the collective-bargaining agreements that we executed with UWA with respect to any of the four locations described above, or to any extension, renewal, or modification of these agreements; provided, however, nothing in the Board's Order shall authorize or require the withdrawal or elimination of any wage increase, or other improved benefits or terms and conditions of employment, that may have been established pursuant to the performance of the above collective-bargaining agreements.

WE WILL NOT discourage activity and support for Local 32B-32J by refusing to hire or in any other manner discriminating against employees with respect to their hours, wages, or other terms and conditions of employment, in order to avoid having to recognize and bargain with Local 32B–32J.

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

WE WILL recognize and, on request, bargain collectively with Local 32B–32J as the exclusive representative of our employees at 19 Rector Street, 32–42 Broadway, and 39 Broadway, with respect to wages, hours, and other terms and conditions of employment, and if agreements are reached embody such agreements in a signed document.

WE WILL, at the request of Local 32B–32J, rescind any departures from terms and conditions of employment that existed prior to our commencing operations

[29] See fn. 27, supra.

at the three above-mentioned facilities, restoring preexisting terms and conditions of employment until we negotiate in good faith with Local 32B–32J to agreement or impasse.

WE WILL make whole the unit employees for losses caused by our failure to apply the terms and conditions of employment that existed prior to our commencing operations at the three above-mentioned facilities, subject to our demonstrating in a compliance hearing that, had we lawfully bargained with Local 32B–32J, we would have, at some identifiable time, lawfully imposed less favorable terms than those that had existed under our predecessor.

WE WILL withdraw and withhold all recognition from UWA as the collective-bargaining representative of our employees at 19 Rector Street, 32–42 Broadway, 39 Broadway, and 71 Broadway, New York, New York, unless and until UWA has been certified by the National Labor Relations Board as the collective-bargaining representative of our employees at these locations.

WE WILL, jointly and severally with the United Workers of America, reimburse all our present and former employees at 71 Broadway for all dues, initiation fees, and assessments that those employees paid, plus interest, except for those employees who voluntarily joined UWA before we executed a collective-bargaining agreement with UWA covering our employees at this location.

WE WILL reimburse employees who are employed at 19 Rector Street, 32–42 Broadway, and 39 Broadway for all dues, initiation fees, and assessments that those employees paid, plus interest, except for those employees who voluntarily joined UWA before we executed collective-bargaining agreements with UWA at these locations.

WE WILL, within 14 days from the date of this Order, offer to all of the former employees of Jubilant Realties—BV Management at 19 Rector Street, to all former employees of Shepard Industries at 32–42 Broadway, and to all of the former employees of Perfect Building Maintenance at 39 Broadway whom we did not hire, employment at the buildings at which they had previously worked or, if such positions no longer exist, offer them substantially equivalent positions without prejudice to their seniority and other rights and privileges previously enjoyed, discharging if necessary any employees hired in their place. If we do not have sufficient positions available, the remaining employees shall be placed on a preferential hiring list.

WE WILL make the employees referred to in the immediately preceding paragraph whole for any loss of earnings and other benefits they may have suffered by reason of our unlawful refusal to employ them, less any net interim earnings, plus interest.

WE WILL make Kimble Kalarsian and Howard Angus whole for losses suffered as a result of our discrimination against them, less any net interim earnings, plus interest.

PLANNED BUILDING SERVICES, INC.

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 LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT coercively interrogate applicants for employment concerning their union sympathies or interrogate them as to whether they would cross a picket line that is maintained and established by a union.

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

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

WE WILL NOT refuse to recognize and bargain with Local 32B-32J, Service Employees International Union (Local 32B–32J) as the exclusive collective-bargaining representative of appropriate units of employees in several of our buildings located in New York, New York.

WE WILL NOT unilaterally change wages, hours, and other terms and conditions of employment of our employees in the above-mentioned units without first giving notice to and bargaining with Local 32B–32J about such changes.

WE WILL NOT recognize and bargain with the United Workers of America (UWA) as the exclusive collective-bargaining representative of our employees unless and until that union has been certified by the National Labor Relations Board as the exclusive-bargaining representative of these employees.

WE WILL NOT give effect to or enforce the collective-bargaining agreements that we unlawfully executed with the UWA, or to any extension, renewal, or modification of these agreements; provided, however, nothing in the Board's Order shall authorize or require the withdrawal or elimination of any wage increase, or other improved benefits or terms and conditions of employment, that may have been established pursuant to the performance of the above collective-bargaining agreements.

WE WILL NOT discourage activity and support for any union by refusing to hire or in any other manner discriminating against employees with respect to their hours, wages, or other terms and conditions of employment, in order to avoid having to recognize and bargain with that union.

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

WE WILL recognize and, on request, bargain collectively with Local 32B–32J as the exclusive collective-bargaining representative of our employees at various locations in New York, New York, with respect to wages, hours, and other terms and conditions of employment, and if agreements are reached embody such agreements in a signed document.

WE WILL, at the request of Local 32B–32J, rescind any departures from terms and conditions of employment that existed prior to our commencing operations at the above-mentioned facilities, restoring preexisting terms and conditions of employment until we negotiate in good faith with Local 32B–32J to agreement or impasse.

WE WILL make whole the unit employees for losses caused by our failure to apply the terms and conditions of employment that existed prior to our commencing operations at the above-mentioned facilities, subject to our demonstrating in a compliance hearing that, had we lawfully bargained with Local 32B–32J, we would have, at some identifiable time, lawfully imposed less favorable terms than those that had existed under its predecessor.

WE WILL withdraw and withhold all recognition from any union as the collective-bargaining representative of our employees unless and until that union has been certified by the National Labor Relations Board as the collective-bargaining representative of our employees at various locations.

WE WILL, jointly and severally with the UWA, reimburse our present and former employees for all dues, initiation fees, and assessments that they paid as a result of our unlawful recognition of UWA, plus interest, except for those employees who voluntarily joined UWA before we unlawfully executed a collective-bargaining agreement with that union.

WE WILL, within 14 days from the date of this Order, offer to all of the former employees of our predecessors whom we unlawfully refused to hire, employment at the buildings at which they had previously worked or, if such positions no longer exist, offer them substantially equivalent positions without prejudice to their seniority and other rights and privileges previously enjoyed, discharging if necessary any employees hired in their place. If we do not have sufficient positions available, the remaining employees shall be placed on a preferential hiring list.

WE WILL make the employees referred to in the immediately preceding paragraph whole for any loss of earnings and other benefits they may have suffered by reason of our unlawful refusal to employ them, less any net interim earnings, plus interest.

PLANNED BUILDING SERVICES, INC.

APPENDIX C

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain on your behalf with your employer

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT act as the collective-bargaining representative of the employees of Planned Building Services Inc. (PBS), at 71 Broadway, New York, New York, unless and until we are certified by the Board as the collective-bargaining representative of those employees.

WE WILL NOT maintain or give force or effect to any collective-bargaining agreement with PBS that covers PBS employees at 71 Broadway, unless and until we are certified by the Board as the collective-bargaining representative of those employees.

WE WILL NOT accept and retain money in amounts equal to union initiation fees and dues that have been wrongfully deducted from the pay of the employees of PBS.

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

WE WILL, jointly and severally with PBS, reimburse all former and present PBS employees at 71 Broadway for all dues, initiation fees, and other assessments that those employees paid, plus interest as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), except for those employees who voluntarily joined UWA before we unlawfully executed a collective-bargaining agreement covering employees at this location.

UNITED WORKERS OF AMERICA

Judith Anderson, Esq. and *Simon-Jon Koike, Esq.,* for the General Counsel.

Stephen Ploscowe, Esq., Dean L. Burrell, Esq., and *Loren Rosenberg, Esq. (Grotta, Glassman & Hoffman, P.A.),* of Roseland, New Jersey, for the Respondent Employer.

Brian Kronick, Esq. (Balk, Oxfeld, Mandell & Cohen), of Newark, New Jersey, for the Respondent Union.

Ira Sturm, Esq. and *Ronald Raab, Esq. (Raab & Sturm),* of New York, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

STEVEN FISH, Administrative Law Judge. Pursuant to various charges and amended charges filed by Local 32B-32J, Service Employees International Union, AFL–CIO (the Charging Party or Local 32B-32J). The Regional Director issued a series of complaints and amended complaints, culminating in an order further consolidating cases, consolidated complaint and notice of hearing on April 20, 1999. This document, refers to several previously issued complaints, which collectively allege that Planned Building Service, Inc. (Respondent Employer or PBS) violated Section 8(a)(1), (2), (3), and (5) of the National Labor Relations Act (the Act), and that United Workers of America (Respondent Union or UWA) violated Section 8(b)(1)(A) and (2) of the Act.

The trial was with respect to the allegations raised by the complaints was held before me on July 19–23, September 21–29, and October 5 and 21, 1999.

Briefs have been filed by the General Counsel and PBS and have been carefully considered. Based upon the entire record,[1] I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

PBS is a New Jersey corporation, with its principal office and place of business in Fairfield, New Jersey, where it is engaged in the business of providing maintenance services for shopping malls, department stores, apartment buildings, and office buildings.

Annually, PBS performs services valued in excess of $50,000 directly for enterprises located within the State of New York, and purchases and receives goods valued in excess of $5000 directly from suppliers located outside the State of New Jersey.

It is admitted and I so find, that PBS is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

It is also admitted and I so find that Local 32B-32J and United Workers of America are labor organizations within the meaning of Section 2(5) of the Act.

II. POSTTRIAL MOTIONS

On November 3, 1999, PBS filed a motion to supplement the record. Responses and objections were thereafter filed by the General Counsel opposing PBS's request.

By Order dated November 12, 1999, I denied PBS's request to supplement the record, principally because the material sought to be introduced did not meet the Board's criteria for newly discovered evidence, as well as the fact that PBS had not demonstrated the relevance of any of the evidence that it sought to introduce.

PBS in its brief made reference to this Order, and implicitly requested that it be changed, in view of the fact that on the last day of trial, counsel for PBS stated on the record that one of the items sought to be introduced in its motion (a dismissal letter from the Regional Director) would be submitted, and no one objected at the time.

I have reconsidered my Order in light of PBS's request, responses submitted by the parties subsequent to the issuance of the Order, as well as my review of the record. Based on these factors, I shall reverse my ruling in part, and admit into evidence the dismissal letter issued by the Regional Director in Case 2–CA–27766, as Respondent's Exhibit 27. In that regard, I note that PBS had indicated on the record that it intended to introduce this document and no objection was raised by any party at the time. Moreover, upon reviewing the record, more particularly the testimony of Michael Francis, CEO of PBS, there are references to this document, and his testimony concerning PBS's hiring at the location involved in that case is somewhat confusing. In that light, the introduction of this letter is necessary to clarify the record and enable me to better understand his testimony. For similar reasons, I shall also admit into evidence the informal settlement agreement executed in the some case executed by all parties, including the Regional Director's letter refusing to issue complaint because of the undertakings in the settlement. These documents were submitted by PBS in one of its responses to the Charging Party's position statements, after which the Charging Party requested that they be admitted into evidence.

I agree. The testimony of Francis implicitly made reference to these documents explaining his hiring actions at the location involved there, and in my view the record should

[1] While every apparent or nonapparent conflict in the evidence may not have been specifically resolved below, my findings are based on my examination of the entire record, my observation of the witnesses' demeanor while testifying and my evaluation of the reliability of their testimony. Therefore, any testimony in the record which is inconsistent with my findings is discredited.

include these items in order to clarify and explain his somewhat confusing testimony in that regard.

However, I reaffirm my previous Order with respect to the introduction of the personnel files sought to be introduced by PBS. I note particularly that PBS made no offer to introduce these documents during the trial nor make any mention that it intended to do so. Moreover, PBS made no specific reference to what these documents would establish.

On November 16, 1999, the Charging Party requested that I take administrative notice of various documents that it appended to its letter, including charges, complaints, and informal settlement agreements involving PBS's conduct at various locations in Massachusetts.

PBS filed a response dated November 24, 1999, opposing the Charging Party's request for administrative notice of these documents.

In its request, the Charging Party asserts that these documents are admissible for the purposes of assessing remedy, and in support of the request that it intends to make in its brief for a broad order and for reimbursement of costs to Local 32B-32J. However, it is clear that informal settlement agreements (with or without a nonadmission clause) cannot be assessed in determining whether Respondent has demonstrated a proclivity to violate the Act, because such agreements have no probative value in establishing violations of the Act. *Painters District Council 9* (*We're Associates, Inc.*), 329 NLRB 140, 144 (1999); *Sheet Metal Workers Local 28 (Astoria Mechanical),* 323 NLRB 204 (1997). Therefore, since these documents have absolutely no relevance to the issues before me, I shall deny the request of the Charging Party to take administrative notice of this material.

Finally, on February 1, 2000, after the receipt of briefs, PBS filed a letter which purported to point out "certain errors in the recitation of facts," contained in the briefs of the Charging Party and the General Counsel. Thereafter, the General Counsel moved to strike PBS' letter, because it was "nothing more than . . . reply brief without requesting permission in disregard of the Board's Rules."

PBS replied by letter February 3, 2000, asserting that its letter was not a reply brief, but merely an attempt to correct factual errors and omissions. Further it notes that the Board's rules and Regulations are silent with respect to reply briefs, and do not preclude their being filed.

While PBS is correct that the Board's Rules do not preclude the filing of reply briefs, they did not authorize or permit such briefs either. I agree with the General Counsel that Board precedent permits such briefs only with the permission of the ALJ. Inasmuch as PBS has neither requested nor received permission from me to file such a brief, the General Counsel's motion to strike is appropriate, and is granted. *A.H. Belo Corp.*, 285 NLRB 807, 810 fn. 1 (1987); *Rainey Security,* 274 NLRB 269, 273 fn. 2 (1985).[2]

[2] PBS' contention that its letter was not a "reply brief," but rather a "correction of errors and omissions," is without merit. Whether PBS entitled the document a "reply brief," or not is insignificant. Clearly by attempting to correct alleged "errors and omissions" in the briefs of the General Counsel and the Charging Party, PBS was seeking to accomplish the same purpose as a reply brief.

III. PRIOR RELATED CASES

A. Planned Building Services, 318 NLRB 1049 (1995) (PBS I)

On September 11, 1995, the Board issued a Decision and Order in the above case adopting and affirming the Decision issued by Administrative Law Judge Snyder with one modification. This case dealt with PBS' conduct at four buildings in upper Manhattan, located between 112th Street and 129th Street, all of which had previously been serviced by another contractor, Ferlin Service Industries. Ferlin also supplied maintenance services to several other buildings in New York City, New Jersey, and Long Island, and whose employees at all of these facilities comprised a single bargaining unit, which had a collective-bargaining relationship with Local 32B-32J.

On October 17, 1991, prior to PBS taking over the contract to provide maintenance services for the four buildings, an election was conducted in Case 2–RD–1260, which involved Local 32B-32J and Local 912 United Commercial and Industrial Workers (Local 912). The results of the election was 71 votes for Local 32B-32J and 54 votes for Local 912. Thereafter, Local 912 filed unfair labor practice (ULP) charges and objections, which resulted in the issuance of an order consolidating a complaint and objections hearing. On February 24, 1994 (well after PBS commenced servicing the facilities involved in that case), Administrative Law Judge Edelman issued a decision concluding that Ferlin had unlawfully threatened employees with discharge if they supported Local 912 in violation of Section 8(a)(1) of the Act and recommended that this conduct warranted setting aside the election. On April 12, 1994, no objections having been filed to the judge's decision, the Board adopted the decision, and ordered that a second election be held. As of the date of the judge's decision, the election had not as yet been held, and in any event as of October 28, 1992, PBS suceeded Ferlin as the contractor for the four buildings involved in the unfair labor practice charges, which comprised a portion of the prior bargaining unit.

The judge found, affirmed by the Board the following facts with regard to PBS' conduct with respect to these buildings. On October 27, 1992, the day before PBS was to commence supplying maintenance services, PBS held a meeting with 18 former Ferlin maintenance employees, including superintendents. The employees were offered jobs, provided employment applications, and were told to bring back completed applications the morning when they were to start work. They were told that they would receive the same wages that they received from Ferlin, but that benefits would not be the same. All of the employees accepted PBS' offer and begin working on October 28, 1992.

Kevin McCullough, assistant to the president of Local 32B-32J, on October 30, 1992, contacted Arthur Birnbaum, a representative of PBS and informed him that Local 32B-32J had recently won an election, was the representative of the

employees of the four buildings in question, and wanted to negotiate a contract. Birnbaum replied that a representative for Local 912 had claimed to represent the workers, and that his boss, Michael Francis, had instructed him to recognize Local 912. Subsequently, Local 32B-32J sent a mailagram to PBS requesting recognition, to which PBS replied that it had voluntarily recognized Local 912 based on a representation of authorization cards signed by a majority of employees.

Although in fact PBS had been shown signed authorization cards for Local 912, by a Local 912 representative, these cards were found to be tainted because of threats made by an agent of Local 912, and because a majority of the cards were circulated, solicited by, and or received by Sam Rodriguez, a supervisor of PBS.

As a result of that finding, the judge found and the Board agreed that PBS unlawfully recognized Local 912, and unlawfully signed a contract with the Union, in violation of Section 8(a)(1), (2), and (3) of the Act, and that Local 912 violated Section 8(b)(1)(A) and (2) of the Act by accepting such unlawful recognition and executing an agreement with PBS.

The Board also agreed with the judge's conclusion that PBS violated Section 8(a)(1) and (5) of the Act by failing and refusing to recognize and bargain with Local 32B–32J, since it was a successor employer to Ferlin. However, the Board disagreed with the judge's conclusion that PBS had come within the "perfectly clear" exception to *Burns Security Service,* 406 U.S. 272, 294–295 (1972), and was not free to set initial terms of employment. The Board concluded, contrary to the judge, that under *Canteen Co*. 317 NLRB 1052 (1995), and *Spruce Up Corp.,* 209 NLRB 194 (1974), PBS had communicated to Ferlin's employees its plan to retain them based on changed terms and conditions of employment, i.e., no benefits and was not a "perfectly clear" successor obligated to consult with the Union prior to setting initial terms and conditions of employment. Therefore, the Board dismissed the allegation in the complaint that PBS violated Section 8(a)(1) and (5) of the Act by unilaterally changing terms and conditions of employment of employees.

Finally, the Board also affirmed the judge's finding that PBS violated Section 8(a)(1), (2), and (3) of the Act by discharging two employees at the request of representatives of Local 912, because the employees refused to sign checkoff authorization cards for Local 912.

B. Planned Building Services, 330 NLRB 791 (2000) (PBS II)

On March 7, 2000, the Board issued a Supplemental Decision and Order in *PBS II*, affirming the decision of Administrative Law Judge Green with miner modifications to the recommended remedy.

The Board also dealt with a request made by Local 32B-32J, the Charging Party in both that case and in the instant case to remand *PBS II* to Judge Green to reevaluate his credibility resolutions, because of the testimony of PBS Vice President Joanne Stratakos in the instant case, where the Charging Party asserts, Stratakos gave false testimony.

The Board rejected Local 32B-32J's request, because there was no showing that Stratakos had given false testimony, since no decision has been issued in the instant matter, and in any event such a finding would not require a different result, since it is not unusual to believe some but not all of a witnesses testimony.

PBS II involved PBS's conduct at the Smith Haven Mall (the mall), in Lake Grove, New York, where prior to December 1995, General Growth Management (General), a contractor whose employees were represented by Local 32B-32J, had been performing services at the mall. The bargaining unit had consisted of 30 employees, with hourly rates ranging from $10.47 to $13.84 per hour for employees, plus pension and welfare benefits.

In the spring of 1995 (at a time between the judge's decision and the Board's decision in *PBS I*), PBS was asked to prepare a bid for this job by Simon Property Group, who was preparing to purchase the mall. After inspecting the mall, Stratakos estimated that it would take 26 full-time employees to do the work, and determined that wage rates in the area for the nonskilled employees was $6.50 per hour.

On June 2, 1995, Michael Francis, PBS' CEO, sent a letter to a representative of Simon, which included PBS's bid, as well as a statement which PBS wanted included in any final document. This statement asserts that "in the event that Local 32B–32J, . . . is deemed to be the Union of record, Simon . . . shall be responsible for any differential in rates and or benefits applicable thereto." The judge's decision does not reflect whether or not this proposed clause was included in the final bid, which was presumably accepted by Simon.

In the fall of 1995, PBS was notified that it would likely be retained if Simon purchased the mall. In November 1995, a meeting was held where Simon tried to have PBS reduce its bid, and told PBS that December 15 was the expected closing date. Further delays ensued and the closing was set for December 26, 1995. On December 28, 1995, Simon purchased the mall and PBS commenced operations.

In preparation for the start of operations, PBS hired and made arrangements for a group of employees to be ready and in place to start working at the mall on the closing date. This group comprised 12 employees, 6 of whom were hired in December 1995 to work temporarily at other locations and then transferred over to the mall, 5 individuals who had never worked for PBS and were hired in December 1995, and 1 employee who was temporarily assigned to work at the mall on December 28 and 29, 1995.

According to Statakos's testimony before Judge Green, she planned to interview all prior employees of General and offer them all jobs at lower rates and benefits. She interviewed the former General employees, told them they would be paid $6.25 per hour and would receive three paid holidays, and no health insurance benefits. She also told them that PBS was a union shop.[3] When asked what she would do with the 11 or 12 people hired in early December, if all or most of General's employees accepted employment, Stratakos testified that she would have placed those people at other locations or retained a larger than anticipated work force for

[3] As will be discussed more fully below, by this time PBS had entered into a contract with UWA covering all future locations.

a period of time and let attrition cure any overstaffing problems.

The former General employees were interviewed on December 28. Nine former employees of General were offered and accepted employment by PBS. Another 12 former employees of General were offered jobs by PBS but turned them down because the terms of employment were below those paid by General. Another individual did not apply because the terms offered by PBS were too low. Judge Green also found that PBS offered a job to an individual who had been employed as a landscaper by General, at $9.86 an hour, as a porter at $6.25 per hour. This individual declined because the salary was a "little low."

Further, PBS offered a job to another employee as a sweeper at $9 an hour. This employer accepted initially, but later in the day he rejected the offer.

Thus, as of the time of the last interviews, PBS had already made job offers to 22 former General employees, 9 had accepted. It had at that time a total complement of 28 employees: 11 new hirer, 1 PBS employee on temporary transfer, 9 former General employees, plus another former General employee who later in the day rejected PBS' offer.

These final interviews were conducted in a group of five employees. All five of these employees furnished testimony in one form or another that Stratakos told them during their interview that PBS did not want to hire a majority of former General employees because that would mean that Local 32B-32J would be voted back in, and that PBS had its own Union (UWA). Further, the General Counsel also adduced testimony from a former supervisor of PBS, who testified that on December 28, 1995, he had asked Stratakos how come more union people were not being hired, and that she replied that if she offered more than 50 percent of them jobs, the Union could be voted back in. Stratakos denied all of the above-described statements attributed to her.

Notwithstanding the above testimony of the five employees who testified about these alleged statements, two of the five employees were in fact offered jobs by Stratakos during this interview, and one was rejected because PBS had a policy against hiring husbands and wives. Both employees who were offered jobs during the interview did not accept. A fourth employee at the interview told Stratakos that he would not be available until January 20, 1996. Later on the same evening, Stratakos telephoned two of the individuals at the final interview (one of whom had already been offered a job earlier in the day), and offered them jobs at $7 per hour, .75 cents more than PBS' previous offer. One of the two employees testified that Stratakos added that she would have to sign a card stating that she was no longer represented by Local 32B-32J. Neither of these two individuals accepted the jobs offers by PBS.

For the week ending December 30, 1995, PBS employed 23 nonsupervisory employees at the mall, and the number fluctuated between 23 and 26 for the next 6 months.

Sometime in May 1994, PBS entered into a contract with UWA which purportedly covered all employees employed by PBS at malls in New York, New Jersey, Connecticut, and Massachusetts. Stratakos testified that had he assumed that Smith Haven Mall would become a UWA shop because of such contract. Accordingly, the record revealed that PBS supervisors solicited and required all of its employees at the mall to sign authorization cards for UWA. On January 15, 1996, PBS signed a contract with the UWA, with a union-security clause, which ran from January 15, 1996, to January 14, 2000.

Based on the above facts, Judge Green issued a decision on November 22, 1996. In that decision, he rejected PBS's argument that its alleged Master contract with UWA, permitted recognition of UWA on an accretion theory. He concluded that the mall was a separate appropriate unit, and that the cards signed by employees on behalf of UWA were invalid since they were solicited by supervisors. Therefore, PBS violated Section 8(a)(1) and (2) and UWA violated Section 8(b)(1)(A) and (2) of the Act.

With respect to the refusal to hire allegations, Judge Green considered the contentions of the General Counsel and the Charging Party that PBS employed an unlawful hiring scheme to avoid being a successor, and under this plan it would have refused to hire a sufficient number of former General employees to avoid becoming a successor. He rejected these speculative contentions, principally because PBS hired or offered to hire nearly all of the former General employees who applied. He pointedly did not make credibility resolutions concerning the statements allegedly made by Stratakos to former General employees and supervisors. Judge Green reasoned as follows:

> If the Union had forcibly instructed its members to accept the job offers no matter what terms were offered, and had the employees followed orders, we would have seen what the Respondent would have done. If it had terminated the interviewing process or refused to hire any more of the predecessor's employees after hiring the first 11 or 12 applicants, we would have a better answer to the General Counsel's speculation. For better or worse this did not happen and we are left with the objective facts that despite the Charging Party's and the General Counsel's theory, and the testimony of their witnesses, the Respondent did, in fact, make job offers to every one of the predecessor's employees (except Joyce Coyne) who applied for a job and who indicated that they were available for work. Most of the former employees of General either refused the job offers or did not apply. Of the people who did apply, nine were hired.
>
> The evidence, while suggestive of a possible plan by which the Respondent hoped to avoid becoming a successor, the evidence, in my opinion, is simply not enough to establish that the Respondent acted in a discriminatory manner by refusing employment to any of the predecessor's employees because of their union affiliation. Maybe it should be considered a "sin" to hope for such an outcome. But it is not a violation of the law to hope for something, unless the Respondent acts in a illegal manner to carry out an illegal plan.
>
> In the absence of sufficient evidence showing that the Respondent illegally refused employment to the

> predecessor's employees, the Respondent, pursuant to the *Spruce Up* decision, was entitled to determine, unilaterally, its initial wages and terms and conditions of employment as long as it announced this prior to the hiring process. This is precisely what happened in the present case and PBS informed the former employees, before they were interviewed, that it was going to offer jobs at about $6.25 to $6.50 per hour and without other benefits.
>
> Since the Respondent was entitled to establish its initial terms and conditions of employment, it follows that it did not illegally discriminate against those persons who refused to accept job offers because the terms of employment varied from those that they enjoyed under the contract with Local 32B-32J. Accordingly, I cannot agree with the General Counsel's interesting theory that those people who did not apply for jobs, or who rejected job offers, were constructively refused employment in violation of Section 8(a)(3) of the Act.

Subsequently, on May 6, 1997, the Board remanded the case to Judge Green to make explicit credibility resolutions between the testimony of Stratakos and certain of General Counsel's witnesses. In a supplemental decision issued on June 3, 1997, Judge Green did not credit the testimony of General Counsel's witnesses, including the former supervisor concerning Stratakos's alleged statements concerning PBS' intentions not to hire a majority of former General employees represented by Local 32B-32J. Judge Green so found, primarily because he did not believe that Stratakos was either so stupid or so lacking in self-control as to make such damaging statements to individuals whom she did not know. He, therefore, affirmed his initial decision, and reiterated his view that PBS' plan was to arrange the hiring process in such a way that there would be a good possibility, and the hope, that a sufficient number of General's employees would refuse employment and, therefore, a majority of the new work force would not consist of General's employees. However, this finding did not establish a violation, even in the face of the concurrent assistance to UWA. He concluded that PBS' plan succeeded, but was not unlawful, since Local 32B-32J "did not convince a sufficient number of members to accept jobs that were offered to them on the terms offered by the Respondent. Had they done so, the Respondent would have been a successor and it would have been obligated to bargain."

In the Board's decision, affirming Judge Green's conclusions and credibility resolutions, the Board did make reference to a contention made by the Charging Party that the offers extended to former General employees were invalid because they were unlawfully conditioned on the employees' accepting representation by UWA.[4] The Board rejected that assertion because the case was not litigated on that basis, and that the General Counsel never chose to litigate that theory of a violation. The Board added that the Charging Party cannot expand the scope of the complaint, and that even if the General Counsel, which it had not, had attempted to change the theory of the case in exceptions, it would in any event be untimely.

The Charging Party also requested several additional remedies, including a corporatewide order and litigation expenses to the Charging Party. The Board rejected these requests, but did agree with the Charging Party that since in *PBS I*, PBS engaged in similar violations of unlawful card solicitation by supervisors, it was appropriate to order corporate posting at all of PBS's facilities.[5]

IV. FACTS

A. Background

PBS provides janitorial cleaning and maintenance services to residential and commercial buildings, department stores, and shopping malls in New York, New Jersey, Connecticut, Pennsylvania, and Massachusetts. It employs workers in a variety of skilled and unskilled classifications including building engineer, fire safety director, handyman, doorman/concierge, and porter/matron.

The principal owner is Michael Francis, who started PBS in 1988. Stratakos was PBS' vice president who had responsibility for PBS's startups at new accounts and was generally involved in interviewing prospective employees for PBS positions when such accounts involved incumbent employees, and when PBS decided to interview and or hire such employees. Gilbert Sanchez was employed by PBS as a regional superior for the buildings involved in the instant complaint, located at 71 Broadway (71 Broadway), 19 Rector Street (19 Rector), 32-42 Broadway (32-42 Broadway), and 39 Broadway (39 Broadway), all in lower Manhattan, New York.

The testimony of Stratakos and Francis reflects that when PBS takes over a job, there is no consistent or established policy as to whether or not to either interview or to offer jobs to the work force employed by the prior contractor. Thus, each individual job is looked at on an individual basis, and a decision is made by PBS on the issue.

According to Francis, PBS' practice at least with respect to its earlier jobs which were generally in New Jersey, was to offer to hire the incumbent employees, as long as the owners were satisfied with the prior performance of these workers while they were employed by the prior contractor. An examination of PBS' practice with respect to specific sites confirmed this procedure. For example, at the Rockaway Mall in Rockaway, New Jersey, the mall had been using its own employees to perform the cleaning and maintenance, and decided to employ an outside contractor and contracted with PBS for that purpose. Both Stratakos and Francis were asked about how PBS decided to staff this facility, and were both asked the question whether or not the prior employees were represented by a union. Both witnesses answered no, and both witnesses gratuitously added, without being asked that these employees were still not represented by a union. At that facility, PBS hired nearly all of the prior employees, since as Francis testified, there had been no dissatisfaction with the cleaning from the clients. However, the employees

[4] Note that Judge Green had found during the interviews the applicants were told that PBS was a union (UWA) shop.

[5] Member Hurtgen dissented from this requirement, and would not order posting at other facilities.

at the Rockaway Mall were making minimum wages, so they did not have to take a pay cut to accept a job with PBS.

At the Ocean County Mall, another nonunionized facility, prior management told PBS it wanted three employees hired and the others replaced. PBS complied with this request, hired the three former workers and hired new employees to fill out the rest of the staff.

Stratakos furnished testimony concerned an apartment building in Newark, New Jersey, called Ten Hill Street. PBS already had a contract for a sister building in Newark, owned by the same corporation. The employees at Ten Hill Street had been represented by Local 945 IBT. PBS had a signed contract with Local 97 IBT. According to Stratakos, she had a discussion with management of the building, and received recommendations as to which former employees should be retained. Based on this discussion, as well as the number of positions that PBS intended to utilize, Stratakos testified that she decided to retain most of the prior staff and interveiwed everyone from said staff that wanted to be interviewed. In this instance, the employees pay was going to be cut, and Stratakos observed that PBS' starting rate "wasn't comparable to somebody that had been working there for five or six years. So we weren't even sure if the people they wanted to keep would stay." Stratakos added that after PBS began the job, there was a dispute between the two teamster locals. The result was that Local 945 retained representative rights at the building, but agreed to sign the same contract that PBS had with Local 97 at PBS's rates.

Stratakos was also involved in hiring at the Newport Mall in Jersey City, New Jersey, which was obtained by PBS in 1994. The prior workforce was represented by Local 734 IBT. At this facility, Stratakos went to the mall about a week before PBS began the contract. She met with all the incumbent employees at a group meeting. Prior to that time Stratakos had not decided whether to hire any or all of these employees. She had been told that management had requested that PBS hire a "Carlos" as a supervisor and that she had agreed to do so. Carlos in turn had recommended to Stratakos that she retain certain of the prior employees, and she also agreed at some point to comply with Carlos's request. At the group meeting, Stratakos gave employee applications, told them the rates that PBS was paying, and asked those who were interested to return later for individual interviews. Thereafter, some of these former employees did in fact interview with her, and some of them were in fact hired, although some could not be hired because PBS had changed shifts, and the employer couldn't fit their days into PBS' schedule. Stratakos summarized the interview process there as follows: "I would try to give everybody a fair shot if they had worked there before." Stratakos filled out the rest of PBS' staff with transferees from other locations, as well as some new employees who were recommended by one of PBS' supervisors.

According to Francis, he recalled that at the Newport Hall, there was some dissatisfaction from the management with the prior crew and that therefore PBS hired only some for the prior workforce. Francis did admit that those employees whom it did hire, were hired for "a cheaper wage package than they were getting at the facility."

As for union representation, PBS had transferred employees into the Newport Mall from buildings in Newark that were represented by Local 97 and Local 945 IBT. Francis testified that he was going to recognize one of these two Unions at Newport Mall, but Local 734 IBT came to Francis and agreed to give PBS a contract that he wanted in order to obtain representation rights for the mall employees. Francis agreed and signed a contract with Local 734. Francis did not recall if Local 734 obtained any authorization cards at that time.

On April 1994, PBS obtained a contract to clean the Garden State Plaza Mall in Paramus, New Jersey. The previous contractor was Allied Maintenance (Allied), whose employees had been represented by Local 560 IBT. PBS offered jobs to all 35 former employees of Allied at substantially lower rates.[6] Interviews were conducted by Stratakos, and another official of PBS. A substantial number of these former employees would not accept a cut in pay, and refused PBS's offer. Some employees did accept the offer, but on the first scheduled day of work, all but a few of those who had accepted, did not show up for work. According to Francis, he was told at that time by someone undisclosed in the record, that Allied had offered jobs to all of their former employees at other locations, with the intent of getting the job back, if PBS was unable to service the mall properly. The mall owners threatened to cancel the contract if PBS did not straighten out the problem. PBS was able to retain the contract, by transferring in employees from other locations, and paying overtime, while assembling a full staff.

During this period of time, Francis asserts that he was approached by Joseph Porcelli, a representative of UWA. According to Francis, Porcelli presented him with proof that the UWA represented a majority of PBS's employees, and he therefore agreed to recognize the UWA as the representative for all of PBS' employees at all malls and or department stores in New Jersey, New York, Connecticut, and Massachusetts. PBS thereafter executed a collective-bargaining agreement with UWA. According to Francis, what was "meant" by the recognition clause was to provide for recognition for all "future" malls and stores.

Francis further testified that his practice was subsequent to the signing of this agreement, to notify the UWA whenever PBS obtained a new contract, and PBS would agree to recognize the UWA if and when UWA presented proof of majority status. Then PBS would enter into 3-year site specific agreements with UWA which coincided with the term of PBS' business contract with the customer.

In 1996, Porcelli retired and was replaced by Carmine Maglieri as president of UWA. Francis continued this same practice with Maglieri. By that time, PBS began to concentrate on servicing office and apartment buildings, and PBS followed this practice and recognized UWA as described below for a number of locations.

In May 1997, PBS and UWA negotiated a successor Master contract effective from May 1, 1997, to April 30, 2002.

[6] For example, Porters were making form $8.50 to $9 per hour. PBS offered $3.50 to $6.

The recognition clause was modified to include office buildings and high rise apartments.

PBS' first account, in New York was in 1992 and involved the four buildings located in Harlem, New York, which were the subject of the unfair labor practice charges and decision described above in *PBS I*. As related above, at the time PBS took over, there was a dispute between Locals 32B-32J and 912 concerning representation of the predecessor's employees. According to Francis, he offered all the incumbent employees jobs which they accepted at the same salary, but no benefits, since he intended to bargain with whichever union won with regard to benefits. However, Francis testified that he "was led to believe when I took the contract that Local 912 was going to get the contract. I did not know the outcome of what it was going to be and I was just rolling the dice." He added that there was going to be an election and he was led to believe that Local 32B-32J "was walking away from these people." In fact, according to Francis, Local 912 did eventually win an election, and although in *PBS I* the Board ordered PBS to bargain with Local 32B-32J, PBS never bargained with Local 32B-32J.[7]

After executing its initial Master contract with UWA, PBS obtained a contract to clean a residential apartment building at 747 Tenth Avenue (Hudsonview), which was owned by the same management company that ran the Harlem properties.

The employees of the prior contractor (Madison Cleaning Co.), were represented by Local 32B-32J. According to Francis, he decided that based on his experience at Garden State Plaza, that he did not believe that the former employees would agree to work for the substantial pay cut that PBS intended to offer, or that if they accepted PBS' offer they would not stay. Therefore, Francis asserts that he decided to staff Hudsonview entirely with transferees from PBS facilities in Garden State Plaza, Hallmark House, and Pavilion in Newark, New Jersey.

When PBS started the Hudsonview job, Local 32B-32J began picketing at the facility, and filed charges with Region 2 of the National Labor Relations Board (the Board). These charges resulted in a dismissal letter from the Region, as well as the execution of an informal settlement agreement.

The dismissal letter, dated June 22, 1995, reflected that on August 29, 1994, Local 32B-32J faxed a letter to PBS requesting that it hire the employees of Madison. It further found as follows:

> The investigation further revealed that when Planned assumed control over the cleaning operations at the jobsite at midnight on August 31, it already had completed its hiring for that site. Indeed, Planned had previously hired and trained its initial complement of jobsite employees at other locations operated by Planned. While it is true that Planned did not seek applications for employment from the former Madison employees until September 21, there is insufficient evidence to conclude that its failure to offer jobs to the former Madison employees on September 1, at a time when it had a full complement of employees, was related to the Union membership of these former employees.

The letter indicated that the allegations in the charge that PBS violated the Act with respect to jobsite hiring after September 1, 1995, was being retained for further processing. That portion of the charge resulted in the execution of an informal settlement agreement by all parties, and letter by the Regional Director dated April 16, 1996, refusing to issue complement based on the undertakings in the settlement. The settlement provided that PBS would cease and desist from refusing to hire employees previously employed by Madison because of their affiliation with Local 32B-32J, as well as backpay and reinstatement for four individuals.

Although the record is not totally clear on this point, it appears based on a compilation of the testimony of Stratakos and Francis, that after PBS began cleaning the building on September 1, 1995, Local 32B-32J and the former employees began picketing. Some of the employees left the picket line and applied for jobs, since the former supervisor of Madison, Sam Rodriguez, was hired by PBS and knew the employees. It appears that as a result of these events, the Region determined that PBS had unlawfully refused to hire these four individuals who had been Madison employees and who were on the picket line. As a result of the settlement, three of these individuals were in fact hired by PBS.

Subsequently, PBS signed a contract with UWA for this site. Interestingly, initially Francis contended that he agreed to recognize UWA because it's "their people that I brought," contending that PBS transferred these employees from Hallmark Pavilion and Garden State Plaza, and that a lot of employees worked for PBS in Newark, lived in New York, and took the path to Newark to go to work. When it was pointed out that prior to that time, Garden State Plaza was the only facility where UWA was recognized, Francis then testified that a majority of the transferees came from Garden Sate Plaza.[8]

Stratakos furnished testimony which contradicted Francis with respect to where the transferees came from into Hudsonview. According to Stratakos, she was directly involved in stuffing Hudsonview, and she brought in transferees from PBS's facilities in Newark, New Jersey, and at Essex Plaza. She made no mention of Garden Plaza as a source of employees for Hudsonview.

At some point after the picketing at Hudsonview began, Francis reached out to someone he knew to set up a meeting with Local 32B-32J to try to resolve the dispute. He subsequently met with Kevin McCullouch, assistant to the president. During this meeting, McCullough demanded that PBS sign a Master agreement with Local 32B-32J covering all of PBS's past and future locations. Francis replied that he could not do that, and would not sign a citywide contract with Local 32B-32J. McCullough replied, that Local 32B-32J does not sign individual agreements, but Francis reminded him that PBS had signed such an agreement with PBS in the past at a New York Times location. McCullough responded that this is not Local 32B-32J's practice anymore.

[7] The record is unclear as to whether Local 32B-32J requested PBS to bargain with it with respect to these locations after the Board's decision.

[8] I note that Garden State Plaza is located in Paramus, New Jersey, and not Newark, where Francis had initially indicated that "a lot" of people worked for PBS in Newark but lived in New York.

In May 1996, PBS obtained a contact for a commercial building at 2 Broadway, in New York, New York. Francis testified that he knew in advance that he would be getting this contract, so he decided to hire extra employees at Hudsonview and train them for a month, before moving them over to 2 Broadway when PBS began servicing that building.

The employees of the prior contractor, ISS, were represented by Local 32B-32J. According to Francis, he decided not to offer jobs to any of the former ISS employees, because PBS was offering wages of $7.50 per hour, as apposed to $13 an hour, and substantially reduced benefits from the Local 32B-32J contract. Francis asserts that he believed that these employees would not accept a job under these conditions, and if they accepted they would not stay. He added that he knew that ISS was a large company and could place employees elsewhere, like what happened to PBS at Garden State Plaza.

In this connection, Francis admitted that he told a representative of the management company of 2 Broadway that he was "going to be non 32B-32J." More significantly, Francis also admitted that PBS was relying on the Regional Director's dismissal letter in Hudsonview to train employees at Hudsonview and transfer them to 2 Broadway, to "thereby avoid having to offer jobs to 32B-32J employees."

Francis further testified that after starting the job at 2 Broadway, he was shown authorization cards for the employees by Porcelli of the UWA. According to Francis, some of them had been obtained by the UWA while their employees were being trained at Hudsonview, and others were obtained from employees after they began working at 2 Broadway. A site agreement was executed by PBS and UWA on June 3, 1996, with effective dates from May 22, 1996, to May 21, 2000.

After PBS started the job at 2 Broadway, Local 32B-32J began picketing at that location. After beginning work at 2 Broadway, PBS began hiring extra employees at that location and training them, in contemplation of getting more work in New York. At some point, Sanchez began to hire employees as "standbys," whereby they would have no regular schedule, but would fill in at any other buildings that PBS had or might obtain in the future.

On December 1, 1997, PBS obtained a contract to service 1995 Broadway, New York, New York, another location where employees represented by Local 32B-32J had previously performed the work. Once more, according to Francis, he did not believe that employees earning $14 an hour would accept a job paying $7.50 to $8 per hour, and he did not offer jobs to these employees, except for the superintendent and the handyman. The super declined, but the handyman accepted and was made the super. The remainder of the staff was completed by using transfers from PBS's Hudsonview facility, and a few from 2 Broadway.

Local 32B-32J did not picket at this site, but on December 3, 1997, its attorney sent a letter to PBS' attorney. The letter sated that PBS had "recently acquired accounts in New York City." The letter ads that Local 32B-32J "reserves the right to picket and/or strike at these locations to protest the outstanding unfair labor practices committed by your client." It concludes by requesting a meeting to discuss remedying PBS' "outstanding unlawful conduct."

B. 71 Broadway

In August 1997, Francis began negotiations with World Wide representatives concerning a cleaning contract for a building at 71 Broadway, which was being converted from a commercial building to a residential building. The building was vacant for over a year, due to renovations, so there was no incumbent work force or union at that facility.

PBS began work cleaning the building on September 2, 1997. Gilbert Sanchez was assigned the responsibility for staffing its building on behalf of PBS. Sanchez asserts that Francis instructed him to staff the building with nine employees.

Sanchez decided to staff this building partially with transferees from other buildings, and partially with new hires. During the first week of PBS's employment on that job, the week ending September 7, 1997, PBS employed 10 employees. According to Sanchez, this crew, included five transfers, Pablo Hernandez and Carlos Pagan from 2 Broadway,[9] and Anthony Rivera, Derrick Wright, and Luis Sanchez from PBS' facility Hudsonview.[10]

Sanchez hired Pierre Freyre and Richard Matos as weekend doormen, who were both Federal police officers with experience as doormen. John Millan was hired as a porter, starting on September 3, 1997. Raymond Prieto was hired as a doorman on September 3, 1997.[11] Daniel Quesada began working for PBS at 71 Broadway on September 4, 1997, as a porter.

On September 6, 1997, the first day at work for Matos and Freyre, both of them were given authorization cards for UWA by Sanchez, who told them in separate conversations that they needed to fill out these cards for union representation. Freyre asked if the union was Local 32B-32J and Sanchez replied that it was not. They both signed the cards and returned them to Sanchez. Later in the day, Sanchez intro-

[9] Hernandez and Pagan were both porters at 2 Broadway. Hernandez began his employment for PBS on April 8, 1996. He worked at 71 Broadway for 2 weeks and was transferred back to 2 Broadway on September 17, 1997. He was transferred back to 71 Broadway on January 14, 1997. Pagan began at 2 Broadway on May 20, 1996, was transferred to 71 Broadway on September 3, 1997, where he was still employed at the time of the trial.

[10] Wright was a porter at Hudsonview, starting on August 4, 1997, and was transferred to 71 Broadway on September 4, 1997. Rivera was also a porter, who began at Hudsonview on January 29, 1997, and according to PBS' records, worked at 71 Broadway for 5 days on September 4, 5, 6, 9, and 10. He was then transferred back to Hudsonview. Luis Sanchez was a lead porter (porter doorman). He was hired at Hudsonview on June 5, 1997, was transferred to 71 Broadway on September 3, 1997, where he worked 4 days, until September 7, when he was transferred back to Hudsonview. Wright was hired on August 4, 1997, at Hudsonview as a porter. He was transferred to 71 Broadway on September 4, 1997. He remained there until October 14, 1998, when he was transferred to 39 Broadway.

[11] According to Sanchez both Millan and Prieto had previously worked for PBS for 1 day as standbys, so he had their applications in his office. They were roommates, so when he called Prieto, Millan answered and Sanchez told both of them to come down for a job interview.

duced Matos to a representative from UWA. During Freyre's conversation with Sanchez, Freyre informed Sanchez that he didn't want any deductions from his check, because he didn't need any additional benefits.[12]

Daniel Quesada was told by Sanchez during his employment interview at 2 Broadway on September 2, 1997, that the job would be union and to work there he had to be union. The next day, Quesada reported to 2 Broadway and was told that he would be working at 71 Broadway. He was given an authorization card and a checkoff card for UWA by Sanchez, along with a payroll information sheet to fill out. Sanchez admitted giving a UWA card to Quesada to fill out, but claims that initially he intended to employ Quesada at 2 Broadway, but that the employee whom he intended to use at 71 Broadway for that position was supposed to transfer from 2 Broadway. However, that employee quit the day before. Thus, Sanchez asserts that he gave the card to Quesada to fill out believing that Quesada was going to be employed at 2 Broadway, which was under contract with the UWA.

Derrick Wright as noted was hired by PBS at Hudsonview as a porter on August 4, 1997. He was hired at Hudsonview by Sam Rodriguez as a "temporary" employee, until PBS had a spot for him as a permanent employee. However, Wright worked regularly at Hudsonview, 40 hours a week until his transfer to 71 Broadway. While employed at Hudsonview, he was not told anything about a union, and never signed any cards or forms for UWA. After being transferred to 71 Broadway, Sanchez gave Wright a UWA card and instructed him to fill it out. Sanchez admitted soliciting Wright's card, as well as giving him a dues deduction form for UWA to fill out. According to Sanchez, the shop steward for UWA, Angel, an employee at 2 Broadway, usually gives out these cards. However, he had quit the day before. Moreover, Wright had transferred to 71 Broadway from Hudsonview, but the paperwork for him did not include any forms for UWA. Thus, Sanchez asserts that since there was no shop steward around to give Wright the forms, he felt that it was incumbent upon him to get these forms signed.[13]

During the next week, PBS hired four additional employees at 71 Broadway. They were Felix Sirjusingh, Elebute Ogunwale, Fabiola Piantinis, and Luis Santiago. Piantinis, Sirjusingh, and Santiago were doormen and Ogunwale was a porter. All were new hires. Thus, for the second week of its operation, PBS employed 12 employees. Luis Sanchez as noted above was transferred back to Hudsonview on September 9, 1997. Freyre who as noted worked only weekends, did not work for PBS the second week.

During the next payroll week ending September 21, 1997, PBS agreed to recognize UWA as the representative for its employees at 71 Broadway. A contract was signed covering that unit on September 19, 1997. The date of recognition is unclear from the record, but according to the testimony of Maglieri and Francis, it occurred sometime that week. According to Francis, he informed Maglieri about the fact that PBS was starting the job in the first week of September. He further asserts that Maglieri subsequently called and informed him that UWA had obtained cards from a majority of employees. Francis recalls that he met with Maglieri either the "day we signed the agreement or may have been several days before." Francis did not recall how many cards Maglieri presented, but he testified that Maglieri had "about 80% of the people." Maglieri for his part, could not recall how many cards he presented, but he testified that on or about September 6, 1997, he personally obtained cards from "everyone" working for PBS at 71 Broadway. After reviewing the cards submitted, Francis contends that he had his staff check them against PBS's payroll records, and concluded that UWA represented a majority of employees in the unit. The "negotiations" for a contract, consisted of Francis informing Maglieri that they would apply the terms of the Master agreement to 71 Broadway.

Maglieri, although not recalling on direct testimony how many cards he obtained, was shown six cards by PBS's attorney, and testified that these were the cards that he presented to Francis, and that were turned over to the Board in response to the General Counsel's subpoena.

These six cards were four cards dated September 6, 1997, and signed by Freyre, Millan, Matos, and Quesada, a card from Wright, dated September 8, 1997, and one signed by Carlos Pagen dated May 29, 1996. However, during the payroll week ending September 21, 1997, PBS employed 13 employees at 71 Broadway. The employees were Pagan, Quesada, Sirjusingli, Pablo Hernandez, Wright, Ogunwale, Prieto, Piantinis, Millan, Matos, Freyre, Francisco Rivera, and a new employee Jon Barker, who was hired on September 17, 1997, as a doorman.[14]

Employee Carlos Pagan was hired by PBS to work at 2 Broadway on May 29, 1996. On his first day of work, Sanchez gave him an application package, which included an authorization card for UWA. Sanchez told Pagan that PBS was a union shop, and in order to work there he had to sign

[12] The above findings are based on the mutually corroborative and credible testimony of Matos and Freyre. Sanchez testified that he merely introduced Matos and Freyre to UWA Representative Maglieri, and walked away. He denied soliciting cards from these employees. For a number of reasons more fully described below I did not find Sanchez to be a credible witnesses in several areas, and I do not credit his testimony as to these events. I note that although Maglieri testified that he obtained the cards from Matos and Freyre without any assistance from anyone at PBS, Maglieri did not testify as to the circumstances of his alleged solicitaion of these cards. I reject his contrived and uncertain testimony as well.

[13] Sanchez did not explain how the absence of a shop steward for 2 Broadway affected his decision to get UWA forms signed by Wright, who never worked at 2 Broadway.

[14] As noted above, this list of 13 employees includes Pablo Hernandez and Pagan who transferred from 2 Broadway to 71 Broadway. Pagan's card which Maglieri allegedly presented to Francis was dated May 29, 1996, suggesting that the card was signed while he was employed at 2 Broadway. There is no evidence that Pablo Hernandez signed any cards for UWA while employed at 2 Broadway. In fact PBS's records indicate that he did not sign a card for the UWA until October 1997. Additionally, these same records show that Barker, Ogunwale, Barker, and Piantinis had not signed cards as of October 11, 1997, and that Sirjnsingh signed up with UWA during the week of October 11, 1997.

the card and form the Union. Pagan worked at 2 Broadway as a standby until October 7, 1996, when he became a full-time employee at that building. He was told by Sanchez that he was to be transferred to 71 Broadway shortly before September 1, 1997. Pagan told Sanchez that he did not want to be transferred and wanted to stay in his own building. Sanchez told him to go to 71 Broadway for a week.

On or about October 9, 1997, the employees at 71 Broadway were at 2 Broadway to pick up their paychecks. According to Pagan, Sanchez at that time handed out dues authorization forms for UWA to all employees, and told them that they had to sign these forms in order to receive their checks. Wright also testified concerning this event, and wasn't sure what Sanchez said about the form, other than the employees had to sign.

Sanchez admits distributing dues authorization forms for UWA on October 9, 1997, while he was distributing paychecks to employees. However, he denies that he told any employee that they had to sign in order receive their paychecks. He adds that although he distributed forms to all employees, some employees did not sign them at that time, but he still gave them their checks. Sanchez did admit however that he instructed the employees, "I need these forms to be filled out." He also told them that the "office" needed them, so that dues can be deducted.

The reason for his actions, according to Sanchez was a previous memo sent to him by Joanne Dunn, payroll administrator for PBS. This memo which was sent to all PBS locations which were unionized, directed supervisors to have these forms filled out, since Dunn had found that PBS's files were missing such forms for many of its employees. This memo included locations, that were represented by numerous other unions, including UWA. Sanchez obtained signed checkoff forms from employees Rosa Perez, Norman Tlejeda, Piantini, Pagan, Wright, and Quesada all dated October 9, 1997. Over the next several weeks, Sanchez followed up, and received such signed forms from other employees a 71 Broadway.

However, neither Sanchez nor anyone else from PBS ever obtained checkoff authorization forms from either Matos or Freyre. Notwithstanding the absence of such forms, PBS deducted $15 per paycheck from their checks. Shortly after the deductions began, Freyre complained to Sanchez that PBS was not supposed to be deducting any money from his check. Sanchez told Freyre that the deductions were a mistake, and reimbursed him $10. However, PBS continued to deduct dues from his salary for the next check, after which he quit his employment without making any further inquiry about the deductions.

Matos, who also quit his employment at PBS, asked Sanchez at the time he left for the money that had been deducted. Sanchez gave him $5 in cash at that time.

Rafael Fernandez in late August 1997, learned from a friend that PBS was hiring and to contact Sanchez. On September 1, 1997, Fernandez met with Sanchez at 2 Broadway and filled out an application for a job as a doorman. According to Fernandez, Sanchez offered him a job at 71 Broadway as a doorman at $9 per hour, starting that same day. Fernandez asserts that the accepted the offer, and he, Sanchez, and another employee then walked over to 71 Broadway. At that location, Fernandez contends that Sanchez told him that "we have a Union," and asked if he belonged to Local 32B-32J? Fernandez alleges that he replied that he worked for a company on a temporary basis that had Local 32B-32J, but he was not a member. Sanchez then responded, according to Fernandez, that the owner didn't "want anybody that belongs to 32B-32J Union working." Fernandez asserts that he made no reply, but that he was not hired that day. Sanchez merely told him that PBS would get in touch with him, while the other individual who allegedly went with them on September 1, 1997, according to Fernandez started work as a doorman on that day at 71 Broadway.

Sanchez confirmed that he interviewed Fernandez on September 1, 1997, at 2 Broadway for a position at 71 Broadway. However, Sanchez denies that he offered Fernandez a job on that date, and asserts that he instructed Fernandez to meet him at 71 Broadway, the next day September 2, 1997. During the initial interview, while they were discussing Fernandez' experience, Fernandez volunteered that he had been working for a Local 32B-32J contractor.

Sanchez did not deny that he told Fernandez that the owner did not want to hire members of Local 32B-32J as Fernandez testified. However, Sanchez did explain why he did not hire Fernandez at that time. According to Sanchez, he told Fernandez to meet him at 71 Broadway on September 2, 1997, the day after the interivew.[15] Sanchez further testified that there were about 10–12 applicants at 71 Broadway on September 2, 1997, and that on that date selected his staff. Sanchez claims that during a meeting with management of the building on that date, he was told that it wanted doormen with English speaking skills. Therefore, since Fernandez' English skills were not that sharp, Sanchez asserts that he did not hire him for the doorman job that had been discussed. Since Fernandez applied for a doorman position, Sanchez claims that he did not offer him a porter's job, because he did not believe that he would be a good porter, since Fernandez had previously been a supervisor.[16]

A week or two later, Sanchez called Fernandez and offered him a part-time position as security guard at 71 Broadway. Fernandez turned down the offer. Subsequently, Fernandez called Sanchez and asked about work, and Fernandez' friend Rosa, who had recommended Fernandez initially, also continued to ask Sanchez to hire Fernandez. Finally, in late October 1997, PBS needed a number of new employees as porters at 71 Broadway. Therefore, Sanchez decided to offer one of those positions to Fernandez. Since English skills were not important in a porter's position, Sanchez agreed to hire Fernandez. Fernandez accepted the offer and began working for PBS at 71 Broadway on November 2, 1997, as a porter. On his first day of work, Sanchez handed Fernandez a dues authorization form for UWA. Sanchez told

[15] Sanchez testified that Fernandez could not have accompanied him to 71 Broadway on September 1, 1997, as Fernandez, claimed, since PBS did not start work at 71 Broadway until September 2, 1997. However, PBS' records contradict Sanchez on this point, and show that PBS employed three employees, Freyre, Matos, and Pablo Hernandez on September 1, 1997.

[16] I note that on his job application, Fernandez listed doorman, and maintenance as the kind of work applying for.

Fernandez according to Fernandez, to sign the form or "otherwise you don't get paid."[17]

In March 1998, Local 32B-32J began an organizing drive at 71 Broadway. During a conversation between Fernandez and Sanchez about overtime, Sanchez told Fernanadez that he heard that someone is organizing for Local 32B-32J in the building. Sanchez asked if Fernandez heard anything. Fernandez said no. Sanchez continued that some people are trying to organize for Local 32B-32J and told Fernandez that if he hears anything to tell Sanchez about it. Sanchez also mentioned to Fernandez the names of three employees who Sanchez believed were trying to organize for Local 32B-32J.[18]

C. 19 Rector

In early December 1997, Francis was notified that the ownership group that owned 1995 Broadway, was negotiating to purchase the building at 19 Rector Street. Francis was told that management wanted PBS to be the cleaning contractor for the building and Francis and representatives of the company negotiated a contract. The prior owner of the building (Jubilant Realties) had apparently employed the cleaning employees directly, although there is some evidence that they were employed by B.V. Management, the managing agent for the building. In any event, it is clear that these employees[19] were represented by Local 32B-32J, and that the building was serviced by approximately 17–20 employees performing cleaning and maintenance tasks.

On or about December 7, 1997, PBS learned that it would be receiving the contract to clean that building. Because of delays in the closing, PBS did not start the job until December 23, 1997. Francis was aware that Local 32B-32J had represented the predecessor's employees. Francis admitted that he decided not to hire any of the prior employees at 19 Rector, and in that connection, instructed Sanchez to hire people off the street, train them at 2 Broadway, and if and when PBS obtained that contract, transfer them over to 19 Rector. Francis also admitted that one of the factors that influenced his decision not to hire the incumbent employees was his knowledge that if he if he hired a majority of employees previously represented by Local 32B-32J, PBS would be obligated to recognize that Union.

Therefore, PBS decided not to interview any of the incumbent employees, and to staff the facility with transferees.

Prior to December 23, 1997, the client indicated to Francis an interest in PBS retaining employees in certain key positions. He, therefore, decided to hire Hector Juarez, who was the previous superintendent (and a Local 32B-32J member) as a supervisor for PBS. The superintendent is not a bargaining unit position for PBS. In that regard Francis personally interviewed and hired Juarez at a higher salary than he had previously been making while employed by Jubilant.[20]

On December 22, 1997, Juarez informed the incumbent employees that the building had been sold, and that they should report to the building the next day in order to fill out applications for jobs with PBS the new owners.[21] Approximately 15 former employees appeared at 19 Rector in the morning. Sanchez gave them a stack of papers to fill out, which included an application questionnaire, a payroll information sheet (PIS), a W-4 form, a I-9 form, plus a memo dated December 9, 1997, from Sanchez to all new employees. This memo states that $15 will be taken off the check of employees for union dues. It further reflects that this money is nonrefundable, even if the employee is terminated during the 60-day probationary period.

Sanchez explained that he was not instructed by Stratakos or anyone else from PBS to give out these packets, but he did so, in order to calm the employees down, who were obviously expecting to be interviewed. He testified that he included the memo about dues, since he had included such a document in the applications packets for all existing buildings, since the memo he had received from J. D. Dunn concerning union dues facts in October 1997.[22]

Stratakos arrived at about 3 p.m. Sanchez informed her that he had given out the packets to the employees because they were getting loud. She informed Sanchez that he should not have given out these documents to these employees, since there are no jobs available, and these forms are only supposed to be filled out by individuals who PBS hires. Stratakos then made a phone call to Francis. After returning from the call, she asked Juarez to find a room to meet with the group of employees. Stratakos testified that while she had not intended to interview any of these employees, since they were there and had received applications, albeit incorrectly, she decided to interview them in order to diffuse a volatile situation.

Juarez found a room on the 27th floor for the meeting, and all the employees present, including Juarez went to that room. Stratakos informed the employees that PBS was the new contractor, but that PBS had come in with a full crew and there were no jobs available at 19 Rector Street. She told them that they had been given the application packet by mistake, and proceeded to direct Sanchez rip up all the documents in the packet that had been filled out, including the application questionnaire, except for the one page PIS.[23]

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[17] Sanchez denied threatening to refuse to pay Fernandez if he refused to sign a UWA form. Sanchez did not deny, however, that he instructed Fernandez to sign such a form. Indeed as noted above, Sanchez admitted instructing all employees at 71 Broadway to sign such forms, as a result of the memo from PBS management.

[18] My findings with respect to this conversation is based on the credible testimony of Fernandez, which was not denied by Sanchez.

[19] I shall refer to these employees as former Jubilant employees, although as noted their precise employer is unclear from the record.

[20] While Francis testified that PBS also hired a handyman and a lead porter from the prior crew, he did not furnish the names of these two individuals. Neither Sanchez nor Stratakos confirmed this assertion, and "PBS" records do not reflect any handyman or lead porters on its payroll at 19 Rector. I, therefore, do not credit Francis' testimony in this respect.

[21] There is no evidence that anyone from PBS instructed Juarez to so inform the employees.

[22] As noted above, Sanchez testified that this same memo caused him to order employees at 71 Broadway to sign checkoff forms for UWA.

[23] According to Stratakos, she retained the PIS, because it was "the safest piece of paper in the entire package forms to retain." She

Stratakos informed the employees that although there were no jobs at 19 Rector Street, PBS had other buildings, and there might be openings there in the future. She told the group that PBS' starting rate was $8 per[24] hour, and gives 1-week vacation, five holidays, no insurance, and no sick days. Stratakos added that she would interview individually anyone who was interested in discussing employment with PBS. Most of the employees left without taking advantage of Stratakos' invitation to interview them.[25]

Some of the employees did speak to Stratakos, including Clorita Galvin, who had been the shop steward for Local 32B-32J. Galvin informed Stratakos that she was the shop steward for the building and that according to the application forms that the employees were given, there is a union in the building. Galvin added that this is a union (32B-32J) building. Stratakos replied, "[N]o its not." Galvin answered that she was going to call Local 32B-32J. Stratakos gave Galvin a card with her name on it and told her to call whoever she pleased.

During their discussion, Stratakos reiterated to Galvin PBS' rates and benefits, and discussed possible openings at other buildings. Stratakos asserts that Galvin indicated that she would "think about it," and that Stratakos noted this on her PIS, before Galvin placed her initials on the form, at Stratakos' request. Galvin denies that she told Stratakos that she would "think about it," as well as asserting that when she put her initials on the form, nothing else was written there.

Stratakos also testified that she tore off the bottom position of the PIS, wrote down the phone number of PBS, and instructed her to call Sanchez at that number if she was interested in employment with PBS. Galvin denies this assertion of Stratakos.

Stratakos also testified concerning her interviews with a number of other employees, which testimony was not contradicted. According to Stratakos at each of these interviews, she essentially repeated to each individual, the wages and benefits being offered by PBS, that there were no jobs at 19 Rector, but if they were interested in jobs at other locations that might become available, to call Sanchez. Stratakos also testified that she wrote notes on some of the PIS forms, which reflect the response of the individual, and she tore off the bottom of the form which included the phone number of PIS for them to call if they were interested in employment. She contends that she gave the number to those employees who stated that they would think about PBS' offer.

A number of the PIS forms were introduced into the record, which tend to support Stratakos' testimony. Therefore, I credit Stratakos[26] that Abigail Balarezo, Francine Brady, Stonka Ignjatovis, and Mara Vujovic told Stratakos that they would think about working for PBS, and that Stratakos gave them the phone number of PBS and told them to call Sanchez if they were interested. Additionally, Reine Beauleeu told Stratakos that he was not interested in working for PBS because the rate was too low. Peter Fagan told her that he refused to apply for work for PBS. Stratakos did not give either of these individuals PBS' phone number. Finally, Joseph Banani, Linda Clerici, Therese Condon, Edna Fonseca, Kimblie Kalarsian, Nicholas Martin, Marjorie Rivera, and George Stetter filled out and turned in PIS forms (as well as the other forms which were ripped up), but did not stay for the individual interviews with Stratakos.

Roberto Silva had been employed by Jubilant as a porter on the day shift. He was also interviewed on that day. Juarez recommended to Stratakos that PBS hire Silva, because he was on the day shift and was familiar with the tenants. She offered Silva a position as a day-shift porter—starter, at $8 per hour. Silva agreed to work for PBS at that salary, although it was well below his prior salary. Silva was the only incumbent employee interviewed who agreed to work for a lower salary, but was also the only one who received a job offer from PBS on that date.

PBS began work on December 23, 1997. During the first week of operations at 19 Rector Street, in addition to Silva, PBS employed Claudia Pena, Rosalba Escobar, Juan Rodriguez, Rafael Pichardo, Alejandes Pagoada, Margarita La-Lane, and Grinis Alba who were all transferred from 2 Broadway, where they had been employed as standbys. Rosa Perez was also transferred from 2 Broadway where she had been a full-time employee. PBS also transferred Jackson Olesty and Rafael Fernandez from its facility at 71 Broadway.[27]

Sanchez also transferred Antonio Mayoral Jr. from PBS' facility in Industry City, where he had been employed as the lead freight elevator operator. Ray D'Armas had called Sanchez, a week before and informed him that Mayoral wasn't getting along well with other workers at Industry City. Sanchez then suggested that Mayoral be sent to him for an interview, and Sanchez would see if he could place him at one of Sanchez' buildings. After interviewing Mayoral Sanchez decided to offer him a transfer to 19 Rector as a freight elevator operator and Mayoral was therefore transferred to that site.

Seven of these employees according to PBS' records, had been scheduled to start at 19 Rector on December 15, 1997, but due to the postponing of the closing, they remained at their other locations.

PBS also hired an individual named Anthony Marrale, who had been employed by Jubilant as an assistant engineer and who was a member of Local 94 Operating Engineers. He was hired by PBS as an engineer. Michael Lynch who was employed by Jubilant as an engineer (also a member of Local 94), was offered a position with PBS at 1995 Broad-

did not explain why she did not retain the application form that the employees had filled out.

[24] The prior employees were earning from $10–$12 to $16 per hour.

[25] One of the employees ripped up his PIS, said I'm not staying to hear this, and walked out.

[26] Additionally, Sanchez corroborated Stratakos' testimony in these respects.

[27] Fernandez actually worked only 1 day at 19 Rector, December 26, 1997, and was then transferred back to 71 Broadway. Sanchez transferred Olesty to 19 Rector, because Olesty had been accused by the superintendent at 71 Broadway of either sleeping on the job or being argumentative. Sanchez did not want to fire Olesty because he was a nice guy, so Sanchez decided to transfer him to 19 Rector.

way. He initially accepted the job, but did not show up for work.

It is undisputed that PBS nether consulted with nor offered to bargain with Local 32B-32J, prior to starting work at 19 Rector.

On December 29, 1997, PBS and UWA signed a collective-bargaining agreement (effective from December 22, 1997, to December 21, 2000) with UWA, and thereafter began to collect dues from employees pursuant to the union-security clause in the contract. PBS agreed to recognize UWA during a previous telephone call from Francis to Maglieri, wherein Francis told Maglieri that PBS acquired the contract for 19 Rector Street, and had transferred nearly all of the staff from UWA represented buildings. Therefore, Francis suggested that PBS would recognize UWA, and the negotiations that ensued consisted of Francis asserting and Maglieri agreeing to apply the terms of the Master agreement to 19 Rector.

During the second week of PBS servicing 19 Rector, Howard Angus, who had been employed by Jubilant as a security officer-porter at a salary of $12.07 per hour, asked to see Sanchez. He had been on vacation during the prior week, when the interviews were held. Sanchez met with Angus on January 5, 1998. Sanchez interviewed Angus, was impressed with him as being very mature, and hired him as a lead porter at a salary of $9 per hour on the night shift. Angus worked for 4 hours on January 5, 1998. The next day January 6, 1998, Angus called Sanchez and said that he couldn't take the job and had quit.

After the interviews of the week before, Stratakos took the PIS forms that she had from the former Jubilant employees and took them with her back to PBS' main office. Thus, Sanchez did not have these forms in his office, where he normally keeps applications on file that he uses to fill additional openings that he may have at 19 Rector and or at other locations.

According to Sanchez, when he had subsequent openings at 19 Rector, he would fill them with transferees from other locations, primarily from standbys.[28] Moreover, Sanchez testified that the need for employees at 19 Rector decreased after the initial startup, eventually reduced from 13 to 9, due to the fact that fewer square feet was occupied then had been indicated to PBS during negotiations for the contract.

Nonetheless, PBS did offer to hire two former Jubilant employees, after it began operations. The day after PBS started the job at 19 Rector, Local 32B-32J as well as the Operating Engineers Union began picketing. On that same day, an article appeared in the New York Daily News about the labor dispute, which mentioned that one of former Jubilant employees on the picket line, Abigail Balarezo, was going through difficult times, including a grandson who needed a heart valve operation. Francis upon reading this article telephoned Sanchez and instructed him to immediately contact Balarezo and offer her a job at 19 Rector Street. Sanchez complied and Balarezo completed a new application form, new PIS along with other forms on December 30, 1997, wherein she accepted a job with PBS at 19 Rector as a porter at $8, scheduled to start on January 5, 1998. On January 5, 1998, Balarezo according to Sanchez, and informed him that her union representative had instructed her not to accept the job with PBS, because she could lose her severance pay. Several months later, Sanchez testified that he received a message left on his answering machine from Balarezo, saying that she would be able to start working for PBS after she had finished going through a trial which was going on.[29]

Kimblie Kalarjian was one of the former Jubilant employees who filled out an initial PIS on December 23, 1997, but did not stay for the interview with Stratakos. Nonetheless, sometime in June 1998, she contacted Sanchez by phone and said that she was interested in a job with PBS. At that time PBS had an opening at 19 Rector, so Kalarjian was hired. She worked there for PBS until April 1, 1999.

Both Sanchez and Francis testified concerning PBS' decision not to offer jobs to nearly all of the former employees at 19 Rector. Sanchez, when called as a witness by the General Counsel under Section 611(c) of the Act, testified that he was the individual for PBS who made the decision as to who to hire at 19 Rector Street, and that Francis would merely give him the number of employees that PBS would need for the job. When Sanchez testified as a witness for PBS, he was asked about that subject, and he initially testified that he had no discussion with either Stratakos or Francis about how to staff 19 Rector, other than the number of employees needed. Sanchez admitted that he knew that the prior work force was represented by Local 32B-32J, but asserts that there was no discussion between himself and his superiors concerning whether to hire any or all of these employees. He added that he was not aware of any policy of PBS as to whether to hire incumbent employees or to transfer employees from other facilities, when starting a new job. Sanchez was then asked since it was his decision whether to hire the former employees, did he consider hiring some of them, since there had been no complaints about their work. Sanchez responded that he "liked" a lot of people there and felt bad that they didn't have a job, but he assumed that their company would take care of them and transfer them to other jobs. He was asked specifically if there was any other reason why he did not offer jobs to the former employees, and relied solely on transferees, and he said no. At the close of his testimony, on questioning by PBS' attorney, Sanchez testified that when he had spoken to Francis about the number of employees needed at 19 Rector, Francis had in fact instructed him to fill the bulk of the staff with transferees from other facilities.

Francis was also called as a witness by the General Counsel under Section 611(c). He testified that he had instructed Sanchez to hire and train people at 2 Broadway and transfer them over to 19 Rector. Francis conceded that he received a copy of a letter from 19 Rector Street LLCC (the buyer) to Jubilant (seller) Realties dated December 22, 1970, with regard to the sale of the property. The letter which makes reference to the collective-bargaining agreement with Local 32B-32J, states that the purchaser agrees to "use best efforts to hire the existing employees of Seller." However, Francis insists that he was not shown the letter until after PBS began operations at 19 Rector. Francis claims that he was shown

[28] Sanchez never offered any of the former Jubilant employees standby positions.

[29] Balarezo did not testify.

the letter by someone from the buyer of the building during the first week of starting the job, but that no one requested him or PBS to hire any of the prior employees.

When Francis was called as a witness by PBS, he explained that PBS staffs a new facility, it generally hires the skilled employees such as handymen and superintendent's who generally have safety director's licenses, as well as day-shift employees who are generally familiar with the tenants. Thus, with respect to these employees, Francis generally interviews and hires these employees himself. As for evening-shift employees, who generally clean and have no contact with tenants, Francis testified that he merely gives the number of employees needed to his operations, i.e., Stratakos, Sanchez, and D'Armis, and they had the freedom to go out and staff the accounts.[30] Francis continued his testimony by describing the situation at Garden State Plaza when PBS offered to hire the entire prior staff, and the prior contractor pulled everyone out. He then talked about the Harlem buildings where Local 912 and Local 32B-32J were in a dispute, when PBS was "really sitting back on the sidelines," but where Local 32B-32J eventually walked away. Francis then talked about Hudsonview, and talked about the literature he had seen passed out at Harlem, and testified how concerned he was, he arranged for a transfer of employees from New Jersey to staff that facility. Francis added that immediately, there was picketing around the building, and that he then reached out to Local 32B-32J to try to resolve the dispute.

At a further point in his testimony, his attorney asked, "[W]hy does PBS rely so heavily on transfers from existing buildings in New York when it takes over a new building? Francis replied, "PBS is dealing with human nature, and they will either not accept a job at substantially lower wages and fewer benefits, if they accept they will either change their mind and refuse the job because they can bump down in their own company, or they will leave after a short time."

Upon questioning by me, Francis testified that at 19 Rector, he instructed Sanchez to put on additional people at 2 Broadway and then transfer them to 71 Broadway, if and when the job at 19 Rector would be starting. Francis as noted above, testified that he personally hired three "key" employees at 19 Rector, including the super, but as to the remaining employees primarily night-shift cleaners, he told Sanchez to use transferees, because he believed that they would not take the job, and if they accepted, they would not stay. Francis then added that once PBS made that decision, "I had 2 Unions picketing in front of the building the day before Christmas."

Also relevant to PBS' hiring at 19 Rector is PBS' position paper, filed with the Region in connection with the charges filed by Local 32B-32J. This seven-page document signed by PBS' attorney, gives a detailed explanation of PBS' hiring practices, and its actions at 19 Rector. Essentially, the position paper asserts that PBS has a past practice of transferring employees from its existing facilities, and that its "hiring needs are almost always met through word of mouth of its existing employees." It further asserts that PBS makes no distinction in hiring practices between employees of a former contractor and outside employees, and that PBS hires employees of a former contractor who have special skills or knowledge of the location to assure a smooth transition. The paper also asserts that "PBS also interviews former contractors employees who request an interview and if there is a need that they fit PBS may hire them."

Further as to janitorial employees, the paper states that the hiring process is not structured, and individuals are interviewed for openings that exist, and then forgotten unless the applicant takes the initiative to followup.

Significantly, however, the position paper although 7 pages long, makes no mention of the assertion in Francis' testimony, that PBS did not offer jobs to former Jubilant employees because PBS believed that they would either not accept the job, or would quit, or would be transferred to other jobs by the prior contractor.

D. 32-42 Broadway

Two apartment buildings located at 32 Broadway and 42 Broadway are adjoining buildings, with the same ownership. The contractor responsible for cleaning these buildings (referred to collectively as 32-42 Broadway), was Shepard Industries, whose employees were represented by Local 32B-32J.

In January 1998, PBS submitted a bid for the cleaning contract. In that connection Francis had several meetings in January 1998 with Barry Pincus, a representative of the ownership. During these discussions, it was mentioned that the employees of the previous contractor were represented by Local 32B-32J. Francis indicated to Pincus that PBS' employees at the building would be represented by another union; and added that "we were members of a fair Union." Francis also informed Pincus that if PBS obtained the job, it anticipated a picket line by Local 32B-32J. Pincus asked what could be done to avoid that problem, and Francis suggested setting up a reserve gate.

Francis testified further hat he decided in early February that PBS would not hire most[31] of the incumbent employees, and that one of the reasons for this decision was his knowledge that if he hired a majority Local 32B-32J people, PBS would be obligated to recognize Local 32B-32J at that facility.

In that connection, Francis instructed Sanchez to utilize transferees[32] from other locations to staff the night shift at 32-42 Broadway. PBS did not, however, learn that it was definitely going to obtain the contract for 32-42 Broadway until Friday, February 13, 1998, when during a meeting consisting of PBS' representatives as well as Pincus, a fax arrived from Shepard terminating its services effective immediately. Thus, Pincus awarded PBS the contract, starting the

[30] At another point in his testimony Francis testified that neither Stratakos nor Sanchez consulted with him before PBS hired employees at 19 Rector, and that except for those individuals who he individually hired, he left the decision on hiring at 19 Rector to Sanchez and Stratakos.

[31] Francis also testified that he decided to keep certain key personnel working on the day shift, because they were familiar with the building and the tenants.

[32] PBS' records reflect that a number of employees were specifically hired at 2 Broadway to be trained for 32-42 Broadway.

next day, Saturday, February 14, 1998. A discussion again ensued concerning the setting up a reserve gate, since as had been previously discussed, PBS expected Local 32B-32J to picket. It was decided to install a reserve gate and knock down a wall between the two buildings on one of the upper floors to permit access from one building another. This was done on the 11th floor.

On that same day Friday, February 13, 1998, PBS began to staff its facility. On Friday and Saturday, February 13 and 14, 1998, PBS utilized a total of 25 employees at that building. According to Sanchez, all of them were transfers from PBS' other facilities such as 71 Broadway, 2 Broadway, and 1995 Broadway. Some were standbys and some regular employees. PBS' records essentially confirm that testimony, except for two employees, Yerling Williams and Germania Barriente. These records reflect that both of them were new employees. They indicate that Williams was hired by PBS on February 13, 1998, as a leadman. His salary was listed on a worksheet as $13 per hour.[33] Barriente was a porter and the records list her date of hire as February 14, 1998. Also, PBS employed Fahd Hamanami and Saleh Aobad who had been previously been employed by Shepards as porters.[34]

According to Sanchez, the building was in such poor condition, that over the weekend on Saturday, February 14, and Monday, February 16, a (Federal building where employees generally do not work on a holiday), that it was necessary to bring in extra employees to do a deep cleaning from top to bottom in order to get the building ready for Tuesday, February 17, 1998, the first working day after the holiday.

Thus, the second week, and first full week of its operations, the week ending Saturday, February 21, 1998, PBS employed 33 employees, including some of those "extra" employees who PBS utilized only to work over the weekend including Monday, February 16, 1998. Most of these 33 employees were also transfers from other locations, except for Williams and Barrientes from the prior week, Hammemi and Aobad former Shepard employees, and Ahmed Kassam, Ray Ryan, and Warren Nelson, who were also former Shepard employees who PBS hired starting Tuesday, February 17, 1998.

Kassem was hired as a freight operator and Nelson and Ryan were hired as starters' fire safety directors. All of the incumbent employees were day-shift employees, and according to Stratakos and Sanchez were hired at the insistence of Joe Brogan, chief engineer and representative of building management, who allegedly informed them that, management preferred that the day staff be hired.[35] A number of these 33 employees who worked on February 16, 1998, did not work any other days for PBS at that facility. This group consisted of employees Barrientes, Leon Guzman, Pedro Lopez, Lucy Morreno, Derrick Miller, and Lucia Pena. Of this group Morreno, Guzman, and Pena were then transferred to other locations. Miller and Guzman, both of whom had previously worked for PBS for only a few days at other locations, did not work for PBS after their 2 days at 32-42 Broadway. Barrientes, who as noted appeared to be a new hire at 32-42 Broadway, worked Saturday and Monday, February 14 and 16. She did not work again for PBS until March 1998 when she worked for 5 days at 32-42 Broadway.

A number of employees who worked at 32-42 Broadway for the first full week plus the first few days, were then transferred back to one of PBS' other buildings. These employees include Stacy Lee, Sandra World, Edmund Leturia, L. Castro, Antonio Mayoral Jr., B. Carabello, Carmen Rengifo, Eddie Chang, Michael Del Rosario, and A. Moreno. During the next payroll week ending February 28, 1998, PBS hired one new employee, James Dearinger, as a starter, who worked 3 days at 32-42 Broadway, before being transferred to another building. Additionally, PBS transferred Elibute Ogunwale and Theresa Kelly to 32-42 Broadway for less than a week. PBS also transferred in Chadwick Vasquez, listed as porter-site supervisor on February 23, 1998, from another building. The remaining employees employed at 32-42 Broadway during this week, included the five former Shepard employees, Ryan, Nelson, Saleh, Kaseem, and Hammimi, as well as Xerling Williams, who also as noted, a new hire by PBS. The rest of the crew during this week were all transferees. They included Gloria Garcia, Gabriela Rico, Maria Barrero, Diana Perez, Maria Penalo, Denis Arena, Grisell Dominguez, Jose Batista, A. Jiminez, B. Muniz, and Hector Aponte. Finally, Peter Piantis, who worked 1 day at 32-42 Broadway on February 14, 1998; worked 1 more day on February 23, 1998, and was transferred to another building.

On Friday, February 13, 1998, Brogan notified the incumbent employees that a new contractor was starting on Tuesday, February 17, 1998, and told them to report to the building on that day (after the holiday) to interview with the new company for jobs.

On Tuesday, February 17, 1998, 18 incumbent employees reported to 32-42 Broadway as instructed. This included William Olivero, who had been the supervisor of the night shift for Shepard, 16 night employees, and Daniel Hlasney, who was the 1 day-shift employee not hired by PBS.[36] Sanchez gave them each a 1-page application form to fill out and instructed them to return at 1:30 p.m. for interviews.

At 1:30 p.m., Sanchez informed the employees that the interviews would be conducted three at a time. The first three employees to be interviewed were Esad Rizai, Claudette Daley, and Josephine Mikulus. Stratakos conducted the interview, and said that there were no jobs available at 32-42 Broadway, but PBS did have three porter jobs available, one at 2 Broadway, one at 71 Broadway, and one at 19 Rector Street. All three employees replied that they would accept the jobs. Stratakos asked Rizai why he wanted such a job

[33] PBS' records also reveals that he joined UWA on the on the same day February 13, 1998.

[34] These two employees started work for PBS on Friday, February 13, 1998.

[35] Sanchez asserts that when he discussed hiring the day crew with Brogan, Brogan listed the names that he wanted hired, and mentioned only the five who were hired by PBS. Brogan allegedly had not mention Daniel Hlasney, who was also employed by Shephard as a day porter. Moreover, according to Sanchez, PBS needed only five day-shift employees.

[36] Hlasney was also the shop steward for Local 32B–32J.

when he was making all this money. Rizai (whose prior salary was $19.30 per hour) replied that he needed a job because he had a family. Stratakos told him that the job paid $9.50 per hour. Rizai replied that he will take it. Stratakos then lowered the salary to $7.50 per hour. Rizai again said that he would take it. Stratakos did not respond, thanked him for coming, and told Rizai that he could go and that PBS would call him. Stratakos did not tell him to call or contact PBS, and gave out no phone numbers. Rizai then left the interview.

After the first three interviews concluded, Sanchez informed the remaining employees to go up to the 18th Floor. There, Stratakos asked for a room to conduct interviews, and Olivero suggested the women's locker room. Olivero, who was as noted the supervisor of the prior crew was interviewed first. Stratakos told Olivero, "William, let's get to the point. Everybody seems to be saying the same thing like they were coached by the Union to say yes take the job." Stratakos went on, "[Y]our going to tell me that you're going to go from $100,000 to less than $30,000. Olivero replied, "[Y]es. I need the job." Stratakos said, "[W]hat's the sense of holding an interview if everyone is going to say yes." Olivero answered, "[Y]ou have to give everybody a chance to agree to take the job. Some may, some may not." The interview ended with Stratakos informing Olivero that PBS would get in contact with him. He was not given a phone number to call, nor told to contact PBS if he was interested in a position.

PBS continued interviewing all of the remaining employees present. Daniel Hlasney, who was a day porter and freight elevator operator with Shepard, was one of those interviewed. The interview began with Sanchez informing Stratakos that Hlasney was the "fellow that Joe Brogan said did a good job, that we should take care of him." Stratakos replied, "I don't want to be bothered with it now, let's get on with this." Stratakos informed Hlasney that PBS was the new contractor, that it pays $7.50 per hour with no sick days, six holidays, and limited medical benefits. She asked if he would be willing to work under these conditions. Hlasney said yes. Stratakos asked why he would he be willing to work under these conditions with such a reduction in pay. Hlasney answered that he was 61 years old and would have a hard time getting another job. Stratakos told Hlasney that PBS had no day porter positions, but it had other buildings and there was a possibility that PBS would need him in another building. Stratakos concluded the interview by saying, "[W]e'll call you." PBS never contacted Hlasney, Olivero, nor Rizai thereafter.

During the rest of the interviews, Stratakos went through PBS' salaries and benefits, and told the employees that PBS has openings from time to time at other buildings. Most of the employees replied that they would accept jobs even at a lower salary. Once again, Stratakos told them that PBS would call them if there were any openings.[37]

After the interviews, Stratakos took the completed applications with her back to PBS' main office, and did not leave them with Sanchez, who was the PBS official in charge of direct hiring for positions that might become available at 32-42 Broadway or other buildings in the downtown New York area. Significantly, Sanchez observed, "it always puzzled me why she would take the applications with her." When Sanchez had subsequent openings at 32-42 Broadway, Sanchez testified that he filled those positions with transfers from other buildings of PBS, which would often require using standbys or new employees to fill those positions.[38]

A few days after PBS began operations at 32-42 Broadway Local 32B-32J set up a picket line in front of the building, joined by most of the former employees who were not hired.

Shortly after PBS began servicing 32-42 Broadway, Francis called Maglieri and told him that PBS had acquired the contract for the building. Maglieri testified that he obtained authorization cards for UWA from employees and showed them to Francis. Francis, also recalled that UWA submitted cards, but no such cards were submitted into evidence. Correspondence between UWA's attorney and PBS dated February 16 and 20, 1998, respectively, indicates that PBS recognized UWA on the basis of the fact that a majority of employees at 32-42 Broadway were transferred from UWA represented facilities. As a result of the recognition, a collective-bargaining agreement was executed patterned after the Master agreement.

With respect to the reasons why PBS did not offer positions to the night crew and 1-day porter (Hlasney), Sanchez, Stratakos, and Francis all provided some testimony. Once again, for most of Sanchez' testimony, he continued to insist that it was his decision not to offer jobs to these individuals, and that Francis merely gave him the numbers of employees needed, and he then decided to fill the jobs with transferees.

[37] The above findings concerning the interviews are based on the credible and mutually corroborative testimony of Hlasney, Olivero, and Esai. To the extent that Stratakos and Sanchez furnished contrary testimony, that testimony is not credited. In fact, most of the testimony of the employees is undisputed, or not denied. Indeed, Sanchez conceded that most of the employees interviewed agreed to accept a job at $7 an hour. While Sanchez and Statakos did deny that they promised to call the employees, I discredit these denials and credit the versions of the employees as related above. I note that this was consistent with PBS's conduct at 39 Broadway, as set forth below, wherein Stratakos and Sanchez initially denied, but then admitted after hearing a tape recording, that Stratakos had promised that employees would be put on a preferential hiring list and would be called if there were openings.

[38] Throughout the first 6 months of 1998, Sanchez telephoned the Times Square Church, on numerous occasions where he is a member, and asked the church to send down members who might be looking for work. Sanchez asserts that he started those individuals whom he hired from the church all standbys. However, PBS' records contradict the testimony of Sanchez that he filled all subsequent openings at 32-42 Broadway with transfers. Their records reveal that PBS hired several new employees at that location. These new employees and their dates of hire are as follows: OlaTayosi Adesina—March 23, 1999; Mohammed Albraidi—April 27, 1998; Nasser Alsahkami—March 9, 1998; Audrey Arroyo—May 4, 1998; Miguel De Jesus—August 18, 1998; Victor Delsolar—May 8, 1998; Albert Kove—September 22, 1998; Ofelia Llamoza—February 11, 1999; Lidice Lozada—August 10, 1998; Edgar Lozano—April 21, 1998; Yoani Luna—May 18, 1998; Beatriz Mesa—April 27, 1998; Cristina Polanco—February 12, 1999; Andres Rodriguez—June 22, 1998; Loonida Santos—April 9, 1999; Edwin Vasquez—March 16, 1999; and William World—April 27, 1999.

According to Sanchez, Stratakos hired the day-staff employees, upon the recommendation of Brogan, and he decided to transfer in the rest of the staff, and not to offer any of the other former employees jobs. Sanchez offered several reasons for his "alleged" decision. First, Sanchez asserted that he liked some of these people, and that "Esai" would have been a great doorman. However, Sanchez asserted that he did not believe that they would want to work for less money and less benefits, and or if they came they would not stay long or do a lousy job. Sanchez also added that he didn't know these people, and didn't know what kind of a job that would do. On the other hand, he knew the people that he had trained at other jobs could do the job. Finally, Sanchez also testified that he considered the fact that the building was dirty when he and other officials from PBS inspected the building.

Once more, near the close of his testimony, Sanchez admitted when asked by PBS' attorney that in fact Francis had directed him, a week before PBS started the job, to staff 32-42 Broadway, except for several day-shift employees, entirely with transferees from other PBS facilities.

Francis, similar to his testimony with regard to 19 Rector, in his initial testimony, suggested that he left the decisions on who to hire and whether to hire incumbent employees to Sanchez, except for certain "key" positions, where he became involved in hiring directly.

When called as a witness by PBS, on direct testimony he furnished generalized testimony about why PBS relies on transfers to staff its buildings in New York. Francis gave a rather rambling response, not specifically directed to 32-42 Broadway, to the effect that employees might say yes and accept a job at a lower rate, but then would quit or be able to bump down into their own company at another complex.

Upon examination by me, Francis began his response by stating that after PBS bid on the job in January 1998, it didn't know whether it would get the job, and he was "very concerned about picketing and strikes," because of the previous picketing and Local 32B-32J's December letter threatening future picketing. Francis conceded that he had made the decision not to hire the incumbent employees, except for the day crew, and had so informed Sanchez in early February 1998. According to Francis, he made this decision because the building was filthy and he had no intention of retaining any of the night personnel, and that he didn't believe that they would either accept or remain at a job when their pay was cut from $13 per hour to $7.50 per hour.

With respect to the dirty building, Francis testified that he had been in the building 30–40 times in the past, and it "has always been dirty." As noted above, Francis also admitted that one of the reasons for the decision not to hire these former employees, referring to all three buildings, was his knowledge that if PBS hired a majority of employees represented by Local 32B-32J, PBS would be obligated to recognize that Union.

On further questioning by PBS' attorney, Francis indicated that this wasn't the primary reason for not offering jobs to these individuals. Francis then testified that the primary reason was "the economic factors, at the rate of pay, performance of the work, the change in hours, the benefits being substantially and the economics of doing the job." When asked to explain what he meant by performance of the work, Francis explained that PBS was "asking people to clean more area than they had cleaned for less money, and human nature doesn't want to do more for less . . . . We were truly demanding more productivity from our employees in the evening staff."

Stratakos testified on direct, that she was involved in the hiring at 32-42 Broadway, and that she did not consider hiring any of the porters and matrons, other than those day-shift employees represented by the owners, because "the building was dirty. I wasn't sure if they knew what their job was at that point." She added that she had not intended to interview any of the prior employees, but since the employees were at the building at the instructions of the management company, she agreed to interview them. On cross examination, Stratakos initially reiterated that she did not hire the former employees because the building was dirty, but indicated that this was only one of the reasons. The other reason, according to Stratakos was the shifts that they were working, since PBS did not have part-time work for them. Stratakos did not explain how this would have been a factor in her decision not to hire these employees, since there is no evidence that she knew or inquired about their prior shifts before PBS decided not to hire them. While PBS did introduce some evidence that some of these employees indicated on their applications that they had worked a part-time schedule while employed at Shepard, these interviews were conducted after PBS decided not to hire them.

Stratakos also admitted that since there had been pickets at 19 Rector and other buildings, that she was afraid that employees would not cross the picket line, and that she was also concerned that if she hired these employees, that they might go on strike. Upon the close of her cross-examination, Stratakos admitted that she not attribute the condition of the building to the cleaning employees.

Upon examination by me, Stratakos insisted that Francis had already had the meeting with Pincus, when Shepard faxed in its termination notice, and that staffing decisions for 32-42 Broadway were made by her, Sanchez, and D'Armes. She asserts that she decided to use transferees from other buildings, and not hire the night porters, because she assumed that none of the former employees would accept a job with PBS, because Shepard would place them elsewhere. She added that prior management had requested that PBS hire the day staff, including several porters. Therefore she interviewed them all on that same day (February 13) and they all agreed to accept jobs with PBS. Stratakos conceded that the day porters took a pay cut in order to stay, but she indicated that she was somewhat skeptical if even these employees would accept. Therefore, she testified that she arranged for backup employees from other facilities, for the entire day staff, including the fire safety directors who did not have their pay cut, in case they did not show up for work as promised. Stratakos also admitted that the condition of the building had no bearing on her decision not to hire these former employees.

With respect to the issue of cleanliness of the building, PBS called Raymond Silva, facilities manager for ADP Financials, which leased four to five floors at 32-42 Broadway.

He testified that during 1997 early 1998, the public corridors were not properly maintained, due primarily to construction going on at the time. Silva discussed these problems with Brogan, and they talked about minimizing the dust coming into ADP's space. On one or two occasions, Silva mentioned to Olivero that Shepard had failed to clean an office of ADP properly. Brogan would immediately arrange for these offices to be cleaned.

Silva admitted that the problems caused by the construction, such as excessive dust and debris were eventually taken care of, but not as fast as Silva thought could be done. Silva also testified that the construction continued through 1999, and that all of the problems that he had complained about had been taken care of by Shepard, prior to PBS assuming the contract.

Silva also testified that after PBS took over, in his opinion the elevator, floors, and freight entrance were maintained better than it had when Shepard was performing the contract. Silva also conceded that it would not be practical to strip and wax the floors during the construction due to all the dust, and that he never complained to Shepard or to Brogan about the failure to wax or strip the floors.

Sanchez, although testifying the building was dirty, also conceded that there was extensive construction going on in the building and that it caused a large amount of dirt in the public areas than ordinarily would have been expected. Oddly, Stratakos asserts that although she made several trips to the building, she did not recall any construction going on at all.

Finally, PBS submitted to the Region a letter dated August 10, 1998, detailing its position with respect to 32-42 Broadway. It's position therein was similar to its arguments with respect to 19 Rector. The letter asserts that PBS' hiring at 32-42 Broadway was consistent with its past practice of transferring employees from its other facilities, where it keeps a supply of readily trained employees. It ads that PBS makes no distinction in hiring practices between employees of former contractors and outside applicants. The letter asserts that PBS' interviews or hire former constructor's employees at the request of the client or if they have special skills or knowledge.

The position paper also states that "whereas here, PBS gained the contract, because the former contractor did a shabby job of maintaining the building, PBS may naturally be less inclined to hire a large number of former employees."

The letter also claims that the former employees precluded themselves from serious consideration by PBS, by insisting on working part time schedules as they had with the prior contractor.

However, as in the case of 19 Rector, the position paper makes no reference to or argument that PBS declined to consider or to hire any of the former employees because PBS believed that these employees would refuse to accept jobs at lower wages or if they accepted, they would either not show up, quit or, do a poor job. Nor is there any reference to the assertion that PBS did not offer jobs to these employees, because it believed that the former contractor would employ them at other locations of that contractor.

E. 39 Broadway

Perfect Building Maintenance (PBM) had been the cleaning contractor for a building located at 39 Broadway, in New York. PBM had a collective-bargaining agreement with Local 32B-32J and employed approximately 10 nonsupervisory employees.[39]

In June 1998, Francis negotiated with Barry Pincus also a representative of the prospective ownership of this building, with regard to PBS obtaining the bid for this property. At the closing, Francis was requested by the sellers to interview the incumbent employees for employment. Francis replied that he would "interview all of the employees and if he had openings PBS would offer them jobs—possibly somewhere else but not here." In that connection, Francis instructed Stratakos or Sanchez to make sure that everyone is interviewed, although he didn't want to use them at 39 Broadway but use them elsewhere if possible.

Thus, as in the case of the other buildings, Francis decided that PBS would not offer jobs to the night-shift employees, but would instead transfer in employees from other facilities. Once again, Francis admitted that one of the reasons for this decision, was because he did not want to be obligated to recognize Local 32B-32J.

Julio Mosquera had been employed by PBM on the day shift as a concierage—lobby man. He also possessed a fire safety director's license. On or about June 13, 1998, Mosquera was approached by Francis's son. The son told Mosquera that PBS was taking over the cleaning contract for the building, and offered Mosquera a job. He was offered the same salary and some benefits that Mosquera received while working for PBM. Mosquera agreed to accept the job.

Francis himself interviewed Matt Logan, the prior building engineer, who also worked the day shift, and offered him a job with PBS as well, with no change in salary. Logan also accepted the offer to work for PBS.

On June 24, 1998, PBS began cleaning 39 Broadway. According to PBS' witnesses it transferred all of the employees whom it used at 39 Broadway from its other facilities. However, PBS' records tend to shed some doubt on this testimony. These records show that during the week ending June 27, 1998, PBS employed 15 employees. While most of these employees were transferees from either 2 Broadway,[40] 71 Broadway,[41] 32-42 Broadway,[42] 19 Rector,[43] or 1995

[39] The employees were Antonio Henriquez, Linda McKenzie, Haralampos Skaliotis, Michael Slevin, Paul Stanovic, Constentiono Tabio, Melania Turkiewicz, Matt Logan, Julio Mosquera, and Francisca Sonta.

[40] Employees Jose Martinez, Hernan Parra, Celia Huamacto, Martha Lozano, and Angelica Valencia. Of this group, Martinez and Huamacto were both hired June 17, 1998, and worked less than a week for PBS before being transferred to 39 Broadway. Parra was hired on June 22, 1998, worked 2 days at 2 Broadway, before being transferred to 39 Broadway on June 24, 1998.

[41] Employees Motana, Torres, and Geronimo.

[42] Employees Mary Adegbeyeni and Angelica Valencia. Adegbeyeni were hired on June 17, 1998, worked 2 days at 2 Broadway and 2 days at 32-42 Broadway before her transfer to 39 Broadway.

Broadway,[44] the records are unclear with respect to employees Samuel George and Hiram Cruz. The records list these two employees with a date of hire of June 17, 1998, but no listing for any days of work at any PBS locations other than 39 Broadway, prior to working at 39 Broadway. The records also reflect that Cruz and George signed either a card or checkoff authorizations, for UWA on June 17 and 22, 1998, respectively. Although no explanation were offered by PBS for these discrepancies, it appears, that PBS may have hired these two employees as standbys, but did not send them to work before June 24, 1998, at 39 Broadway.

On June 25, 1998, Stratakos went to the building in order to interview the previous employees, who had been instructed the day before (June 24, 1998) to report for interviews. Prior to the interviews, John Santos, a business representative for Local 32B-32J met with the former PBM employees who were about to be interviewed. He discussed with them the possibility of wearing a tape recorder during the interviews. Four employees, Skaliotis, Tobio, Mosquera, and Henriquez, agreed to put a tape recorder in their pocket when they went in to their interviews. Santos instructed all of the employees to accept any jobs that PBS offered, regardless of the pay scale.[45] In addition to these four employees, PBS interviewed employees Turkiewicz, Sonta, and Stanovic.

Stratakos, during these interviews, informed the employees that PBS was the new contractor, and that it had no jobs available at 39 Broadway, since it had transferred in a full crew. However, Stratakos told the employees that PBS had other buildings where it may have some openings. She went over PBS' rates and benefits and accepted written applications from the employees. All employees interviewed told Stratakos that they would accept any job offered.

When Stratakos testified initially, as a 611(c) witness, called by the General Counsel, she insisted that she never told any of the employees that PBS would call them. She testified, as she had in connection with 19 Rector and 32-42 Broadway, that she told employees who were interested in working at any of PBS' buildings that they should call or get in touch with Sanchez. She added that she offered them Sanchez' phone number at 2 Broadway. Stratakos also emphatically denied telling any employee that she would put their name on a preferential hiring list, or indeed that PBS maintained such a list.

Sanchez, also called as a witness by the General Counsel, initially corroborated Stratakos' testimony in these areas.

However, the testimony of the four employees, corroborated by the tape recording tell quite a different story. This evidence establishes that in fact Stratakos promised to call each of the employees if PBS had any openings, and that she promised to put them on a preferential hiring list. Stratakos explained that such a list means that the first opening that PBS has for their positions, she would give them a call and offer them a job. Indeed, after hearing the tape, when Stratakos and Sanchez testified as witnesses for PBS, they recalled that Stratakos had mentioned a preferential hiring list.[46]

During her initial testimony, Stratakos also adamantly denied that during her interview with Mosquera, she asked him if he would work if the incumbent employees went on strike. Once again, Stratakos' testimony was directly contradicted by the tape, as well as the credible testimony of Mosquera. Thus, as noted above Mosquera had already been promised a job with PBS days before by Francis Jr., but the full details of his financial package had not been finalized. In fact, during the interview some questions were discussed about what benefits Mosquera would be receiving. During this interview, Stratakos asked Mosquera what he would do if their former employees went on strike, and whether he would go outside or stay inside. Mosquera replied, that he would fill out an application. Stratakos answered, "[N]o, no, no, no," and Sanchez interjected, "[S]he's asking you," before Stratakos continued, "[I]f they go on strike, are you going to feel like you have to go outside and work with them, walk up and down with them, or rejoin going to stay inside and work?" Mosquera told Stratakos that he would continue to work. Stratakos replied, "[T]hat's all I needed to know. Thank you very much."

After that exchange, Stratakos helped Mosquera fill out his job application. She agreed to give him his same salary of $16.89 per hour as had been agreed upon with Francis, but she told him that with respect to benefits such as vacations, holidays, and sick days, she would have to discuss these matters with Francis.

After hearing the tape, and testifying for PBS, Stratakos explained that since she was responsible for ensuring a smooth transition, she wanted to be sure that there was going to be an available desk person to service the tenants. She added that was concerned that Mosquera might not show up because he had worked with the former employees for a number of years, and it might be difficult for him to walk past these people picketing outside the building.

When Stratakos initially testified, she asserted that during her interview with Skaliotis, she was so impressed with his skills and experience as a handyman, that she told him that she would hire him "on the spot" and make sure he was in a building by the next day. Once more, Stratakos' testimony is contradicted by the credible testimony of Skaliotis and the tapes. Thus, I find that Stratakos did not offer Skaliotis a job, and that she merely told him to fill out an application and that she would call if she had an opening.

After the tape was played, Stratakos when called as an witness by PBS, offered a new version of events, and claimed that, in fact, she offered Skaliotis a job as an engineer at 1995 Broadway, but only after the interview, because she had to clear the offer with Francis first. She asserts that

[43] Employees Alba Catana, Claudia Cortez, and Sandra World. Catana was also hired on June 17, 1998, worked 1 day at 2 Broadway and 1 at 19 Rector before transferring to 39 Broadway.

[44] Employee Orlando Rosario.

[45] Santos admitted that he and McCulloch had developed a scheme that members would take any job offered them so they could work in the building until Local 32B-32J pulled them to other jobs. However, there is no evidence that this "plan" was communicated to the employees.

[46] Significantly, it was not until Stratakos was confronted with the tape that PBS turned over the preferential hiring list, that had previously been subpoenaed by the General Counsel.

Francis gave her permission to make the offer, which she did personally make to Skaliotis in the lobby. She adds that Skaliotis replied, that he would keep his options open, since he had so many years of experience.

I reject and do not credit Stratakos' testimony in this regard. Her testimony is extremely suspect, in view of her clear and admitted failures to testify truthfully as to her questioning of Mosquera about his crossing the picket line, and her offer to set up a preferential hiring list for the employees. Moreover, Skaliotis credibly denied ever receiving a job offer from Stratakos either during or after the interview, and Francis, although called as a witness by PBS, failed to corroborate Stratakos' assertion that he had authorized Stratakos to hire Skaliotis.

I have also relied on the lack of credibility of both Sanchez and Stratakos, based on the fact that the tape recording directly contradicted their testimony in several areas, to discredit their testimony in other instances as described above. More particularly, I note that their testimony that they told the employees at 39 Broadway to call PBS if they were interested in a job, which is clearly contradicted by the tape as well as the credible testimony of the employees.

After the interviews with the seven employees concluded, Stratakos took both the applications of the employees and the preferential hiring list back with her to the main office. She did not direct any supervisors to use the list or make any other effort to make sure that it was used.[47] Sanchez although admittedly aware of the list, did not ask for it or utilize it when he had subsequent openings to fill at 39 Broadway or any other of the buildings under his supervision.

According to Sanchez, he did have subsequent openings at 39 Broadway which he filled with transferees from other locations, or with some new hires.[48] Sanchez admitted that he was aware that Stratakos had put employees on a preferential hiring list, and that meant that "when a job becomes available they will be the first one hired." However, since Stratakos took the list with her, Sanchez did not have it when he had openings to fill. Sanchez admitted that he did not ask Stratakos for the list when he had openings subsequent to June 24, 1998, and asserts that after a while "it went out of my mind. I have so many things to do." According to Sanchez, Stratakos should have been aware when he hired new people, but that Stratakos had "some problems."

During the second week of its operations at 39 Broadway, the week ending July 4, 1998, PBS employed 14 employees, plus Mosquera and Logan. The list included 12 employees from its initial crew, plus employees Arly Santiago and Ricardo Bonilla. Santiago was hired by PBS on June 22, 1998, but according to PBS' records, worked at both 71 Broadway, and 39 Broadway on July 4, 1998.[49] Bonilla began working for PBS on December 26, 1997, at 2 Broadway, where he worked until January 1, 1998. From January 4 through June 28, 1998, he worked at 71 Broadway and he was transferred to 39 Broadway on June 29, 1998.

During the next payroll week, ending July 11, 1998, PBS employed 16 employees plus Mosquera and Logan. These 16 employees included 2 more employees new to 39 Broadway. They were Eddie Chang, who worked for PBS at 71 Broadway from January 23 to February 18, 1998,[50] 1 day, February 19, 1998, at 32-42 Broadway, and May 17, 1998 at 19 Rector. He had not worked for PBS since May 17, 1998, when he was assigned to 39 Broadway on July 10 and 26, 1998. Neal Medrano was hired by PBS on June 22, 1998, at 71 Broadway, but did not work at that location until July 4, 1998.[51] He then worked 4 days at 19 Rector from July 5 to 8, 1998, when he was transferred to 39 Broadway on July 11, 1998.

Shortly after PBS began at 39 Broadway, Local 32B-32J leafleted and put up a picket line, manned primarily by former employees for PBM. On July 3, 1998, Melania Turkiewicz, one of the pickets came into the building and began talking to Logan and Mosquera. Stratakos came over to the group and ordered Turkiewicz to leave. Turkiewicz and Stratakos began to argue, and because of the way Stratakos spoke to Turkiewicz, both Logan and Mosquera quit working for PBS on that day, and joined the picket line.

PBS and UWA executed a collective-bargaining agreement with UWA, dated July 7, 1998.[52] Francis recalled notifying Maglieri that PBS had obtained the contract for 39 Broadway, and had transferred into that building employees from sites already represented by UWA. Francis and Maglieri both recall that Maglieri obtained cards for employees at 39 Broadway prior to the recognition. Maglieri identified 15 cards that he claimed that he obtained from employees at 39 Broadway and submitted to Francis sometime in July 1998. They included cards signed by Adegbeyeni, Torres, Catano, Huamacto, Motana, Martinez, Cortes, and Lozano, all of which were signed when these employees were employed by PBS at other locations. He submitted a card from World dated July 3, 1998, Hernan dated June 22, 1998, and Cruz dated June 17, 1998.[53] According to Maglieri, he also submitted cards signed by Quesada, Wright, and Pagan with respect to 39 Broadway, although these employees never worked at 39 Broadway, but at 71

[47] Stratakos explained that she was looking for another job at the time, and simply forgot about the list. Francis also admitted that he made no effort to make sure that the preferential hiring list was utilized as promised. He asserts that he thought that Sanchez and Stratakos were using the list.

[48] PBS' records reveal that PBS hired new employees at 39 Broadway on the following dates.

Jose Diaz—December 9, 1998; Adriana Guzman—January 15, 1999; Anibal Hernandez—July 17, 1998; Nancy Hernandez—December 8, 1998; Harry Laboy—August 17, 1998; Ramon Liz—April 8, 1999; Eva Peri—March 23, 1999; and Dionicia Sierra—February 10, 1999.

[49] PBS' records show that on his date of hire, June 22, 1998, he signed up with UWA.

[50] I note that although Chang's first day of work and date of hire was January 23, 1998, he also signed up with UWA on January 14, 1998, before that day.

[51] He also signed up with UWA on June 22, 1998.

[52] Francis admitted that he had told Pincus during negotiations concerning PBS' bid for the job, that employees at 39 Broadway would be represented by a union other than Local 32B-32J.

[53] As noted above, these cards were signed before they started working for PBS.

Broadway, and were also submitted to Francis in support of UWA's recognition demand at that building.

By letter dated June 23, 1998, Kevin McCulloch informed Stratakos that Local 32B-32J was in the process of completing employment applications of the former employees from 39 Broadway, and would forward them to Stratakos "as soon as they were finalized by the employees." McCulloch further requested that Stratakos contact him so that the parties could commence negotiations. Francis replied by letter June 26, 1998, that the job had already started, and except for Mosquera and Logan, the remaining employees needed had been transferred from other PBS locations. Thus, PBS rejected McCulloch's request to begin negotiations, since Local 32B-32J did not represent a majority of employees at 39 Broadway.

Testimony was furnished by both Sanchez and Francis concerning PBS' decision not to offer jobs to the former PBM employees (other than Mosquera and Logan). Once again, as in the case of their testimony concerning the hiring process at other buildings, initially both witnesses indicated that the decision in this regard was made by Sanchez. Thus, they both testified that Francis would give Sanchez the number of employees needed, and that Sanchez decided not to offer jobs to the incumbents, and to fill all slots with transferees. According to Sanchez, the reasons that he decided not to hire the former PBM employees was because he believed that PBM, the prior contractor would find them other jobs. In that regard, Sanchez asserts that he had been told by employees at 32-42, that Shepard, the prior contractor at 32-42 Broadway, had in fact found the employees other jobs with Shepards at other locations. Sanchez also added that he believed that since the employees were working for substantially more money with PBM, that they would not be very happy, productive, or loyal working for half the salary and doing the same work.

As in the case of the other buildings, only at the close of his testimony on redirect, did Sanchez admit that in fact, Francis had instructed him to fill the staff (except for Mosquera and Logan) with transferees.

Francis for his part, as in the case of the other buildings, initially furnished generalized testimony about PBS' general policies of allegedly hiring day-shift workers or employees with special skills from the prior work force. He then indicated that he leaves the decision on hiring the remainder of the staff to Sanchez, Stratakos, or D'Armis. Once more, toward the close of his testimony, when examined by the me, Francis admitted that, as in the case of 19 Rector and 32-42 Broadway, he had instructed Sanchez not to hire the former employees (other than Mosquera and Logan) and to staff 39 Broadway with transferees. According to Francis, he made this decision for the reasons that he gave in the other cases, the economics and performance on the job. Francis explained further that most of the people were going to be going from part time to fill time, so PBS would be asking them to work substantially more hours at a lower rate than they were making. Francis added that he knew that there were a lot of part timers at 39 Broadway.[54] Thus, Francis summarized that he decided not to hire the PBM employees because he felt that they weren't going to accept the job because PBS would be cutting their pay and because the employees had been working part time and would not accept full-time positions with PBS.

Finally, as noted above, after admitting that one of the reasons that he did not hire the former employees from all three buildings, was his knowledge that PBS would be obligated to recognize Local 32B-32J, Francis attempted to temper that admission.

Francis in response to a question from his attorney testified that was not the "primary" reason for his decision. Francis asserted that the primary reason (encompassing all three building) was the economic factors and work performance. He elaborated further that PBS was asking people to clean more areas than before, for less money, and human nature doesn't do that.

Finally, PBS also submitted a position paper, dated September 11, 1998, with respect to 39 Broadway. This letter was similar to the position papers submitted with respect to 19 Rector and 32B-32J Broadway. It emphasized PBS' general practice of transferring employees from one building to another and asserts that PBS has no practice of hiring incumbent employees. It also noted that during interviews with former employees of PBM, Stratakos instructed Sanchez to call PBS if they were interested, and denied that any employees were asked if they would cross a picket line. The letter again notes PBS' past practice is to transfer employees in from its other facilities, that it has hired and trained, and that it hires employees of former contractors "who have special skills or knowledge of the location to ensure a smooth transition."

The paper adds that after the interviews, as is the normal practice at PBS, "the applicant is forgotten unless the applicant takes the initiative to follow—up by telephone or in person." It again emphasized that the interviewees failed to contact Sanchez and "hence declined to be considered for employment."

Once again, the position paper makes no reference to any of the reasons mentioned by either Sanchez or Francis as an explanation for not hiring the incumbent employees. These reasons as related above, included the assertion that PBS believed that PBM would make sure that the employees would be employed at PBM's other locations, that PBS believed that the employees would not accept positions with PBS because of the cut in salary or reduction in benefits, that if they did accept they would be unhappy or disloyal employees, or that as Francis testified they would not accept full-time positions.

V. ANALYSIS

A. The Alleged Interrogation

The General Counsel asserts that PBS violated Section 8(a)(1) of the Act when Stratakos unlawfully interrogated Mosquera on June 25, 1998, during their interview. During this interview, Stratakos asked Mosquera whether he would cross a picket line in the event the former employees struck. In assessing the legality of this inquiry it is important to determine Mosquera's status at the time of the questioning.

[54] No evidence was introduced by PBS that the prior employees at 39 Broadway had worked part-time positions while employed by PBM.

Thus, if Mosquera was considered an employee of PBS at the time of the inquiry, such questioning is lawful if PBS had a reasonable basis to fear an imminent strike, and if PBS by its questioning was merely seeking to ascertain the chances for it keeping its business open. *Certainteed Co*., 282 NLRB 1101, 1107 (1987); *Mosher Steel Co*., 220 NLRB 336 (1975); *Daka, Inc*., 310 NLRB 201, 207 (1993); *Naperville Ready Mix*, 329 NLRB 174, 178 fn. 19 (1999).

On the other hand, such questioning of job applicants stands on a different footing. The Board has long held that any questioning of job applicants concerning their union affiliation activities or membership is inherently coercive and interferes with Section 7 rights. *Century Wine Spirits,* 304 NLRB 338, 359 (1991); *Challenge Cook Bros.,* 288 NLRB 387, 397 (1988); *International Metal Co*., 286 NLRB 1106, 1110 (1983); *Bighorn Beverage*, 236 NLRB 736, 751 (1978); *Rochester Cadet Cleaners,* 205 NLRB 773 (1973); *Service Master*, 267 NLRB 875 (1983); and *Singer Co*., 158 NLRB 677, 689 (1966).

The rationale for that conclusion is aptly summarized in the opinion of the administrative law judge in *Singer,* supra.

> An employment interview is not an abstract discussion forum, or an occasion for chance or casual conversation, but is a session of serious import at which the employer deals with matters, and propounds corresponding inquires, designed to determine the suitability for employment, in the employer's eyes, of the applicant being interviewed. Hence, an applicant has reason to know that his answers to questions are meaningful to the employer and, depending upon their nature, may in greater or lesser but nevertheless in some degree be determinative of the outcome. For if the subjects inquired about were matters of indifference to the employer, he would have no reason to put the questions. When, therefore, an applicant for employment is asked how he feels about a union or whether he would vote for one, he has ample reason to know from such questioning itself, when no contrary words or circumstances are said or indicated to him during the interview, that the employer has a significant aversion to the employment of prounion applicants; in the circumstances, there is no other rational interpretation he can place upon the employer's inquiry, as experience prior to and under the Act has amply demonstrated. Accordingly, applicants in the position of the five involved in this case had reason to believe that their chances of employment would be adversely affected if they were, in fact, persons who favored self-organization of employees and were to expose themselves as of this persuasion during the interview. For such fundamental reasons as these, inquires of an applicant for employment respecting how he feels about, or whether he would vote for, a union tend to restrain the applicant, both during the interview and during his employment if accepted, from the totally free exercise of the self-organization rights which the Act guarantees to him. Id. at 689.

While the Board has seemed to abandon any "per se" approach to finding interrogations unlawful,[55] I note that some of these cases cited are post *Rossmore*. However, in my view. "inherently coercive," is language more closely aligned with a per se approach to finding a violation. Thus, as in all cases of interrogations, the Board must consider all the underlying circumstances of the interview in assessing whether or not it is coercive and therefore unlawful. However, the Board is likely to view such questioning as coercive, unless the Employer establishes a clearly defined and legitimate rationale for the interrogation. Cf. *Bay Control Services,* 315 NLRB 30, 42–43 (1994) (ALJ, affirmed by Board found that Employer's inquiry of job applicant about crossing a picket line not coercive, because Employer sought only to inform applicant of the dangers and risk to herself or her vehicle if she crossed a picket line).

It thus becomes important to determine Mosquera's status at the time of the interview. In that regard, I agree with the General Counsel that he must be considered an applicant rather an employee, as asserted by PBS. I note that although he had been told by Francis that he was hired prior to the interview, the final terms of his hire were not settled, and in fact were discussed during the interview. A close analysis of the interview makes it crystal clear that his employment with PBS was contingent on his responses to Stratakos' questions about crossing the picket line, and had he not agreed to cross the potential picket line, he would not have been hired. In these circumstances, I shall treat Mosquera as an applicant for employment, and assess the coerciveness of the questioning on that basis.

Thus, the interview began by Stratakos noting that although she knew that Mosquera had been spoken to by her boss, she must treat him like everyone else, and he must fill out an application. At that point, she immediately asked Mosquera if he intended to work or stay outside if the employees go on strike. Significantly, Mosquera initially ducked the question, and responded that he would fill out the application as requested.[56] At that point, both Stratakos and Sanchez said, "[N]o, no, no," i.e., telling Mosquera that he cannot fill out the application unless and until he answers Stratakos' question. Stratakos then repeated her question and asked if Mosquera was going to "go outside" and "walk up and down with them," or "stay inside and work." Mosquera then responded, "I'm going to stay inside and work." Stratakos then replied, "[T]hat's all I need to know. Thank you very much." Thus, only after Mosquera agreed to cross the picket line and work, did Stratakos permit him to fill out an application, and than discuss the terms of his employment. Thus is it clear that in these circumstances the implication of the question was that Mosquera would not be hired if he answered that he would not stay if employees went on strike. *St. Louis Auto Parts*, 315 NLRB 717, 720 (1994); *Fremont Ford,* 289 NLRB 1290 fn. 6 (1988).[57] Indeed, the rationale

[55] *Rossmore House*, 277 NLRB 269 (1984); *Sunnydale Medical Clinic*, 277 NLRB 1217 (1985).

[56] The fact that Mosquera initially attempted to avoid answering this question, is an indication of the coerciveness of the inquiry.

[57] Cf. *Sunnyvale Medica,* supra, where the Board found questioning to be noncoercive, in large part because "it did not reasonably appear from the nature of the questions that the Employer was seeking to obtain information from employee on which Employer might take adverse action against the employees". Here, it clearly appears that PBS was seeking to obtain information from Mosquera on the

as explained by the judge in *Singer,* appears to apply here. Thus, absent words to the contrary, Mosquera had every reason to believe that his chances for employment would be adversely affected, if he responded that he would join the picket line.

Therefore, I conclude that he interrogation of Mosquera was coercive, and that by such conduct, PBS violated Section 8(a)(1) of the Act.

B. The Alleged Violations at 71 Broadway

I have found above that during the first week of PBS' contract at 71 Broadway, Sanchez instructed employees Matos, Freyre, Quesada, and Wright to sign authorization cards for UWA. Such conduct is patently unlawful. I so find. *Baby Watson Cheesecake*, 320 NLRB 779, 786 (1996); *Shore Health Center*, 317 NLRB 1286, 1290 (1995); *Davis Supermarket*s, 306 NLRB 426, 453 (1992), enfd. 2 F.3d 1162, 1176 (D.C. Cir. 1993).

PBS argues with respect to the cards of Quesada and Wright, that Sanchez admittedly solicited, that such conduct was not unlawful. It asserts with respect Wright's card, that Sanchez assumed that Wright was already a member of UWA, by virtue of his prior employment with PBS at Hudsonview, a location previously represented by UWA. Since the shop steward for UWA at 2 Broadway had just quit, and he usually gives out UWA cards, Sanchez testified that he felt it was incumbent upon him to get the cards signed. In fact, Wright had never signed a UWA card while employed at Hudsonview, and had never even been told about UWA while employed there. Sanchez's testimony provides no defense to these allegations. Whether or not Sanchez believed Wright had already signed a card or that he felt that he was merely helping out due to the absence of a shop steward is irrelevant. Wright had not signed a card, and there was no shop steward at 71 Broadway, since there had been no recognition yet of UWA at that facility. The absence of a shop steward at 2 Broadway has no relationship to any reasonable belief by Sanchez that he was authorized to solicit cards for UWA at 71 Broadway. What it does show is the fact that as the record amply demonstrates, PBS intended to recognize and bargain with UWA at this facility, as well as all the others in this case, regardless of whether UWA represented a majority of its employees, and that PBS intended to assist UWA in obtaining such majority. The fact is that it is not the business or prerogative of PBS to help UWA solicit cards, whether or not the employee transferred from another UWA represented facility, that had a contract in existence.

Similarly, with respect to Quesada, PBS argues that Sanchez initially intended to hire him to work at 2 Broadway, and transfer another employee to 71 Broadway. Thus, Sanchez testified that he instructed Queseda to fill out UWA forms, but after the other employee whom he intended to transfer quit, he decided to hire Quesada directly for 71 Broadway. I do not credit Sanchez's testimony, since Quesada's credible testimony establishes that he was given UWA forms to fill out after being told that he would be working at 71 Broadway. However, even if I were to credit Sanchez, such testimony provides no defense to his conduct. PBS argues that "there is nothing sinister here that rises to the level of a violation." I disagree. The test for a violation is not whether it is "sinister," but whether the conduct reasonably tends to coercive employees in the exercise of their rights. When a supervisor instructs an employee to sign union cards, the cases are clear, as cited above, that such conduct has such a tendency.

Accordingly, I conclude that PBS has violated Section 8(a)(1) and (2) of the Act.

It is undisputed that on or about October 9, 1997, Sanchez distributed UWA dues authorization forms to employees, along with their paychecks. Sanchez admitted telling these employees that "I need these forms to be filled out," and that the "office" needed them, so that dues can be deducted. Sanchez' conduct in this regard is a clear violation of Section 8(a)(1) and (2) of the Act. It is well settled that checkoff authorizations must be made "voluntarily," and that an employee cannot be compelled to executed such forms, whether or not there is a valid union-security clause in existence. *Service Employees Local 74* (*Parkside Lodge of Connecticut),* 323 NLRB 289, 293 (1997); *Gloria's Manor,* 225 NLRB 1133, 1143 (1976). Therefore, PBS by directing its employees to sign such forms, has coerced employees in the exercise of their rights in violation of Section 8(a)(1) and (2) of the Act. *Mode O-Day,* 280 NLRB 253, 255 (1986); *Communication Workers Local 1101 (New York Telephone),* 281 NLRB 413, 414 (1986).

PBS argues that it is not a violation of the Act for an employer to inform employees that they had to be members of the Union and to condition employment on membership and payment of dues. *Rochester Mfg. Co*., 323 NLRB 260, 262 (1997). However, here Sanchez did more than merely inform employees of their membership or potential dues obligations. He in fact said nothing about the contract, or any obligation under it to become a member and or to pay dues. He merely directed them to execute the UWA forms, which under *Rochester,* supra, cited by PBS is unlawful, since it leads employees to believe that the dues-checkoff authorization method of fulfilling their financial obligations to the Union is compulsory.

The fact that as Sanchez testified, he may have been acting pursuant to the memo from PBS' office directed to all of PBS' locations provides no defense to PBS' conduct. Although as PBS points out, the employees may have not been threatened[58] if they failed to sign the forms, the mere direction by PBS to sign the forms, deprives employees of their choice whether or not to execute these forms, and coerces them in the exercise of their Section 7 rights.

Therefore, I conclude that PBS had violated Section 8(a)(1) and (2) of the Act by such conduct.

basis of which PBS would decide whether or not to hire him or retain him as an employee, and even if he were considered to be an employee.

[58] While Pagan did testify, and Sanchez denied, that PBS required employees to sign the UWA forms before being allowed to pick up their paychecks, I note that no other employee corroborated Pagan's testimony in this regard. I need not resolve the credibility dispute between Pagan and Sanchez in this area, since as I have concluded above, PBS' conduct is unlawful in any event, and a finding concerning Pagan's testimony would not significantly change the remedy for the violation.

It is not disputed that PBS deducted dues from the salaries of Freyre and Matos for UWA, although neither of these employees ever executed checkoff authorizations for UWA. In fact, Freyre specifically informed Sanchez, that although he signed an authorization card for membership in UWA (at Sanchez' direction), he did not want any deductions made from his check.

Since it is clearly unlawful for PBS to deduct dues from the salaries of employees, who have not executed checkoff authorizations, PBS has once again violated Section 8(a)(1) and (2) of the Act. *Mashkin Freight Lines*, 261 NLRB 1473, 1481 (1987); *American Geriatric Enterprises,* 235 NLRB 1532 (1978); *Western Auto Associates*, 143 NLRB 703, 705 (1963).

It is also appropriate to find, which I do, that UWA by accepting and retaining such unlawfully obtained funds, has violated Section 8(b)(1)(A) of the Act. *American Geriatric,* supra.

I have found that PBS agreed to recognize UWA on or about September 19, 1997. During the payroll week ending September 21, 1997, PBS employed 13 unit employees at 71 Broadway. Maglieri testified that he submitted six authorization cards to Francis, when he demanded recognition, at some point prior to September 19, 1997. Of these six cards, I have already concluded that the cards of Matos, Freyre, Wright, and Quesada were tainted by virtue of Sanchez having solicited them, so they cannot be counted towards UWA's majority. Maglieri also alleges that he submitted a card signed by Pagan, dated May 29, 1996, while Pagan was employed by PBS at 2 Broadway. However, Pagan credibly testified and I find,[59] that on his first day of work at 2 Broadway, Sanchez gave him an application package which included an authorization card for UWA. Sanchez told Pagan that PBS was a union shop, and in order to work there he had to sign the card and join the Union. As I have related above, such comments by supervisors are unlawful, and taints Pagan's card, as well, as support for UWA's majority status.

Therefore, that leaves UWA with just one valid card, the card of Millan, dated September 6, 1997, out of a unit of 13 employees.[60] Thus, UWA clearly did not represent an uncoerced majority of PBS' employees at 71 Broadway as of September 19, 1997, or indeed at any time prior to the recognition. Therefore, PBS has violated Section 8(a)(1), (2), and (3) of the Act by recognizing UWA and executing a contract with a union-security clause. *Sound One Co*., 317 NLRB 854, 859 (1995), enfd. 104 F.3d 356 (2d Cir. 1996).

It also follows and I find that UWA has thereby violated Sections 8(b)(1)(A) and (2) of the Act. *Alton Belle Casino*, 314 NLRB 611, 628 (1994).

While it is undisputed that PBS hired Rafael Fernandez as a porter at 71 Broadway on November 2, 1997, a significant credibility dispute exists between the testimony of Fernandez and Sanchez, concerning Fernandez' interview and potential hire in September 1997. I credit Fernandez' version of these events, as related above. I note initially, that Fernandez is still employed by PBS, and therefore his testimony, adverse to PBS is entitled to greater weight. *Sam's Club,* 322 NLRB 8 (1996). Moreover, as I have discussed infra, Sanchez was directly contradicted by the tape recording in several significant respects. Additionally, Sanchez was contradicted by two neutral witnesses, officials of his church, with respect to his efforts to solicit employees from the church during the period of time that PBS was hiring employees for the buildings involved herein.

Accordingly, based on these factors,[61] as well as comparative demeanor considerations, I credit Fernandez and conclude that Sanchez did initially agree to hire him as a doorman at 71 Broadway, but revoked that offer, after finding out that Fernandez had been employed at a 32B-32J shop, and telling Fernandez that the owner of PBS "didn't want anybody that belongs to 32B-32J Union working." I have considered, as PBS argues the fact that PBS eventually hired Fernandez in November, but nonetheless conclude that Sanchez made the statement attributed to him in September. I note that by November 1997, PBS had already recognized UWA (unlawfully once again), so the need to avoid hiring Local 32B-32J supporters was reduced.

I also reject Sanchez' explanation that he did not hire Fernandez initially because of his poor English skills. In that regard, Fernandez' "poor" English skills must have been obvious to Sanchez when he interviewed Fernandez and promised him a job, before he found out about Fernandez' 32B-32J history. Moreover, Fernandez' application also listed doorman and maintenance as a job that he was interested in and Sanchez' explanation for not offering him a porter's job, i.e., that he didn't believe that Fernandez would be a good porter because he had previously been a supervisor, I find unconvincing. I note in that connection that PBS did offer Fernandez a porter's position in November (after the recognition) despite the alleged fact that Sanchez had believed he would not be a good porter. Sanchez did not explain why he did not believe that Fernandez would be a good porter in September, but changed his mind on this subject in November when he hired Fernandez for that position.

Although these findings that I have made with respect to PBS' conduct towards Fernandez, could lead to potential violations of Section 8(a)(1) and (3) of the Act, I make no such findngs, since the complaint makes no such allegations, and the General Counsel has not offered any amendments to the complaint to reflect such violations. While the Charging Party asserts in its brief that Fernandez should be considered a discriminatee and entitled to reinstatement and backpay, I cannot agree. It is the General Counsel, and note, the Charging Party that determines the scope of the complaint and the identity of discriminatees.

Since, as I have noted above, there is no complaint allegation with respect to Fernandez he cannot be considered a discriminatee, nor can I find a violation with respect to any

[59] I note that Sanchez did not deny Pagan's testimony in its regard.

[60] While a number of other employees in the unit, such as Barken, Ogunwale, Piantinis, and Sirjnusingh, eventually signed cards for UWA, these actions took place in October, well after the recognition and execution of the contract.

[61] I also note that Sanchez, although testifying as to his version of events, did not specifically deny that he told Fernandez that the owner didn't hire members of Local 32B-32J.

of the conduct of PBS towards him. However, I can and do consider this conduct as reflective of animus towards Local 32B-32J, and as relevant evidence in assessing PBS' motivation in refusing to hire Local 32B-32J members at its other locations.

Similarly, I have also found above, that in March 1998, Local 32B-32J began organizing at 71 Broadway. At that time, Sanchez told Fernandez that he heard that someone is organizing for Local 32B-32J in the building, asked if Fernandez heard anything about it, instructed Fernandez if he hears anything about such organizing to tell Sanchez about it, and mentioned to Fernandez the names of three employees who Sanchez believed were trying to organize for Local 32B-32J. This conversation would again establish several violations of the Act by PBS, has they been alleged in the complaint, such as coercive interrogations, and giving employees the impression that their union activities were under surveillance. However, once again, although I cannot and do not find such violations, since the complaint does not so allege, I do find it appropriate to consider such conduct as additional evidence of animus towards Local 32B-32J, particularly where it occurred in March 1998, contemporaneous with the alleged unlawful hiring scheme by PBS at its other locations.

C. The Refusal to Hire

On May 11, 2000, the Board issued a decision in *FES*, 333 NLRB 9, wherein it set forth a somewhat revised framework for litigating refusal to hire cases, and clarified the elements of a violation and the respective burdens of the parties. Thus the Board modified the requirements necessary to establish a violation under *Wright Line*, 251 NLRB 1083 (1950), in a refusal to hire case. The General Counsel must show (1) that the respondent was hiring or had concrete plans to hire; (2) that the applicants had experience or training relevant to requirements of the positions for hire; and (3) that antiunion animus contributed to the decision not to hire the applicants. Supra at 12.

These slight modifications of prior law have little impact on the instant matter, since there is no dispute that PBS was hiring at the time of the alleged unlawful conduct, and that all of the alleged discriminatees had sufficient experience or training relevant to the positions for hire. The third and most significant element, that antiunion animus contributed to the decision not to hire, *FES* makes clear, has not changed, and will be decided by adherence to existing law on that issue. 333 NLRB 9, 12 fn 8. It is to that issue that I now turn.

It is clear that a new owner of a business or a successor contractor, like PBS, is not obligated to hire all or even any of the employees employed by the predecessor contractor. However, it may not refuse to hire the predecessor's employees, because they were represented by a union or to avoid having to recognize and/or bargain with the 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). Some of the factors relied on by the Board in establishing such a violation include evidence of union animus; lack of a convincing rationale for the 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 or contractor conducted its staffing in a manner precluding the predecessor's employees from being hired as a majority of the new owner's work force to avoid the Board's successorship doctrine. *Galloway School Lines,* 321 NLRB 1422, 1422–1423 (1996*); U.S. Marine Corp*., 293 NLRB 669 (1989), enfd. 944 F.2d 1305 (7th Cir. 1991), citing *Houston Distribution Service,* 227 NLRB 960 (1977); *Lemay Caring Centers,* 280 NLRB 60 (1986), enfd. mem. 815 F.2d 711 (9th Cir. 1987). As in *U.S. Marine,* supra, I conclude that all of these factors are present here.

The most significant evidence in support of such a conclusion is the testimony in this proceeding of Francis, PBS' CEO. He admitted that one of the reasons that he decided and instructed Sanchez to fill most of the openings at all three locations with transferees, and consequently not offer jobs to incumbent employees, was because he knew that if he hired a majority of Local 32B-32J represented employees, he would be obligated to recognize that Union. That admission by Francis, standing alone manifested a clear intent to hire less than half of its work force in order to avoid successorship status. *Triple A Services,* 321 NLRB 873 (1996). Indeed this testimony amounts to an "outright confession" by PBS that it was attempting by its hiring process to avoid a successorship obligation to Local 32B-32J. *Pacific Custom Materials*, 327 NLRB 75, 86 (1998); See also *Honda of Hayward,* 307 NLRB 340, 344 (1992); *J. R. Sousa & Sons,* 210 NLRB 982, 985 (1974).

In my view, I need go no further in finding that the General Counsel has established sufficient evidence to prove that union animus, i.e., the desire to avoid recognizing Local 32B-32J, contributed to PBS' decision not to hire the employees formerly employed by the three predecessor companies. This evidence would be enough without more, to shift the burden to PBS to establish under *Wright Line* that it would have taken the same action, absent such union animus.

However, the record herein contains substantially more evidence than Francis' admission, to support the finding of unlawful motivation in PBS' hiring practices in all the buildings. Thus, at 39 Broadway, I have found above that PBS unlawfully interrogated Mosquera concerning his intention to cross a picket line that PBS believed would be forthcoming. Notably, my finding in this regard was premised on my conclusion that the tenor of the questioning made clear that Mosquera would not have been hired had he not agreed to work notwithstanding the existence of a picket line. This evidence demonstrates that PBS was also concerned that Local 32B-32J intended to picket, and that it did not want to hire employees that might or would refuse to cross the picket line or even join the picket line themselves. This is an impermissible consideration for hiring, since it penalizes employees for their intention to engage in protected concerted activities, or put another way conditions their employment on abandoning their rights to engage in such activity. Further support for this conclusion is found in Francis' testimony concerning his decision not to hire incumbent employees at 32-42 Broadway. In that regard, Francis testified that he was very concerned about "picketing and strikes," because of the

previous picketing and Local 32B-32J's December letter threatening further picketing. Additionally, Stratakos testified that she was afraid employees wouldn't cross the picket line and was concerned that if the incumbent employees accepted a job, that they would go out on strike. These admissions by Francis and Stratakos, coupled with the unlawful interrogation of Mosquera, all support the finding which I make, that another unlawful consideration (in addition to its desire to avoid a successorship obligation), in PBS' decision making process was its fear that if it hired these employees, they would refuse to cross a picket line, and or join such a picket line and go out on strike.

Further, I have also found that at 71 Broadway, PBS retracted an offer of employment to Fernandez, because he worked at a 32B-32J building, and told him that PBS "don't want anybody that belongs to Local 32B-32J Union working." Although Fernandez was eventually hired by PBS, this was only after it had unlawfully recognized UWA at that location. *Ruston & Mercer Woodworking,* 203 NLRB 123, 124 (1973). This evidence, as well as other statements made to Fernandez, after his hire which would have amounted to interrogations and unlawful impression of surveillance, had they been alleged, but can nonetheless he considered as evidence of animus, provide further support for a finding of unlawful conduct by PBS in its hiring. Although these statements and actions took place at another building, 71 Broadway, where no unlawful refusal to hire was alleged, they are probative of PBS' conduct at the buildings in question. *Edelco, Inc.,* 321 NLRB 857, 870 (1996).

Indeed, PBS' conduct at 71 Broadway of assisting and unlawfully recognizing UWA, as found above, further demonstrates its animus towards Local 32B-32J. Thus, although there was no existing workforce at 71 Broadway, PBS was so concerned about avoiding Local 32B-32J at that facility, that it retracted its offer of a job to Fernandez, when it found out that he had previously worked at a Local 32B-32J building. It then unlawfully recognized UWA, to make sure that Local 32B-32J could not obtain recognition there, and that PBS could apply its UWA contract to these employees. This conduct by PBS is consistent with its unlawful conduct found by this Board in *PBS I* and *PBS II*, wherein in both cases, PBS unlawfully recognized another union (Local 912 in *PBS I*, and UWA in *PBS II*), in an attempt to avoid having to recognize Local 32B-32J and potentially pay the higher rates and benefits called for in Local 32B-32J's contract. It is also appropriate to consider these prior cases, as supportive of animus towards Local 32B-32J, even though they took place years ago. *Stark Electric,* 327 NLRB 518 fn. 2 (1999); *Control Services,* 315 NLRB 431, 432 (1994); *Berry Schools*, 239 NLRB 1160, 1162 fn. 10 (1979).

The above evidence including the prior Board cases (*PBS I* and *II*), support the conclusion that PBS was intent on recognizing UWA and avoiding Local 32B-32J. At the three buildings in question, it immediately recognized UWA, and agreed to apply the terms of their Master contract without any negotiations. In fact, it was Francis who noticed UWA of the new buildings, and agreed to recognize UWA in some cases without UWA having to submit any cards. This further demonstrates support for the conclusion that PBS refused to hire the Local 32B-32J members because of its preference to recognize and deal with UWA on a continuing basis including at these locations *Columbus Janitor Service,* 191 NLRB 902, 903 (1971).

Further evidence supporting PBS' discriminatory motivation can be found in examining its hiring practices for these three buildings. Initially it must be emphasized that PBS had made its decision not to offer jobs to most of the incumbent employees before these employees had been notified of their terminations, and without any intention to interview or consider[62] for hire any of these employees, which included numerous experienced and qualified employees. Such conduct is highly probative of discriminatory motivation, and an unlawful hiring scheme. *Daufuskie Island Club & Resort*, 328 NLRB 415, 421 (1999); *Triple A Services,* supra at 873; *Laro Maintenance Co.;* 312 NLRB 155 fn. 2 (1993); enfd 56 F.3d 224 (D.C. Cir. 1995); *Systems Mgmt.*, 292 NLRB 1075 fn. 2, 1096 (1989); *Shortway Suburban Lines,* 286 NLRB 323, 325–326 (1987). In this connection, I note that although most of the employees hired at the three buildings were transferees, a few were new hires, but even among those who were not, many of them were relatively inexperienced, since they had been working for PBS as standbys, often with less than a week's experience. Moreover, when PBS transferred an experienced worker from another facility, it had to replace that worker at that facility with a new worker or another standby. Finally, PBS transferred a few employees into these buildings who had prior disciplinary or other work-related problems at the location from which they were transferred. *Laro,* supra at fn. 2. Thus, PBS' hiring scheme consisted primarily of putting on extra employees as standbys or temporary employees in contemplation of obtaining jobs at these buildings, and then transferring them over to the three buildings when PBS obtained the jobs. This is little different than hiring new employees with no experience off the street and hiring them directly at the three buildings. The only significant difference between these two scenarios is the fact that once the employees were hired, although on a standby or temporary basis at PBS' other buildings, they were forced to become members of the UWA, under its collective-bargaining agreement between UWA and PBS. Thus, this action served the dual purpose of facilitating PBS' recognition of UWA at the three buildings, and of eliminating the possibility that PBS would be compelled to recognize Local 32B-32J.

It is also important to note that this hiring practice employed by PBS at these buildings was contrary to its hiring procedures in the past. Thus, Francis conceded that PBS' practice when it took over jobs at New Jersey facilities was to offer jobs to incumbent employees as long as the owners were satisfied with the prior performance of the workers. These facilities included prior work forces that both were and not represented by a Union. Notably at Rockaway Mall, a

[62] Although it did in fact interview most of the incumbent employees, this was done only because either management requested that the interviews be conducted or the employees were present at the building expecting to be interviewed. More importantly, all the employees were told that there were no openings at the particular location where they worked, and the interviews related only to possible future openings at other locations.

facility with a nonunion incumbent work force, PBS hired the entire work force. Interestingly, when both Stratakos and Francis testified about hiring at this facility, they were asked about whether the prior work force was represented by a Union. They both responded no, and both added the gratutious comment, that the employees were still not represented by a Union. Stratakos also testified about hiring at an apartment building in Newark, Ten Hill Street. There, after receiving some recommendations from management on which employees to retain, she conducted interviews with everyone who wished to be hired. At the Newport Mall, Stratakos testified that she interviewed employees on either a group or individual basis and summarized the interview process as follows. "I would try to give everybody a fair shot if they had worked there before."

There cannot be a more striking disparity between that interview process and the interview procedure used by PBS here. Clearly, the incumbent employees not hired were not given "a fair shot," or indeed any shot at all of being hired by PBS at the buildings where they worked, since they were told that PBS had already filled all its positions at those facilities. This disparity from prior hiring practices is further evidence of discriminatory intent. *Laro,* supra at 162; *Shortway Suburban,* supra at 326; *Gallaway School Lines,* supra.

PBS argues, however, that it has maintained a consistent practice of staffing its facilities in New York with transferees, and that it did so because of its experience at Garden State Plaza. I disagree. I do not believe it is appropriate to simply ignore PBS' prior practices in New Jersey in assessing the issue of whether it followed its own hiring practices when staffing the buildings in question here.[63] In any event, the evidence reveals that even in its New York jobs, PBS did not uniformly staff its facilities primarily with transferees. Thus, in its first New York job, the four buildings in Harlem, later subject to the ULP charges in *PBS I*, PBS hired the entire staff from the incumbent work force, and did not use any transferees.

PBS asserts that its practice changed as a result of its experience at Garden State Plaza, when it hired the incumbents, but those who accepted did not show up, and PBS was told that the prior contractor had offered them jobs at other sites. However, this contention is belied by the evidence, since at the Smithhaven Mall, which was subsequent to Garden State Plaza (and the subject of the charges in *PBS II*), PBS offered jobs to *all* the incumbents who were interested. In fact, the evidence suggests that the motivation for PBS' past hiring decisions revolved around an attempt to avoid recognizing Local 32B-32J. Thus, in *PBS I*, involving the Harlem buildings, PBS did in fact hire all of the incumbent employees, previously represented by Local 32B-32J. However, Francis admitted that when he started this job, he "was led to believe that Local 912 was going to get the contract" and that Local 32B-32J was "walking away from these people." Unfortunately for PBS, Local 32B-32J did not "walk away" but instead demanded recognition from PBS, two days after PBS began the job. PBS responded to this demand by refusing Local 32B-32J's request and agreeing to recognize Local 912, based on cards solicited by PBS' supervisor. Thus, PBS began its pattern of unlawfully assisting and recognizing another union (with a cheaper contract), in an attempt to avoid recognizing Local 32B-32J. The judge and the Board found in *PBS I* that PBS had violated Section 8(a)(1) and (2) of the Act by assisting and recognizing Local 912, and Section 8(a)(1) and (5) of the Act by refusing to recognize and bargain with Local 32B-32J.

This decision, in my view, started PBS' education in NLRB proceedings and NLRB law, which clearly affected its subsequent hiring decisions. It's next job was Smithhaven Mall, and by then as a result of *PBS I*, PBS knew as found by the judge, that if it hired a majority of incumbent employees, formerly represented by Local 32B-32J, it would be obligated to recognize and bargain with Local 32B-32J. PBS clearly was intent on avoiding that possibility, and the judge found, devised a hiring process, designed to avoid this result. However, he did not find it to be unlawful, because it was concluded that PBS in fact offered jobs to substantially all of the prior employees, in the *hope* that a majority would not accept. There was one important new fact added to the picture. By this time PBS had signed a contract with UWA which purported to cover all of PBS's future locations. Therefore, PBS believed that this contract would allow them to recognize UWA and concurrently not be obligated to recognize Local 32B-32J at that facility. Thus, it did not believe it would have to recognize Local 32B-32J when it agreed to offer to hire substantially all of the incumbent employees. Indeed, when it offered jobs to the former employees, PBS told them that PBS was a UWA shop. It is also significant that the Board in affirming the judge's finding, dismissing the refusal to hire allegations, made reference to the Charging Party's assertion in its brief, relying on this finding that PBS had unlawfully conditioned hiring on employees accepting representation by UWA. The Board rejected that contention because the case was not litigated on that theory and the General Counsel never chose to litigate that theory of a violation, even in the General Counsel's own exceptions. The suggestion from that footnote, appears to be that had the case been litigated under that theory, the Board may very well have found a violation. It is notable in that regard that the primary basis for the judge dismissing the refusal to hire allegation, was his finding that PBS had in fact offered jobs to most of the incumbent employees. Thus, had it been considered that these offers were conditioned on membership in UWA (which recognition the judge found to be unlawful), he and the Board might well have found the refusal to hire unlawful.

Nonetheless, the judge affirmed by the Board, found the recognition unlawful, and rejected PBS' assertion that its Master contract with UWA permitted recognition of UWA at the mall. He also found that as in *PBS I*, PBS again used its supervisors to unlawfully solicit cards for UWA.

What is even more significant is the judge's findings that PBS by its hiring hoped to avoid Local 32B-32J, and that "if the Union had forcibly instructed its members to accept the

[63] Noteworthy in this regard also is the testimony of both Francis and Stratakos that PBS has no established policy as to whether or not to interview or offer jobs to the work force employed by a prior contractor. Stratakos added that each individual job is looked at on an individual basis and a decision is made by PBS on this issue.

job no matter what terms were offered, and had the employees followed orders, we would have seen what Respondent would have done." Thus the judge, in effect blamed the union for not making sure that the incumbent employees accepted job offers, regardless of the rates, and provided a blueprint for Local 32B-32J in all future cases where PBS obtained contracts previously serviced by Local 32B-32J contractors.

Thus, by the time PBS began to staff the three buildings in question, it was fully aware of several things. It knew that its contract with UWA would not permit it to recognize UWA, without UWA having demonstrated majority support from employees, and more importantly, that it was likely that Local 32B-32J based on Judge Green's opinion, would make sure that the incumbent employees would accept any offers that PBS would make, even at reduced rates and reduced benefits. Therefore, it could not take a chance that the employees would accept job offers, as Judge Green had suggested.

Instead, PBS believed that it had devised another option to avoid Local 32B-32J, which it employed at Hudsonview. There, PBS decided to transfer employees to that facility, from its locations in New Jersey. Although Local 32B-32J filed charges with respect to PBS' failure to hire the incumbent employees at Hudsonview, the Regional Director dismissed these charges, concluding that PBS' had "previously hired and trained its initial complement of job site employees at other locations operated by PBS." He was unable to conclude that there was sufficient evidence that the failure to offer jobs to the incumbents was related to their union membership. Of course, the Regional Director did not have the benefit of the admissions by Francis that are present here, or the events in *PBS II*.[64]

More importantly, the dismissal letter provided a justification for PBS' subsequent conduct in hiring, as exemplified by the admissions of Francis in connection with its staffing of 2 Broadway, in May 1996. I note that Francis had met with McCulloch after Local 32B-32J began to picket at Hudsonview, in an attempt to resolve the dispute, but that effort was not successful. Thus, when it staffed 2 Broadway, Francis was certain that he did not want to be forced to deal with Local 32B-32J, who unfortunately for PBS, was the representative of the previous contractor. Therefore, PBS decided not to offer jobs to the incumbent employees, and to instead hire and train extra employees at Hudsonview and transfer them to 2 Broadway. Francis, in this regard admitted that he was relying on the Regional Director's dismissal letter in Hudsonview, when he decided to train employees at Hudsonview, and transfer them to 2 Broadway, to "thereby avoid having to offer jobs to 32B employees." Indeed, the discriminatory nature of this hiring process is further demonstrated by Francis' further admission that he told a representative of management for 2 Broadway that he was "going to be non 32B."

Francis further testified that he agreed to recognize UWA at 2 Broadway, based on authorization cards shown to him by Maglieri from employees signed while employed at Hudsonview. Thus, the unlawful nature of PBS' hiring scheme and consequent recognition of UWA continued to develop. By failing to hire employees from the incumbent work force and instead transferring employees in from other facilities, PBS accomplished two purposes. It avoided the possibility of having to recognize Local 32B-32J, and ensued the continuation of that status, by foisting upon the employees the representation of UWA.

This is precisely what the evidence discloses, PBS continued to do when it staffed the three buildings in issue here. I note, that I cannot make ULP findings with respect to PBS' hiring practices at Hudsonview and 2 Broadway, since these events are not before me, and they are well beyond the 10(b) period. However, to the extent that PBS relies on its hiring at these buildings to establish a lawful prior practice, that it continued in connection with its hiring at the instant buildings, it is appropriate for me to consider how such "practice" developed.

Further evidence of PBS' discriminatory motive can be found in the disparity between PBS' treatment of the applications filed by the incumbent employees at all three buildings. Thus, the evidence discloses that when an applicant walks in off the street for an interview, Sanchez interviews them, and if not hired, the application is retained by Sanchez at his office at 2 Broadway for future use, when Sanchez needs additional employees. However, the applications filed by the incumbent employees at 19 Rector, 32-42 Broadway, and 39 Broadway, were not retained by Sanchez, but instead taken by Stratakos to PBS' office in New Jersey, and were never used again by PBS to hire additional employees. Thus, the incumbent employees were removed from the potential hiring pool, which is significant evidence of discriminatory treatment. Indeed, Sanchez, himself, testified that he was "puzzled" that Stratakos took the applications with her, and never returned them to Sanchez for future use. It is not surprising that he would be puzzled by this action of Stratakos, which can only be rationally explained by PBS' intent to avoid hiring these employees.

In this connection, PBS seeks to explain this action by arguing that it was expecting these employees to call them if they were interested in future employment with PBS at other locations. However, this explanation is not convincing. At both 32-42 Broadway and 39 Broadway, Stratakos told the employees interviewed that PBS would call them if it had future openings, and at 39 Broadway, promised to put them on a preferential hiring list. While at 19 Rector, PBS did inform employees to contact PBS if they were interested in jobs, I note that there, PBS had distributed applications that indicated employees would be forced to join UWA. This conduct would have tended to unlawfully discourage employees from accepting employment with PBS. Further, their applications were torn up in front of them, except for a

[64] The Regional Director also did not have the further admission by Francis when he described his hiring at Hudsonview. He testified that he had seen all the literature passed out and had seen what had taken place in 1992 with the four accounts in Harlem. He added that he was "very concerned and I arranged to transfer people from New Jersey, and it immediately had picketing around the building." This testimony demonstrates that Francis when he decided to transfer employees from New Jersey into Hudsonview, rather than hire the incumbent employees, was concerned with the protected concerted activity of employees i.e., passing out literature and picketing which are unlawful considerations on the part of PBS.

one-page PIS which further tended to discourage their employment possibilities. In any event, I find that PBS has adduced no sufficient explanation for its disparate treatment of these applications, particularly where the evidence discloses that Sanchez consistently used the applications that he had in his office to attempt to contact applicants for possible job openings.[65]

PBS also seeks to justify this conduct by arguing that PBS generally hires and contacts applicants who consistently call PBS to express their interest in employment. While Sanchez did furnish some testimony supportive of that contention, I find such testimony unconvincing and I do not credit same. While it may be true that PBS hires those applicants who call more often, if for no other reason, that their names are more familiar to Sanchez, this fact cannot justify PBS completely removing the applicants from the hiring pool, unless they call themselves. Moreover, the evidence reveals that Sanchez called a number of applicants from the applications in his office, who had not called him first. Also, Sanchez called officials of his church to solicit inexperienced employees to apply for jobs, who had not even filed applications, and still did not use the applications of fully qualified experienced employees that PBS had sitting in its main office. I once again emphasize Sanchez' own testimony that he was "puzzled" that Stratakos took all the applications submitted from the incumbent employees with her to the main office. This testimony indicates strongly that Sanchez would have preferred to have had them to utilize when staffing his facilities, but that he knew that his supervisors had determined that these applicants were not to be offered jobs by PBS.

Accordingly, I conclude that the discriminatory and disparate manner that PBS treated the applications for the incumbent employees provides significant evidence of an unlawful hiring scheme by PBS. *Carib Inn of San Juan,* 312 NLRB 1212, 1224 (1993); *U.S. Marine*, supra at 671.

The unlawfulness of this conduct is further highlighted, by PBS' hiring practices after the initial hiring at each location. Thus at 19 Rector, PBS staffed its initial complement of employees with transferees from PBS' other locations. This group included seven employees from 2 Broadway where they had been standbys, one full-time employee from 2 Broadway, two full-time employees from 71 Broadway,[66] and one full-time employed at PBS' facility in Industry City.

It is also significant, that of this group of transferees, two of them Olesty and Mayoral were having problems with either PBS' supervisors or with other employees, before being transferred. Thus, PBS decided to transfer these two "problem" employees into a new facility, where its witnesses testified that PBS is interested in assuring a smooth transition, rather than even considering a large group of experienced employees, concerning whom it received no complaints whatsoever. To the contrary, PBS received a letter from the ownership indicating that it wants these employees to be hired. I find that PBS' decision to transfer to 19 Rector two problem employees, rather than hiring experienced and well thought of employees from the predecessor, is a further indication of discriminatory conduct by PBS. *Laro,* supra at fn. 2 (Respondent refused to consider experienced pool of incumbent employees, while transferring in two employees with poor disciplinary records).

Even more importantly, subsequent to PBS receiving the applications from the former employees, PBS hired a number of employees at 19 Rector. While many of them were also transferees, PBS' records reflect (contrary to Sanchez' testimony which I once again discredit on this issue), that PBS hired seven new employees, between February and September 1998 at 19 Rector. This subsequent failure to offer employment, to these experienced employees is further evidence of discriminatory conduct, which relates back to the initial hiring decision by PBS. *Champion Rivet*, 314 NLRB 1097 1099 (1994); *Weco Cleaning Specialists*, 308 NLRB 310, 311 (1992), *Handy Andy*, 296 NLRB 1001, 1003 (1989); *U.S. Marine v. NLRB,* 944 F.2d 1305, 1305–1317 (7th Cir. 1991).

PBS argues however that its conduct at 19 Rector demonstrates a lack of discriminatory intent, because it in fact hired all employees who followed up their applications and or showed interest in employment with PBS. It points to the fact that PBS hired Silva as a day porter on the first day of employment, as well as Howard Angus on January 5, 1998, an Kimble Kalarjian in June 1998. Additionally, the record revealed that PBS offered a job to Abigail Balarezo on December 30, 1997, which she initially accepted, but then turned down. I find that contrary to PBS' arguments, these hires or attempted hires provide little or no support for PBS' position that its hiring processes were lawful. I note initially that PBS offered Balarezo a job only after her name appeared in the newspaper highlighting significant family medical problem, exacerbating her loss of employment at 19 Rector. Thus, PBS' decision to offer her a job can be explained by either its desire to avoid bad publicity, or perhaps compassion from Francis for her difficult situation. Either way, the offer to her is an obvious exception to PBS' decision not to consider the former employees for jobs. With respect to Silva, he was hired because he was recommended by Juarez.

As for Angus and Kalarjian, as well as Balarezo, they were all hired or offered hire after PBS had recognized UWA as the collective bargaining representative for PBS' employees at 19 Rector. At that point PBS' desire to avoid recognizing Local 32B-32J, became less significant. *Shortway Suburban,* supra at 326.

PBS' conduct in hiring at 32-42 Broadway is even more damaging to the legality of its hiring scheme. Thus at that location PBS utilized approximately 33 employees over a period of the first 3 weeks, nearly all of them transferees from other locations. Many of these employees however worked at 32-42 Broadway for only a few days, before they were transferred back to other locations. This action, particularly absent any other explanation, suggests that PBS transferred these employees into 32-42 Broadway in order to

[65] In that regard the record reflects that Sanchez used the applications in his office to contact over 30 applicants to discuss employment opportunities with them from late 1997 through the first 6 months of 1998.

[66] However, one of these employees, Rafael Fernandez worked only 1 day at 19 Rector, December 26, 1997, and was then transferred back to 71 Broadway.

support UWA's majority status, to enable PBS to recognize UWA, which PBS did on February 20, 1998, only days after it started the job, and consequently to avoid having to recognize Local 32B-32J.[67]

Although PBS did hire five former Shepard employees, on the day shift, they were hired at the request of the owners of the building. *Laro,* supra. Subsequent to the first several weeks of PBS starting the job at 32-42 Broadway, PBS continued to hire employees, and although Sanchez testified that he filled these openings with transferees, once again this testimony is contradicted by PBS' records, which establish that PBS hired 17 new employees at 32-42 Broadway between March 9, 1998, and April 27, 1999, while never contacting or offering these positions to any of the former Shepard employees, a number of whom had filled out applications. Most significantly of all, unlike the employees interviewed at 19 Rector who had only indicated that they would think about employment with PBS, nearly all of the former employees interviewed by Stratakos and Sanchez at 32-42 Broadway, expressly agreed to accept a job with PBS at lower rates and benefits. These employees included Rizai who told a skeptical Stratakos that he would accept a job at a substantial wage reduction, because he needed a job and had a family. Rizai continued to agree to accept even when Stratakos lowered PBS' potential salary from $9.50 to $7.50 per hour. Similarly, Hlasnay, the one day-shift porter not hired by PBS (who had been recommended by Brogan), also informed Sratakos when she questioned him why he would want a job with such a reduction in pay, that he was 61 years old and would have a hard time finding another job. Stratakos expressly told these two employees, as well as others who were interviewed and agreed to accept a job that PBS would call them if a position became available.

However, notwithstanding this promise, their applications went with Stratakos to New Jersey, never to be used again. Sanchez proceeded to fill 17 subsequent jobs at 32-42 Broadway with new employees. Moreover, when PBS began at 39 Broadway, in June 1998, it had another entirely new facility to staff. It had promised that it would call the former 32-42 Broadway employees for available jobs at any locations. Yet, it failed to offer any of them one of the positions at 39 Broadway. Therefore, I conclude that the above conduct provides substantial evidence of discriminatory motivation by PBS with regard to the former Shepard employees. *Champion,* supra; *Weco,* supra; *Handy Andy,* supra; *U.S. Marine,* supra.

An examination of PBS' hiring at 39 Broadway reveals even more damaging evidence of PBS' discriminatory motivation. Thus, instead of hiring an experienced crew of former PMB employees, whom the owners requested that PBS interview, PBS again decided to staff its entire crew with transferees. Two of these alleged transferees Cruz and George, were in effect new employees, since that they had not worked for PBS before starting at 39 Broadway. However, these two employees had signed cards for UWA before they started work for PBS, suggesting that PBS may have considered them standbys on these dates. Significantly, this is contrary to Sanchez' testimony that he does not consider an employee to be a standby until he actually works for PBS. Thus here, with respect to these two employees, they signed UWA cards before starting work for PBS, clearly unlawful conduct, and PBS made sure that these employees were transferred into 39 Broadway, to once again ensure UWA's majority status and consequently avoid PBS having to recognize Local 32B-32J. Once again, the record revealed that many of the transferees into 32-42 Broadway had worked less than a week for PBS at other locations, which makes them little different than new employees, and further demonstrates PBS' unlawful intent of transferring in UWA members in order to avoid Local 32B-32J.

What makes its conduct at 39 Broadway so damaging to PBS is the fact that the former PBM employees interviewed agreed to accept positions with PBS even at reduced rates, and Stratakos promised to put them on a preferential hiring list for any future opening at any location. She also promised to call these applicants when PBS had such a job available. However, once again, the applications were taken by Stratakos back to New Jersey, and were not used to fill any future openings at any buildings. While Sanchez admitted that he knew that a preferential hiring list meant "when a job becomes available they will be the first to get one," he concedes that he never asked Stratakos for the list when he filled subsequent jobs.

Indeed the very next week, after the interviews, PBS transferred in two employees, one of whom Arly Santiago was hired on June 22, 1998, and signed a card with UWA on that date. However, he did not work for PBS until July 4, 1998. During the next payroll week, ending July 11, 1998, PBS transferred in two more employees from other facilities. Subsequently, PBS continued to transfer in some employees, and hired 8 new employees between the dates of July 17, 1998, and April 8, 1999. Yet, it did not offer any of these positions to any of the former PBM employees whom it had interviewed, who had agreed to accept positions and who PBS had promised to place on a preferential hiring list. It is hard to imagine more persuasive evidence of discriminatory motivation then this conduct by PBS. I so find.

Accordingly, based on the foregoing analysis and authorities, I conclude that the General Counsel has made a strong prima facia showing of discrimination in PBS' hiring at all three locations. Once the General Counsel has met its initial burden, the burden shifts to PBS to establish by a preponderance of the evidence, that it would have taken the same action even in the absence of union considerations. *Wright Line,* supra; *NLRB v. Transportation Management,* 462 U.S. 393 (1993), *FES,* supra. In light of the General Counsel's

[67] Interestingly, one of the employees so transferred was Antonio Mayoral Jr. He, as noted above was transferred from one of PBS' other locations to 19 Rector as part of 19 Rector's startup crew, although he had problems getting along with other employees at that other location. I found that to be a factor supporting a finding of discriminatory conduct by PBS. His record shows that he worked at 19 Rector from December 15, 1997, to February 4, 1998, when he was transferred to 71 Broadway. He worked there from February 5 to 12, 1998, when he was sent to 32-42 Broadway. He worked there for only 5 days until February 18, 1998, when he was transferred again, this time to 2 Broadway. It appears again that PBS transferred a "problem" employee into 32-42 Broadway rather than hire experienced employees. *Laro,* supra.

strong prima facie showing of discrimination, PBS' burden is substantial. *Vemco, Inc*., 304 NLRB 911, 912 (1991); *Eddyleon Chocolate,* 301 NLRB 887. 889 (1991). I conclude that PBS has fallen far short of meeting its burden in that regard.

It is once again important to highlight the admission of Francis, that his desire to avoid having to recognize Local 32B-32J was one of the factors in his decision to instruct Sanchez to staff all three buildings primarily with transferees and not to offer jobs to the vast majority of former employees at these buildings. In an attempt to extricate PBS from this damaging admission, PBS' attorney elicited from Francis the further testimony that this factor was not the "primary" reason for his decision. Even assuming that Francis' testimony in this respect is credible, which I find it is not, such a finding would not be sufficient to meet PBS' *Wright Line* burden. Whether union animus is the "primary reason" or not is not the test of *Wright Line*. As long as protected conduct, as here, is one of the reasons, for the refusal to hire, it is unlawful, regardless of whether there is another "primary reason" for the action. What PBS must demonstrate in order to meet its *Wright Line* burden is that it would have failed to hire these employees, absent their protected conduct, i.e., PBS' desire to avoid Local 32B-32J and its concern that such employees would not cross a Local 32B-32J picket line. Put another way, PBS must establish that the various other alleged "primary reasons" for its actions, would have been sufficient by themselves to have caused PBS not to hire them. PBS has not come close to so proving.

The alleged "primary reasons," for PBS' decision, according to Francis were "the economic factors at the rate of pay, performance of the work, the change in hours, the benefits being substantially and the economics of doing the job." Francis further explained that by performance of work he meant that PBS was asking people to clean more area than before for less money and human nature doesn't do that. "You don't want to do more for less." Thus in effect, Francis was stating that PBS did not offer jobs to the vast majority of employees of the predecessor companies, because he believed that they would not accept jobs at substantially reduced rates and benefits. For a number of reasons, described more fully below, I find this alleged defense to be pretextual, and that PBS has not shown that it would have failed to hire these employees for these reasons.

The first problem with PBS' defense, is the substantial inconsistencies and contradictions in the testimony of PBS' witnesses concerning PBS' reasons for its hiring decisions, as well as who actually made such decisions. With respect to the latter issue, Sanchez throughout nearly all of his testimony, including his testimony as a witness called by the General Counsel, and when called by PBS, insisted that it was his decision not to hire these former employees, and that the only discussion that he had with respect to hiring with his supervisors, involved his being told that certain "key" employees had been or would be hired by PBS. With respect to the remaining slots, which encompassed the vast majority of employees hired, and consisted mainly of night-shift employees, he was given only the number of employees needed, and he then decided where to get them. Thus it was according to Sanchez, his decision to staff these positions with transferees and not to offer jobs to or even interview the former employees for these jobs. Sanchez furnished a number of different reasons explaining his decisions in this area for each of the buildings.

At 19 Rector, Sanchez testified that he "liked" the people there, but he did not offer any of them jobs, because he assumed that the prior employer would take care of them and transfer them to other jobs for that company at other locations. As to 32-42 Broadway, Sanchez offered several reasons for *his* failure to offer jobs to the bulk of the former employees and to transfer in employees from PBS' other facilities instead. Sanchez asserted that he not believe that these employees would want to work for less money and less benefits and if they came they would not stay or do a lousy job. Sanchez added that he didn't know what kind of a job that they would do while he knew the people that he had trained could do the job. Finally, Sanchez testified that he also considered the fact that the building was dirty when he and other officials of PBS walked around and inspected the buildings.

While testifying about 39 Broadway, Sanchez testified that he had been told by employees from 32-42 Broadway that Shepard, the prior contractor there, had in fact found other jobs for these employees at other locations. Sanchez added that therefore he believed that PBM the prior contractor at 39 Broadway would also find jobs for the incumbent employees not hired by PBS. The other reason advanced by Sanchez for not hiring these employees, was his alleged belief that since the employees were making substantially more money with PBM, that they would not be very happy, productive or loyal working for PBS at half the salary and doing the same work.

It was only at the end of his testimony, on redirect, when Sanchez conceded that in fact Francis had instructed him to use transferees to staff all the positions at the buildings, except for the "key" positions that PBS agreed should be filled by incumbent employees. Thus, this testimony effectively negates and discredits all of Sanchez' previous testimony as to why "he" allegedly decided not to hire these employees, since he in fact did not make the decision.

Statrakos also furnished some testimony concerning the decision not to hire most of the incumbent employees at 32-42 Broadway. She testified that *she* did not consider hiring these employees because "the building was dirty." Later on in her testimony, she added another reason why she decided not to hire these employees. That reason allegedly was that the shifts that these former employees had worked were part time, and PBS did not have part-time employees. At a further point in her testimony, Stratakos, after again insisting that she had made the decision not to hire these employees, explained that she decided to use transferees, because she assumed that none of the former employees would accept a job with PBS, because Shepard would place them elsewhere. Finally, Stratakos admitted that she did not blame the prior employees for the condition of the building and that the condition of the building has no bearing on her decision not to hire these employees.

Francis also provided testimony concerning the decision not to hire most of the incumbent employees at all three loca-

tions. His testimony went back and forth in a number of areas. As to the decision itself, at several points in his testimony, Francis asserted that he hired only the "key" employees at each location, primarily these on the day shift, including those employees with safety licenses. As to the remaining employees, primarily those working on night shifts, Francis testified that he left the decision on who to hire including whether or not to fill these positions with incumbents, to Sanchez or Stratakos. However, at other points in his testimony, including primarily at the end, when examined by me, Francis admitted that in fact it was his decision not to offer jobs to these employees and instead use transferees, and that he so instructed Sanchez. The reasons given by Francis for this decision, also varied from building to building. With respect to 19 Rector, Francis testified that he did so because he believed that they would not take the job or if they accepted, they could not stay.

When testifying about 32-42 Broadway, Francis claimed that he decided not to hire the incumbent night-shift employees, because the building was filthy, and he did not believe that they would accept or remain at the job, when their pay was cut from $13 per hour to $7.50 per hour.

Finally, Francis also testified to his reasons for not hiring incumbents at 39 Broadway. At that location, Francis stated that the reasons were the same as he gave in other cases, the economics and performance on the job. Francis explained that most of people were going to be going from part time to full time, so PBS would be asking them to work substantially more hours at a lower rate. Francis added that he knew that there were a lot of part timers at 39 Broadway. Francis summarized his decision not to hire the former employees, by asserting that he felt that because they weren't going to accept the job at PBS because PBS would be cutting their pay and because the employees had been working part time and would not accept full-time positions with PBS.

As noted above, after admitting that one of the reasons for his decision was his knowledge that PBS would be obligated to recognize Local 32B-32J if it hired a majority of these employees, Francis attempted to temper that admission by furnishing the alleged "primary reasons" for his decision, as related above.

It is obvious, from an analysis of the above testimony, that PBS has been unable to adduce a consistent and coherent version of events, as to who made the decision not to hire these employees, as well as to why this decision was made. However, the most telling evidence of such inconsistencies is the three position papers submitted by PBS in connection with the charges relating to each of the three buildings. All three position papers use virtually identical language in explaining PBS' hiring decisions. They all essentially state that PBS at each location followed its established practice of transferring employees in from other locations, except for certain key positions, where it hired the incumbent employees. These papers add that PBS makes no distinction between employees of former contractors and outside contractors, and that when it does interview applicants, the applicant is forgotten unless the applicant takes the initiative to call PBS.

In the position proper dealing with 32-42 Broadway, PBS added that since the employees of the contractor did "a shoddy job of maintaining the building, PBS may naturally be less inclined to hire a large number of incumbent former employees." Further, it also claimed that the former employees of 32-42 Broadway, precluded themselves from serious consideration by PBS, by insisting on working part-time schedules.

Most significantly, there is not one word in any of the three position papers, concerning the alleged "primary" reasons testified to by Francis, as well as by Sanchez and Stratakos, why PBS did not hire the incumbent employees. There is no assertion in the position papers that PBS believed that because of the reduction in rates and or benefits, that the employees would not accept a job with PBS, would not stay with PBS if they accepted, or would not be loyal or good employees if they stayed. Nor is there any mention of the alleged fact that PBS believed that the prior contractor would place these employees at other locations.

I find this omission to be particularly significant and highly damaging to PBS' attempt to meet its *Wright Line* burden. I note that position papers submitted by attorneys for Respondent are admissible as admissions against PBS. *Black Entertainment Television*, 324 NLRB 1161 (1997); *Steve Aloi Ford,* 179 NLRB 229 fn. 2 (1969); *Albion Poultry & Egg Co.,* 134 NLRB 827 fn. 1 (1961), and often highly probative in assessing motivation of parties and or the credibility of witnesses. *Bond Press*, 234 NLRB 1227, 1231–1232 (1981); *Operating Engineers Local 150 (Willbros Energy Services*), 307 NLRB 272, 275 (1992); *Dimensions In Metal,* 258 NLRB 563, 576–577 (1981).

Here, the "alleged" primary reason for PBS's decision not to hire the former employees, i.e., that they would refuse to accept jobs at lower rates, which was mentioned by all of PBS' witnesses as motivating PBS' decision, inexplicably did not receive any mention in any of the position papers. Moreover, another "alleged" reason mentioned prominently by PBS' witnesses, although significantly not by Francis as an alleged "primary reason," was PBS' alleged belief that the employees would be given jobs by their former employees at other locations. This alleged reason for PBS' hiring decision, also did not appear in any of the position papers. Additionally, as I have noted above, the testimony of PBS' witnesses was inconsistent and uncertain as to who made the decision not to hire most of the incumbent employees.

Finally, although the position paper and some testimony of PBS' witnesses indicated that at 32-42 Broadway, PBS did not hire the incumbent employees because the building was dirty and because PBS believed that they would not accept part-time positions, these reasons were not repeated by Francis when he testified as to his alleged "primary reasons for his decision at all three buildings." Moreover, with respect to the building being dirty, Stratakos conceded that she did not blame the employees for this condition, and that this was not a factor in her decision not to hire the former employees at 32-42 Broadway.

The above-described evidence demonstrates that PBS has advanced shifting reasons for its decision not to hire the incumbent employees, which substantially destracts from the validity of PBS' defense and demonstrates the pretextual nature of its explanation for its actions. *Douglas Foods Corp.,* 330 NLRB 821 (2000); *Champion Rivet,* supra at

1097*; Casey Electric*, 323 NLRB 774, 775 (1994); *Shortway Suburban,* supra at 326, and at 327. Thus, where as here, an employer has vacillated in offering a consistent explanation for its actions, an inference is warranted that the real, real reason for its actions is not among these asserted. *Connecticut Health Care Centers*, 325 NLRB 351, 366 (1998); *10 Ellicott Square Court Corp.,* 320 NLRB 762, 773 (1996), enfd. 104 F3d. 354 (2d Cir. 1996); *Black Entertainment,* supra.

Apart from the inconsistencies in PBS' testimony about its reasons for not hiring most of the incumbent employees, an examination of the evidence adduced by PBS in support of its assertion that it would have made its hiring decisions for these reasons, reveals such evidence to be woefully inadequate.

The alleged "primary" reason for its decision, according to Francis' testimony, as well as PBS' brief, is that PBS believed that the employees would not accept positions at PBS, because they would not want to suffer a substantial reduction in wages and benefits. PBS cites *Vantage Petroleum Corp*., 247 NLRB 1492 (1980), *Sierra Realty Co. v. NLRB, and J. O. Mory, Inc*., 326 NLRB 604 (1998), in support of the proposition that this is a lawful reason for PBS to refuse to offer such applicants employment. PBS places special emphasis on the following language in *Vantage Petroleum,* supra:

> The failure to hire because of an unwillingness to match the union's wage and benefit scale is materially different from refusing to hire employees to avoid recognizing the union. . . . Respondent had reason to assume that those employees in all likelihood would not want to suffer a reduction in that rate. [247 NLRB at 1493.]

PBS is correct that these cases stand for the proposition that in some circumstances, such a defense is lawful. However, this does not mean that PBS can simply assert such a defense, without adducing probative evidence that PBS in fact relied on such a defense in its decision not to hire or offer to hire these employees. In that respect, PBS had been unable to do so, leading to a finding which I make, that this alleged defense was pretextual and not relied on by PBS, contrary to Francis' testimony. *FES,* supra, 333 NLRB at 18 fn. 22; *Donald A. Pusey, Inc.,* 327 NLRB 147 (1998); *J & L Enterprises*, 310 NLRB 121, 127 (1993), *Shortway,* supra at 327.

The only evidence presented in support of Francis' alleged belief that the employees would not accept jobs under these conditions is Francis' self-serving and unconvincing testimony, which I do not credit. On the other hand, the evidence establishes that in fact the applicants at both 32-42 Broadway and 39 Broadway, who PBS did interview, unequivocally told Stratakos that they would accept jobs at PBS' rates, many of them simply telling her that they needed a job or were 61 years old (Hlasney). Yet, none of these employees were offered jobs with PBS, although a number of openings developed at the same locations after the interviews which were filled with new employees.[68] Thus, the evidence establishes that PBS had no basis for believing that the employees would not accept job offers, and that its assertion of this defense is pretextual. *Donald Pusey,* supra; *J & L Enterprises,* supra. Cf. *Sierra Realty,* supra, and *Vantage,* supra.[69] (Where the court and Board respectively concluded that the employer had a reasonable belief that the employees would not accept.) There was no evidence in either case, as here, that employees had affirmatively told the employer that they would agree to work at the employer's rates. Moreover, the record also establishes several instances where PBS did offer to hire day-shift employees at both 19 Rector and 32-42 Broadway at PBS' rates, and all of those employees whom PBS offered jobs at these rates accepted. Neither Francis nor PBS offered any explanation as to why it allegedly had a different belief concerning day-shift employees. Finally, PBS offered a job to Balarezo, after newspaper publicity motivated Francis to order that she be hired. She accepted a job at PBS' rates, as did Kalarjian at a later date. While Balarezo changed her mind about accepting the job, before reporting for the job, according to the testimony of PBS' witness, she did so for reasons unrelated to the rates PBS was providing.

Additionally, the evidence discloses that the criteria for which PBS claims to have disqualified the employees from consideration do not exist in written from, and have not been strictly adhered to. *FES,* supra at fn. 22. Cf. *J. O. Mory,* supra, where the Board concluded that the employer acted pursuant to a well established and consistent policy of not hiring high wage earners.

Here, as I have detailed above, PBS had no established policy, written or otherwise, not to hire high wage earners. Indeed, its own witnesses admit that it had no such policy, and that each new location is evaluated separately based on its particular facts. PBS' history revealed several instances where it hired employees, regardless of prior earnings, where the prior ownership was satisfied with their work. While PBS argues that its experience at Garden Plaza, changed its practice, this contention is belied by the record. Thus, subsequent to Garden State Plaza, PBS began Smithhaven Mall, where it offered to hire all former employees at lower wages, and where nine of these employees accepted jobs at such wages. Moreover, I have also found, as detailed above, that its hiring practice at other New York City buildings, such as 2 Broadway, were also motivated by a desire to avoid recognizing Local 32B-32J, as well as a desire to recognize UWA.

Accordingly, based on the foregoing, I find that the alleged "primary" reason advanced by Francis for PBS' failure to hire the majority of incumbent employees was pretextual,[70] and that PBS has not met its *Wright Line* burden of proof.

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[68] While PBS attempts to explain this failure by pointing its allege policy of hiring only employees who follow up their applications with calls, I have rejected Sanchez' testimony in this regard. Further, the employees were specificantly told by Stratakos that they would be called if there were future openings, and at 39 Broadway were promised to be placed on a preferential hiring list.

[69] It is also significant, that in *Vantage Petroleum,* supra, unlike here, employees were advised by the employer *before* it made its hiring decision, that they could file applications. Yet, none did so until after the employer decided not to hire them.

[70] I also rely on the fact, as related above, that PBS made no mention of this alleged "primary" reason for its action in its three position papers.

PBS fares no better when one examines the other alleged defenses, that its various witnesses testified motivated its decision. I note initially that none of these reasons were even mentioned by Francis as the "primary" reason for PBS' decision.

They include the assertion that PBS believed that the prior contractor would find other jobs for these employees. Once again it is significant that no mention was made of this reason in the position papers submitted by PBS. Also, no credible evidence was adduced substantiating PBS' alleged belief in this regard. While Francis did point to Garden State Plaza, where the prior contractor did find other jobs for employees who PBS had hired, those events took place years before, in New Jersey, involving a different contractor and a different union. Contrast that with more recent jobs, such as Smithaven Mall, where PBS hired or offered to hire all employees, represented by Local 32B-32J, the same Union involved here. Yet if PBS believed the prior contractor at the three buildings here would transfer the former workers to other jobs, why did it not believe that the contractor at Smithtown Mall would do the same thing. No answer was given by PBS to this question. Therefore, I conclude that this is but another pretextual explanation offered by PBS.

I find similarly with respect to other alleged defenses raised by PBS. PBS' witnesses assert that another reason for its decision not to hire the former employees at 32-42 Broadway was the alleged fact that the building was dirty and that it determined that it would not hire the employees responsible for the condition of the building. In support of its position in this regard, PBS points to the fact that the building was in such poor condition, that it had to spend the entire weekend before starting the job performing a "deep cleaning," which it did not have to do at any of its other jobs. However, the credible evidence establishes, particularly by the testimony of Silva, PBS' own witness, that the main problems with the cleanliness of the building were caused by the dust and debris from construction, and that these problems were primarily resolved by Shepard before PBS took over. Additionally, Stratakos admitted that she did not blame the former employees for the fact that the building was dirty, and that this was not the reason that PBS did not hire them.

Even more significantly, PBS hired the day-shift employees at 32-42 Broadway, which included several porters, who also were obviously involved in cleaning the building. PBS furnished no explanation as to why it exempted these employees from its alleged blanket prohibition against hiring these employees because of the condition of the building. It is also puzzling why, if PBS considered these employees such poor employees, PBS interviewed them and offered to hire them at its other buildings should there be openings. Finally, it is noted that during the interviews PBS made no effort to ascertain which employees, cleaned which areas, or any other attempt to measure their cleaning abilities. PBS introduced no evidence that any specific employee was deficient in their performance. *Capital Cleaning Contractors*, 322 NLRB 801, 807 (1996), *Carib Inn,* supra at 1225. Accordingly, based on the above, I find this alleged reason to be pretextual as well, and that PBS has not shown that it would not have hired employees at 32-42 Broadway for this reason.

Finally, several of PBS' witnesses advance still another reason for its decision at 32-42 Broadway. That alleged reason is PBS' purported belief that since many of the former employees worked part-time shifts while working for Shepard, that they would not be interested in working for PBS. Stratakos at one point testified that this was one of the reasons that she decided not to hire many of these employees. In fact, PBS in support of this testimony, cites the job applications of some of the night-shift employees, which indicates that they had worked part-time shifts at the prior contractor. However, this could not have been a reason for PBS not to hire these employees, since no evidence was presented that Stratakos or PBS knew what shifts these employees were previously working at the former contractor, and the decision not to hire him was admittedly made by PBS prior to the interviews. It is also significant that Stratakos changed her testimony when examined by me. At that time, she asserted unequivocally that the only reason that she decided not to hire the former night-shift employees, was because she believed that Shepard would place them elsewhere, and made no mention of the part-time issue.

Finally, although Francis also furnished some testimony on the part-time issue, he asserted that *he,* on behalf of PBS, decided not to hire employees because he knew that they had worked at part-time positions with their prior employer, and he did not believe that they would accept the full-time positions that PBS intended to utilize. The problem, however, is that Francis gave this testimony in connection with 39 Broadway, and not 32-42 Broadway, as testified to by Stratakos. This is but another example of the inconsistent testimony of PBS' witnesses which as detailed above, severely undermines the validity of PBS' alleged defenses.

I therefore reject this alleged defense as well, and find it to be but another pretextual attempt by PBS to mask its true motivation for its hiring decisions; i.e. Its desire to avoid recognizing Local 32B-32J and its concern that if it hired its these employees, they would not cross a picket line, that it believed Local 32B-32J intended to set up at these buildings.

Finally, PBS makes some other specific assertions concerning the particular buildings involved. At 19 Rector, PBS argues that none of the former employees submitted applications to PBS for employment, and that on this basis alone, all charges with respect to this building must be dismissed. I do not agree.

The evidence with respect to this issue reveals that the former employees appeared at the building, prepared to interview for positions with PBS, pursuant to prior instructions from their supervisors. However, PBS had no intention of either hiring them or even interviewing them, since it had decided not to hire any of them, except for their former supervisor. PBS did though distribute application packages, to these workers, which included a form that required membership in UWA. When Stratakos arrived, she ordered the applications ripped up (except for a one-page PIS) and told the employees that there were no jobs for these employees at 19 Rector, since all positions had been filled.

In these circumstances, I concluded in accord with longstanding Board precedent, that it would have been futile for

the employees to have applied for jobs with PBS, and that PBS cannot rely on the failure of some of them to agree to interview with Stratakos, as a defense to a refusal to hire. *Shortway Suburban,* supra at 326; *Inland Container,* 275 NLRB 378 fn. 5 (1985); *Sherwood Trucking*, 270 NLRB 445, 448 (1984); *Love's Barbeque Restaurant No. 62*, 245 NLRB 78, 81 fn. 10 (1979); enfd. in relevant part 640 F.2d 1094 (9th Cir. 1981); *Mason City Dressed Beef,* 231 NLRB 735, 748 (1977); *Macomb Block & Supply,* 223 NLRB 1285, 1286 (1976).

Here, PBS relies on the fact that after it announced to the employees its rates and benefits, and offered to interview employees who were interested in employment at other facilities, a majority of those present walked out and did not participate in the interviews. Additionally, some of those that did interview, indicated that they were not interested in employment at PBS' rates or indicated that they would "think about it," and never followed up with a call to PBS. However, all of these events transpired *after* PBS had notified them that they would not be hired at 19 Rector, where they had previously worked. Therefore, PBS cannot rely on these events, *Macomb Block,* supra; *Shortway,* supra, to assert that the employees failed to apply. Moreover, I note that when PBS initially furnished application packets to the employees, they included forms for UWA which employees were required to sign. Thus, it was reasonable for employees to believe that membership in UWA was a requirement for hire by PBS at 19 Rector, an unlawful condition. While Stratakos subsequently ordered the form ripped up (except for the PIS forms) she did not tell the employees that the UWA form should have not been included, but only that the packets were improperly given to them, because all positions were filled and they were not going to be hired. Therefore, it is reasonable to conclude, which I do, that the employees believed that a job with PBS would require membership in UWA and that such a belief may have motivated their failure to apply. This conclusion is supported by the testimony of Galvin, the Local 32B-32J shop steward, who questioned this UWA form, as well as the failure of PBS to recognize Local 32B-32J, during her interview with Stratakos.

Accordingly, based on the foregoing analysis and authorities, I conclude that all of the reasons that PBS professed were responsible for its decision not to hire the vast majority of employees, formerly employed by the predecessor contractor at each of the three buildings was pretextual. Therefore, PBS has failed to meet its *Wright Line* burden of establishing that it would have failed to hire these employees absent unlawful union considerations.[71]

I therefore conclude that PBS has violated Section 8(a)(1) and (3) of the Act by its refusal to hire employees formerly employed by the predecessor contractors at 19 Rector, 32-42 Broadway and at 39 Broadway.[72]

D. The Alleged Refusal to Bargain with Local 32B-32J

The complaint alleges that PBS refused to recognize and bargain with Local 32B-32J, in violation of Section 8(a)(1) and (5) of the Act. This allegation is based on the assertion that PBS is a successor employer of the employees at each location, and that but for its discriminatory refusal to hire the predecessors employees, it would have hired a majority of employees, previously represented by Local 32B-32J. Under long-established precedent, the General Counsel argues that PBS therefore was obligated to recognize and bargain with Local 32B-32J. *U.S. Marine,* supra; *Love's Barbeque,* supra; *Weco,* supra. I agree.

The complaint alleges that units consisting of service employees at each of the three separate locations, constitute separate appropriate units for collective bargaining. PBS admitted in its answer that each of these units is appropriate. I therefore need not delve any further into the issue of appropriate unit, since it is clear that a unit need only be found to be an appropriate unit, in order to supporting a refusal to bargain allegation. *Triple A Services,* supra; *RB Associates*, 324 NLRB 874 (1997).

However, I note that PBS did submit evidence apparently in support of a contention which it seems to be asserting in its brief that such a unit was not appropriate, but instead a unit including all of PBS' downtown buildings was the only appropriate unit. PBS' arguments are not totally clear in this respect, since it appears that this evidence is relevant to the 8(a)(2) allegations, in support of its argument that its recognition of UWA was lawful.

However, to the extent that PBS can be said to have asserted that the single location unit is not appropriate, I conclude that it cannot so contend, since it answer admitted the appropriateness of the unit.

In any event, even assuming that PBS could raise the issue, I conclude that it has not adduced sufficient evidence to rebut the presumption that a single-facility unit is appropriate *RB Associates,* supra. While PBS did adduce evidence of interchange and common supervision, it adduced no evidence that any party, i.e., either PBS or UWA considered a unit of PBS' downtown locations as the appropriate unit. To the contrary, they relied on their Master agreement, which called for recognition for all of PBS' facilities in several States, even though PBS represented other unions at other facilities. *Columbus Janitor,* supra at 903. Moreover, PBS and UWA signed separate collective-bargaining agreements for each location, commensurate with the expiration date of PBS' contract with its customer. Thus, it is clear that the parties treated each location as a separate unit, and the only mention of a unit confined to its downtown locations came

[71] I have considered *Crotona Service Co.,* 200 NLRB 738 (1972), and *Industrial Catering*, 224 NLRB 972 (1976), cited by PBS in support of its position. I find these cases clearly, distinguishable and inapposite. In *Crotona,* supra; while the ALJ affirmed by the Board found no violation when an employer had transferred in employees from another facility, the ALJ found no evidence of discriminatory intent and no violations of Sec. 8(a)(1) of the Act. In *Industrial Catering* supra, the employer ignored applications of predecessor's employees, but followed its normal practice of using other methods for staffing. This was also found lawful, where once again no evidence was presented of animus or discriminatory treatment. Here as detailed above, there is substantial evidence of animus, not the least of which is the admission by Francis that his hiring decision was unlawfully motivated.

[72] This finding includes all employees of these companies except for those employees that PBS hired when it started its operations.

from the arguments of PBS' attorney's. Indeed, no witness testified that they were relying on or considered such a unit to be appropriate or to be part of PBS' decision to recognize UWA.

I therefore conclude that a single location unit for each building is an appropriate unit for collective bargaining.

Although, Local 32B-32J may not have made demands for recognition at all of the buildings, this failure is inconsequential. Where, as here, PBS has discriminatorily refused to hire most of the employees employed by the predecessor employer's at each building, any request for bargaining would be futile. *Smith & Johnson Construction*, 324 NLRB 970 (1997*), Triple A Services,* supra; *Precision Industries*, 320 NLRB 661, 711 (1996).

Since it is clear that PBS is performing essentially the same work as the predecessor employer's and there is no hiatus in operations, there is no question that PBS is the successor employer at each location, inasmuch as I have found above that it discriminatorily refuse to hire the predecessor's employees, in order to avoid recognizing Local 32B-32J.

In such circumstances, PBS has violated Section 8(a)(1) and (5) of the Act, by refusing to recognize and bargain with Local 32B-32J. *Daufuskie Club,* supra; *Laro,* supra; *Weco,* supra; *U.S. Marine,* supra.

While under *Burns*, a successor employer is ordinarily free to set initial terms of employment without bargaining with the incumbent owner, that privilege, is forfeited when an employer discriminates in unlawfully refusing to hire the predecessors employees. In such circumstances, an employer cannot set initial terms of employment without consultation with the Union. *Gallaway School Lines*, 321 NLRB 1422, 1425–1427 (1996); *Capital Cleaning,* supra; *Weco,* supra.

I therefore conclude that since it is undisputed that PBS failed to notify or consult with Local 32B-32J before it changed terms and conditions of employment of employees at each of the three locations, that PBS has thereby unilaterally changed such employment conditions in violation of Section 8(a)(1) and (5) of the Act.

E. The Recognition of UWA

Since I have concluded above that PBS as the successor employer at all three facilities, was obligated to recognize and bargain with Local 32B-32J as the collective-bargaining representative of its employees at these locations, it follows that PBS was not free to recognize or sign contracts with UWA as the representative of such employees. *Shortway Suburban,* supra at 328, 329; *Northland Hub*, 304 NLRB 665, 677–678 (1991).

It is therefore unnecessary to consider PBS' assertions that its recognition of UWA was lawful under *Kroger Co.*, 219 NLRB 388, 389 (1975) (Board finds clause in contract providing for recognition at additional locations valid, as long as majority status is found at new location), or *Gitano Distribution Center*, 308 NLRB 1172, 1178 (1992) (Board concludes that if majority of employees in unit are transferees from recognized unit, employer's obligation to recognize the union that represented employees at other location). These cases are clearly inapplicable, since in neither of them was there a finding, as here, that the employer was legally obligated to recognize another labor organization. I note in addition, that I have found that the transfers of PBS' employees into the three locations involved here, was part of PBS' illegal scheme to avoid recognizing Local 32B-32J. Therefore, these transfers cannot under these circumstances be relied upon to justify recognition of UWA.

Accordingly, I conclude PBS has violated Section 8(a)(1) and (2) of the Act by recognizing and signing collective-bargaining agreements with UWA covering each location. Since all of these contracts contain union-security clauses, which clauses were enforced by PBS, I further conclude that by such conduct, PBS has violated Section 8(a)(1) and (3) of the Act. *Northland Hub,* supra at 678; *Systems Management,* supra at 1101.

CONCLUSIONS OF LAW

1. Planned Building Services, Inc. (PBS) is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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

3 (a) All service employees employed by PBS at 19 Rector Street, New York, New York (Rector Street unit), constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

(b) All service employees employed by PBS at 32-42 Broadway, New York, New York (32-42 unit) constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act.

(c) All service employees employed by PBS at 39 Broadway, New York, New York, (39 Broadway unit), constitutes a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act.

4. By refusing to hire employees who had previously been employed at the locations set forth above, because these employees had previously been represented by Local 32B-32J and in order to avoid an obligation to recognize and bargain with Local 32B-32J, PBS has violated Section 8(a)(1) and (3) of the Act.

5. By refusing to recognize and bargain with Local 32B-32J as the collective-bargaining representative of its employees employed in the aforesaid units, PBS has violated Section 8(a)(1) and (5) of the Act.

6. By departing from preexisting conditions of employment of its employees employed in the aforesaid units, without prior notification to and bargaining with Local 32B-32J, PBS has violated Section 8(a)(1) and (5) of the Act.

7. By recognizing and executing collective-bargaining agreements with UWA when Local 32B-32J was the exclusive representative of employees in the aforesaid bargaining units, PBS has violated Section 8(a)(1) and (2) of the Act.

8. By executing, maintaining and enforcing the above-described contracts, which contain union-security clauses, and by deducting dues, initiation fees and remitting same to UWA, PBS has violated Section 8(a)(1), (2), and (3) of the Act.

9. By coercively interrogating an applicant for employment concerning his sympathies on behalf of Local 32B-32J and whether he would cross a Local 32B-32J picket line, PBS has violated Section 8(a)(1) of the Act.

10. PBS, at its location at 71 Broadway, New York, New York, violated Section 8(a)(1) and (2) of the Act, by directing and instructing its employees to sign authorization cards and or dues deduction forms for UWA, by deducting dues from the salaries of employees, who had not authorized such deductions, and by recognizing and signing a collective-bargaining agreement with UWA, notwithstanding that UWA did not represent a majority of employees employed by PBS at that location.

11. By maintaining and enforcing the above-described contract, which contains a union-security clause and by deducting dues and initiation fees and remitting same to UWA, PBS has violated Section 8(a)(1), (2), and (3) of the Act.

12. By accepting recognition from and entering into a contract with PBS, covering PBS's employees at 71 Broadway, and by accepting dues and initiation fees from PBS based on such contract, UWA has violated Section 8(b)(1)(A) and (2) of the Act.

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

THE REMEDY

Having found that PBS and UWA 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.

I have found above that at PBS' location at 71 Broadway, PBS violated Section 8(a)(1), (2), and (3) and UWA, Section 8(b)(1)(A) and (2) of the Act, by agreeing to recognition and executing a contract, at a time when UWA did not represent a majority of employees at that building. In order to remedy these violations, I shall recommend that PBS withdraw recognition from UWA, unless and until UWA is certified as the exclusive representative of the employees at that location, 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 the agreement.

It is also appropriate to recommend that PBS and UWA jointly and severally reimburse all former and present employees employed by PBS at 71 Broadway for all initiation fees, dues and other moneys which may have been exacted from them pursuant to the union-security provisions of the collective-bargaining agreement signed by PBS and UWA, with interest as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

However, in that connection, PBS and UWA need not reimburse any employees who voluntarily joined UWA before September 19, 1997, the effective date of the contract covering the employees at that location. *PBS II*, 330 NLRB at 794; *Katz's Deli*, 316 NLRB 318, 334 (1995). I would note in this regard, that those employees who signed cards or checkoff forms for UWA prior to that date, at the direction of PBS' supervisors cannot be said to have voluntarily joined UWA, and are entitled to the reimbursement of their dues and fees.

Turning to the three other buildings, where I have found that PBS discriminatorily refused to hire employees formerly employed by the predecessor employer's at these facilities, the appropriate remedial scheme is spelled out in *FES,* supra. Although I have found violations at each of these buildings, I note that the record is not totally clear concerning the number of openings available versus the number of applicants. Indeed the record is even uncertain as to the number of applicants, particularly at 19 Rector, where some applicants refused to interview with PBS, after being told that there were no jobs for them and what rates PBS would pay if openings developed at other facilities.

For the reasons that I have detailed above, in response to PBS's contention, that no violation can be found as to employees who did not apply, I conclude that all of the former employees of the respective predecessor employer's at all three buildings, who were not hired by PBS, shall be considered discriminatees.[73] Under *FES,* supra, 333 NLRB at 14, the question of which of the discriminatees are entitled to backpay and instatement shall be determined in compliance, where the number of discriminatees exceeds the number of available jobs at the time of the discrimination.

The record demonstrates that this remedy is appropriate in the case of 19 Rector, where the number of jobs available was clearly less than the number of discriminatees. In such a case, *FES,* supra, concludes that those discriminatees who compliance determines not to be eligible for normal refusal to hire remedies shall be entitled to a refusal to consider remedy. This remedy, consistent with *B & K Construction*, 321 NLRB 561, 562 (1996), provides that these individuals must be considered for any future openings in accord with non discriminatory criteria; and that PBS must notify the discriminatees, the charging party, and the Regional Director of future openings in positions for which the discriminatees were eligible or substantially equivalent positions.

Additionally, at the compliance proceeding, the General Counsel can show that the remaining discriminatees, i.e., these not found to be entitled to instatement or backpay, because the number of applicants exceeded the number of available jobs, would have been hired to openings that developed subsequent to the initial unlawful refusal to consider them for employment. If such a showing is made by the General Counsel at a compliance proceeding the burden shifts to PBS to show that it would not have hired the discriminatees for these openings even in the absence of its earlier refusal to consider them on the basis of their union affiliation. If PBS fails to meet this burden, the discriminatees must be offered the positions in question, or if those positions no longer exist, substantially equivalent positions, and be made whole for any losses suffered as a result of PBS' unlawful conduct.

[73] The Board in *FES* uses the term instatement, rather than reinstatement, since these discriminatees had not previously worked for PBS.

As I have observed several times in this decision, I have considered all the former employees of the respective predecessor employers to be discriminatees, even though some of them did not apply for jobs with PBS, and or some indicated that they did not wish to work for PBS at PBS' rates.[74] However, I do believe that it would be appropriate for the General Counsel, in assessing the issue of which discriminatees would have been hired for the available openings at 19 Rector, to consider these facts in the compliance proceeding.[75]

Thus in sum, I shall recommend that at 19 Rector, the compliance proceeding shall be utilized to determine which of the discriminatees are entitled to immediate instatement and backpay based on the number of available jobs on the dates of discrimination, and that the remaining discriminatees be subject to the refusal to consider remedies discussed above.[76]

With respect to 32-42 Broadway and 39 Broadway, there the record reflects that the number of jobs available exceeded the number of discriminatees. In such cases the normal refusal to hire remedies would be applicable.

In all instances, whatever backpay is found to be due to the discriminatees, shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as per *New Horizons,* supra.

I shall also recommend that PBS be ordered to recognize and bargain on request with Local 32B-32J with respect to the employees at each building, and if an agreement is reached reduce the agreement to a written contract. Additionally, PBS shall on request of Local 32B-32J, rescind any departures from terms of employment that existed before PBS' takeover at each location, and to retroactively restore preexisting terms and conditions of employment, including wage rates and payments to benefit funds, that would have been paid absent PBS' unlawful conduct, until PBS negotiates in good faith with Local 32B-32J to agreement or to impasse. *Weco,* supra at 321, *Daufaskie Club,* supra. The remission of wages shall be computed as in *Ogle Protection Service*, 183 NLRB 602 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), plus interest as prescribed in *New Horizons,* supra. PBS shall also remit all payments it owes to employee benefit funds in the manner set forth in *Merryweather Optical Co.*, 240 NLRB 1213 (1979), and reimburse its employees for any expenses resulting from PBS' failure to make such payments as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981).

It is also appropriate the recommended that PBS withdraw recognition from UWA at 19 Rector, 32-42 Broadway, and 39 Broadway, unless and until UWA is certified as the representative of such employees, and cease giving effect to the collective-bargaining agreements that PBS executed with UWA covering these buildings.

Since there are no complaint allegations against UWA with respect to these three buildings, PBS alone must be ordered to reimburse all former and present employees at these three locations for all dues and other moneys exacted from them pursuant to the union-security clauses in the agreements signed by PBS, with interest as provided in *New Horizons,* supra. Once again, PBS need not reimburse any employees for such dues and fees, who voluntarily joined UWA before the effective dates of the contracts at the respective locations where such employees were employed. *PBS II,* supra.

The Charging Party has requested that a broad order be issued, since PBS has demonstrated a proclivity to violate the Act. *Hickmont Foods*, 242 NLRB 1357 (1979), *U.S. Service Industries*, 324 NLRB 834, 838 (1997). I agree. This is the third time that PBS has been found to have violated Section 8(a)(1) and (2) of the Act. (See *PBS I* and *PBS II.)* Moreover, in the instant case PBS has again violated these sections of the Act at four separate locations, as well as Section 8(a)(1)(3) and (5) of the Act at three buildings. Therefore, I find that a broad order is appropriate.

The Charging Party also requests that the Charging Party and the General Counsel be awarded litigation expenses.[77] The Charging Party asserts that since PBS' defenses herein rest upon "transparently untruthful testimony of (a witness), whose words and demeanor demonstrate unmistakably that he was not to be believed," that litigation expenses are warranted. *Frontier Hotel,* 318 NLRB 857 (1995), enf. denied in relevant part 118 F. 3d 795 (D.C. Cir. 1997).

The Charging Party also argues, that PBS has acted in "bad faith" in the litigation herein, creating an exception to the American rule of not awarding attorney's fees to prevailing parties. *Lake Holiday Associates*, 325 NLRB 469 (1998); *Frontier,* supra. Therefore, the Charging Party contends that PBS' defenses were frivolous, and an award of attorney's fees is appropriate. I disagree.

While the Charging Party emphasizes the testimony of Stratakos and Sanchez, which was in part discredited by the tape recording of the interviews at 39 Broadway, this does not establish as the Charging Party argues that PBS "encouraged its witnesses to lie under oath so as to evade liability under the Act." I would note that the tape recording involved only a small portion of the witnesses' testimony, and although I discredited their testimony in other aspects as well, such testimony was far from "transparently untruthful" that the Board condemned in *Frontier,* supra.

Moreover, PBS raised legitimate and substantial defenses to its conduct. Although I did not conclude that PBS had met its *Wright Line* burden of proof with respect to the 8(a)(3) allegations, or that it presented sufficient defenses to the

[74] I again emphasize that these individuals were told that there were no jobs for them at the locations where they worked, and that the interview that some of them declined, and at where some indicated a disinclination to work at PBS' rates, related to jobs at other locations.

[75] Kimble Kalarsian the record discloses was hired by PBS at 19 Rector, several months after the initial refusal to hire her and Howard Angus was hired a week after PBS began operations. Therefore, they are not entitled to an instatement order, but would be entitled to backpay from the refusal to hire them until the dates they began working for PBS.

[76] I shall also leave to the compliance stage of this proceeding, the impact of the remedy on Balarezo. Although there is evidence in the record that PBS offered her a job, after the initial discrimination, Balarezo did not testify, so the record is not complete on this issue. It is therefore appropriate to leave the effect of this "offer" of PBS on Balarezo's status to compliance. *Pacific Custom,* supra.

[77] The General Counsel has made no such request.

other allegations, I do not believe that these defenses were frivolous. Nor can it be said that the case was litigated in "bad faith," Cf. *Lake Holiday,* supra. Counsel for PBS acted professionally throughout this proceeding, and although the case was litigated aggressively by all sides, PBS was cooperative, respectful and most helpful in expediting a proceeding that raised substantial issues involving four different facilities. Cf. *Frontier,* supra, where the Board relied heavily on the fact that the Respondent's main witness, was its attorney, whose testimony consisted of "unresponsive, aggressive and flagrantly disrespectful remarks" which demonstrated his intent "to make a charade of this proceeding."

Accordingly, I find that PBS' defenses were debatable and not frivolous, and that an award of attorney's fees is not appropriate. *U.S. Service,* supra at fn. 20.

Finally, I shall recommend that PBS be ordered to post notices at each of its facilities. I note that the Board ordered such a remedy in *PBS II*, based on the fact that PBS engaged in similar conduct in *PBS I*. Here, PBS has once more engaged in similar conduct, in violation of Section 8(a)(1) and (2) of the Act, at four separate facilities, as well as violations of Section 8(a)(1), (3), and (5) at three separate locations.

In such circumstances a notice requiring posting at all of PBS' facilities is clearly appropriate. I so recommend.

[Recommended Order omitted from publication.]