

**Nathan Katz Realty Co. and NMR Realty and Local 32B-32J, Service Employees International Union, AFL-CIO and Local 187, Factory and Building Employees Union, Party in Interest.** Cases 29-CA-16378 and 29-CA-16390

April 27, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS  
AND BROWNING

On September 27, 1994, Administrative Law Judge Eleanor MacDonald issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the judge's decision.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions and to adopt the recommended Order as modified.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondents, Nathan Katz Realty Co. and NMR Realty, Queens, New York, their officers, agents, successors, and assigns, shall take the action set forth in the Order as modified below.

1. Add the following sentence to paragraph 1(d) of the Order.

“. . . This should not be construed to require or permit the varying or abandoning of any provision that increased wages and benefits over those which previously existed.”

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

<sup>1</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

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 instruct you not to contact labor organizations.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting Local 32B-32J Service Employees International Union, AFL-CIO or any other Union, and we will not inform you that you are being discharged because you joined the Union.

WE WILL NOT assist or contribute support to Local 187, Factory and Building Employees Union, by recognizing such labor organization as the exclusive representative of our employees for the purpose of collective bargaining at a time when such labor organization does not represent a majority of our employees in an appropriate unit.

WE WILL NOT give effect to, perform, or in any other manner enforce the collective-bargaining agreement executed with Local 187 on or about February 15, 1992, or any modification, extension, renewal, or supplement thereto, or any superseding agreement. This should not be construed to require or permit the varying or abandoning of any provision that increased wages and benefits over those which previously existed.

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

WE WILL offer Joseph Kutyla immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL notify him that we have removed from our files any reference to his discharge and that the discharge will not be used against him in any way.

WE WILL withhold recognition from Local 187, Factory and Building Employees Union as your representative unless it has been certified by the Board as your exclusive collective-bargaining representative.

NATHAN KATZ REALTY CO. AND NMR  
REALTY

*Laura H. Kriteaman, Esq. and Rhonda Aliout, Esq.*, for the General Counsel.

*Robert Lipman, Esq. (Lipman & Plesur)*, of Jericho, New York, for Respondent Nathan Katz Realty Co.

*Ira A. Sturm, Esq. (Manning, Raab, Dealy & Sturm)*, of New York, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ELEANOR MACDONALD, Administrative Law Judge. This case was tried in Brooklyn, New York, on January 13, 1994. The consolidated complaint, which named Nathan Katz Realty Co. as the only Respondent, alleged that Respondent Katz, in violation of Section 8(a)(1), (2), and (3) of the Act, directed employee Joseph Kutyla to refrain from joining or supporting Local 32B-32J; informed Kutyla that his discharge was due to his membership in Local 32B; and discharged Kutyla because he joined Local 32B. The complaint also alleged that Respondent Katz recognized Local 187 and entered into a collective-bargaining agreement with Local 187 notwithstanding that Local 187 did not represent a majority of its employees. On March 2, 1994, a stipulation was entered into by the General Counsel, Local 32B-32J, and Respondent Katz. On March 21, 1994, on motion of the General Counsel, the complaint was amended by adding certain allegations and by adding NMR Realty to the caption of the case as a Respondent. Respondent Katz filed an answer to the amended consolidated complaint. Although it was served with the General Counsel's notice of motion and other relevant documents, and although it was served with the order amending the consolidated complaint, NMR Realty did not file any opposition nor any answer herein.<sup>1</sup> Thereafter, on May 16, 1994, the record was closed and a date for the submission of briefs was set.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and by Respondent Nathan Katz Realty Co. in June 1994, I make the following<sup>2</sup>

FINDINGS OF FACT

I. JURISDICTION

Nathan Katz Realty Co., a partnership with its principal office at 41-33 75th Street, Elmhurst, New York, is engaged in the management of residential apartment buildings, includ-

<sup>1</sup>Miriam Katz, a principal of Respondent NMR Realty, attended the instant hearing and testified on behalf of Respondent Katz.

<sup>2</sup>My findings herein are based on the record made at the hearing and, as to Respondent Katz, they are also based on the stipulation of March 2, 1994. My findings as to Respondent NMR are based on the record and on the allegations in the amended consolidated complaint which are deemed admitted by NMR.

ing a residential apartment building located at 35-65 86th Street, Jackson Heights, New York. NMR Realty, a partnership with its principal office at 41-33 75th Street, Elmhurst, New York, is engaged in the ownership and rental of a residential apartment building located at 35-65 86th Street, Jackson Heights, New York. Respondent Katz manages the Jackson Heights building owned by Respondent NMR, collects all rental payments from the Jackson Heights building on behalf of Respondent NMR, hires and fires all employees employed at the Jackson Heights building, is the payroll agent for the Jackson Heights building and is reimbursed by Respondent NMR for payroll expenses at the Jackson Heights building, and conducts all labor relations for employees who work at the Jackson Heights building. Annually, Respondent Katz and Respondent NMR collectively derive gross rental revenues in excess of \$500,000 and receive at their New York locations, goods and materials valued in excess of \$50,000 directly from points outside the State of New York. Both Respondents herein admit, and I find, that Respondents are joint employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. It is not disputed, and I find, that Local 32B-32J, Service Employees International Union, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act, and that Local 187, Factory and Building Employees Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

1. Background

Nathan Katz testified that he is the owner of Nathan Katz Realty and a principal in NMR. For a number of years, the building at 35-65 86th Street had been served by a resident superintendent named Al Perfetti. According to Nathan Katz, Perfetti was "a 32B man," and an outstanding superintendent. Perfetti occupied a superintendent's apartment on the first floor of the building. He was covered by a collective-bargaining agreement between Respondent Katz and Local 32B-32J which provided on April 21, 1988, for a weekly wage of \$376.20 with annual increases thereafter in 1989 and 1990. In addition, payments were made on Perfetti's behalf to union funds for pension and medical insurance, and Perfetti was given paid holidays and vacation time. Perfetti was a full-time, 8 hours a day superintendent who was apparently much respected by the tenants of the building; he retired in September 1991.

Nathan Katz controls about 20 buildings through Nathan Katz Realty and NMR. As will be seen below, he makes all of the personnel decisions and controls the finances of the buildings.

2. Hiring of Joseph Kutyla

Joseph Kutyla testified that in September 1991, he was interviewed for the position of resident superintendent at the building located on 86th Street.<sup>3</sup> Kutyla was interviewed by Nathan Katz and by Jerzy (George) Gorczyn, the maintenance foreman of Nathan Katz Realty, who acted as inter-

<sup>3</sup>Kutyla's native tongue is Polish and he testified through an interpreter.

preference between Kutyla and Katz. Kutyla was informed of the duties of the superintendent's position and was informed that the job was his. Kutyla was told not to contact a union or other organization. In response to this instruction, Kutyla stated that if someone came from the Union, he would inform Katz and Gorczyn. Kutyla began work in September and he was given an apartment on the sixth floor of the building.

Kutyla testified that his immediate supervisor was Gorczyn. The latter visited the building once a week or once every 2 weeks and Kutyla saw him in the office once or twice a week when he went to request parts, supplies, and oil and to pick up checks. Gorczyn ordered all the supplies for the building. Kutyla was taught to operate the boiler by Gorczyn, the previous superintendent and a mechanic from the oil company. In addition, Miriam Katz, the daughter of Nathan Katz and a principal in NMR, visited the building once every 3 or 4 weeks to instruct Kutyla to fix vacant apartments and remove the coin receipts from the laundry room.

According to Miriam Katz, Kutyla was hired as a part-time superintendent to work about 20 hours per week. Nathan Katz, whose responsibilities include negotiating all contracts for the buildings, hiring and firing all employees, making all required contributions under any collective-bargaining agreements, and signing all the paychecks, stated that he did not apply the Local 32B contract to Kutyla. The record shows that Kutyla was paid \$200 per week; apparently no contributions were made to any funds in his behalf.

### 3. Kutyla's tenure as superintendent

Kutyla testified that after he had been at work for 1 month, Gorczyn permitted a painter named Kazic (Kazimierz Gurga), to live in the basement. Kazic had keys to the building. Kazic sometimes painted apartments in the building and he performed work in other buildings as well.

The front door of the building is kept locked and all the tenants have keys to this door. There is no doorman, but a buzzer and intercom system permits visitors to gain admittance to the building. Tenants in individual apartments press a button which unlocks the front door to admit visitors. A dentist has an office in the building; according to Kutyla, the dentist often buzzes people into the building without knowing their identity. The basement has side and back doors which are locked by means of a fire safety mechanism. The mechanism permits the door to be opened from the inside without a key, but a key is necessary to open the door from the outside. It is possible to prop the basement doors open with a device so that they will remain open.

Kutyla stated that he did not get complaints from the tenants about his work. Kutyla acknowledged however, that on January 9, 1992, Gorczyn gave him a letter when he went to the office. The letter, which is on Nathan Katz Realty letterhead and is signed by Nathan Katz, states:

We were informed by the tenants that you are not maintaining the building the way it should be.

1. The building is not kept clean.
2. The security of the building is lax by not making sure all doors around the surrounding buildings are locked.
3. You have friends that are drunk and sleep in public areas.

4. The washing machine has been broken into, which has never happened before.

5. There have been robberies which has never happened before.

6. You have been told to maintain the boiler by cleaning the oil filters once a week, you did not even do it once.

This is a warning to advise you that if you do not maintain the building you will be terminated from the job.

According to Kutyla, when he asked Gorczyn about the letter, Gorczyn replied that Kutyla should not worry about it.

Kutyla testified that he cleaned the oil filters on the burners once a week as he had been instructed to do. He acknowledged that there had been a break in to the laundry room. He denied that he permitted any one to sleep in the public areas of the building, and he pointed out that others had keys to the building and could have admitted strangers.

Miriam Katz, who testified that she visits all the buildings managed by Respondent Katz in order to check on the maintenance and investigate tenant complaints, stated that she visited the building on 86th Street about once a week. Miriam Katz testified that while Perfetti had been the superintendent, the building was very clean, the brass and mirrors were polished, the floors were clean and she never had complaints from the tenants. Once Kutyla began working in the building, it looked run down, the halls, stairs and lobby were dirty, there were cigarette butts and candy wrappers on the floors, the brass turned black, garbage compactor areas were overrun with roaches, and she got complaints from the tenants. Kutyla did not report elevator or roof alarm problems promptly, the basement doors were open, a drunk man was found in the laundry and garbage, and debris piled up. In addition, Kutyla did not perform simple jobs that he should have done such as replacing a washer.

Miriam Katz kept a diary of her visits to the various buildings controlled by her family. The diary shows that she made 11 entries about the building on 86th Street beginning on October 15, 1991, and ending on January 21, 1992. Miriam Katz testified that the purpose of keeping notes was to help her take any action that was required, to remind her to speak to Gorczyn and so that she could instruct Gorczyn to issue warnings to the supers. According to Katz, 99 percent of the times she visited a building, she wrote a note in her diary.

The 11 entries relevant herein may be summarized as follows:

October 15, 1991: elevator did not close on the 2nd and 3rd floors, dumpster required for garbage in back.

November 6, 1991: sidewalk and laundry room were dirty.

November 15, 1991: building is filthy with dirt on the floors and roaches.

November 22, 1991: Super to be instructed to empty garbage compactor at least once a day or as necessary.

November 29, 1991: halls dirty again, Super to be warned.

December 4, 1991: Gorczyn to talk to Super about sweeping sidewalk.

December 16, 1991: garbage chutes filthy and overrun with roaches.

December 27, 1991: front door locks broken yesterday.

January 7, 1992: two washers not working and Super did not notify office.

January 14, 1992: Super could not be found and building was filthy.

January 21, 1992: elevator stuck since last evening, Super did not notify office. Also various notes for renovating an empty apartment including note that Super should be taught to regrout the tub.

Miriam Katz testified that she asked Gorczyn to instruct Kutyla to keep the building clean and to mop and polish the floors, and that the latter reported back to her on four or five occasions that he had transmitted her instructions to Kutyla. Miriam Katz stated that the tenants were upset because the building was less clean and was infested with roaches and there was a drunken man in the laundry room. She also found that the sidewalk was dirty and that the back of the building was full of debris. Miriam Katz acknowledged that other buildings required extermination services for roaches.

Miriam Katz testified that she recommended to her father that Kutyla be discharged in November because he was failing to maintain the building, but that her father replied that Kutyla should be given another chance. She also recommended Kutyla's discharge at about the time of a tenant petition dated January 6, 1992. The petition was addressed to Nathan Katz and demanded that Kutyla be replaced as superintendent because he was failing to maintain the building. Miriam Katz admitted that she typed this petition and that she went around the building and asked tenants to sign it after a tenant who did not have the requisite language skills asked her to write a petition. Various tenants of the building testified about the signing the petition: none of these witnesses could recall when they signed the petition, with one witness stating that the petition was signed after Kutyla was discharged, and another witness stating that it was signed in November or December 1991. These witnesses all testified about their dissatisfaction with the performance of Kutyla as superintendent of the building and their belief that he was responsible for a decline in security.

Jerzy Gorczyn testified that he has been employed by Katz Realty since July 1990. As the maintenance foreman he checks on the condition of the buildings and hires contractors to perform work. Gorczyn testified that the tenants in the 86th Street building complained about a lack of cleanliness and a lack of security in the building after Kutyla was hired. Gorczyn found that the back doors were open, the garbage compactor rooms were filthy, and that the oil filters on the boiler had not been changed. Miriam Katz told Gorczyn about problems in the building and Gorczyn spoke to Kutyla and instructed him to do a better job. But Kutyla did not improve his performance.<sup>4</sup> On four or five occasions, Gorczyn told Nathan Katz to fire Kutyla but Katz told Gorczyn to give Kutyla another chance. According to Gorczyn, Nathan Katz has fired between 6 and 10 superintendents on his recommendation. Gorczyn denied knowledge of Kutyla's membership in Local 32B-32J and he denied ever discussing the Union with Kutyla. Gorczyn stated that Nathan Katz had

<sup>4</sup>Gorczyn stated that Kutyla had performed well during his probation but that his work deteriorated thereafter; however, Gorczyn did not say when the probation ended.

given permission for the painter Kazic to live in the basement, and that Kazic had keys to the front door of the building but not to the back door. Gorczyn testified that Kutyla lived on the sixth floor of the building in contrast to the previous superintendent who had lived on the first floor; he said that Kutyla was supposed to check the lobby and the front door a few times a day but that it was not his job to stand in the lobby.

Kutyla testified that on February 7, 1992, Gorczyn told Kutyla that he was dismissed and he gave Kutyla a paycheck and a letter. Gorczyn told Kutyla that he was fired because he joined the Union and that he should not have signed the card for the Local 32B-32J. The letter signed by Nathan Katz as "Landlord," was entitled "Notice of Termination of Superintendent Employment and Surrender of Apartment 6E." It stated:

PLEASE TAKE NOTICE that your employment by me is hereby terminated effective as of February 7, 1992. Notice is hereby given that you are required to remove from and surrender up possession of apartment, occupied by you under the agreement of employment on or before February 14, 1992.<sup>5</sup>

Kutyla testified that Gorczyn did not tell him that he was fired for poor work performance. Gorczyn did not testify about his conversation with Kutyla on the day the latter was discharged.

Kutyla testified that for some time after he was fired on February 7, 1992, Kazic was the acting superintendent. Later, a man named Szuba became the building superintendent.<sup>6</sup> Tenant Beatrice Mehlman testified that Kazic was the temporary superintendent for a few months after Kutyla's discharge. Tenant Albert Anavi testified that Kazic was the super for a few months before Szuba was hired. Tenant Grigori Krishtul testified that Kazic was the temporary superintendent for 1 or 2 months after Kutyla was fired.

Nathan Katz testified that at the time he discharged Kutyla, he had never before fired any of the superintendents at the buildings he controls. With respect to Kutyla, Katz stated that he had many complaints about his performance from tenants, from his daughter and from Gorczyn. Each time Gorczyn urged him to fire Kutyla, Nathan Katz would tell the latter to give the super another chance. Eventually, Nathan Katz decided to fire Kutyla and he wrote the letter on February 7, 1992, which informed Kutyla of his discharge. Nathan Katz testified that he discharged Kutyla because he had received too many complaints about him. Katz stated that he did not know Kutyla was a member of Local 32B-32J when he fired him and Katz denied ever discussing the Union with Kutyla.

#### 4. Local 32B-32J's efforts to represent the employees of Respondents

Anthony Spataro, a business agent for Local 32B-32J, testified that he called Nathan Katz in August 1991. Nathan Katz had signed the 1988-1991 collective-bargaining agreement with the Union on behalf of the building on 86th Street

<sup>5</sup>Kutyla was evicted from his apartment a few months later.

<sup>6</sup>Neither Kazic nor Szuba testified herein; Szuba was still employed at the time of the instant hearing.

pursuant to which the previous superintendent, Perfetti, had been compensated. In July 1991, the Union had sent Nathan Katz a proposal for a successor agreement but it had received no response. When Spataro spoke to Nathan Katz in August 1991, Katz said he had not yet had a chance to sign the successor agreement because of medical problems. Spataro called Katz again in November or December 1991, and Nathan Katz told him that he had not been able to find the contract in his files but that he would get back to him. Spataro did not hear from Katz thereafter, and on January 24, 1992, he visited the building on 86th Street. Spataro was surprised to encounter Kutyla on the premises because he did not know that Perfetti had retired. Spataro asked Kutyla if he wanted to join the Union; Kutyla said that he did and he signed an authorization card. Spataro testified that he tried to reach Nathan Katz and that he eventually spoke to him on February 6, 1992. Spataro asked Nathan Katz about signing the new contract, but Katz replied that there was a new man on the job who did not want to be in the Union. When Spataro responded that Kutyla had already signed a card for Local 32B, Katz expressed surprise and asked Spataro to meet him at his office. On February 18, 1992, Spataro went to Nathan Katz' office and asked the latter to sign the successor agreement. Katz said he would not sign the contract and he informed Spataro that he had signed a contract with Local 187. Katz told Spataro that his mind was made up and that he had spoken to his attorney about the matter. Katz did not inform Spataro that he had discharged Kutyla nor did he mention that there had been problems with Kutyla's performance.

Kutyla testified that Local 32B-32J business agent visited him at the building on January 24, 1992, and asked about his work and his pay. Kutyla told Spataro that he had to tell Gorczyn if a union contacted him, and he telephoned the office but Gorczyn was not present. Then, Kutyla signed a membership card for Local 32B-32J. On this occasion, Spataro also called the office and asked to speak to Nathan Katz, but the latter was out. Two or three days after the meeting with Spataro, Kutyla told Gorczyn that he had signed a card for the Union. Gorczyn said that Kutyla "did not do well" by signing, that it was unnecessary and that the boss did not like it that he had signed for the Union.

Nathan Katz testified that he has about 20 buildings and that many of these are covered by collective-bargaining agreements with Local 187. Respondent introduced into evidence a request for recognition from Local 187 dated February 8, 1992, a statement from Szuba that he was a member of Local 187 dated February 8, 1992, and an authorization card signed by Szuba dated February 8, 1992. The card states that Szuba commenced his employment at the building on February 7, 1992. Nathan Katz testified that he could not recall how he received these documents. A signed contract with Local 187 covering the building was introduced into evidence. The contract states on its face that it is effective commencing February 15, 1992, for a term of 3 years, and the body of the document discloses that the contract was entered into on February 12, 1992. There are no dates next to the signatures on the document. Nathan Katz testified that he negotiated the contract over the telephone. Katz claimed not to recall anything about this contract except that it provided for a semi-monthly wage of \$275 and he professed not to recall anything about the provisions of the contracts with Local

187 for the other buildings under his control. He was unable to state whether any of his employees received medical insurance or pension contributions. In fact, the printed matter in the instant contract providing for medical insurance has been crossed out and there is no language dealing with a pension.<sup>7</sup>

### B. Discussion and Conclusions

Nathan Katz was an uncooperative witness: on cross-examination, he professed not to recall certain facts relating to the most basic knowledge about his real estate operations. In contrast, he was readily able to recall information that was helpful to Respondents' case. Further, Katz claimed never to have fired a superintendent while his foreman, Gorczyn, testified that Katz has fired between 6 and 10 supers on his recommendation. I find that Nathan Katz was not a credible witness and I shall not rely on his testimony where it is contradicted by more reliable evidence. Gorczyn recalled many facts about Kutyla's employment. I observed, however, that he was very eager to tell the same story as Nathan Katz and that he was able to testify on direct without the benefit of hearing the question before he began his answer. I am convinced that Gorczyn came prepared to give only that testimony which would support Respondents' interests herein. I shall not rely on Gorczyn's testimony where it is contradicted by more credible evidence. I shall rely on the testimony of the other witnesses; I find that they did their best to recall events that took place a long time before the instant hearing.

I find, as alleged in the amended consolidated complaint, that Respondent Nathan Katz Realty Co. exercises control over the labor relations policy of NMR Realty and that it administers a common labor policy with NMR Realty.

I credit the testimony of Kutyla that when he was hired, he was instructed not to contact a labor organization. By issuing this instruction, Respondents violated Section 8(a)(1) of the Act.

The facts show that the building on 86th Street was well cared for and clean during the tenure of Perfetti, the full-time superintendent, prior to his retirement in September 1991. Perfetti had been paid \$376 per week and full benefits pursuant to the Local 32B-32J contract. After Perfetti left, however, Respondents hired Kutyla to work 20 hours per week at a wage of \$200. The tenants soon began to complain that the building was dirty and that maintenance was not up to the former standard. Miriam Katz documented these deficiencies. She and Gorczyn repeatedly urged Nathan Katz to fire Kutyla, but Nathan Katz kept saying that Kutyla should be given another chance. Although Nathan Katz testified that he wanted to give Kutyla another chance and justified this attitude by stating that he was unaccustomed to firing supers, Gorczyn's testimony shows that this is not true. Rather, I believe that Nathan Katz was aware that Kutyla could not possibly do the work in 20 hours that Perfetti had done in 40 hours, but Nathan Katz hoped that Kutyla could be made to produce more in 20 hours per week and that the tenants could be made to accept less in the way of cleanliness and service. For this reason, Nathan Katz kept refusing requests that Kutyla be fired. Indeed, I find that Nathan Katz con-

<sup>7</sup>By contrast, the Local 32B-32J contract provides for payments to various funds on behalf of the employee.

doned Kutyla's failings and informed his daughter and foreman that Kutyla was to be kept on and trained to do a better job. After the warning letter of January 9, 1992, Miriam Katz noted in her diary on January 14, 1992, that the building was dirty and that she could not find Kutyla and she noted on January 21 that the elevator had been stuck overnight. On January 21, however, Miriam Katz also made extensive notes relating to the renovation of a vacant apartment, including the note that Kutyla was to be taught how to regrout a tub. Thus, as late as January 21, Nathan Katz was not intending to discharge Kutyla and plans were still being made to give further training to Kutyla. No precipitating factor has been cited by Respondents for discharging Kutyla on February 7, and no evidence has been presented to show that any unusual event took place in the 17 days between January 21 and February 7 that would have caused Kutyla's dismissal. The only event shown to have occurred during this time was the conversation between Spataro and Nathan Katz on February 6, 1992, when Spataro informed Katz that Kutyla had joined Local 32B-32J and when Spataro asked Nathan Katz about signing the new collective-bargaining agreement. I credit Kutyla that Gorczyn told him that he was fired because he joined the Union. Thus, I find that Respondents had knowledge of Kutyla's union membership when Kutyla was discharged and I find that the discharge was caused by the revelation that Kutyla had joined the Union. Although Kutyla had not been a fully satisfactory employee until that day, Respondents had condoned Kutyla's failings and had sought to improve his performance and to offer him further training. I find that Kutyla's inferior performance is cited as a pretext by Respondents to mask the real reason for his discharge—the fact that he joined Local 32B-32J. *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Furthermore, Respondents have not shown that they would have discharged Kutyla in the absence of his union activity; Nathan Katz seemed determined to keep Kutyla and train him until Katz learned of Kutyla's membership in the Union. I find that by discharging Kutyla and by informing Kutyla that his discharge was due to the fact that he had joined Local 32B-32J, Respondents violated Section 8(a)(3) and (1) of the Act.

It is clear to me that the building was not as well maintained during Kutyla's tenure as it had been under Perfetti. As I emphasized above, Perfetti had worked twice the hours worked by Kutyla. Further, it is evident that Kutyla was not an experienced superintendent since Gorczyn was training him to perform many tasks. Moreover, many of the tenant complaints were not necessarily attributable to Kutyla's failings. It has not been shown that Kutyla was responsible for any break in to the building. A painter had been given permission to sleep in the basement and any failure of security or unauthorized persons present in the basement might have been attributable to the painter. Problems in the lobby could have been caused by the dentist who admitted people to the building without checking their identities. Also, Kutyla was not given an apartment on the first floor and was living far from the lobby, thereby making it more difficult for him to be aware of what was going on there. Finally, as a part-time employee, Kutyla was not expected to be on the premises during a full-time work day; therefore he could not be

expected to see security problems and correct them as quickly as Perfetti might have.

All of the reliable testimony shows that Kazic, the painter, was the temporary superintendent of the building for some period of time after Kutyla was discharged. The witnesses who testified on the matter recalled that Kazic performed his duties for 1 or more months. Thereafter, Szuba became the superintendent of the building. The credible evidence leads to the inescapable conclusion that Szuba was not employed at the building on February 8, 1992, the day after Kutyla was fired and the day Szuba purportedly signed an authorization card for Local 187 and the day Local 187 purportedly requested recognition from Nathan Katz. The credible evidence also leads to the conclusion that Szuba was not employed by Respondents on February 12 nor on February 15, 1992, the days, respectively, when the contract with Local 187 was signed and became effective. I note especially that Nathan Katz testified that he could not recall how he received the request for recognition nor could he recall much about his purported negotiations with Local 187. Finally, no credible evidence was introduced showing when Szuba actually began working for Respondents, and Respondents did not call their superintendent to testify about this issue. It is clear that, Kutyla having been discharged unlawfully, he was still an employee on February 12 and 15, 1992. Thus, when Respondents entered into the contract with Local 187 on February 12, 1992, Local 187 did not represent any employee employed at the building. By recognizing Local 187 as the exclusive collective-bargaining representative of employees at the building and by entering into a collective-bargaining agreement with Local 187 when Local 187 did not represent any employees at the building, Respondents rendered unlawful assistance and support to Local 187 in violation of Section 8(a)(2) and (1) of the Act.

I decline to defer the issue of Kutyla's discharge to arbitration as requested by Local 32B-32J because that issue is intertwined with other issues herein that are inappropriate for deferral.

#### CONCLUSIONS OF LAW

1. Respondents Nathan Katz Realty Co. and NMR Realty are joint employers and Nathan Katz Realty Co. exercises control over the labor relations policy of NMR Realty and administers a common labor policy with NMR Realty.

2. By instructing their employee Joseph Kutyla not to contact a labor organization, Respondents violated Section 8(a)(1) of the Act.

3. By discharging their employee Joseph Kutyla and by informing Kutyla that his discharge was due to the fact that he joined Local 32B-32J, Respondents violated Section 8(a)(3) and (1) of the Act.

4. By recognizing Local 187, Factory and Building Employees Union as the exclusive bargaining representative of employees at the 86th Street building and by entering into a collective-bargaining agreement with Local 187 at a time when Local 187 did not represent any employees, Respondent violated Section 8(a)(2) and (1) of the Act.

#### THE REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, I find that it must be ordered to

cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondents having discriminatorily discharged an employee, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

I shall recommend that Respondents, to dissipate the effects of their unfair labor practices, withdraw and withhold all recognition from Local 187 and cease giving effect to the collective-bargaining agreement dated February 15, 1992, or to any renewal, modification, or extension thereof.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>8</sup>

#### ORDER

The Respondents, Nathan Katz Realty Co. and NMR Realty, Queens, New York, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Instructing employees not to contact labor organizations.

(b) Discharging employees because they joined a labor organization and informing employees that their discharge was due to the fact that they joined a labor organization.

(c) Assisting or contributing support to Local 187, Factory and Building Employees Union, or any other labor organization, by recognizing such labor organization as the exclusive representative of any of its employees for the purpose of collective bargaining at a time when such labor organization does not represent the majority of employees in an appropriate unit.

(d) Giving effect to, performing, or in any other manner enforcing the collective-bargaining agreement executed with the aforesaid labor organization on or about February 15, 1992, or any modification, extension, renewal, or supplement thereto, or any superseding agreement.

<sup>8</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.

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

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

(a) Offer Joseph Kutyla immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(b) Remove from their files any reference to the unlawful discharge and notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

(c) 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.

(d) Withhold recognition from Local 187, Factory and Building Employees Union as the representative of their employees unless the Union has been certified by the Board as their exclusive collective-bargaining representative.

(e) Post at their building at 35-65 Street, Jackson Heights, New York, and at their office at 41-33 75th Street, Elmhurst, New York, copies of the attached notice marked "Appendix."<sup>9</sup> Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondents' 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 Respondents have taken to comply.

<sup>9</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."