

**Executive Cleaning Services, Inc. and AT&T and Local 68, International Union of Operating Engineers, AFL-CIO and Tower Center Associates, Party In Interest**

**Thru State Maintenance, Inc. and Local 68, International Union of Operating Engineers, AFL-CIO and Local 734, Laborers' International Union of North America, AFL-CIO, Party In Interest and Tower Center Associates, Party In Interest.** Cases 22-CA-16200 and 22-CA-16518

September 30, 1994

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS DEVANEY  
AND COHEN

On May 21, 1992, Administrative Law Judge Howard Edelman issued the attached decision. Respondent AT&T filed exceptions and a supporting brief, the General Counsel filed cross-exceptions and a supporting brief,<sup>1</sup> Respondent AT&T, the General Counsel, and the Charging Party each filed answering briefs, and Respondent AT&T filed two reply briefs.

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, findings,<sup>2</sup> and conclusions<sup>3</sup> as modified and to adopt the recommended Order as modified and set forth in full below.

<sup>1</sup> In a letter dated September 9, 1992, Local 68, International Union of Operating Engineers, AFL-CIO informed the Board that it joins in the exceptions filed by the General Counsel.

<sup>2</sup> Respondent AT&T 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.

The judge made several errors in his decision: the correct date on which Local 734 obtained authorization cards for One Tower Center was April 5, 1989, not March 5 as stated by the judge; the judge mistakenly referred to a Local 174 rather than Party in Interest Local 734, Laborers' International Union of North America, AFL-CIO, in several places in his decision; and the judge misspelled the name of Local 68 Business Agent Steven McGuire.

<sup>3</sup> In adopting the judge's finding that Respondents AT&T and Executive Cleaning Services are joint employers we rely additionally on *Whitewood Oriental Maintenance*, 292 NLRB 1159 (1989), enf. sub nom. *Texas World Service Co. v. NLRB*, 928 F.2d 1426 (5th Cir. 1991).

We agree with the judge that Executive Cleaning Services and AT&T, as joint employers, violated Sec. 8(a)(1) by soliciting employees to sign a petition to decertify the Union and by denying McGuire, an authorized union representative, access to the One Tower Center facility. In addition to the factors cited by the judge in support of these findings, we note that before circulating the decertification petition, Executive Cleaning Services advised AT&T that it intended to sever its relationship with Local 68 and that an

1. We agree with the judge's conclusion that the decision to lay off the employees of Executive Cleaning Services (ECS) and subcontract the work to Thru State Maintenance was a mandatory subject of bargaining. There is no contention that this decision involved any capital investment or change in the scope or direction of the joint employers' business. Rather, AT&T, a joint employer with ECS, decided to replace "employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment . . ." based solely on the size of the wage increase proposed by the Union. *Fibreboard Corp. v. NLRB*, 379 U.S. 203, 215 (1964).<sup>4</sup> Accordingly, this decision was a mandatory subject of bargaining. *Id.*; see also *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981); *Holmes & Narver*, 309 NLRB 146, 147 (1992) (decision to lay off employees for economic reasons was mandatory subject of bargaining).<sup>5</sup> By failing and refusing to bargain over this decision, Respondents AT&T and ECS, as joint employers, violated Section 8(a)(5) and (1) of the Act.<sup>6</sup>

internal AT&T memorandum indicates that AT&T was willing to renew ECS's cleaning contract, on a nonunion basis, if this effort was successful. With regard to the expulsion of McGuire, we note that AT&T Supervisor Thompson confiscated Union Representative McGuire's badge and demanded that he leave the building, at Executive Cleaning Services' request.

We find no merit to AT&T's argument that the 8(a)(3) and (5) allegations should be dismissed because the Union assertedly did not give timely notice of its intent to modify the parties' collective-bargaining agreement as contemplated by Sec. 8(d). *Jet Line Products*, 229 NLRB 322, 322-323 (1977) (8(d) requirements applicable only in the case of a strike or lockout). Likewise, AT&T's claim that the 1986-1989 collective-bargaining agreement between Executive Cleaning Services and Local 68 was automatically renewed for 1 year pursuant to a contractual renewal provision in the absence of timely notice is without merit, as the Respondents never took the position that Local 68's contract proposal was untimely or refused to bargain on that basis, and Local 68 continued its efforts to contact the Respondents for negotiations. See *Hassett Maintenance Corp.*, 260 NLRB 1211 fn. 3 (1982).

<sup>4</sup> Technically, ECS's contract was with Tower Center Associates (TCA), a partnership which owned the One Tower Center building but was itself 49 percent owned by AT&T. For the reasons stated by the judge, we agree that TCA was AT&T's agent for the purpose of selecting ECS as the cleaning contractor for One Tower Center in 1986 and for the purpose of not renewing ECS's contract in 1989.

<sup>5</sup> We disavow the judge's reliance on *Otis Elevator Co.*, 269 NLRB 891 (1984), as that decision was overruled by *Dubuque Packing Co.*, 303 NLRB 386 (1991). Further, to the extent that *Lapeer Foundry & Machine*, 289 NLRB 952 (1988), relies on *Otis*, we also disavow the judge's reliance on *Lapeer*. See *Holmes & Narver*, above, 309 NLRB at 147 fn. 3. In light of the above, we do not rely on the judge's discussion of the circumstances in which a decision to lay off employees or to subcontract work is a mandatory subject of bargaining.

Member Cohen regards the decision in this case as falling within the ambit of category 3 of *First National Maintenance*.

<sup>6</sup> It is undisputed that neither AT&T nor ECS notified Local 68 of the decision to terminate ECS's cleaning contract at One Tower Center and subcontract the work to another employer until after

*Continued*

2. The General Counsel has excepted, inter alia, to the judge's finding that AT&T and ECS did not unlawfully repudiate an oral agreement with Local 68 concerning the terms of a successor agreement to the parties' 1986-1989 contract. We find no merit to this exception.

To the extent that the General Counsel contends that Local 68, AT&T, and ECS orally agreed that, as part of the 1986-1989 collective-bargaining agreement, the cleaning employees' wages at One Tower Center would catch up with those paid at other AT&T buildings, the judge correctly found that evidence of an oral agreement may not be used to vary the terms of a written agreement. See *NDK Corp.*, 278 NLRB 1035 (1986). In this regard, although there was a written catchup provision in Local 68's agreement with the maintenance contractor at One Tower Center, no such provision appears in Local 68's agreement with ECS.

We also find that the evidence presented concerning the catchup provision is not sufficiently definite with respect to essential terms and conditions of employment to constitute an enforceable successor agreement to the 1986-1989 collective-bargaining agreement. In this regard, the General Counsel has shown that AT&T Official Stomski agreed in principle to "catch up" the One Tower Center wage rates in 1989 to those paid at other AT&T facilities, subject to Local 68's agreement to roll back wages at that location in 1986 below the rates paid the other facilities, and that Local 68 subsequently agreed to a specific rollback figure that was agreeable to AT&T. In December 1988, Local 68 Business Agent Giblin wrote a letter to ECS noting that the existing agreement was expiring and stating "our desire to negotiate a renewal agreement with you."<sup>7</sup> In February 1989, Local 68 mailed to ECS a proposal for a new contract which included substantial increases in wages and benefits. In his testimony, Giblin conceded that Local 68's initial proposal for a successor agreement did not fully catch up the One Tower Center wage rates with those paid at the other AT&T buildings. Giblin explained this as a "business

decision" to seek a more moderate wage increase in light of the substantial, unexpected increase in the health and welfare plan contribution also contained in the proposal: "We said even though the catch up exists, there's no way that we can go from \$1.05 an hour up to \$2.50 an hour in our health and welfare plan and then tell him put these rates of pay up on top of that."

It is well settled that a collective-bargaining agreement arises only after a meeting of the minds on all material terms. *Roman Iron Works*, 282 NLRB 725, 726 (1987). It is clear from the above recitation of facts that the parties' understanding in 1986 fell far short of a meeting of the minds on all material terms of a successor agreement.<sup>8</sup> Moreover, even with respect to wages, the evidence does not support a finding that the parties intended to reopen the contract only as to wages or to predetermine that term without regard to other contractual issues that might arise. Indeed, Local 68's course of conduct in 1989 would seem to confirm that wages and the other terms which were not addressed or agreed on in 1986 were intended to constitute an integral part of bargaining for a successor agreement.<sup>9</sup> Accordingly, under all the circumstances, we find that the General Counsel has not established that an enforceable oral agreement on wages for a successor agreement existed, or that AT&T or ECS unlawfully repudiated such an agreement at One Tower Center in 1989.

#### AMENDED REMEDY

The General Counsel contends that the judge's recommended Order should be modified to include a provision expressly requiring that ECS be reestablished as the cleaning contractor at One Tower Center. We find merit to this exception and shall modify the judge's Order accordingly. See *Hillside Manor*, 257 NLRB 981 (1981), *enfd. mem.* 697 F.2d 294 (2d Cir. 1982).<sup>10</sup>

<sup>8</sup> See, e.g., *Interprint Co.*, 273 NLRB 1863 (1985) (no meeting of the minds because, inter alia, the agreement lacked commencement and termination dates).

<sup>9</sup> We also note that Local 68's contract proposals which included wages at variance with those that would have been required under the alleged catchup agreement is inconsistent with the General Counsel's claim that a meeting of the minds existed. Cf. *Bi-County Beverage Distributors*, 291 NLRB 466, 468-469 (1988) (meeting of the minds found where parties, inter alia, acted in a manner consistent with the existence of an agreement).

<sup>10</sup> We find no merit to AT&T's suggestion that any restoration order should require only that the parties bargain in good faith concerning restoration, in light of the judge's finding that the subcontracting here violated both Sec. 8(a)(3) and (5). Likewise, there is no basis for conditioning the restoration order on ECS's willingness to resume operations at One Tower Center, as AT&T suggests, because ECS is also a respondent in this case. Any claim that ECS cannot comply with the Board's Order may be raised at the compliance stage of these proceedings.

Member Cohen agrees with his colleagues that Respondents AT&T and ECS violated Sec. 8(a)(5) and (1) by laying off ECS employees and subcontracting their work to Thru State Maintenance

TCA's February 16, 1989 letter announcing that the decision had already been reached, and no party contends that any negotiations occurred with respect to the subcontracting decision or the subsequent layoffs. Likewise, neither AT&T nor ECS ever responded to Local 68's initial proposal for a successor to the 1986-1989 agreement with ECS with any counterproposals. AT&T merely announced that the ECS cleaning contract would not be renewed. ECS's only response was to tell Local 68 in early February that its proposed rates were too high. On February 20, ECS advised TCA that it intended to "terminate" its relationship with Local 68 and proposed a renewal of its cleaning contract with TCA on a "non-Union" basis. When Local 68 subsequently unilaterally reduced its demands, ECS responded that it was "too late."

<sup>7</sup> Although the letter, which was placed in evidence by the Respondent, is addressed to ECS with copies to the Federal and state mediation services, ECS's president, Mannix, testified that he never received the letter.

We also shall modify the judge's Order to include appropriate provisions remedying the 8(a)(3) violations found and shall modify the remedy and substitute a new notice to employees with respect to Respondent Thru State Maintenance to more closely reflect the violation found against that employer.

#### ORDER

The National Labor Relations Board orders that the  
A. Respondents AT&T and ECS, joint employers, East Brunswick, New Jersey, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing to recognize and bargain collectively with Local 68, International Union of Operating Engineers, AFL-CIO, with respect to wages, hours, and other terms and conditions of employment, including the decision and effects of subcontracting its cleaning services, for the following unit of employees:

All custodial maintenance and related categories of employees employed by Executive Cleaning Services, Inc. at One Tower Center.

(b) Discontinuing the use of Executive Cleaning Services, Inc. (ECS), as the cleaning contractor for AT&T at One Tower Center resulting in the termination of employees employed by ECS without bargaining collectively and in good faith with the Union.

(c) Discriminating against employees in regard to hire or tenure of employment for the purpose of discouraging membership in a labor organization by terminating employees in retaliation for the size of the Union's wage demands.

(d) Soliciting employees to sign a petition seeking to decertify the Union as their collective-bargaining representative.

(e) Prohibiting authorized union representatives from lawfully conducting union business in the One Tower Center facility.

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

(a) Reestablish ECS as the cleaning service contractor at One Tower Center.

(b) Recognize and bargain with the Union in good faith as the exclusive representative of the employees in the unit described above concerning terms and conditions of employment, including any decision and the effects thereof of subcontracting the cleaning services at the One Tower Center facility to another cleaning

contractor and, if an agreement is reached, to embody such agreement in writing.

(c) Reinstate and make whole those employees of ECS who were laid off on March 31, 1989, for any loss of pay or other benefits suffered as a result of the Respondents' unlawful conduct in the manner set forth in the remedy section of the judge's decision.

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

(e) Post at the One Tower Center, East Brunswick, New Jersey facility copies of the attached notice marked "Appendix I."<sup>11</sup> Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by each Respondent's authorized representative, shall be posted by the Respondents immediately upon receipt 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 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 from the date of this Order what steps the Respondent has taken to comply.

B. Respondent Thru State Maintenance, Inc., East Brunswick, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Recognizing or bargaining with Local 734, Laborers' International Union of North America, AFL-CIO, as the collective-bargaining representative of its employees at One Tower Center unless or until an uncoerced majority of the employees in an appropriate unit designate Local 734 as their representative.

(b) Giving any force or effect to the collective-bargaining agreement executed between Local 734 and Thru State in 1989 covering its employees at One Tower Center with respect to rates of pay, hours, and other terms and conditions of employment.

(c) Maintaining and enforcing any union-security and checkoff provisions in the above-described collective-bargaining agreement and deducting union dues from its employees and remitting such dues to Local 734.

(d) Informing its employees at One Tower Center that they must become members of Local 734 as a

without timely notice to or bargaining with Local 68. He also agrees that requiring the Respondents to restore the status quo by reestablishing ECS as the cleaning contractor at One Tower Center, and reinstating ECS employees laid off on March 31, 1989, is the appropriate remedy for this violation. See, e.g., *Hillside Manor*, supra. In light of this conclusion, Member Cohen finds it unnecessary to reach the 8(a)(3) issue.

<sup>11</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."

condition of continued employment and must execute dues-checkoff cards.

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

(a) Withdraw and withhold recognition of Local 734 as the collective-bargaining representative of its employees at One Tower Center unless and until a free and uncoerced majority of employees within an appropriate unit designate Local 734 as their collective-bargaining representative.

(b) Reimburse its employees at One Tower Center for any dues, fees, initiation fees, or other moneys deducted from their wages and paid to Local 734 pursuant to the collective-bargaining agreement described above, with interest, in the manner set forth in the judge's decision.

(c) Post at the One Tower Center, East Brunswick, New Jersey facility copies of the attached notice marked "Appendix II."<sup>12</sup> Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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

<sup>12</sup> See fn. 11, above.

#### APPENDIX I

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 fail to recognize and bargain collectively with Local 68, International Union of Operating Engineers, AFL-CIO, with respect to wages, hours, and other terms and conditions of employment, including the decision and effects of subcontracting our cleaning services, of the following unit of employees:

All custodial maintenance and related categories of employees employed by Executive Cleaning Service, Inc. at One Tower Center.

WE WILL NOT discontinue the use of Executive Cleaning Services (ECS) as the cleaning contractor for

AT&T at One Tower Center without bargaining collectively and in good faith with the Union.

WE WILL NOT solicit employees to sign a petition seeking to decertify the Union as the collective-bargaining representative of the above unit of employees.

WE WILL NOT discriminate against our employees on the basis of their participation in protected, concerted activities by subcontracting our cleaning services and laying off employees in retaliation for bargaining proposals submitted by the Union.

WE WILL NOT prohibit authorized union representatives from lawfully conducting union business in the One Tower Center facility.

WE WILL reestablish ECS as the cleaning contractor for the One Tower Center facility.

WE WILL recognize and bargain with the Union in good faith as the exclusive representative of the employees in the unit described above concerning terms and conditions of employment, including any decision and the effects thereof of subcontracting the cleaning services at the One Tower Center facility to another cleaning contractor and, if an agreement is reached, embody such agreement in writing.

WE WILL reinstate and make whole those employees of ECS who were laid off on March 31, 1989, for any loss of pay or other employment benefits suffered as a result of our unlawful conduct, with interest.

WE WILL 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 amount of backpay due under the terms of this Order.

#### AT&T AND EXECUTIVE CLEANING SERVICES, INC., JOINT EMPLOYERS

#### APPENDIX II

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 recognize or bargain with Local 734, Laborers' International Union of North America, AFL-CIO, as the collective-bargaining representative of our employees at One Tower Center unless or until a free and uncoerced majority of our employees within an appropriate unit designate Local 734, Laborers' International Union of North America, AFL-CIO, as their representative.

WE WILL NOT give any force or effect to the collective-bargaining agreement executed between Local 734

and our corporation in 1989 covering our employees at One Tower Center with respect to rates of pay, hours, and other terms and conditions of employment.

WE WILL NOT maintain or enforce any union-security or checkoff provisions in the above-described collective-bargaining agreement and WE WILL NOT deduct union dues from our employees and remit such dues to Local 734.

WE WILL NOT inform our employees they have to become members of Local 734 and execute dues-checkoff cards as a condition of continued employment.

WE WILL withdraw and withhold recognition of Local 734 as the collective-bargaining representative of our employees at One Tower Center unless and until a free and uncoerced majority of employees within an appropriate unit designate Local 734 their collective-bargaining representative.

WE WILL reimburse our employees at One Tower Center for any dues, fees, initiation fees, or other moneys deducted from their wages and paid to Local 734 pursuant to the collective-bargaining agreement described above, with interest.

THRU STATE MAINTENANCE, INC.

*Wayne Eastman, Esq.*, for the General Counsel.  
*Francis X. Dee, Esq. (Carpenter, Bennett & Morrissey)*, for AT&T.

*Anna R. O'Connor, Esq.*, for AT&T.  
*Albert G. Knoll, Esq.*, for the Union.

## DECISION

### STATEMENT OF THE CASE

HOWARD EDELMAN, Administrative Law Judge. This case was tried before me on January 8–10, 17, and 18, April 2, 3, 4, and 5, June 18–21, 1990, and February 19 and 22, 1991, in Newark, New Jersey. The case was based on a consolidated complaint dated October 31, 1989, on unfair labor practice charges filed by Local 68, International Union of Operating Engineers, AFL–CIO (the Union). The complaint was amended during the trial, on January 9. The complaint alleges in substance that American Telegraph & Telephone (Respondent AT&T) was a joint employer of the employees of its cleaning contractor, Executive Cleaning Services, Inc. (Respondent ECS) at the One Tower facility in East Brunswick, New Jersey; that Respondent AT&T violated Section 8(a)(3) and (5) of the Act by terminating Respondent ECS and subcontracting its cleaning service contract to another cleaning contractor without affording the Union an opportunity to bargain over the decision; that Respondent AT&T violated Section 8(a)(5) of the Act by repudiating an oral agreement with the Union concerning terms of a successor collective-bargaining agreement; that Respondents AT&T and ECS violated Section 8(a)(1) of the Act by soliciting the employees of Respondent ECS to file a decertification petition; and that Thru State Maintenance, Inc. (Thru State) violated Section 8(a)(2) of the Act by assisting and recognizing

Local 734, Laborers' International Union of North America, AFL–CIO (Local 734), and entering into a collective-bargaining agreement with Local 734, notwithstanding that Local 734 did not represent an uncoerced majority of Thru State employees.

On the entire record, including my observation of the demeanor of the witnesses, and on a careful consideration of the posttrial briefs, I make the following

### FINDINGS OF FACT<sup>1</sup>

AT&T is a corporation with an office and place of business at One Tower Center in East Brunswick, New Jersey, where it is engaged in providing telephone communication services. In the course and conduct of such business AT&T annually derives gross revenue in excess of \$100,000. It also annually sells and ships from its New Jersey facilities goods and materials valued in excess of \$5000 directly to points located outside the State of New Jersey. It is admitted, and I find, that AT&T is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

ECS is a corporation with an office and place of business in Highland Park, New Jersey, where it is engaged in providing commercial cleaning services. ECS during its normal course of business between March 31, 1989, and March 31, 1990, provided cleaning services for various AT&T facilities located in New Jersey valued in excess of \$50,000. It is admitted, and I find, that ECS is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Thru State is a corporation with an office and place of business in Fanwood, New Jersey, where it is engaged in the business of providing commercial cleaning services for various commercial buildings. During the normal course of its business during the period between March 30, 1988, and March 30, 1989, it provided services in excess of \$50,000 for corporations located in the State of New Jersey which are directly engaged in interstate commerce. Thru State admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Union and Local 734 are admittedly, and I find, labor organizations within the meaning of Section 2(5) of the Act.

Beginning in the late 1960s AT&T started to operate certain facilities in New Jersey. According to the credible testimony of Eugene McNany, then the controller of the 195 Broadway Corporation, a corporation within the AT&T overall corporate structure<sup>2</sup> with responsibility for AT&T's real estate operations, AT&T officials including McNany met with John and Vincent Giblin, officers of the Union. During this meeting McNany stated AT&T knew that it was going to employ operating engineers at some facilities as its own employees as well as subcontracting engineering and cleaning service work, and it wanted to deal with a reliable labor organization, namely, the Union. After this initial meeting the Union negotiated the essential terms of a collective-bar-

<sup>1</sup> This case was a long and complex case. All counsel, throughout the course of trial and in their briefs demonstrated the very highest quality of legal excellence.

<sup>2</sup> ATT is composed of many different corporations, all wholly owned and operated by AT&T which were set up to perform various operations for AT&T. There is no dispute that the 195 Broadway corporation and other corporations described below were part of AT&T.

gaining agreement which was signed by AT&T's initial cleaning contractor, McLean.<sup>3</sup> The agreement covered a certain AT&T facility in Piscataway, New Jersey.

Thereafter, and through at least 1987, the Union represented the employees of the cleaning contractors subcontracted by AT&T to service AT&T's Piscataway facilities, and operating engineers employed by other contractors to perform engineering services for AT&T at the same locations.

During the years through at least 1987, AT&T took over other facilities in New Jersey and collective-bargaining agreements were entered into with the Union on behalf of other mechanical and cleaning contractors in the same manner as described above. From time to time there were changes in the contractors, however the Union always represented the employees of the successor contractor, because it was understood by the bidding contractors that the job was a union job. All collective-bargaining agreements between the Union and the contractor had the same expiration dates and were for terms of 3 years.

According to the credible testimony of Giblin, negotiation of the service and mechanical contractors contracts was handled directly by Giblin for the Union, and Fran Wetzel and John Bladder of AT&T. At some later point in time Giblin negotiated both the service and mechanical contracts directly with Thomas Stomski, AT&T building manager of operations. As new jobsites opened up in Piscataway, Giblin would negotiate directly with Wetzel as to the essential terms for the cleaning service and mechanical contracts. Wetzel would inform the contractors bidding on the various jobs as to the essential terms (pay rates) and the contractors aware of the essential terms would frame their bids with these terms in mind. When AT&T selected the contractors, Wetzel would inform Giblin and Giblin would mail a copy of the Union's collective-bargaining agreement which the contractor would sign and return. Eventually, Giblin conducted the same negotiations with Stomski.<sup>4</sup> Sometime in 1984, after divestiture of AT&T Giblin called Stomski and told him he was having a labor problem reaching a collective-bargaining agreement with a contractor, Joule, at AT&T's facility in Hopewell, New Jersey. Stomski referred him to Jim Griggs of AT&T. Giblin contacted Griggs and negotiated a collective-bargaining agreement with Griggs covering Joule's employees. Joule refused to sign the agreement and AT&T terminated Joule. Although Griggs was not called as a witness a court deposition substantially corroborates Giblin's testimony. There is no evidence that any of the subcontractors employed by AT&T, whether service or mechanical ever negotiated collective-bargaining agreements directly with the Union, nor is there any evidence that the Union organized the employees employed by these contractors.

<sup>3</sup> Vincent Giblin essentially corroborated McNany's testimony except that he mistakenly testified that AT&T Official Stan Smith was present. I conclude that Giblin was a very credible witness, notwithstanding some errors in recollection some inconsistencies. I was particularly impressed with his demeanor and with his overall excellent recollection of relevant details. Throughout his testimony, he appeared to be reliving many of meetings to which he testified.

<sup>4</sup> Neither Wetzel nor Bladder testified. Stomski testified and denied such negotiating. For reasons set forth below I conclude that Stomski is an incredible witness.

As set forth above, ECS was a cleaning contractor who performed cleaning services for AT&T. Daniel Mannix was the president and sole owner of ECS. Mannix credibly testified<sup>5</sup> that sometime in 1984, ECS had been awarded various cleaning contracts for AT&T facilities at various locations throughout northern New Jersey. Mannix was friendly with Thomas Stomski who advised him, along with other AT&T officials, that the facilities were "Union" facilities and the amount of the labor rates negotiated between AT&T and the Union. Mannix then submitted bids for these facilities using the labor rates supplied to him by Stomski and other AT&T officials in formulating his bid. He received his award based on his low bid. On being notified by AT&T of his award, he went to the offices of the Union where he was given an agreement containing the labor rates negotiated between AT&T and the Union which he signed without any negotiation.

Sometime prior to 1985 AT&T and Tower Developers, a commercial real estate developer formed a partnership, Tower Center Associates (Tower), for the purpose of building and running a facility called the Tower Center complex which was to consist of two office buildings and a hotel. The partnership agreement provided that Tower Developers was to be the managing partner and receive 51 percent of the interest in the partnership for the purpose of distribution of profits. AT&T was to receive 49 percent. However, overall management of the venture was to be shared collectively between the partners.

On September 15, 1985, Tower entered into a lease with AT&T as a tenant for the occupancy of the entire Tower One building. The lease was for a term of 15 years. As the sole tenant of the building, AT&T was responsible for the payment of operating expenses, which included cleaning costs of the building. In this connection the lease provided that AT&T had the exclusive right to select cleaning contractors to provide the necessary cleaning services.

Sometime during the summer of 1985, Mannix, who was friendly with Stomski, met with Stomski and asked him if he could use his influence to have him selected as the cleaning contractor for AT&T when it commenced its occupancy of Tower One. Stomski agreed. It appears that up through the summer of 1985, Stomski had responsibility for staffing and plans for operating the building. From summer of 1985 through March 1987 this responsibility was transferred by AT&T to Jerry Twardy, an AT&T building manager. The building manager of Tower was Steve Herzog, an employee of Tower Developers. Herzog testified that as the representative of the landlord, Tower, which owned the entire complex, of which AT&T was the sole tenant of Tower One, he was concerned with the welfare of the entire complex, rather than only with the maintenance of Tower One. In accordance with such concern, Herzog obtained an oral agreement from Twardy to permit him to select the cleaning and mechanical contractors for Tower One notwithstanding the lease between

<sup>5</sup> Mannix was called as a witness by counsel for the General Counsel pursuant to Rule 611(c) of the Federal Rules of Civil Procedure. ECS is a respondent to this proceeding and Mannix was a hostile witness. I have credited his testimony set forth below as it is to an extent, an admission against his interest, and because of his presumed and demonstrated hostility against the positions of General Counsel and the Union, such testimony is entitled to a high degree of credibility.

Tower and AT&T which gave exclusive authority for such selection to AT&T. From March 1987 and thereafter, Stomski had authority for the building operations of Tower One. At all times he was in a much more responsible position than Twardy since he was in charge of AT&T's building operations over a wide geographic area which covered several States rather than a single building, which defined Twardy's authority. Pursuant to Mannix's request and since Stomski was pleased with ECS' services at AT&T's other facilities, Stomski recommended to Herzog that ECS be selected as the cleaning service contractor for Tower One.

On December 1985 Giblin of the Union met with Jack Larkin, president of Larkin Services Corporation, the mechanical service contractor who had been selected by AT&T as the low bidder for the Tower One building, and Stomski. Giblin was present because it had already been decided by Herzog, Twardy, or Stomski, or any combination of them, on behalf of AT&T that Larkins' employees were going to be covered by the Union. Giblin credibly testified that from talking to Larkin prior to the meeting he was informed that AT&T wanted a reduction in the labor rate from the Union's current area rate as a precondition to a union contract between Larkin and the Union. Giblin credibly testified that Stomski stated that he wanted to staff Tower One with Larkin as the mechanical contractor and ECS as the cleaning contractor, but required a lesser labor rate from the Union's current area rate. Stomski then stated that he wanted ECS to be nonunion. Giblin told Stomski that he couldn't agree to that. Giblin insisted that any agreement would have to include that all employees employed by Larkin and ECS would have to be union employees. After considerable discussion, Stomski stated he would agree on the cleaning employees and mechanical employees being Union if the Union would agree to a rollback in the wage rate. Giblin stated that he could agree to a rollback as long as there was a catchup at some later fixed point in time. Stomski agreed to this in principal. It was ultimately agreed that Giblin would get together with Larkin, come up with some reduced labor rates, and that Larkin would take these numbers back to Stomski.<sup>6</sup>

<sup>6</sup> As set forth above, I found Giblin to be a credible witness. I find his testimony in this connection particularly credible because of Giblin's detailed testimony which I do not believe could so easily be fabricated. Moreover, there would have been no reason for his presence at this meeting unless it was just such issues that were being discussed. Stomski incredibly testified that the meeting was set up because Giblin did not really believe in the reality of the divestiture of AT&T. Stomski testified that during the entire meeting he explained the divestiture process that had taken place. I find such testimony incredible for four reasons. First, I was particularly unimpressed with the demeanor of Stomski. He appeared nervous at times, was evasive at other times, and vague at other times during the course of his testimony. Second, his entire testimony consisted essentially of denials concerning this conversation and almost all other relevant conversations, prior to and subsequent to the instant conversation with Giblin, as contrasted with Giblin's detailed testimony as to these other conversations. Third, if the conversation were about divestiture, there would be no reason for Larkin's presence. and fourth, divestiture had taken place 2 years prior to this meeting. Giblin had had prior discussions with Stomski concerning the effects of divestiture at the time it had gone into effect. If at this late date Giblin still had some lingering questions concerning divestiture, he could have called Stomski, or some other AT&T official on the phone, or called his attorney. In any event there was clearly no rea-

Pursuant to the December agreement, Giblin met with Jack Larkin Sr. on January 13 and worked out an agreement to roll back the labor rate for Larkin. Giblin also told Larkin that he would roll back the labor rate for ECS to the 1984 Piscataway area rate. Giblin told Larkin that this agreement was conditioned on a catchup in the next collective-bargaining agreement. Larkin was to get back to Stomski with these rates.

On January 15, 1986, Herzog, by letter informed Larkin that he had been selected as the mechanical contractor, and a collective-bargaining agreement was executed between Larkin and the Union which included the agreed-upon rates.

Giblin, believing that since AT&T was agreeable to the rates worked out for the Larkin agreement was also agreeable to the rate suggested for ECS, pursuant to his January 13 meeting with Larkin, told Steven McQuire, a union business representative, to mail Mannix a labor agreement with the supposedly agreed-upon labor rate. McQuire mailed out such contract. Shortly thereafter, Mannix called the Union and told McQuire he couldn't pay those rates.<sup>7</sup>

On January 17, 1986, Giblin and McQuire met with Mannix who told them that the rates were too high, presumably because AT&T would not agree with these rates. Mannix never cared what the rates were as long as they were agreeable to AT&T. Giblin credibly testified he walked to another room and placed a call to Stomski in an effort to work this out. Stomski was unavailable. Giblin then put in a call to Larkin Sr., told him the problem, and asked him to contact Stomski. (Giblin, Larkin, and Stomski were socially friendly with each other.) Larkin contacted Giblin a few minutes later and informed him as to a slightly lower set of rates that AT&T presumably would agree to.<sup>8</sup> Giblin returned to Mannix, showed him the rates which Mannix indicated were acceptable. Mannix essentially corroborated Giblin, except that he testified that he initially presented the rates that AT&T was looking for to Giblin.<sup>9</sup> Giblin then told Mannix not to forget that there would be a catchup in the rates for the next contract.<sup>10</sup> A collective-bargaining agreement was

son to set up a special meeting to discuss something that was by now ancient history. I have no problem concluding that Stomski is not a credible witness.

I note that no party called Larkin as a witness. This is too bad. His testimony would have probably been most helpful. However, I do not find the failure of General Counsel to call Larkin in any way affects the credibility of Giblin.

<sup>7</sup> I conclude that Giblin's January 13, 1986 meeting with Larkin, his agreement with Larkin as to the rollback rate which was ultimately accepted by AT&T and incorporated in the Union's collective-bargaining agreement with Larkin, reinforces my credibility resolution concerning the December 1985 meeting with Stomski. I also believe that Giblin would not have been responsible for mailing out a collective-bargaining agreement to ECS with a rolled back labor rate unless he was acting pursuant to what he believed was an agreement with Stomski agreed upon during the the December 1985 meeting.

<sup>8</sup> Giblin testified that Larkin told him he had reached Stomski and that the numbers came from Stomski. There was a hearsay objection as to this testimony which was sustained.

<sup>9</sup> Either way the testimony supports Giblin's testimony as to the December 1985 meeting with Stomski.

<sup>10</sup> Mannix denied this conversation. In view of my credibility resolutions concerning Giblin and Mannix set forth above, I credit Giblin.

prepared with the new rates and Mannix signed it. The agreement was for a 3-year term; it did not include a catchup provision.

On or about February 24, 1986, ECS and Tower Center Associates (Tower) executed a service agreement. The costs of ECS day cleaners were billed directly to AT&T with Tower as a clerical intermediary, with the costs of the night porters billed to Tower and passed through to AT&T to the extent these costs exceeded base year allowances. The direct billing arrangement for the day porters was adopted because the day porters were there pursuant to AT&T's request.

In January 1989, the Union prepared a new collective-bargaining agreement with a labor rate proposal that incorporated what Giblin believed was the catchup proposal agreed to between the Union and AT&T. This agreement was mailed to Mannix during the first week in February. A day or so later, Mannix, contacted Herzog about the proposed union agreement and Herzog informed him the rates were too high. Mannix then called Giblin and informed him of Herzog's position. Giblin told Mannix that the rates were what AT&T had agreed to in 1986.

Giblin thereafter called Stomski and told him of his conversation with Mannix and reminded him of the catchup deal he believed he had with AT&T. Stomski denied that he had made any such deal.<sup>11</sup> Giblin then called Herzog, but Herzog would not take his call. Giblin then called John O'Brien an AT&T vice president of building operations and told him about the catchup agreement. O'Brien told Giblin that the Union's rates were excessive but that he believed the matter could be worked out.

During this period Herzog and Stomski conferred about the Union's proposed agreement and agreed that the proposed rates were too excessive. On February 9, Herzog wrote a memo to Geoffrey Hammond, an AT&T official, which stated that although AT&T might not want to dispute the rate increase, it created a difficult situation for Tower Two and the hotel. Herzog recommended the cleaning service contract be rebid.

In a letter dated February 16, Herzog informed Mannix that the cleaning contract would be put out for rebid because the union rates were too excessive. Mannix responded by a letter dated February 20 to Herzog informing him that he was terminating his relationship with the Union and proposed a more modest wage increase in a new nonunion contract.

On February 27, Mannix conducted two meetings, one with the day employees and the second with the night employees. At these meetings Mannix told his employees that their collective-bargaining agreement with the Union was expiring the next day and that without the Union in the shop they might not lose their jobs. Mannix told the employees that the the best way to save everybody's job was to sign a petition and vote the Union out. He pointed out that if the employees agreed to this they could put their names on a petition. A petition was circulated and the employees signed the petition. A similar meeting was conducted and a petition circulated among the night employees.<sup>12</sup>

<sup>11</sup> Stomski completely denied this conversation. For the reasons set forth above, I do not credit Stomski.

<sup>12</sup> The evidence set forth in the above paragraph is based on the credible testimony of Harriette Neyor and Kabba Kamara. I found both of these witnesses gave detailed and mutually corroborative testimony on this issue as well as testimony concerning ECS's day-to-

On February 28, Union Representative McQuire received a telephone call from Neyor who told him of the planned decertification petition to be filed with the Board. McQuire went to visit Tower One. Union officials were permitted to visit the Tower One facility to conduct union business provided they followed certain security procedures. McQuire credibly testified that he had made a number of visits to this facility and was familiar with the security procedures and that he followed the established procedures on his February 28 visit which included signing in at the AT&T security desk and obtaining a badge. After obtaining his badge he went to the ECS office where he met ECS Supervisors Razzaq and Chessman. He told them that their meetings with the employees were illegal. Chessman left the office and returned a few minutes later with George Thompson, an AT&T supervisor and a security officer. Thompson accused McQuire of being in the building without proper authorization. McQuire said he had a badge. Thompson claimed he had not signed in and was unauthorized. Rather than pursue the matter McQuire left.<sup>13</sup>

ECS employees continued to perform cleaning services for AT&T at Tower One until March 31. On March 3, the Union filed unfair labor practice charges which formed the basis of the instant complaint. Following the filing of such charges Giblin continued to press for negotiation of a new collective-bargaining agreement with ECS by contacting AT&T officials and Mannix from ECS. On March 13, Giblin spoke with Jack Pierson, an AT&T supervisor who reported to O'Brien. Giblin suggested extending the ECS agreement from month to month pending a resolution of the Union's charges with the Board. Giblin proposed reduced labor rates from those originally proposed in the original agreement submitted to Mannix. Pierson stated that he would take it up with O'Brien. Some days later O'Brien called Giblin and told him that ECS was being terminated and that a new cleaning contractor would be employed. During this same period Giblin also called Mannix and proposed significantly reduced rate proposals over the original rate proposals. Mannix told Giblin that it was too late.

On March 31, the ECS employees were terminated. At some point in time in March, Thru State and Tower entered into a contract for Thru State to perform the cleaning services for the One Tower. Thru State was presently performing

day operations, which was relevant concerning the issue of AT&T and ECS alleged as a joint employer. Their testimony was generally candid and forthright, especially on cross-examination, and generally consistent with their direct. Mannix admitted calling these meetings and speaking with the employees concerning his AT&T and the Union. He denied recommending that a decertification petition be circulated, but admitted that in response to questions he explained the procedure. In view of my unfavorable credibility resolution concerning Mannix set forth above, I do not credit his testimony.

<sup>13</sup> Chessman and Thompson testified that McQuire was asked to because he did not have a badge. I credit the testimony of McQuire. McQuire had made frequent visits to this facility before and was familiar with the proper procedure for entry. Since he was on legitimate union business, there is no reason why he would not follow such established procedure. On the other hand AT&T and ECS, anxious to avoid any possible labor problem given the present situation with the Union, might very well be motivated to restrict such visit by McQuire. Moreover, as set forth below I do not find Chessman and Thompson to be credible witnesses based on their testimony concerning the joint employer status of AT&T and ECS.

cleaning services for Tower Two. On April 1, Thru State and Local 734 entered into an initial collective-bargaining agreement. As of this date Local 734 had obtained an authorization card from a majority of the Thru State employees performing cleaning services for Tower Two. At this time there were no employees hired by Thru State to perform cleaning services for Tower One. On April 3, Thru State began performing cleaning services for Tower One with 37 nonunion employees that were hired on or about March 31 by Thru State. No employees formerly employed by ECS were hired by Thru State. Local 734 obtained authorization cards for these employees on March 5.

During the period that ECS performed cleaning services for AT&T the ECS employees were under the supervision of ECS Supervisor Jeff Chessman. He hired employees when necessary and also fired or disciplined employees when necessary. In addition he also made most of the daily work assignments. However, ECS employees (porters) Neyor and Kamara testified credibly that on a daily basis Thompson, an AT&T supervisor, was present in the morning in the ECS office, that he looked over the timecards, that he made some work assignments to ECS employees on a more or less daily basis as cleaning problems came up and Chessman was not in the area. There were other occasions when Thompson told Chessman to increase or decrease the number of ECS employees performing various tasks in different locations of the building.<sup>14</sup>

#### Analysis and Conclusions

The central issue in this case is whether AT&T and ECS are joint employers.

The Board has held that one employer is a joint employer with another employer when the employers share or codetermine matters governing the essential terms and conditions of employment of the other employer's employees. *Clinton's Ditch Co.*, 274 NLRB 728 fn. 3 (1985). The Board agreed with the administrative law judge that where an employer sought to be named as a joint employer, participates in the collective-bargaining process of the other employer's employees, or is involved directly or indirectly in the wages or other terms of employment such participation in negotiations and control, direct or indirect, is sufficient to establish a joint employer relationship. *Id.* at 738, 739. Similarly, the Board has held that where an employer has demonstrated authority to determine labor relations policies and terms and conditions of employment of the employees of another employer then it is a joint employer with such other employer. *Pulitzer Publishing Co.*, 242 NLRB 35, 36 (1979). In *Pulitzer* such authority was found to exist based on a finding that during the final negotiating session between the union and Berberich, Pulitzer's director of labor relations, negotiated with representatives of the union on those issues which were

holding up a final agreement, the most important of which was a productivity bonus for Berberich's employees.

The credited facts in this case concerning the Giblin December 1985 meeting with AT&T's representative Stomski establishes that the Union dealt strictly with AT&T to establish whether the shop was to be a union shop and if so what the pay rates were to be. After such agreement was reached a contract would be prepared and ECS would sign it. There were no negotiations with ECS. During this meeting, Stomski stated he wanted to staff Tower One with Larkin as the mechanical contractor and ECS as the cleaning contractor. Stomski initially told Giblin that the Union could represent Larkin's employees, but at a lower labor rate than the Union's current area standard. However, he wanted ECS to be nonunion. When Giblin insisted that the cleaning service contract must be Union, Stomski agreed but insisted that there would have to be a rollback in the rate. Giblin agreed providing there was a catchup when the next agreement would be negotiated. It was ultimately agreed that Giblin would come up with some numbers for both Larkin and ECS which would reflect their agreement. Ultimately, such numbers were agreed on and collective-bargaining agreements were executed between the Union and Larkin and ECS. However, there was no negotiation between the Union and the contractors. All negotiations were between Union Representative Giblin and AT&T Representative Stomski. There was no catchup provisions provided for in the agreements.

The facts further establish that all prior agreements between the Union and the mechanical and cleaning contractors performing work for AT&T were always negotiated in the same manner from the late 1960s when AT&T first began operating out of New Jersey to date. The negotiations as to the rates contained in the service contracts ultimately executed between the service contractor and the Union were negotiated entirely between AT&T and the Union. AT&T would then release the agreed-upon labor rates to the mechanical and cleaning contractors bidding on the job and select the low bidder who would then execute without negotiation, the collective-bargaining agreements prepared for them with the rates agreed on with AT&T.

Accordingly, I conclude that based on AT&T's negotiation for the essential labor rates at the 1986-1989 collective-bargaining agreement between ECS and the Union, AT&T was a joint employer with ECS.

The General Counsel contends that AT&T exercised such control over the day-to-day operations of ECS employees at its Tower One facility that by such control a joint employer relationship was established. In this connection it was established that all hiring, firing, and discipline of ECS's employees was handled exclusively by ECS supervisors. In addition, ECS supervisors also made most of the daily work assignments. However, there were occasions on a daily basis that AT&T Supervisor Thompson also made work assignments. In addition there were other occasions when he would increase or decrease the number of ECS employees assigned by an ECS supervisor to perform a given cleaning task. Thompson was also present on a daily basis in the ECS office and looked over the timecards of ECS employees.

The Board has held that when one employer exercises extensive control over another employer's employees, a joint employer relationship is established. *W. W. Grainger, Inc.*, 286 NLRB 94, 96 (1987). However the facts in *Grainger*,

<sup>14</sup>Both Neyor and Kamara impressed me as credible witnesses. Their testimony was very detailed. They gave specific examples of such assignments. Moreover their testimony was forthright and consistent on both cross-and direct examination. Chessman and Thompson both essentially testified that Thompson never made such assignments. However, the corroborative and detailed testimony of Neyor and Kamara impressed me more than the bare denials of Thompson and Chessman.

are clearly distinguishable from the facts of the instant case. In *Grainger*, the employer exercised complete and exclusive control over the other employer's employees' daily work activities. Further, such control extended beyond the day-to-day direction of employees and included such matters as effectively recommending discipline, evaluating the work performance of employees, determining vacation time, and the right to require removal of employees.

It is clear the control exercised over ECS employees by AT&T falls far short of that exercised by *Grainger*, and in my opinion far short of the type of control necessary to establish a joint employer. However, since my finding of a joint employer status between AT&T and ECS is based on AT&T's collective-bargaining relationship with the Union, I conclude that its limited supervision of ECS employees and presence in ECS' office simply reinforces my conclusion of the joint employer relationship between AT&T and ECS.

It may be contended by AT&T that during the December 1985 period, Stomski had no authority to bargain or select contractors for AT&T. I find such contention without merit. The lease between Tower and AT&T gave AT&T the exclusive right to select the cleaning and mechanical contractors for Tower One. Moreover, Stomski was an important AT&T official with broad authority and responsibilities concerning the selection of contractors and engaging in collective-bargaining negotiations with labor organizations, particularly the Union throughout all of AT&T's New Jersey facilities. Therefore, I conclude that at all times material, including the December 1985 meeting, Stomski had actual, or at the very least, apparent authority to bargain with the Union and select or effectively recommend the selection of contractors for AT&T at Tower One.

Both AT&T and Tower contend that it was Tower which had the authority to select the mechanical and cleaning contractors at the Tower One facility, and not AT&T. In this connection, the lease between Tower and AT&T for the Tower One facility clearly and unequivocally vested sole and complete authority in AT&T, the tenant of Tower One, to select such contractors. I conclude the terms of such legal instrument binding. Clearly the Union had a right to rely on the terms of the lease agreement. Moreover, its initial dealings concerning obtaining an agreement to select union cleaning and mechanical contractors were with Stomski, an AT&T official with whom the Union had other similar dealings with at other AT&T facilities in New Jersey. In any event, nobody from AT&T or Tower ever informed the Union that AT&T did not have authority to select contractors and negotiate with the Union as they had always done in the past, or that contrary to the specific terms of the lease between AT&T and Tower, AT&T had surrendered its right to select such contractors. Therefore, I conclude that any decision by AT&T as tenant to delegate its powers to Tower (of which AT&T was an equal partner) and specifically to Herzog, an agent of Tower, amounted to a decision to select Tower and Herzog as its agent. This is a basic principal of agency. Restatement, 2d *Agency* § 1. Moreover, AT&T was an equal partner with the Landis group in Tower and any attempt by AT&T, the tenant in Tower One, to separate itself from the actions of Tower, of which it is an equal partner, amounts to no more than a shabby attempt by AT&T, the tenant, to escape responsibility for its actions by attempting to shield itself behind its partnership.

Having concluded that AT&T and ECS are joint employers, the next issue to be resolved is whether AT&T was required to bargain with the Union concerning its decision to replace ECS as its cleaning contractor at the Tower One facility. There is no dispute that at the time the ECS agreement with AT&T expired, the Union was the collective-bargaining representative of ECS' employees.

The Board has held that an employer violates Section 8(a)(5) of the Act by failing to bargain with a union concerning a decision to subcontract out work. In *Otis Elevator Co.*, 269 NLRB 891 (1984), The Board interpreted the Supreme Court's decision in *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), as follows: "The critical factor to determine whether the decision is subject to mandatory bargaining is the essence of the decision itself, i.e., whether it turns upon a change in the nature or direction of the business, or turns upon labor costs; not its effect on employees nor a unions ability to offer alternatives." The Board also held that included within Section 8(d) of the Act are all decisions which turn on a reduction of labor costs. See also *Dubuque Packing Co.*, 303 NLRB 386 (1991) (which involved a decision to relocate rather than to subcontract). The Board has also held such obligation extends to a joint employees situation similar to the instant case. *W. W. Grainger, Inc.*, supra; *Clinton's Ditch Co.*, supra; and *Summaid Growers of California*, 239 NLRB 346 (1978).

The facts of the instant case conclusively establish that ECS was terminated by AT&T exclusively because in AT&T's opinion the labor rates proposed by the Union were too high. This is evidenced by Mannix's credible testimony that in 1989 when he presented the Union's proposed rates to Herzog, he was told by Herzog that such rates were unacceptable. When Giblin was so informed by Mannix he attempted to contact Stomski but when unable to do so contacted AT&T Representative O'Brien who confirmed that the Union's proposed rates were too high. Later, on or about March 13, 1989, Pierson, an AT&T representative, spoke with Giblin concerning the rates proposed by the Union. Giblin indicated he was flexible on the rates and suggested the possibility of extending the ECS contract on a month-to-month basis, but AT&T was unwilling to do so.

Accordingly, I conclude that AT&T by replacing ECS with Thru State failed to bargain with the Union concerning its decision to discontinue ECS in violation of Section 8(a)(5) of the Act. Moreover, since the decision to discontinue the services of ECS was clearly motivated by the labor rate demands of the Union, I further conclude that the resulting termination of the ECS employees is violative of Section 8(a)(3) of the Act. In view of my finding that AT&T and ECS are joint employers, I also conclude that AT&T and ECS, joint employers, violated Section 8(a)(1), (3), and (5) of the Act.

Counsel for the General Counsel contends that during the December 1985 meeting, Stomski agreed with the Union to provide for a catchup in the rates in the succeeding 1989 collective-bargaining agreement equal to those of employees covered by contracts between the Union and cleaning contractors at AT&T facilities in the Piscataway area, in exchange for the rollbacks agreed to for the 1986 agreement. However, the specific terms of such catchup were never agreed on, nor was such catchup agreement included in the written 1986-1989 collective-bargaining agreement ulti-

mately executed between ECS and the Union. The Board does not permit evidence of an oral agreement to vary the terms of a written agreement, *NDK Corp.*, 278 NLRB 1035 (1986). Accordingly, I conclude there is insufficient evidence to establish the existence of a catchup agreement to be contained in any future collective-bargaining agreement executed between the Union and AT&T as a joint employer with ECS.

The credible testimony of ECS employees Neyor and Kamara clearly establishes that Mannix, in an attempt to maintain its cleaning contract with AT&T, solicited its employees to sign a petition authorizing the filing of a petition to decertify the Union. Such testimony is corroborated by Mannix's February 20, 1989 letter to Herzog stating his decision to sever his relationship with the Union. I conclude such solicitation is violative of Section 8(a)(1) of the Act. *Yellowstone Plumbing*, 286 NLRB 993, 1002 (1987). Since I have concluded that AT&T and ECS are joint employers, I conclude that AT&T and ECS violated Section 8(a)(1) by unlawfully soliciting a decertification petition.

The credible testimony of Union Representative McQuire establishes that on February 28, immediately after being informed of Mannix's attempt to solicit a decertification petition, he visited the Tower One facility and after complying with the appropriate procedures of signing in and obtaining a visitor's badge, attempted to meet with Mannix to discuss his attempt to decertify the Union. He so informed ECS Representative Chessman of such intention. Chessmen left and contacted AT&T Representative Thompson who confronted McQuire and told him he had to leave, notwithstanding McQuire's insistence that he had followed the proper procedure for visitation and had a right to be present. I conclude that given ECS' and AT&T's knowledge of the purpose of McQuire's visit and their concern that he might cause labor problems they asked him to leave, notwithstanding his compliance with visitation procedures and his legitimate union purpose for such visit. I further conclude that by such action AT&T and ECS as a joint employer violated Section 8(a)(1), *Walton Mfg. Co.*, 126 NLRB 697 (1960).

It is not disputed that Thru State recognized and signed a collective-bargaining agreement with Local 734 on March 31, 1989, at a time when it employed no employees to service Tower One. Thru State employees began servicing Tower One on April 1, but did not sign Local 734 authorization cards until April 5. I conclude that such conduct by Thru State constitutes unlawful assistance in violation of Section 8(a)(1) and (2) of the Act.

#### CONCLUSIONS OF LAW

1. AT&T is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. ECS is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
3. At all times material, AT&T and ECS are joint employers of the employees of ECS.
4. Thru State is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
5. The Union and Local 734 are labor organizations within the meaning of Section 2(5) of the Act.
6. At all times material, the following unit of employees constitutes a unit appropriate for bargaining within the meaning of Section 9(b) of the Act:

All custodial maintenance employees and related categories of employees employed by ECS at AT&T's Tower One facility.

7. AT&T and ECS, as joint employers, failed and refused to bargain collectively with the Union concerning the decision to discontinue the services of the employees described above in paragraph 6 of this section within the meaning of Section 8(a)(1) and (5) and Section 8(d) of the Act.

8. AT&T and ECS, as joint employers, discriminated and terminated the employees described and set forth in paragraph 6 of this section, because of the rates of pay and other terms and conditions of employment proposed by the Union in collective-bargaining negotiations with the joint employer, in violation of Section 8(a)(1) and (3) of the Act.

9. AT&T and ECS, as joint employers, initiated, encouraged, and circulated a petition among the employees set forth and described in paragraph 6 of this section, seeking to decertify the Union in violation of Section 8(a)(1) of the Act.

10. AT&T and ECS, as joint employers, prevented and evicted a union representative from meeting representatives of ECS and the employees set forth and described above in paragraph 6 of this section, at AT&T's Tower One facility in furtherance of their unlawful activities described above in paragraph 9 of this section.

11. Thru State unlawfully assisted Local 734 by granting recognition and executing a collective-bargaining agreement with Local 734 covering its service employees performing cleaning services for AT&T at its Tower One facility, notwithstanding that Local 734 did not represent a majority of such employees, in violation of Section 8(a)(1) and (2) of the Act.

#### REMEDY

As the Supreme Court observed "our task in applying Section 10(c) is to take measures designed to recreate the relationships that would have been had there been no unfair labor practice." *Franks v. Bowman Transportation*, 424 U.S. 747, 769 (1975). Therefore, I conclude that ordering Respondents AT&T and ECS, as joint employers, to bargain with the Union concerning the decision to intimate ECS with the resultant layoff of its employees performing work at Respondent AT&T's Tower One facility and to reinstate such employees with backpay, constitutes the appropriate remedy for such decision bargaining violation *Lapeer Foundry & Machine*, 289 NLRB 952, 955 (1988). The joint employer's backpay liability shall run from the date of the layoffs until the date the employees are reinstated to their same or substantially equivalent positions or have secured equivalent positions of employment elsewhere. Backpay shall be based on the earnings the employees would have received during the applicable period less any interim earnings computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Respondents AT&T and ECS, a joint employer, shall also be ordered to bargain with the Union concerning the decision to terminate the services of ECS at the Tower One facility causing the layoff of its employees, and the effects of that decision, *Lapeer Foundry & Machine*, supra.

I shall also recommend that Respondent Thru State be ordered to withdraw and withhold recognition from Local 174

as the collective-bargaining representative of its employees at the Tower One facility unless a free and uncoerced majority of Respondent Thru State's employees, within an appropriate unit designate Local 174 as their representative. I shall further recommend that Respondent Thru State reimburse its employees assigned to work at Tower One for any dues, ini-

tiation fees, or other moneys deducted from their wages and paid to Local 174 pursuant to the collective-bargaining agreement between Thru State and Local 174 covering its employees at Tower One, together with interest as computed above.

[Recommended Order omitted from publication.]