

**National Management Consultants, Inc. and 775  
and 156-08 Riverside Drive Realty Corp. and  
Milo Alexander and Local 32B-32J, Service  
Employees International Union, AFL-CIO.**  
Cases 2-CA-25386 and 2-CA-25524

November 24, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS  
DEVANEY AND RAUDABAUGH

Exceptions filed to the judge's decision in this case present the issue of whether the Respondents validly offered reinstatement to two discharged unfair labor practice strikers, thereby tolling backpay to these employees.<sup>1</sup>

The National Labor Relations 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,<sup>2</sup> and conclusions and to adopt the recommended Order,<sup>3</sup> as modified below.

The judge found, inter alia, that employees Raymond Ortiz and Milo Alexander were unfair labor practice strikers and that they were discharged by the Respondents because of their participation in the strike, in violation of Section 8(a)(3) and (1) of the Act.<sup>4</sup> The judge further found that by letters dated September 23, 1991,<sup>5</sup> the Respondents offered reinstatement to Ortiz and Alexander, and the judge accordingly tolled the Respondents' backpay liability to them as of September 23.

The General Counsel, inter alia, excepts to the judge's finding that the September 23 letters constituted valid offers of reinstatement. We find merit in this exception for the reasons stated below.

The Respondents' September 23 letters to Ortiz and Alexander stated:

In view of your actions, management has had no choice but to replace you.

<sup>1</sup> On June 16, 1993, Administrative Law Judge D. Barry Morris issued the attached decision. The General Counsel filed exceptions and a supporting brief. The Respondents filed exceptions, and the General Counsel filed a motion to strike, contending, inter alia, that the Respondents' exceptions were untimely filed. We have treated the Respondents' exceptions as cross-exceptions, which are therefore timely filed, and we accordingly deny the General Counsel's motion.

<sup>2</sup> The General Counsel 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>3</sup> The judge inadvertently neglected to include a notice in his recommended Order. Accordingly, we include the notice here.

<sup>4</sup> The Respondents did not except to these findings.

<sup>5</sup> All dates are in 1991 unless otherwise noted.

However, due to your fine performance at the position you held, management would be agreeable to reinstating you if you return to work immediately.

Should you decide that you would like to return to work, please notify me within five (5) business offer of days. If I do not hear from you I will have no choice but to search for permanent replacements.

We find that the Respondents' letters do not constitute valid offers of reinstatement. As discharged unfair labor practice strikers, Ortiz and Alexander were discriminatees entitled to an unconditional offer of reinstatement and to backpay. *Tamara Foods*, 258 NLRB 1307, 1309 (1981); *Park Inn Home for Adults*, 293 NLRB 1082, 1089 (1989). The Respondents, therefore, had no legitimate basis for conditioning their continued right to reinstatement and backpay on their complying with the letters' requirement to respond within 5 business days or be permanently replaced. That condition had the effect of subordinating their remedial rights to the rights of employees hired to replace them. See *Chesapeake Plywood*, 294 NLRB 201, 202-203 (1989). Accordingly, we find that the Respondents' September 23 offers of reinstatement to Ortiz and Alexander were invalid and that the judge incorrectly tolled their backpay and failed to require, in his recommended Order, that the Respondents offer them immediate and full reinstatement.<sup>6</sup>

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondents, National Management Consultants, Inc. and 775 and 156-08 Riverside Drive Realty Corp., New York, New York, their officers, agents, successors, and assigns, shall take the action set forth in the recommended Order as modified.

1. Substitute the following for paragraph 2(b).

“(b) Offer Milo Alexander and Raymond Ortiz immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make

<sup>6</sup> Chairman Stephens and Member Raudabaugh would also rely on that portion of *Esterline Electronics Corp.*, 290 NLRB 834, 835 (1988), which deals with *conditional* offers. The Board stated that a letter offering reinstatement to a discriminatee will be deemed invalid “if the letter on its face makes it clear that reinstatement is dependent on the employee's returning on the specified date or if the letter otherwise suggests that the offer will lapse if a decision on reinstatement is not made by that date.” In the instant case, the Respondents' letters made it clear that reinstatement was dependent on an employee's responding within 5 business days. Phrased differently, the offer could lapse if the employees did not respond within that period. Thus, the offer was invalid.

them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them from the date of their discharge on September 13, 1991, until such time as the Respondents communicate valid offers of reinstatement to them.”

2. Substitute the attached notice for that of the administrative law judge.

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.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

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

All full-time and regular part-time building service employees, including the superintendent and porters employed at our facilities at 156-08 and 775 Riverside Drive, New York, New York, but excluding all doormen, guards, professional employees and supervisors as defined in the Act.

WE WILL NOT condition bargaining on the Union’s waiver of discharged strikers’ rights to reinstatement.

WE WILL NOT discharge or otherwise cause the termination of any employees because of activity protected by Section 7 of the Act.

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, on request, recognize and bargain collectively with the Union as the exclusive representative of the employees in the above-described appropriate unit and, on request, embody in a signed agreement any understanding reached.

WE WILL offer Milo Alexander and Raymond Ortiz immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and

make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge’s decision.

WE WILL remove from our files any reference to their unlawful terminations and notify them in writing that this has been done and that evidence of the unlawful discharges will not be used as a basis for future personnel actions against them.

NATIONAL MANAGEMENT CONSULTANTS, INC. AND 775 AND 156-08 RIVERSIDE DRIVE REALTY CORP.

*Burt Pearlstone, Esq.*, for the General Counsel.  
*Howard R. Birnbach, Esq.*, of Great Neck, New York, for the Respondents.

DECISION

STATEMENT OF THE CASE

D. BARRY MORRIS, Administrative Law Judge. This case was heard before me in New York, New York, on September 14–15 and November 2, 1992. On charges filed on October 23, 1991, and January 10, 1992, and subsequently amended, a consolidated complaint was issued on August 25, 1992, alleging that Respondents, National Management Consultants, Inc. (National) and 775 and 156-08 Riverside Drive Realty Corp. (Riverside) violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act). Respondents filed an answer denying the commission of the alleged unfair practices.

The parties were given full opportunity to participate, produce evidence, examine and cross-examine witnesses, argue orally, and file briefs. Briefs were filed by the General Counsel and by the Respondents.

On the entire record of the case, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent National, a corporation with an office and place of business in Brooklyn, New York, has been engaged in the management of residential real estate, including apartment buildings located at 775 and 156-08 Riverside Drive, New York, New York. National manages approximately 20 buildings in New York and it collects rents in excess of \$500,000 annually. Riverside, a New York corporation, has been engaged in the ownership and management of real estate including the facilities located at 775 and 156-08 Riverside Drive. Annually Riverside derives revenues in excess of \$500,000. Riverside and National purchase and receive at their New York facilities goods valued in excess of \$5,000 from suppliers who purchase and receive such goods from suppliers located outside the State of New York. I find that Respondents are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. See *James Johnston Property Mgt.*, 221 NLRB 301, 302 (1975). In addition, Respondents have not denied, and it is therefore deemed admitted, and I so find, that Local 32B-32J, Service

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

## II. THE ALLEGED UNFAIR LABOR PRACTICES

### A. *The Facts*

#### 1. Successorship

For a number of years Time Equities, Inc. owned, operated, and managed the buildings located at 775 and 156-08 Riverside Drive. In November 1990, Riverside purchased the assets of Times Equities with respect to the Riverside Drive location. Since then National has been engaged in the day-to-day management of the Riverside Drive facility. Following the change in ownership and management, Respondents have continued to operate the building as a residential apartment with the same tenants. At the time Respondents took over the property there were four employees: Superintendent Aponte, Raymond Ortiz and Milo Alexander, porters, and Freddy Garcia, a handyman. These employees were all retained by Respondents in the same capacities as they occupied prior to the change in ownership in November 1990. Accordingly, I find that since November 1990 Respondents have been engaged in the same business operations, at the same location, providing the same services to the same customers, and employing the same employees as had been employed by Time Equities. I find, therefore, that Respondents constitute successors to Time Equities. See *Christopher Street Corp.*, 286 NLRB 253, 255 (1987).

#### 2. Joint employer status

National is responsible for the day-to-day operations of the facility and supervises the building service employees. The person responsible for this is Sol Singer, the onsite manager employed by National who directs the superintendent, the handyman, and the two porters. National may hire and fire employees, but not without approval from Riverside. Similarly, National may enter into collective-bargaining agreements, but only with the approval of Riverside. The employees are paid by National from a payroll account that it maintains, but the moneys are deposited by Riverside into the payroll account and are expressly for that purpose. In addition, Sol Gross and Joseph Friedman are officers in both National and Riverside. Based on the above, I find that National and Riverside each significantly controls the employment of the building service personnel at the facility and, as such, are joint employers of those employees. See *Marcus Management*, 292 NLRB 251, 259-260 (1989).

#### 3. The Union's attempts to negotiate a successor agreement

Respondents have not denied, and it is therefore deemed admitted, that the following employees of Respondents constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time building service employees, including the superintendent and porters employed at Respondents' facilities at 156-08 and 775 Riverside Drive, New York, New York, but excluding

all doormen, guards, professional employees, and supervisors as defined in the Act.

Since 1985 the Union has been the designated exclusive collective-bargaining representative of the employees in the unit. The most recent collective-bargaining agreement was effective for the period April 21, 1988, through April 20, 1991. Sol Gross, vice president of both National and Riverside, testified that in November 1990 he became aware of the then current collective-bargaining agreement between Time Equities and the Union. Joseph Friedman, president of National and an officer of Riverside, testified that after the change of ownership Respondents maintained the same salaries and working conditions as prevailed under the 1988-1991 collective-bargaining agreement for the building service employees.

In June 1991<sup>1</sup> the Union requested that Respondents meet and bargain with it to negotiate a successor agreement to the 1988-1991 agreement. During the first week of July Pedro J. Pizarro, the Union's business agent, telephoned Gross and asked him whether Respondents intended to sign an assent agreement to the Realty Advisory Board Master Agreement. Gross answered that Respondents did not intend to sign an assent agreement but that they were interested in an independent agreement for the property. Pizarro then sent a proposed independent agreement but Gross failed to reply. Pizarro followed this up with several phone calls but these calls went unreturned.

In August, not having received a favorable response, Pizarro decided that the employees should strike. A 1-day strike ensued. Pizarro spoke to Friedman on the day of the strike, told him about the strike and Friedman stated, "I'm not going to negotiate anything until these guys go back to work." A week later, Pizarro again spoke to Gross about the agreement and Gross told Pizarro that he would get back to him by the end of the month. Not having heard from Gross, Pizarro again called Gross' office during the last part of August and was told by the receptionist that Gross was on vacation and would not return until September 11. Pizarro telephoned Gross on September 11 or 12, at which time Gross told Pizarro that he was told by his attorney not to sign the agreement. Respondents offered no counterproposals to the proposed agreement and Pizarro told Gross that the employees would probably go on strike. The strike began on September 13. The strikers included Alexander, Ortiz, and Garcia. Superintendent Aponte did not join in the strike.

#### 4. Discharges of Alexander and Ortiz

Alexander appeared to me to be a credible witness. He testified that Gross came up to him at the picket line on the first day of the strike and told him, "You know you're going to be fired for going on strike." Alexander then asked Gross why Respondent would not sign a contract and Gross replied, "I'm not going to [be] strong-armed into signing a contract with a union I don't like." Ortiz also credibly testified that on the first day of the strike Singer approached him on the picket line and told him that he was fired because he went on strike. In addition, Robert Byrd, the superintendent of the building next to Respondents' facility, credibly testified that on the first or second day of the strike he was standing with

<sup>1</sup> All dates refer to 1991 unless otherwise specified.

Ortiz in front of the service entrance of the facility and Singer approached Ortiz and asked him "what he was doing at the building, why he was picketing in front of his building, that he had been fired and he had no reason to be there." A short time later Byrd asked Singer why he would not sign the union contract and Singer replied that "he did not like the contract and that he would not sign" it. Byrd then asked Singer why he had fired Ortiz and Singer replied that "he fired him because he was on strike."

On September 16 Respondents circulated a letter to the tenants of the facility. The letter stated, in pertinent part:

Management has made it clear that any employee who decides to strike, his employment will be *immediately* terminated with no chance of reinstatement. Thankfully, Mr. Aponte, your superintendent, has assured us that he will continue to work. However, others, namely the two porters, have chosen their own demise. *THEIR EMPLOYMENT IS HEREBY TERMINATED!!*

Alexander testified that he saw the letter on September 16. Ortiz also credibly testified that Alexander showed him a copy of the letter the same day. Shortly thereafter, Pizarro went to the building to discuss the letter with Respondents. He saw Singer and asked him whether the two employees had been "fired." Singer replied, "[h]e was proud of the letter. That he had helped write it. And that there's not going to be any negotiations until these guys go back to work, until the strike was over."

#### 5. Offer of benefits

At the hearing, General Counsel amended the complaint alleging that Respondents, through Singer, on or around September 15, offered a promise of benefits to strikers to induce them to refrain from engaging in protected, concerted activity. Prior to the amendment Singer had testified that while the strike was going on Singer told Ortiz, "I pay you for three weeks vacation, come back, think about [it]." Subsequent to the amendment, Singer testified that he approached Ortiz while Ortiz was picketing and he told him, "I don't understand why you are on strike, because I don't owe you anything . . . I just finished paying you three weeks vacation." When asked whether he offered to give him vacation pay, Singer testified, "No, he just got it a month ago." Singer also testified that on August 23 Ortiz had received 3 weeks' vacation pay which totaled \$1020. This testimony was not rebutted. I credit Singer's testimony and find that the General Counsel has not shown by a preponderance of the evidence that an offer of benefits was made. Accordingly, the allegation is dismissed.

### Discussion and Conclusions

#### 1. Supervisory status

The record is clear that Joseph Friedman is president of National and Sol Singer is managing agent. Singer testified that the four employees in the unit at the facility were under his supervision. In addition, Sol Gross is vice president of both National and Riverside. Both Gross and Friedman testified that they made the decision to fire Ortiz and Alexander.

I find that Friedman, Singer, and Gross are supervisors within the meaning of Section 2(11) of the Act.

#### 2. Failure to bargain

The complaint alleges that Respondents have failed and refused to bargain in good faith with the Union, in violation of Section 8(a)(1) and (5) of the Act. The Board has found violations of the duty to bargain in situations where an employer ignores or simply makes no attempt to honor union requests to bargain. *Franchet Metal Craft*, 262 NLRB 552, 554 (1982). The Board has also held that the failure by an employer to submit any counterproposals tends to frustrate further bargaining and may thus constitute a clear rejection of the collective-bargaining duty spelled out in the Act. See *Chalk Metal Co.*, 197 NLRB 1133, 1147 (1972). In June the Union requested that Respondents meet and bargain with it to negotiate a successor agreement to the one which had expired on April 20. In July the Union submitted a proposed collective-bargaining agreement. Several times during July, August, and September Pizarro attempted to get response from Respondents but was unsuccessful. Finally, on September 11 or 12, Gross told Pizarro that his attorney advised him not to sign the agreement. Gross offered no reasons, offered no counterproposals and made no attempt to schedule any meetings to discuss the matter. I find that Respondents' conduct demonstrates bad faith and an attempt to frustrate, rather than engage in meaningful bargaining. Accordingly, I find that Respondents have refused to bargain with the Union regarding a successor collective-bargaining agreement, in violation of Section 8(a)(1) and (5) of the Act.<sup>2</sup>

#### 3. Unfair labor practice strike

A strike will be considered to be an unfair labor practice strike if the record establishes that an unfair labor practice was a "contributing cause" of the strike. *Massachusetts Coastal Seafoods*, 293 NLRB 496 (1989). The uncontroverted testimony of Pizarro, Alexander, and Ortiz shows that Pizarro called together the four building service employees on the day before the strike and told them he felt they would have to strike to get Respondents to the bargaining table. All of the employees agreed and the strike commenced the following day. The record is clear that the employees struck primarily because of the failure of Respondents to negotiate in good faith. I thus find that the strike, which began on September 13, was an unfair labor practice strike at its inception.

#### 4. Discharges of Ortiz and Alexander

It is well established that the discharge of striking employees, even if they are engaged in an economic strike, is a violation of Section 8(a)(1) and (3) of the Act. See *Mars Sales Co.*, 242 NLRB 1097, 1102 (1979), *enfd.* in pertinent part

<sup>2</sup>The complaint also alleges that Respondents insisted, as a condition of reaching any collective-bargaining agreement, that the Union agree to waive the rights of Ortiz and Alexander to reinstatement. Pizarro testified that in January or February 1992 Gross told him that "one of the conditions" to negotiating was that he "didn't want [any] of the striking employees back to work." This testimony was not rebutted. Accordingly, I find that Respondents conditioned bargaining on the Union's waiver of discharged strikers' rights to reinstatement, in violation of Sec. 8(a)(1) and (5) of the Act.

626 F.2d 567, 572–573 (7th Cir. 1980). I have credited Alexander's testimony that, on the first day of the strike, Gross told him that he would be fired for going on strike. I have also credited Ortiz' testimony that Singer told him he was fired because he went on strike. This was corroborated by Byrd who testified that Singer told him that he had fired Ortiz because he was on strike. In addition, Respondents' letter to the tenants dated September 16 states that any employee who decides to strike will be "immediately terminated with no chance of reinstatement." The letter continues that the "two porters have chosen their own demise. Their employment is hereby terminated." I find that the General Counsel has made a prima facie showing sufficient to support the inference that protected conduct, namely, the strike, was a motivating factor in Respondents' decision to discharge the employees.

Under *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), once a prima facie showing has been established, the burden shifts to the employer to demonstrate that the "same action would have taken place even in the absence of the protected conduct." Respondents maintain that the employees were terminated because during the strike garbage was accumulating which resulted in a potential health hazard. Under *Laidlaw Corp.*, 171 NLRB 1366, 1369–1370 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970), Respondents had the right to hire replacement workers during the duration of the strike. The Board pointed out, however, that the strikers remain employees. I find that Respondents have not sustained their burden under *Wright Line* and that their discharge of Alexander and Ortiz on September 13 constitutes a violation of Section 8(a)(1) and (3) of the Act.

#### 5. Offers of reinstatement

Respondents introduced into evidence copies of letters dated September 23, addressed to Ortiz and Alexander stating "management would be agreeable to reinstating you if you return to work immediately. Should you decide that you would like to return to work, please notify me within five (5) business days." Singer testified that the letters were sent by certified mail and the record contains the white certified mail receipts stamped by the post office. Singer testified that the "green" return receipt was not requested. At the time the letters were introduced, General Counsel objected to their receipt into evidence arguing that the documents were not submitted to General Counsel pursuant to its subpoena and, therefore, should be precluded pursuant to *Bannon Mills, Inc.*, 146 NLRB 611 (1964). I did not believe that the subpoena clearly called for these documents and I, therefore, overruled General Counsel's objection and admitted the letters into evidence. In its brief General Counsel urges an additional reason, not advanced at the hearing, why I should not consider the letters. Paragraph 17(b) of the complaint alleges that Respondents have failed to reinstate or offer to reinstate Alexander and Ortiz. In their answer Respondents did not deny the allegation. Since, under the Board's rules, if an allegation is not denied it is deemed admitted, General Counsel contends that Respondents should be bound by their answer and that I should not consider the letters offering reinstatement.

While technically General Counsel is correct, had General Counsel raised the same objection at the hearing, no doubt counsel for Respondents would have at that time moved to amend the answer. I believe that Respondents' failure to deny paragraph 17(b) of the complaint was an oversight and that it would be inequitable for me not to consider the letters offering reinstatement. I credit Singer's testimony that the letters were mailed and I note that the record contains the white certified mail receipts with the post office stamp affixed. I therefore find that by letters dated September 23, Respondents offered reinstatement to Ortiz and Alexander.

#### 6. Deferral to arbitration

On March 17, 1992, an arbitration award was issued finding that National did not assume the collective-bargaining agreement between Time Equities and the Union. Respondents urge that I defer to that decision. Pursuant to *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), and its progeny, one of the standards which must be satisfied before the Board will defer to the decision of an arbitral tribunal is that the unfair labor practice issue must have been presented to and considered by the arbitral tribunal. The complaint alleges that Respondents are successors to Time Equities. There is no indication that this issue was either presented to or considered by the arbitrator. While the complaint also alleges that Respondents "adopted" the prior agreement, General Counsel has not requested any relief with respect thereto, nor has the matter been pursued in General Counsel's brief. Indeed, to be deemed to have adopted the predecessor's contract, there must be clear evidence of consent. See *Hospital Employees Local 1115 (Kerst View)*, 248 NLRB 1234, 1244 (1980). The mere continuation of economic benefits prevailing at the time of the takeover will not, without more, indicate an adoption of the predecessor's collective-bargaining agreement. See *Virginia Sportswear*, 226 NLRB 1296 (1976). In this connection, I note that the arbitration award involves a claim for delinquencies in payments to the welfare, pension, and annuity funds. It would appear therefore that Respondents did not make fund payments, thereby indicating that Respondents did not adopt the prior contract. I find that a sufficient showing has not been made to sustain the allegation that Respondents adopted the collective-bargaining agreement between Time Equities and the Union. Accordingly, the allegation is dismissed. In addition, for the reasons previously stated Respondents' motion to defer is denied.

#### CONCLUSIONS OF LAW

1. Respondents are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The following employees of Respondents constitute a unit appropriate for the purposes of collective-bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time building service employees, including the superintendent and porters at Respondents' facilities at 156-08 and 775 Riverside Drive, New York, New York, but excluding all doormen, guards, professional employees and supervisors as defined in the Act.

4. Respondents are joint employers of the employees in the above-described unit and constitute successors of Time Equities, Inc.

5. At all material times the Union has been the exclusive collective-bargaining representative of the employees in the above unit within the meaning of Section 9(a) of the Act.

6. By failing and refusing to negotiate, Respondents have failed and refused to bargain in good faith with the Union, thereby engaging in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

7. By conditioning bargaining on the Union's waiver of discharged strikers' rights to reinstatement, Respondents have engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

8. By discharging Milo Alexander and Raymond Ortiz for engaging in a strike Respondents have engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

9. The aforesaid unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

10. Respondents did not violate the Act in any other manner alleged in the complaint.

#### THE REMEDY

Having found that Respondents have engaged in certain unfair labor practices, I find it necessary to order Respondents to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Respondents having discharged Milo Alexander and Raymond Ortiz in violation of the Act, I find it necessary to order Respondents to make them whole for any loss of earnings they may have suffered from the time of their discharges to the date of Respondents' offers of reinstatement.<sup>3</sup> Backpay shall be computed in accordance with the formula approved in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).<sup>4</sup>

As I have also found that Respondents have unlawfully refused to bargain with the Union I shall further recommend that Respondents be ordered to bargain collectively with the Union as the representative of the employees in the appropriate unit.

General Counsel has requested that I issue a broad order requiring Respondents to cease and desist from violating the Act in "any other manner." In *Transport Service Co.*, 302 NLRB 22 fn. 2 (1991), the Board stated

Although we agree with the Judge that the Respondent has violated the Act, we do not agree that a broad order is necessary here. A broad order is warranted only when a respondent is shown to have a proclivity to violate the Act or has engaged in such egregious or widespread misconduct as to demonstrate a general dis-

<sup>3</sup>I have previously found that by letters dated September 23, 1991, Respondents offered reinstatement to Alexander and Ortiz. Since I have found the strike to be an unfair labor practice strike from its inception, Alexander and Ortiz were, accordingly, unfair labor practice strikers. As such, they retain their rights to reinstatement.

<sup>4</sup>Under *New Horizons*, interest is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

regard for the employees' fundamental statutory rights. See *Hickmott Foods*, 242 NLRB 1357 (1979).

General Counsel has cited no prior Board decisions against the Respondents based on similar conduct. See *Sheet Metal Workers Local 27 (Camcon)*, 292 NLRB 1046 (1989). Based on the record in this proceeding I do not believe that Respondents have engaged in such egregious or widespread misconduct as to warrant a broad order.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>5</sup>

#### ORDER

The Respondents, National Management Consultants, Inc. and 775 and 156-08 Riverside Drive Realty Corp., their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain in good faith with Local 32B-32J Service Employees International Union, AFL-CIO as the exclusive representative of the employees in the following appropriate unit:

All full-time and regular part-time building service employees, including the superintendent and porters employed at Respondents' facilities at 156-08 and 775 Riverside Drive, New York, New York, but excluding all doormen, guards, professional employees and supervisors as defined in the Act.

(b) Conditioning bargaining on the Union's waiver of discharged strikers' rights to reinstatement.

(c) Discharging employees for activities protected by Section 7 of the Act.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

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

(a) Upon request, recognize and bargain collectively with the Union as the exclusive representative of the employees in the above-described appropriate unit and, upon request, embody in a signed agreement any understanding reached.

(b) Make whole Milo Alexander and Raymon Ortiz for any loss of earnings, with interest, in the manner set forth in the remedy section.

(c) Remove from their files any references to the unlawful discharges of Alexander and Ortiz and notify them in writing that this has been done and that the discharges will not be used against them in any way.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports and all other records necessary to analyze the amounts of backpay owing under the terms of this Order.

(e) Post at the facility located at 775 and 156-08 Riverside Drive, New York, New York, copies of the attached notice

<sup>5</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.

marked "Appendix."<sup>6</sup> Copies of the notice on forms provided by the Regional Director for Region 2, after being signed by Respondents' authorized representative, shall be posted by the Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places in-

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<sup>6</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."

cluding all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days of the date of this Order what steps the Respondents have taken to comply.

IT IS FURTHER ORDERED that those allegations of the complaint as to which no violations have been found are dismissed.