

**Stanford Realty Associates, Inc. and Local 32B-32J,  
Service Employees International Union, AFL-  
CIO. Case 2-CA-24237**

March 31, 1992

**DECISION AND ORDER**

BY CHAIRMAN STEPHENS AND MEMBERS  
DEVANEY AND OVIATT

On July 16, 1991, Administrative Law Judge Steven B. Fish issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed a brief in support of the judge's decision.

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

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,<sup>1</sup> findings, and conclusions<sup>2</sup> and to adopt the recommended Order.

**ORDER**

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Stanford Realty Associates, Inc., New York, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

<sup>1</sup> 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), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>2</sup> We agree with the judge that the Respondent is obligated as a successor to recognize and bargain with the Union on request and we adopt his recommended Order. In adopting the Order, we find it unnecessary to pass on the sufficiency of the Union's request that the Respondent bargain with it. We do agree, however, that the Union's requests to sign a contract subsumed a demand for recognition that was sufficient to trigger the Respondent's obligation to recognize it, and that the Respondent violated Sec. 8(a)(5) and (1) by failing to do so. *Sterling Processing Corp.*, 291 NLRB 208, 217 (1988).

In adopting the judge's conclusion that the Respondent violated Sec. 8(a)(1) when Supervisor Cosovic threatened to kill former employee Sladek if Sladek came into the vicinity of the building again, we note that Sladek had been near the building for the purpose of picketing with the striking employees and that Cosovic made the threat in the presence of employees and told employee Munoz to transmit the threat to Sladek.

*Margit Reiner, Esq.*, for the General Counsel.  
*Clifford S. Bart, Esq.*, Melville, New York, for the Respondent.

**DECISION**

**STATEMENT OF THE CASE**

STEVEN B. FISH, Administrative Law Judge. Pursuant to charges and amended charges filed by Local 32B-32J, Service Employees International Union, AFL-CIO, the Regional Director for Region 2 issued a complaint and notice of hearing, on May 7, 1990, alleging that Stanford Realty Associates, Inc. (Respondent) has violated Section 8(a)(1) and (5) of the Act by, in substance, refusing to recognize and bargain with the Union as the exclusive representative of its employees, since January 1990, by bypassing the Union and dealing directly with its employees, promising them benefits if they abandon support for the Union, and threatening employees with physical harm if employees continued to picket and/or appear on the picket line in support of the Union.

The trial with respect to the allegations raised in the complaint was held before me on October 30 and November 1 and 5, 1990, in New York, New York. A brief has been filed by Respondent. The General Counsel submitted a memorandum in lieu of a brief. I have carefully considered each of these documents, as well as the entire record. Based upon said record, including my observation of the demeanor of the witnesses, I make the following

**FINDINGS OF FACT**

**I. JURISDICTION AND LABOR ORGANIZATION**

Respondent is a New York corporation, which has been engaged in the management and operation of a residential apartment located at 121 Madison Avenue, New York, New York. Annually, in the course and conduct of its operations, Respondent derived gross revenues in excess of \$500,000, and purchases and receives at its facility products, goods, and materials valued in excess of \$5000 from other enterprises located within the State of New York, each of which other enterprises receive the products, goods, and materials directly from points outside the State of New York. It is admitted and I so find that Respondent 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 find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

**II. FACTS**

Prior to April 1, 1989, the apartment building located at 121 Madison Avenue, New York, New York, was owned by Crystal Management Corp. and operated and managed by Millerton Management.

The Union had been the recognized collective-bargaining representative for the service employees employed at the building, since at least 1982, and for some prior period of time not specifically enumerated in the record. The Union and Millerton had been parties to a series of contracts incorporating this relationship, the last one running from April 1985 to April 20, 1988. The contract's recognition clause covers all service employees under the jurisdiction of the Union. Further examination of the agreement reveals the various classifications covered, which includes handypersons, doormen, porters, elevator operators, and superintendents. It is undisputed that the contract covered, and that Millerton

recognized the Union as the collective-bargaining representative for the one superintendent that it employed, as well as six other employees employed as doormen, handymen, and porters. Immediately prior to April 1, the superintendent employed by Millerton was Irving Malkis. The other employees were four doormen (Ed Sladek, Elridge Maynard, DaCosta Drakes, and Robert Martinez, one porter (Mario Manoz), and one handyman (Peter Portelli).

On April 20, 1988, the contract between Millerton and the Union expired. Millerton was not a member of the Realty Advisory Board (RAB) an association with whom the Union bargains for many of the 40 apartment buildings in the area. The Union's practice is and was to reach agreement first with the Association, and then after that contract is printed, submit such agreement to the independent buildings such as Millerton to sign. The contract is entitled, "Apartment House Agreement."

While the Union reached agreement with the RAB at midnight on April 20, 1988, over the terms of a new contract, the record does not disclose when the contract was eventually printed and/or sent out to independently, such as Millerton to sign. In fact, the record also does not indicate whether the union ever sent Millerton or Crystal a copy of a proposed new agreement to execute, subsequent to April 20, 1988.

It is clear, however, that Millerton never executed a new agreement with the Union. Nonetheless, Millerton continued to apply the terms of the old agreement, and continued to submit to the union welfare and pension payments on behalf of its employees, as well as checkoff of dues and submit same to the Union.<sup>1</sup>

Respondent was incorporated in November 1988. At that time, its president, David Magier, began negotiations with officials from Crystal Management with respect to Respondent purchasing a long-term lease on the property at 121 Madison Avenue.<sup>2</sup> These negotiations culminated in Respondent's agreement to purchase the long-term lease, held by Crystal for the property, as of April 1, 1989.

During the course of the negotiations between Magier and the officials of Crystal, Magier was never told by these officials that the Union had been or was the collective-bargaining representative of the employees at the building, or that there was a contract in existence which covered these employees.<sup>3</sup> Magier credibly testified that he did not know at the time that there was a union representing the employees, and that based on his experience in the industry, a prospective seller normally notifies the buyer that the Union is there and that a contract is in existence which covers the employees. Magier has been involved in the real estate industry for 16 years and has purchased between 20 to 30 buildings. Some of the buildings had union contracts covering their employees, and some did not. According to Magier's uncontradicted testimony, normally the seller notifies the

buyer of the existence of the union contract, particularly since the standard contract with Local 32B-J requires such notification. In fact, article VI of the Apartment House contract with Millerton, obligated an employer in the event of sale or transfer, to notify the Union 2 weeks before the effective date, and to require the transferee to agree in writing to adopt the contract. Furthermore, the contract provided that the Employer pay 6 months' pay for the benefit of employees as liquidated damages for any breach of these provisions.

Thus, based on his knowledge of this clause and his experience in the industry, Magier asserts that he did not ask about a Union, and did not believe that the Union represented employees in the building. While I am somewhat skeptical, as the General Counsel suggests, that someone as experienced as Magier was in the industry, would purchase a building without knowing whether the Union was there or not, I am constrained to credit Magier in this regard. Magier's explanation for not inquiring about the Union's status is quite plausible, and in the absence of any contradictory evidence,<sup>4</sup> I credit Magier that he did not know on April 1, 1989, when Respondent commenced operation of the building, that Crystal or Millerton had previously recognized or had a contract with the Union covering the employees at 121 Madison Avenue. On April 1, 1989, Respondent began its operation and control of the building, without any hiatus. Respondent hired the entire complement of seven employees previously employed by Millerton, and continued to perform the same services without any change in the jobs and job functions of these employees. Respondent employed Joan Brooks, its executive vice president, as its representative in direct charge of the day-to-day managing of the building. Brooks was present at the building 5 days a week, and answered the telephone herself.

In late May 1989, Eddie Sladek, a porter-doorman employed by Respondent, upon attempting to enter the hospital, was informed that he no longer had Blue Cross coverage. Sladek complained first to Brooks about the problem, who told Sladek that she would check with David Magier about the matter.

Sladek then visited the Union and spoke to Robert Moxheim, the business agent assigned to service the building at the time. Sladek registered his complaint about lack of medical coverage. Moxheim informed Sladek that he was aware that the building had been sold, and added that he was going to try to get the new company to sign a contract with the Union, and to provide the employees with medical benefits. Moxheim, in Sladek's presence, called Respondent and spoke with Joan Brooks. Moxheim identified himself as a business agent for Local 32-B and said that he wanted Respondent to sign a contract with the Union and to provide the employer with medical benefits. Brooks responded that she didn't know anything about any contract. Moxheim replied that he would deliver a copy of the contract to her along with an explanatory letter. The conversation concluded on that note.

My findings with respect to this conversation are based on a compilation of the credited testimony of Brooks, Moxheim, and Sladek. I note that Sladek, the General Counsel's witness, who overheard Moxheim's portion of the conversation,

<sup>1</sup> The record does not disclose whether the 1988 RAB contract provided for increases in welfare and pensions contributions, or whether Millerton paid such increased amounts, if such increases were included there.

<sup>2</sup> Millerton had been the managing agent for Crystal at what location noted above, Millerton had not executed the agreement that the Union had agreed to with the RAB.

<sup>3</sup> As noted above, Millerton had not executed the agreement that the Union had agreed to with the RAB.

<sup>4</sup> I note that no officials from Millerton or Crystal testified.

corroborated Brooks' testimony that Moxheim did not make the assertion that the Union represented the employees.

During May and June, Respondent continued to employ the same seven former Millerton employees, although these were temporary employees hired on various weeks to replace employees out on vacation or on sick leave.<sup>5</sup>

Moxheim did not send Respondent a copy of the contract nor an explanatory letter as he had promised. Moxheim asserts that he made numerous attempts to contact Brooks by phone, and left messages for her with the doormen, but she did not return his calls. Brooks denied receiving any such messages and I credit her denials. I note the failure of the General Counsel to produce any of the doormen to confirm Moxheim's testimony that he left messages with them for Brooks. Indeed, the General Counsel did call two doormen as witnesses, Drakes and Maynard, and Sladek who fills in as a doorman at times, but failed to ask any of these witnesses questions about such messages. Moreover, as I noted above, Sladek's testimony substantially corroborated Brooks as to her version of their conversation, to the effect that Moxheim had promised to deliver to Brooks a copy of the contract, which was not done even under Moxheim's version. Thus, I find Brooks to be more credible in this instance.

Between late May and October 1989, neither Moxheim, nor anyone from the Union, contacted Respondent. In September 1989, Robert Flores took over from Moxheim as business agent for the building. Moxheim turned over the file on the property to Flores, but they had no discussion about the status of the contract.

According to Flores, he received a call from Malkis, the superintendent at the building in October, and was told that the employees still did not have medical coverage. Flores replied that he would check with Moxheim on what was happening. Flores spoke to Moxheim and asked for an update on the building. Moxheim informed Flores that he had delivered a contract to Respondent, but that it still had not been signed.

Subsequently, in October, Flores visited Joan Brooks at the building. He identified himself as a business agent for the Union, and gave her a copy of the proposed union contract. Flores told Brooks that he wanted Respondent to sign the contract. Brooks replied that she knew nothing about it, and that as far as she knew Respondent did not have a contract with the Union. Brooks added that she was not in a position to sign, and she would forward it to Magier. Brooks immediately forwarded the contract to Magier. Magier called his attorney who instructed him that if the employees wanted a union, they could file a petition with the National Labor Relations Board.<sup>6</sup>

In January 1990, Flores spoke to Magier on the telephone. Flores identified himself and asked Magier if he had a chance to look over "our contract." Magier replied that his lawyers were still looking it over. Shortly thereafter, Flores spoke to Brooks, also by phone. Flores told Brooks that he was calling in reference to the contract. Brooks informed Flores that Magier had said that Flores had given Respondent the "wrong contract." Flores replied that he had given Re-

spondent the standard apartment house contract.<sup>7</sup> Brooks continued to insist it was the "wrong contract." Flores began to get upset and told Brooks that "we have a problem here," the men are complaining about lack of medical coverage. Flores added that unless Respondent signed the contract the Union might have to take action against the building. Flores also told Brooks that the Union had a prior contract "with the building," and this contract is a continuation of this process. Brooks responded that the Union could do whatever it wanted to do, but Respondent had no problem and Respondent had no contract with the Union. Flores concluded that Brooks should have Magier contact him.

Shortly thereafter, Flores spoke to Magier and asked if he had made a decision about signing the contract. Magier replied that it was the "wrong contract." Flores explained that Respondent was given the standard agreement and added that the Union had a prior contract with "the building" and this apartment house agreement contract was a continuation of this process. Flores asked what Magier meant by the "wrong contract." Magier simply repeated it was the "wrong contract." The conversation concluded.

In this instance, I credit Flores as to the existence of these January conversations over the denials of Magier and Brooks that these discussions ever occurred. I find it likely that Flores would have followed up the delivery of the contracts to Respondent, and that he would not have requested a strike authorization without a definitive refusal to execute the agreement, which did not take place until January.

During January 1990, Respondent's work force had changed. Sladek and Martinez were no longer employed, having been replaced by other doormen, and Malkis was replaced by Cosovic as superintendent. Thus, of the seven former Millerton employees originally employed by Respondent, only three (Maynard, Drakes, and Munoz) were still employed by it in January 1990.

Subsequently, Flores spoke to Kevin McCullough, his superior in the Union, to obtain strike authorization. Flores explained to McCullough that he had delivered the contract to Respondent and that the contract had not been signed, despite his numerous attempts to persuade it to do so. McCullough gave Flores the authorization to strike. During this discussion, Flores contends that McCullough told him that Stanford and Millerton were "the same Company." Flores also asserts that McCullough told him that the Union had an "Evergreen clause," in its previous contract with Millerton. According to Flores an "Evergreen" clause is in effect on automatic renewal clauses.<sup>8</sup>

On March 19, 1990, Flores on behalf of the Union called a strike at the building. Flores told the employees that the employees would have to go on strike because Respondent had not signed the contract with the Union, which resulted in employees not having any medical coverage. Employees Drakes, Maynard, and Munoz participated in the strike and

<sup>5</sup>However, Portelli, the handyman, left Respondent's employ on May 24, 1989. He was replaced by C. Camilleri, on May 27, 1989.

<sup>6</sup>Magier had received similar advice from his attorney in May 1989, when Brooks reported to him her conversation with Moxheim.

<sup>7</sup>I note that according to Moxheim, in addition to the standard apartment house agreement, the Union is also a party to at least two other standard contracts with employers, a working superintendent agreement and a resident manager agreement.

<sup>8</sup>I would note that the Apartment House Agreement executed by Millerton did not contain an automatic renewal clause.

picketed outside the building.<sup>9</sup> On March 21, 1990, Magier approached Maynard while he was picketing and asked why the employees were on strike. Maynard answered that the employees have no coverage. Magier replied that Respondent had a new health plan for the employees and asked Maynard to come into the office with the other employees, but without the union delegate to discuss it. Magier asked to meet the next day at 9:30 a.m. Maynard replied that he would check with the other employees.

Maynard discussed Magier's offer with Drakes, who told Maynard that if Magier did not want the union delegate to come, he would not go to a meeting.

The next day, March 22, Munoz and Drakes were picketing when Magier approached them. He asked if they had gotten his message. Drakes and Munoz replied that they did get the message, but the employees had a representative to speak for them, and they would not meet with him. Magier responded that he would speak to the employees anyway. He told them that he had a health plan proposal that was better than or at least competitive with the union contract, and that it included Blue Shield and Blue Cross, and putting money aside for employees' retirement. Munoz then asked Magier why did he wait for a year to offer this to the employees, and allow them to have no insurance during that time. Magier did not respond. Drakes informed Magier that he should talk with "our" union representative about the matter. Munoz agreed with Drakes.

The above findings with respect to these incidents is based primarily on the testimony of Drakes, Munoz, and Maynard. While Magier admitted to having the conversations with the employees and suggesting a meeting, he did not mention the specific discussions about the medical plan. However, I note that he did not deny that he discussed the specifics of the proposed new medical plan, nor that he compared it favorably to the plan in the union contract. I credit the mutually corroborative testimony of the employees, particularly since they were all still employed by Respondent at the time of the hearing, and are not discriminatees with a direct financial interest in the outcome of the proceedings. *Molded Acoustical Products*, 280 NLRB 1394, 1398 (1986); *K-Mart Corp.*, 268 NLRB 246, 250 (1983); *Georgia Rug Mill*, 131 NLRB 1304, 1305 fn. 2 (1961), enfd. as modified 308 F.2d 89 (5th Cir. 1962).

Although as noted above, employee Eddie Sladek left Respondent's employ in January 1990, he was and continued to be a roommate of employee Mario Munoz. Consequently, after the strike began, Munoz told Sladek that the employees were on strike. Sladek told Munoz that he intended to go to the picket line and stayed and supported the employees in their strike.

On or about March 22, Sladek went to the picket line and walked up and down with the employees. Later on that day, while Sladek was still at the picket line, but by himself, he was approached by Superintendent Ibish Cosovic. Cosovic had a wrench in his hand, and was pointing the wrench toward Sladek's face, when he told Sladek that he was warning him that he didn't belong there. Sladek felt threatened by this action and left. Sladek then filed a criminal complaint against Cosovic, which was subsequently withdrawn. Then Sladek

returned home that evening, he called the fire department and reported that Cosovic did not have a number six boiler license.<sup>10</sup>

On March 23, the fire department came to the building and spent time in the basement. After the fire department left, Cosovic came out to the picket line and spoke to Munoz, in the presence of Drakes. He told Munoz that Sladek had called the fire department, that he didn't work at Respondent, and he had no right to be close to the building. He instructed Munoz to tell Sladek that if Sladek came around the building again, Cosovic would kill him.<sup>11</sup>

The Union filed its initial charge on March 26, 1990, against Harlington Realty Corp. alleging a violation of Section 8(a)(1) and (5) of the Act by bypassing the Union and dealing with employees directly.<sup>12</sup>

On April 12, 1990, the Union filed a first amended charge against Stanford Realty Associates, with the same allegations. A second amended charge was filed on April 24, 1990, against Respondent, which added additional allegations of threatening individuals with physical harm and/or death to discourage support for the Union or picketing on behalf of the Union. The instant complaint issued on May 7, 1990.

### III. ANALYSIS

#### A. *The 10(b) and Laches Defenses*

Respondent contends that the instant complaint is barred by Section 10(b) of the Act, and alternatively that dismissal is warranted based on laches. Respondent asserts initially that it did not receive proper notice of its alleged refusal to recognize and bargain with the Union until May 7, 1990, when the instant complaint was issued. I do not agree. While the charges and amended charges filed in March and April 1990 allege only direct bargaining with employees and bypassing the Union, this allegation is closely related in time and nature to the alleged refusal to recognize and bargain, and are both directed at circumvention of the collective-bargaining process. *Long Island Day Care Services*, 303 NLRB 112 (1991); *Roslyn Gardens Tenants Corp.*, 294 NLRB 506 (1989). Thus, the charges provide sufficient notice to Respondent of the alleged allegations and are closely related to the allegations in the complaint. *Long Island Day Care*, supra; *Nickels Bakery of Indiana*, 296 NLRB 927 (1989).

Respondent also argues, citing *Chambersburg County Market*, 293 NLRB 654 (1989), that the complaint is barred by Section 10(b) of the Act, since the refusal to recognize and bargain first occurred in May 1989, after the Union's initial demand was not complied with by Respondent, and that the subsequent refusals in January 1990 by Respondent were only reiterations of its initial refusal in May 1989.

The General Counsel disagrees, citing *Christopher Street Owners Corp.*, 286 NLRB 253 (1987), for the proposition that the 10(b) period does not begin to run until it became clear that Respondent was refusing to recognize to bargain and with the Union. Respondent acknowledges the existence

<sup>10</sup> Apparently, it was required that superintendents have such a license.

<sup>11</sup> The above findings are based on the undenied and mutually corroborative testimony of Drakes, Munoz, and Sladek. Cosovic did not testify.

<sup>12</sup> Magier is also the president and sole shareholder of Harlington. He is the owner of 50 percent of the stock of Respondent.

<sup>9</sup> Employee Camilleri participated in the strike for 1 day and then went back to work.

of *Christopher Street*, supra, but argues in effect that Respondent's position in May 1989 was no different from its position in January 1990, i.e., it would not sign the industry-wide contract offered by the Union. Thus, Respondent asserts that the Union was on notice of Respondent's refusal to recognize and bargain with it, by virtue of the May refusal to sign the contract, as well as Respondent's failure to adhere to the terms of employment of the predecessor, plus the failure to continue to check off dues.

I am in agreement with the General Counsel's assessment of the facts and the view that *Christopher Street* rather than *Chambersburg* is dispositive. Thus, it is the refusal to recognize and bargain with the Union that is critical for 10(b) purposes, not the date that Respondent commenced operations as an alleged successor. *Goldin-Feldman, Inc.*, 295 NLRB 359 fn. 3 (1989). Moreover, it is well established that notice of the unfair labor practice, whether actual or constructive, must be clear and unequivocal, and the burden of showing such notice is on the party raising the affirmative defense. *Strick Corp.*, 241 NLRB 210 fn. 1 (1979).

Therefore, while Respondent admittedly did not adhere to the terms of Millerton's contract or continue to check off dues, this conduct is ambiguous as to Respondent's intentions, for as Respondent itself asserts, the obligation to recognize and bargain on the part of a successor-employer is triggered only when a union makes a demand. *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27 (1987).

When the Union made its first demand that Respondent sign a contract in May 1989, its obligations were at that point tested for the first time. However, while it did not agree to sign the contract or recognize the Union at that time, it clearly did not unequivocally refuse to do so. The response of Brooks was merely that Respondent as far as she knew did not have a contract, and she would await the Union sending a copy of the contract and an explanatory letter. Thus, Respondent's position here was essentially no different from the position of the employer in *Christopher Street*, who simply ignored the union's written request to sign a contract or alternatively to negotiate a new agreement. Thus, as in *Christopher Street*, it was not clear in May 1989 that Respondent was refusing to bargain with the Union, and the Union could reasonably believe that Respondent needed time to consider whether to sign the industrywide contract. *Id.* at 253.

Subsequently, the Union made three additional demands that Respondent sign the contract in October 1989 and January 1990, and it was only in January 1990 when Brooks and Magier told the Union that it would not sign the contract submitted by the Union, did the 10(b) period begin to run. Therefore, I reject Respondent's 10(b) defense. *Christopher Street*,<sup>13</sup> supra, *Goldin-Feldman*, supra.

<sup>13</sup> I would note that in *Christopher Street*, the employer never responded to any of the union's demands. The Board reasoned, however, that the 10(b) period began to run only after the second demand was refused, since the union could reasonably believe that the employer was considering whether to sign the agreement. Here, such an inference is even stronger, since in October, within 6 months from the initial demand, the Union gave a copy of the contract to Brooks, who promised to forward it to Magier for his review. Thus, the Union was clearly entitled to assume Respondent was considering its offer until January 1990.

Respondent argues further that the instant complaint should be dismissed based on the doctrine of laches. *Zelazny v. Lyng*, 853 F.2d 540 (7th Cir. 1988). While the Board has applied the doctrine of laches and estoppel to the parties in unfair labor practice proceedings,<sup>14</sup> I am not persuaded that Respondent has demonstrated an unreasonable lack of diligence by the Union in the assertion of its rights, nor that Respondent has suffered any prejudice from any lack of diligence that has been demonstrated.

Respondent initially faults the Union for failing to obtain from Millerton a new collective-bargaining agreement from April 1988 to April 1989, when Respondent commenced operating the building. However, such failure cannot constitute a waiver or abandonment of the Union's rights. I note that the Union did continue to represent employees of Millerton during that time period, and in fact, processed a grievance during that period concerning the termination of the superintendent. Moreover, Millerton continued to make payments into the Union's funds and checked off dues during this 1-year span. See *Imperial House Condominium*, 279 NLRB 1225, 1236 (1986); *Pioneer Inn Associates*, 228 NLRB 1263, 1264 (1977). Thus, I conclude that the Union's failure to obtain a new signed agreement from Millerton does not constitute an abandonment of its representative status of the employees, and cannot form the basis for an assertion that it was guilty of laches vis a vis its relationship with Respondent, which had not as yet arisen.

Once Respondent began managing the building on April 1, 1989, the Union acted promptly by demanding in late May that Respondent sign a contract and pay medical benefits, immediately after it was told by an employee that such medical benefits were no longer being provided by Respondent.

While the Union might have been well advised to have followed up sooner on its initial request, and certainly should have sent Respondent a copy of the contract as promised, I cannot find its failure to do so to be an unreasonable failure of due diligence. See *Christopher Street*, supra, where the Board excused a delay of over 7 months between the two demands. See also *Westvaco Corp.*, 289 NLRB 301 (1988); *Columbia Typographical Union 101 (Washington Post Co.)*, 220 NLRB 1173 (1975). (Failure to act for 10 months does not amount to laches.) More importantly, Respondent has presented no evidence showing that it suffered any meaningful or real detriment, or any prejudice whatsoever from the Union's failure to make another request until October, some 5 months after the original demand. *Columbia Typographical*, supra at 1173. Thereafter, the Union gave Respondent a reasonable opportunity to decide whether to sign the contract or recognize the Union, and as I have noted above, it was not until January 1990 did Respondent indicate that it would not agree to the Union's demand. The Union then picketed Respondent in March and filed its charges and amended charges at that time. Thus, I conclude that based on the foregoing, Respondent has failed to establish either that the Union acted with an unreasonable lack of diligence in the assertion of its bargaining rights with Respondent, or that Respondent suffered any demonstrable prejudice from the Union's failure to pursue its rights in a more timely fashion.

<sup>14</sup> *Preston Haskell Co.*, 238 NLRB 943 (1978); *Columbia Broadcasting System*, 214 NLRB 637, 642 (1974).

Accordingly, I reject Respondent's assertion that laches of the Union warrants dismissal of the complaint.<sup>15</sup>

*B. The Alleged Refusal to Recognize and Bargain*

The Board's traditional test for successorship status, as affirmed by the Supreme Court in *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), and most recently in *Fall River*, supra, is whether there is a continuity in the employing enterprise. *Petoskey Geriatric Village*, 295 NLRB 800, 801 (1989); *Goldin-Feldman*, supra at 373. Here, Respondent has hired the entire work force previously employed by Millerton in the unit, has continued managing the building, with no hiatus in operations, in virtually the same fashion, as Millerton had operated. Thus, it is not disputed by Respondent that there was a "continuity in the employing entity," when it took over the operation of the building from Millerton.

However, Respondent has raised a number of defenses to a finding that it is the "successor" to Millerton, and whether it has lawfully refused to recognize or bargain with the Union. Respondent argues that assuming that the Union made an appropriate demand for recognition, the unit previously represented by the Union, was inappropriate due to the inclusion of a supervisor in the unit, namely, the superintendent. Therefore, Respondent argues that because the demand requested bargaining in an inappropriate unit it was not obligated to bargain with the Union. *Renaissance West Community Health Center*, 276 NLRB 441, 444 (1983).

The General Counsel does not dispute the supervisory status of the superintendents. Indeed, the General Counsel has alleged Respondent's superintendent, Cosovic, to be a supervisor and agent of Respondent in connection with certain 8(a)(1) allegations. However, the General Counsel contends, and I agree, that the inclusion of one supervisor in a unit of seven employees does not render the unit inappropriate. *Puerto Rico Hotel Assn.*, 259 NLRB 429, 447 (1981), revd. on other grounds 690 F.2d 318 (2d Cir. 1982).

While a unit consisting entirely of supervisors is inappropriate, *Grand RX Drug Stores*, 193 NLRB 525, 527 (1971), the mere presence of one or more supervisors in the unit does not render the entire unit inappropriate. *Puerto Rico Hotel*, supra. The issue is really one of unit placement, and Respondent would be justified in excluding the superintendent from the unit when and if it commences bargaining. *Arizona Electric Power*, 250 NLRB 1132, 1134 fn. 20 (1980). Because the exclusion of the one supervisor from the unit does not destroy the Union's majority status, cf. *Burlington Food Store*, 172 NLRB 781 (1968), the Union's successorship status is unaffected by the fact that the unit included a supervisor.<sup>16</sup>

Moreover, it is also significant that Respondent at no time premised its refusal to bargain with the Union on the basis of the inclusion of the superintendent in the unit. *David Wol-*

*cott Kendall Memorial School*, 866 F.2d 157, 161, 162 (6th Cir. 1989).

Accordingly, I reject Respondent's assertion that the presence of the one supervisor in the unit rendered the unit inappropriate, or otherwise justified its refusal to bargain. I conclude therefore that the Respondent was and is at all times material the successor-employer to Millerton with an obligation to recognize and bargain with the Union in an appropriate unit.

The next and more serious question involves whether in fact Respondent refused to recognize and bargain with the Union. In this connection, Respondent asserts correctly that a successor's duty to bargain is triggered only when the Union has made a bargaining demand. *Fall River*, supra. Thus, Respondent cannot be found to have violated its bargaining obligation as a successor, unless the Union makes an appropriate demand for recognition and bargaining. *Miles & Sons Trucking Service*, 269 NLRB 7 (1984).

Respondent contends therefore that here the Union's sole demand upon Respondent was a request that it sign the industrywide contract, and that at no time did the Union request that Respondent recognize it or bargain with it concerning the terms and conditions of Respondent's employees. Thus, since under *Burns*, supra, Respondent as the supervisor is not obligated to sign the contract previously executed by the predecessor employer, Respondent contends that the Union has not made an appropriate demand for recognition or bargaining, and Respondent has not unlawfully refused to do so.

However, it is has been repeatedly held "that a valid request to bargain need not be made in any particular form, or in *haec verba*, so long as the request clearly indicates a desire to negotiate and bargain on behalf of the employees in the appropriate unit concerning wages, hours, and other terms and conditions of employment." *Marysville Travelodge*, 233 NLRB 527, 532 (1977). Here, the Union made four demands on Respondent to execute the contract, accompanying some of them with a request to provide medical benefits. Thus, the Union's demands here, in my view, contemplate and subsume a demand for recognition and sets forth a bargaining proposal on behalf of the employees. *Yolo Transport*, 286 NLRB 1087 (1987); See also *Sterling Processing Corp.*, 291 NLRB 208, 216 (1988).

Moreover, the Union subsequently filed charges and amended charges against Respondent, which further demonstrates and clarifies its request for recognition and bargaining. *Williams Enterprises*, 301 NLRB 167, 174 (1991); *Fall River*, supra; *IMS Mfg. Co.*, 278 NLRB 538, 541 (1986).<sup>17</sup>

Finally, I would note that Respondent clearly treated the Union's demands as tantamount to requests to recognize and bargain. Thus, when Respondent received notice of these demands, Magier spoke with his attorney who advised him that if the employees wanted a union a petition should be filed with the Board for an election. Accordingly, based on the foregoing, I conclude that the Union has demanded that Respondent recognize and bargain with it as the collective-bargaining representative of its employees.

<sup>15</sup> Respondent's reliance on *Tennsco Corp.*, 141 NLRB 296, 298 (1963), in support of its assertion in this regard is misplaced. There, the complaint was dismissed on the grounds that no successorship relationship had been established, and the discussion of the union's failure to make a prompt recognition request related only to the question of the Board's rejecting the judge's incorrect finding in that case of presumption of majority status.

<sup>16</sup> It is also worthy to note that the unit alleged as appropriate in the complaint does not include the category of superintendents.

<sup>17</sup> As the charges do not specifically allege a refusal to recognize or bargain, they do allege violations of Sec. 8(a)(5) of the Act by bypassing the Union and bargaining directly with employees. Such allegations clearly presuppose and contemplate an obligation to recognize and bargain with the Union.

The next question to be answered is whether Respondent has in fact refused to recognize or bargain with the Union. It could be argued that it has not, because its response to the Union's demands was that the Union had presented the "wrong contract." Thus, one could conclude that Respondent has merely refused to sign the contract submitted by the Union, which it is lawfully entitled to do. Moreover, by responding that the Union submitted the "wrong" contract, it could be interpreted as an implicit assertion that it might sign the "right" contract, or agree to bargain with the Union over terms of the contract.

However, although I conclude that the Union was less than diligent in testing Respondent's intentions in this regard, by striking without even making a specific request to meet and bargain, or at least to clarify Respondent's position, I conclude that based on the circumstances, Respondent has in fact refused to recognize and bargain with the Union.

I note particularly Respondent's conduct, as found below, of bypassing the Union, requesting that employees meet with it without the presence of the union representative, and promising them benefits to induce them to abandon the Union. This conduct clearly demonstrates a refusal to recognize and bargain with the Union, and negates any inference that could be drawn from its statements about the "wrong contract," that it would have been willing to recognize or bargain with the Union. I would also note in this connection the advice from Respondent's attorney as related above as well as its silence subsequent to the filing of the instant charges to further demonstrate that it was refusing to recognize and bargain with the Union.<sup>18</sup>

Finally, I would also note my finding above that Respondent did not know when it purchased the lease for the building that the Union was the collective-bargaining representative for Millerton's employees. However, as that fact may be significant in the case of imposing liability on a successor-employer to remedy the unfair labor practices of its predecessor, c.f. *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973), I do not believe that it is relevant to a determination of successorship status under *Burns* supra. The obligation under *Burns* arises by operation of law, and is not affected by whether or not Respondent knew at the time of the purchase that the predecessor had a bargaining relationship with the Union.

Similarly, this conclusion is not changed by the fact that at the time of the refusal to recognize and bargain Respondent no longer employed a majority of employees formerly employed by Millerton. Thus, when the Union first requested recognition and bargaining in May 1989, Respondent was the successor-employer, and obligated at the time to comply with the Union's requests. That status continued to be in force, and Respondent is obligated to establish that the Union no longer enjoyed majority support or it had a reasonably based doubt of majority status, based on objective considerations, in order to justify a refusal to recognize. *Terrell Machine Co.*, 173 NLRB 1480, 1481 (1969), enf'd. 427 F.2d 1088 (4th Cir. 1970). See also *Martin of Mississippi*. 283 NLRB 258, 259 (1987). Respondent adduced no evidence to meet its burden in that regard, and the turnover of employees is insufficient to do so, since the Board presumes that new employees

support the Union in the same ratio as those they replace *Petoskey Geriatric*, supra at 802; *Christopher Street*, supra at 256; *Alexander Linn Hospital Assn.*, 288 NLRB 103, 108, (1988).

Accordingly, based on the foregoing, I conclude that Respondent has violated Section 8(a)(1) and (5) by refusing on and after January 1990 to recognize and bargain with the Union.

### C. The Alleged Direct Bargaining, Promise of Benefits, and Threats

I have found that Respondent by Magier requested that employees speak with him about a new health plan without the presence of the union representative, and then subsequently discussed with employees the implementation of a new health plan that was better or as good as the union plan. Magier also detailed the specifics of his plan, which included Blue Cross and Blue Shield and putting money aside for early retirement.

Because the Union was the exclusive collective-bargaining representative of Respondent's employees at the time, Respondent was not free to discuss these matters directly with employees. By such conduct, Respondent engaged in unlawful direct dealing and bypassing the Union in violation of Section 8(a)(1) and (5) of the Act. *Kirby's Restaurant*, 295 NLRB 897, 901 (1989); *Fabric Warehouse*, 294 NLRB 189, 193 (1989); and *Bay Area-Los Angeles Express*, 277 NLRB 1063, 1081 (1985).

Additionally, by promising the employees the same or a better health plan without the Union, Respondent has violated Section 8(a)(a) of the Act. *Bay Area*, supra; *K & K Transportation Co.*, 254 NLRB 722 (1981).

I have also found that former employee Sladek, while at the picket line in support of the employees' strike against Respondent, was threatened by Cosovic with a wrench, and told that he didn't belong there. Because Sladek was a former employee, he is still considered an employee under Section 2(3) of the Act, and Cosovic's threat, clearly in reprisal for Sladek's protected concerted activity, is violative of Section 8(a) (1) of the Act. *Redwood Empire, Inc.*, 296 NLRB 396 (1989); *Little Rock Crate & Basket Co.*, 227 NLRB 1406 (1977).

Angered by this threat, Sladek called the fire department and reported that Cosovic did not have a proper boiler license. After the fire department came to Respondent's premises on March 23, Cosovic told Munoz (Sladek's roommate) that Sladek had no right to be close to the building and that he would kill Sladek if Sladek came again.

Respondent contends that Cosovic's remarks are not unlawful because Sladek in fact did not belong there, and they were motivated solely by Sladek's call to the fire department, which is not protected conduct.

However, Respondent is incorrect, because, as I have noted, Sladek was a former employee and had a right to be outside the building supporting the employees, and Respondent had no right to tell him to leave.<sup>19</sup> Moreover, while it is true the threat was made in part because of Sladek's call to the fire department, I conclude it was at least in part motivated by Sladek's protected activity of supporting the em-

<sup>18</sup> Indeed, Respondent's answer admits that it has not recognized or bargained with the Union.

<sup>19</sup> Note that there is no evidence that Sladek was on Respondent's property.

ployees, and is therefor unlawful. Additionally, I note that the call to the fire department was provoked by and an outgrowth of Sladek's protected conduct and Cosovic's prior unlawful threat.

Accordingly, I conclude that Cosovic's threat to Munoz, to be transmitted to Sladek, which also tends to discourage protected conduct by Munoz, as well as Sladek, is violative of Section 8(a)(1) of the Act.

#### CONCLUSIONS OF LAW

1. The Respondent, Stanford Realty Associates, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 32B-32J, Service Employees International Union, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

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

All building service employees employed at 121 Madison Avenue, New York, New York, excluding all office clerical employees, guards, professional employees and supervisors as defined in the Act.

4. At all times material Union has been the exclusive collective-bargaining representative of the employees in the unit described alone.

5. Since on or about April 1, 1989, Respondent has been a successor-employer to Millerton Management Co. in the operation of the apartment building at 121 Madison Avenue, New York.

6. Since on or about January 1990, and continuing to date, Respondent has failed and refused to recognize and bargain collectively with the Union as the exclusive representative of the Respondent's employees in the unit described above, and therefor has engaged in and is engaging in unfair labor practices in violation of Section 8(a)(1) and (5) of the Act.

7. By bypassing the Union and dealing directly with employees in the unit concerning matters over which it was obligated to bargain with the Union, Respondent engaged in unfair labor practices in violation of Section 8(a)(1) and (5) of the Act.

8. By promising employees better or equal health benefits if they abandon union representation, Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act.

9. By threatening employees or former employees with physical harm and/or death if they engage in protected concerted activities, Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act.

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

#### REMEDY

Having found that Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) and (5) of the Act, I shall recommend that it cease and desist therefrom and, on request, bargain collectively with the Union as the exclusive representative of employees in the appropriate unit.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>20</sup>

#### ORDER

The Respondent, Stanford Realty Associates, Inc., New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and, on request, bargain collectively with Local 32B-32J, Service Employees International Union, AFL-CIO, in the following appropriate bargaining unit:

All building service employees at 121 Madison Avenue, New York, New York, excluding all office clerical employees, guards, professional employees and supervisors as defined in the Act.

(b) Bypassing the Union and dealing directly with employees in the unit concerning matters over which it was obligated to bargain with the Union.

(c) Promising employees better or equal health benefits if they abandon union representation.

(d) Threatening employees or former employees with physical harm and/or death if they engage in protected concerted activities.

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

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

(a) Recognize and, on request, bargain in good faith with the Union as the exclusive bargaining representative of its employees in the unit found appropriate respecting rates of pay, hours of work, or other terms and conditions of employment and, if an agreement is reached, embody it in a written and signed agreement.

(b) Profit at its facility in New York, New York, copies of the attached notice marked "Appendix."<sup>21</sup> Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

<sup>20</sup>If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

<sup>21</sup>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."

## APPENDIX

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

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to meet and bargain collectively with Local 32B-32J, Service Employees International Union, AFL-CIO, as the exclusive bargaining representative of our employees in the following appropriate unit:

All building service employees employed by us at 121 Madison Avenue, New York, New York, excluding all office clerical employees, guards, professional employees and supervisors as defined in the Act.

WE WILL NOT bypass the Union and deal directly with our employees in the unit concerning matters over which we are obligated to bargain with the Union.

WE WILL NOT promise our employees better or equal health benefits if they abandon union representation.

WE WILL NOT threaten our employees or former employees with physical harm and/or death if they engage in protected concerted activities.

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

WE WILL recognize and, on request, bargain in good faith with the Union as the exclusive bargaining representative of our employees in the unit found appropriate respecting rates of pay, hours of work, or other terms and conditions of employment and, if an agreement is reached, embody it in a written and signed agreement.

STANFORD REALTY ASSOCIATES, INC.