

Sierra Realty Corp. and Local 32B-32J, Service Employees International Union, AFL-CIO.
Case 2-CA-25833

June 9, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING
AND COHEN

On August 25, 1993, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs, and the Respondent filed cross-exceptions and a supporting brief. The Respondent filed an answering brief, and the General Counsel filed both an answering brief and a reply brief to the Respondent's answering brief.

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, and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondent's refusal to hire former employees of Supreme Building Maintenance Corporation (Supreme) was not a violation of Section 8(a)(3) of the Act. Having found that the Respondent did not unlawfully refuse to hire the former Supreme employees, he also found that the Respondent was not a successor employer to Supreme and that it did not violate Section 8(a)(5) by refusing to bargain with the Union over employees' terms and conditions of employment. We disagree with the judge for the reasons set forth below.

The Respondent manages residential and commercial real estate properties throughout New York City, including a building located at 12 East 46th Street. In 1984 the Respondent subcontracted the building's cleaning and maintenance service to Supreme, which was signatory to a multiemployer bargaining agreement with the Union covering employees in a single, multiemployer bargaining unit.

It is undisputed that by 1992¹ the Respondent was experiencing financial losses managing the 46th Street building. To help stem these losses, the Respondent's president, John Samuelson, decided to eliminate its service contract with Supreme, and in February he informed Supreme's president, Stephen Engel, of his decision. Specifically, he told Engel that the cost of operating with Supreme was too high "with the hours and the prices" it was paying for Supreme's employees and that the Respondent could save money "if we

hired our own people . . . at lower fringe benefits and wages." Engel offered to lower Supreme's fee, but Samuelson rejected it as insufficient to meet its goal of saving on labor costs.

On April 14 Supreme received official notice from the Respondent that its service contract would be canceled effective May 31. Supreme promptly notified the Union of this fact and told the Union that the Respondent would assume the building's cleaning and maintenance work. On April 29 Union Official John Bevona contacted the Respondent's building manager, William Van Loan, to inquire whether Supreme's employees would be retained by the Respondent. Van Loan responded that that decision would be made by his superiors who were out of town for a week. Bevona telephoned Van Loan two more times over the next 2 weeks, urging the Respondent to hire the Supreme employees, but each time Van Loan told him that his superiors were still out of town and that he was therefore unable to give him a definitive answer. On May 10 and 11, an advertisement for two positions as porters with the Respondent appeared in the Spanish newspaper *El Diario*. Samuelson testified that he authorized the placement of this advertisement because "we had to hire help."

Meanwhile, at the same time that the help-wanted advertisements were appearing in the newspaper and while Bevona was in telephone contact with Van Loan, Kevin McCulloch, the Union's assistant to the president, sent Van Loan a mailgram, which made "unconditional application for continued employment" of Supreme's two employees working at the 46th Street building and requested Van Loan to contact Bevona for "the purpose of . . . commenc[ing] negotiations." The Union received no response.

Approximately 2 weeks prior to the May 31 termination of the service contract, Oswaldo De LaRosa and Hector Delgado, Supreme's employees currently assigned to the 46th Street building, asked Van Loan what would become of their jobs after May 31. Van Loan suggested that they contact the Union and invoke their contractual seniority rights, which Van Loan believed would enable them to retain their employment with Supreme.

On June 1 the Respondent took over the cleaning and maintenance operations of its 46th Street building, employing newly hired employees to perform the same work that Delgado and De LaRosa performed but at reduced hours and lower wages. On June 25 the Union resubmitted to the Respondent another unconditional application for employment on behalf of Delgado and De LaRosa. Van Loan responded that he was contractually prohibited from hiring the two employees due to a "non-hiring" clause in the expired service contract with Supreme in which the Respondent promised to refrain from hiring any Supreme employees during or

¹ All dates are in 1992.

following termination of the contract. Van Loan further stated that due to this contractual prohibition, the Respondent hired “replacement employees,” neither of whom are represented by the Union and, accordingly, the Respondent was refusing the Union’s request to engage in contract negotiations.

The Judge’s Decision

The judge found that the Respondent violated neither Section 8(a)(3) nor (5) as alleged and dismissed the complaint. The judge found that the Respondent terminated the Supreme contract because its 46th Street building was losing money and that it was imperative for the Respondent to look for ways to cut costs. He found that there were two obvious choices by which this goal could be achieved and that the Respondent executed both of them—canceling the Supreme contract with its high operational costs and hiring individuals to work fewer hours at lower wages and fringe benefits than the Supreme employees. Viewed in this economic light, the judge framed the issue in this case as follows:

Whereas it is unlawful to refuse to hire employees in order to avoid a successorship obligation and the resulting obligation to recognize and bargain with the Union, is it also a violation of the Act to refuse to hire employees to avoid paying the higher wages under a union contract that the predecessor employer paid?

The judge answered this question in the negative and gave two reasons for his conclusion. First, he noted that there must be “substantial evidence of union animus” to find a violation, and he found that the Respondent harbored none in this case as evidenced by the fact that after May 31 it retained Supreme with its union work force as the maintenance contractor at another building which it managed on 31st Street, and that it eventually hired Delgado in July as its own employee at that building. The judge also noted that when Delgado and De LaRosa inquired about their continued employment, Van Loan encouraged them to assert their contractual seniority rights which would enable them to remain employed with Supreme. Second, relying on *Vantage Petroleum Corp.*,² the judge found that because Delgado and De LaRosa earned more with Supreme than what the Respondent was willing to pay for the same work, it had reason to assume that the two individuals would not accept its lower wages and fringe benefits and, therefore, the Respondent was justified in not extending job offers to them.

In sum, the judge concluded from the foregoing that the Respondent’s refusal to hire Delgado and De LaRosa was based, not on an unlawful attempt to

avoid a successorship obligation, but, rather, was a lawful attempt to avoid the two employees’ union wage scale. Accordingly, because he found that the Respondent did not violate Section 8(a)(3) by failing to hire Delgado and De LaRosa, the judge concluded that the Respondent was not a successor to Supreme and did not violate Section 8(a)(5) by refusing the Union’s request to engage in collective bargaining.

Discussion

The basic legal principles applicable to this case are not in dispute and have been stated on many occasions in the past. An employer, like the Respondent, who takes over the operations of a previous employer is entitled to wipe the slate clean by not hiring any or all of the employees of its predecessor. This freedom of action, however, is not without limit. As the Supreme Court observed in *Howard Johnson Co. v. Hotel & Restaurant Employees*:³

[I]t is an unfair labor practice for an employer to discriminate in hiring or retention of employees on the basis of union membership or activity. . . . Thus, a new owner could not refuse to hire the employees of his predecessor solely because they were union members or to avoid having to recognize the union.

This is precisely the Respondent’s posture in this case. As noted in the factual narrative above, Respondent President Samuelson stated in his discussion with Supreme’s president that the Respondent was suffering financial losses at the 46th Street building due in part to the high cost of operating with Supreme, and that one way it could save money would be “if we hired our own employees” and paid them “lower fringe benefits and wages.” As the Respondent freely admits, it was the higher wages which Supreme paid its employees which made it “perfectly clear that the Respondent did not intend to hire Supreme’s employees.” (R. Br. at 9.) Nevertheless, the judge justified this specific refusal to hire on the grounds that the Respondent harbored no union animus and its conduct constituted a lawful attempt to avoid the union wage scale as opposed to an unlawful attempt to avoid successorship obligations. We disagree.

Refusing to hire employees in order to avoid their union wage scale is the plainest form of 8(a)(3) discrimination and is in no way lawfully distinguishable from a refusal to hire employees in order to avoid a successorship obligation. Collectively, such conduct constitutes discrimination against employees’ “union affiliation” and, as the Supreme Court stated long ago in *Phelps Dodge*,⁴ just as “workers cannot be dismissed from employment because of their union affili-

² 247 NLRB 1492 (1980).

³ 417 U.S. 249, 262 fn. 8 (1974).

⁴ *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 183 (1941).

ations,” neither can they be denied employment because of their union affiliation. There, like here, an employer refused to hire two union members and defended its conduct by arguing that Section 8(3) of the Act, the predecessor of Section 8(a)(3), should not be read as forbidding discrimination against the wages of union members seeking employment (as opposed to incumbent union employees). In rejecting this argument and finding the respondent’s conduct unlawful, the Court explained (*id.* at 185):

Discrimination against union labor in the hiring of men is a dam to self-organization at the source of supply. The effect of such discrimination is not confined to the actual denial of employment; it inevitably operates against the whole idea of the legitimacy of organization. In a word, it undermines the principle which, as we have seen, is recognized as basic to the attainment of industrial peace.

We rely on this reasoning from *Phelps Dodge* to conclude that the Respondent’s refusal to hire Delgado and De LaRosa because of their union wage scale was discriminatory in violation of Section 8(a)(3).

We recognize, of course, that “inquiry under § 8(a)(3) does not usually stop at [the] point” of finding discriminatory conduct; “the finding of a violation normally turns on whether the discriminatory conduct was motivated by an antiunion purpose.”⁵ Contrary to the judge, we do not find this element lacking here. Rather, we find that the Respondent’s refusal to hire its predecessor’s union employees constituted conduct which bore “its own indicia of intent”⁶ and, therefore, in light of this direct evidence of unlawful intent, we need not search elsewhere, as the judge did, for independent circumstantial evidence of animus from which to infer that the Respondent was motivated by an antiunion purpose. Accordingly, we find it irrelevant that the Respondent may have continued to maintain a contractual relationship with the Union at its other buildings or that it eventually hired Delgado at one of those facilities. Nor can we accept the judge’s conclusion that Supreme’s higher union wage scale establishes a valid economic defense for the Respondent’s decision not to hire Delgado and De LaRosa. In effect, the judge would hold that the Respondent had what the Court described in *Great Dane Trailers* as a “legitimate and substantial” business justification for its conduct.⁷ We disagree. Such purported justification cannot justify conduct that is, in fact, related to the employees’ union affiliation. They were refused hire solely because of their union wages and the unlawfulness of that decision is in no way minimized or affected by the

fact the Respondent may have believed that by hiring them it would cost it money or time and effort in bargaining with the Union. Indeed, if these kinds of business reasons could justify discrimination, the proscriptions and protections of the Act would be rendered largely nugatory.

The Respondent, citing *Wright Line*,⁸ attempts to justify its refusal to hire Delgado and De LaRosa on the ground that they would not have accepted the lower wages that it was offering. In this regard, the Respondent asserts that the two employees never made an unconditional application for employment, but rather attached economically unacceptable preconditions to their reemployment, i.e., application of the wages and benefits they enjoyed with Supreme and, therefore, the two employees would not have been hired even absent their union affiliation. We reject this defense.

Contrary to the Respondent’s contention, Delgado and De LaRosa did not place any conditions on their employment applications, as evidenced by the mailgram described above in which the Union’s presidential assistant, McCulloch, stated: “[W]e make unconditional application for continued employment of Hector Delgado and Oswaldo De LaRosa” We do not find, as urged by the Respondent, that the unconditional nature of this application for employment was belied by McCulloch’s testimony at the hearing that whenever a cleaning contractor loses an account, the Union’s practice is to seek to insure that the new contractor “hires the [current] employees and maintains the wages and benefits.” It is clear that the Respondent did not base its refusal to hire the two employees on McCulloch’s statement because it was not communicated until the hearing in this matter, long after the hiring decision was made, and thus to rely on that statement now amounts to pretextual post hoc rationalization.⁹

Further, there is no evidence that the Union’s practice, as expressed by McCulloch, was ever promulgated contemporaneously with the Union’s unconditional application for employment, thereby rendering the employment application ambiguous. Rather, there is nothing in the record to support the Respondent’s contention that Delgado and De LaRosa would have declined an offer of employment by the Respondent even if one had been made at the Respondent’s lower wage rates. It is for this reason that *Vantage Petroleum Corp.*,¹⁰ cited by the judge and relied on by the Respondent, is inapposite. In that case the employees

⁵ *NLRB v. Great Dane Trailers*, 388 U.S. 26, 33 (1967).

⁶ *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 231 (1963).

⁷ 388 U.S. at 34.

⁸ 251 NLRB 1083 (1980), *enfd.* on other grounds 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982).

⁹ *Shortway Suburban Lines*, 286 NLRB 323, 326-327 (1987), *enfd.* 862 F.2d 309 (3d Cir. 1988). See also *Limestone Apparel Corp.*, 255 NLRB 722 (1981), *enfd.* 705 F.2d 799 (6th Cir. 1982).

¹⁰ 247 NLRB 1492.

conditioned their job applications on their existing union wages and benefits.¹¹

Having concluded that the Respondent violated Section 8(a)(3) in its refusal to hire Delgado and De LaRosa, we next consider whether the Respondent violated Section 8(a)(5) by refusing to bargain with the Union with respect to terms and conditions of employment. The answer to this question depends on whether the Respondent is a successor employer to Supreme.

The threshold test developed by the Board and approved by the Supreme Court in *Burns*¹² and *Fall River Dyeing*¹³ for determining successorship is: (1) whether a majority of the new employer's work force in an appropriate unit are former employees of the predecessor employer; and (2) whether the new employer conducts essentially the same business as the predecessor employer. We find that both prongs of this test have been met here.

With respect to the first prong, it is now well settled that where, as here, an employer is found to have engaged in a discriminatory refusal to hire its predecessor's employees, the Board infers that all the former employees would have been retained, absent the unlawful discrimination. *Love's Barbeque Restaurant No. 62*, 245 NLRB 78, 82 (1979), *enfd.* in relevant part sub nom. *Kallman v. NLRB*, 640 F.2d 1094 (9th Cir. 1981). Under such circumstances the Board presumes that the union's majority status would have continued. *State Distributing Co.*, 282 NLRB 1048 (1987). In light of our finding that the Respondent violated Section 8(a)(3) by refusing to hire Delgado and De LaRosa, we find that the first prong of the successorship test has been satisfied.

As to the second prong of the successorship test, i.e., whether the predecessor's business has been continued by the new employer without substantial change, we consider

whether the business of both employers is essentially the same, whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products, and basically has the same body of customers.

¹¹ We also reject the Respondent's two "affirmative defenses" that the "non-hiring" clause in the service contract with Supreme precluded it from hiring Delgado and De LaRosa, and that the proper course of action by the two employees was to file a grievance alleging that Supreme was obligated under its collective-bargaining agreement with the Union to offer them alternative employment. The nonhiring clause defense, like the McCulloch statement, was asserted long after the Respondent made its hiring decisions and thus was not, in fact, relied on in refusing to employ Delgado and De LaRosa. As for the contractual grievance that the two employees may have against Supreme, we find that irrelevant to the issues in this case regarding the Respondent's liability under the Act.

¹² *NLRB v. Burns Security Services*, 406 U.S. 272 (1972).

¹³ *Fall River Dyeing v. NLRB*, 482 U.S. 27 (1987).

Fall River, supra, 482 U.S. at 43. Applying these factors here, we find that the Respondent continued Supreme's business in substantially unchanged form. Thus, on the day immediately following expiration of its cleaning contract with Supreme, the Respondent commenced performance of the same cleaning operations, servicing the 46th Street building in substantially the same manner as Supreme and utilizing employees who performed the same functions and exercised the same skills as Supreme's employees.

The Respondent argues that it cannot be a successor because its business is managing real estate rather than performing maintenance services, like Supreme, and, therefore, it fails the essential requirement of *Fall River* that the business of both employers be the same. The Respondent misunderstands *Fall River*. The Court made it clear in that case that the factors it set out for determining whether a new employer has continued the same business operations as the predecessor are to be assessed primarily from the perspective of the employees. Thus, the question is "whether those employees who have been retained will . . . view their job situations as essentially unaltered."¹⁴ From the perspective of Delgado and De LaRosa in this case, they would have perceived the Respondent as an entity which simply displaced Supreme as a cleaning and maintenance contractor and, as such, would have viewed their job situation as essentially unaltered in light of the above evidence showing that the Respondent effectuated no significant change in the nature of the cleaning operation after the takeover.

Nor do we find merit in the Respondent's contention that its employment of different supervisors and substitution of different terms and conditions of employment preclude it from being deemed a successor employer. Except for the lower wages which, as found infra, were unlawfully changed, the only other significant change in employment conditions effectuated by the Respondent was the hiring of a part-time work force to work fewer hours. However, as the Third Circuit explained, the successor employer "may not avoid its obligation under the Act to negotiate with a properly recognized union by merely changing the hours of work by its employees while still maintaining the same nature and type of services previously provided by [the predecessor employer]." *Systems Management v. NLRB*, 901 F.2d, 279, 304 (3d Cir. 1990). Likewise, the Respondent cannot escape this obligation by employing different supervisors. See *Boston-Needham Industrial Cleaning Co.*, 216 NLRB 26, 27 (1975), *enfd.* 526 F.2d 74 (1st Cir. 1975) (Where "other factors indicate that essentially the same operation has been continued," the fact that there may not be "substantial

¹⁴ *Fall River*, 482 U.S. at 43 (quoting *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 184 (1973)).

continuity in employment of the predecessor's supervisory staff" is not "of overriding importance.')

Remaining for consideration under the test for successorship is whether Delgado and De LaRosa constitute an appropriate unit for bargaining. We find that they do. Thus, although it is true that the Respondent took over only a portion of Supreme's operations whose employees, including Delgado and De LaRosa, were represented in a single multiemployer bargaining unit, the Board has stated "that successorship obligations are not defeated by the mere fact that only a portion of a former union-represented operation is subject to the sale or transfer to a new owner, so long as the employees in the conveyed portion constitute a separate appropriate unit, and they comprise a majority of the unit under the new operation."¹⁵ Mere diminution in the employee complement is no impediment to a finding of successorship. *Lloyd Flanders*, 280 NLRB 1216, 1219 (1986).

In addition, it is well-established Board policy to find a single-location unit presumptively appropriate. *Orkin Exterminating Co.*, 258 NLRB 773 (1981). Unlike the respondent in *P. S. Elliott Services*, 300 NLRB 1161 (1990), the Respondent here has not presented sufficient evidence to meet its burden of overcoming this single-location unit presumption. Indeed, it presented no evidence pertaining to this question. Accordingly, we find that a unit consisting of porters at the 12 East 46th Street building is an appropriate unit.

For these reasons, we find that the Respondent meets all the criteria of a successor employer and that by refusing the Union's request to bargain it violated Section 8(a)(5).¹⁶ In addition, we find that the Respondent violated Section 8(a)(5) by unilaterally reducing rates of pay and eliminating benefits of employees provided for in the collective-bargaining agreement between Supreme and the Union. In making this finding, we acknowledge, as the Respondent points out, that a successor employer is ordinarily free to set initial terms on which it will hire the predecessor's employees. *Burns*, 406 U.S. at 294-295. However, this right is forfeited where, as here, the successor has unlawfully failed to hire employees because of their union affiliation. *State Distributing Co.*, 282 NLRB 1048

¹⁵ *Stewart Granite Enterprises*, 255 NLRB 569, 573 (1981). See also *G.T. & E. Data Services Corp.*, 194 NLRB 719, 720-721 (1971).

¹⁶ We find no merit in the Respondent's contention that successorship principles are inapplicable where, as here, it purchased no assets of Supreme and instead "cease[d] to purchase a service from a company and provide[d] the service through his own employees" *Burns* itself was a successorship case that did not involve a purchase of assets by the new employer. Further, in *Saks Fifth Avenue*, 247 NLRB 1047 (1980), enfd. in relevant part 634 F.2d 681 (2d Cir. 1980), the Board applied the successorship doctrine to a situation in which an employer, like the Respondent, ceased purchasing a service from a company and provided the service with its own employees.

(1987); *U.S. Marine Corp.*, 293 NLRB 669, 671-672 (1989), enfd. en banc 944 F.2d 1305 (7th Cir. 1991). The Respondent, therefore, was not entitled to set the initial terms of employment without first consulting the Union. Id.

THE REMEDY

Having found that the Respondent has violated Section 8(a)(1), (3), and (5) of the Act, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the purposes of the Act.

Having found that the Respondent discriminatorily refused to hire Hector Delgado and Oswaldo De LaRosa because of their union affiliation, we shall order the Respondent to offer these employees positions for which they would have been hired, absent the Respondent's unlawful discrimination or, if those positions no longer exist, to substantially equivalent positions, dismissing, if necessary, any and all persons hired to fill such positions. We shall also order the Respondent to make whole Delgado and De LaRosa for the loss of earnings and other benefits they have suffered as a result of the Respondent's discriminatory conduct. Backpay shall be computed in accordance with the formula set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Having found that the Respondent also has unlawfully refused to bargain collectively with the Union, we shall order that the Respondent, on request, recognize and bargain collectively in good faith with the Union concerning rates of pay, wages, hours, and other terms and conditions of employment about which the Respondent would have been required to bargain had the Union's lawful status been acknowledged on June 1, 1992—the date that the Respondent began cleaning and maintenance operations at its 12 East 46th Street building. In addition, we shall order the Respondent to cancel, on request by the Union, the changes in wages and benefits that it made when it began operations, and to make Delgado and De LaRosa whole for the losses they suffered because of these unilateral changes from June 1, 1992, until the Respondent negotiates in good faith with the Union to agreement or to impasse.

Wages shall be computed as prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), plus interest as prescribed in *New Horizons*, supra. The Respondent shall remit all payments it owes to any employee benefit funds, including any additional amounts due the funds in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979). The Respondent shall also reimburse its employees in the manner set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), with interest as prescribed in *New Horizons*, supra, for any expenses

ensuing from the Respondent's failure to make those payments.¹⁷

ORDER

The National Labor Relations Board orders that the Respondent, Sierra Realty Corporation, New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to hire employees because of their union affiliation and to avoid an obligation to bargain with Local 32B-32J, Service Employees International Union, AFL-CIO.

(b) Failing to recognize and bargain with the Union as the exclusive collective-bargaining representative of its employees in the following unit, including making changes in the rates of pay and benefits of the employees in this unit without notice to and consultation with the Union:

All porter employees employed by the Respondent at its 12 East 46th Street building, excluding office clerical employees, guards, professional employees and supervisors as defined in the Act.

(c) 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 Hector Delgado and Oswaldo De LaRosa full and immediate reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights which they have formerly enjoyed, discharging if necessary other employees who have been hired in their places.

(b) Make Delgado and De LaRosa whole for the loss of earnings they have suffered due to the discrimination practiced against them, in the manner described in the remedy.

(c) On request, bargain with the Union as the exclusive representative of the employees in the above appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(d) On request of the Union, cancel any changes in the rates of pay and benefits or other terms and conditions of employment that existed immediately before the takeover of cleaning and maintenance services at its 12 East 46th Street building, and make the employees whole by remitting all wages and benefits that

¹⁷To the extent that an employee has made personal contributions to a fund that are accepted by the fund in lieu of the Respondent's delinquent contributions during the period of the delinquency, the Respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondent otherwise owes the fund.

would have been paid absent such changes from June 1, 1992, until it negotiates in good faith with the Union to agreement or to impasse in the manner described in the remedy.

(e) 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.

(f) Post at its 12 East 46th Street building copies of the attached notice marked "Appendix."¹⁸ Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 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.

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

MEMBER COHEN, concurring.

I concur in the result, but not its full rationale.

The judge found the following facts:

Samuelson (Respondent's president) was clearly experienced in the field and knew that if he hired Delgado and De LaRosa [the two employees of the predecessor] he would have to recognize the Union at the building and would probably end up paying them the same wage as Supreme (the predecessor) paid them. As they were good employees and knew the building, the only reason for not hiring them was to avoid recognizing the Union and paying the Union scale.

In sum, the Respondent knew that its hiring of the predecessor's employees would result in a bargaining obligation to the Union.¹ The Respondent also believed that the presence of the Union would mean that the Respondent would probably have to pay the wages of the predecessor. The Respondent therefore decided to avoid the Union by not hiring the predecessor's employees. Such discrimination, in order to avoid unionization, is unlawful under Section 8(a)(3).

¹⁸If 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."

¹See *NLRB v. Burns Security Services*, 406 U.S. 272 (1972).

Unlike my colleagues, I do not believe that *Phelps Dodge*² is particularly helpful. That is the seminal case for the proposition that applicants are employees. No one contends the contrary here. Similarly, I do not believe that the principles of *Erie Resistor*³ are apposite. It is unnecessary to say that the Respondent's refusal to hire the predecessor's employees bore "its own indicia of intent." Rather, as discussed above, the evidence itself establishes that the Respondent's intent was to avoid unionization.

Since the General Counsel established a prima facie case that the refusal to hire was unlawfully motivated, and inasmuch as I agree with my colleagues that an affirmative defense was not established, I agree that the refusal to hire was unlawful.⁴

I also agree with the 8(a)(5) conclusions of my colleagues. However, in doing so, I confine myself to the facts of this case. That is, but for the unlawful 8(a)(3) motive, the Respondent would have hired all of the predecessor's unit employees, and those employees would have comprised all of the Respondent's unit. In these circumstances, the Respondent was not free to set the initial terms and conditions of employment.

² *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941).

³ *Erie Resistor Corp. v. NLRB*, 373 U.S. 221 (1963).

⁴ See *Wright Line*, 251 NLRB 1083 (1980).

APPENDIX

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

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

WE WILL NOT refuse to hire employees previously employed by Supreme Building Maintenance Corporation because of their union affiliation or to avoid an obligation to bargain with the Local 32B-32J, Service Employees International Union, AFL-CIO.

WE WILL NOT fail to recognize and bargain with the Union, as the exclusive collective-bargaining representative of the employees in the following unit, including making changes in the rates of pay and benefits or other terms and conditions of employment of the employees in this unit without notice to and consultation with the Union:

All employees formerly employed by Supreme at our 12 East 46th Street building excluding office clerical employees, guards, professional employees, and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you or any other employees in

the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on the request of the Union, bargain with it as the exclusive representative of the employees in the above unit concerning their terms and conditions of employment and, if an understanding is reached, embody it in a signed contract if asked to do so.

WE WILL, on request of the Union, cancel any changes from the rates of pay and benefits or other terms and conditions of employment that existed immediately before our takeover of Supreme's operations and make the employees whole by remitting all wages and benefits that would have been paid absent such changes from June 1, 1992, until we negotiate in good faith with the Union to agreement or impasse.

WE WILL offer to employees formerly employed by Supreme at our 12 East 46th Street building immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and discharging if necessary other employees who have been hired in their place, and WE WILL make them whole for the loss of earnings and other benefits resulting from our unlawful conduct, less any net interim earnings, plus interest.

SIERRA REALTY CORP.

Suzanne Sullivan, Esq., for the General Counsel.
Sidney Orenstein, Esq. (Finkelstein, Bruckman, Wohl, Most & Rothman), for the Respondent.
Paul Galligan, Esq. and Ron Goldman, Esq. (Manning, Raab, Dealy & Sturm), for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me on May 19 and 20, 1993, in New York, New York. The complaint here, which issued on August 26, 1992,¹ was based on an unfair labor practice charge filed on June 29 by Local 32B-32J, Service Employees International Union, AFL-CIO (the Union). The complaint alleges that Sierra Realty Corp. (Respondent) violated Section 8(a)(1) and (3) of the Act by terminating the employment of Hector Delgado and Oswaldo De LaRosa, who had been employees of Supreme Building Maintenance Corporation (Supreme), whose employees are represented by the Union, and which had been the building maintenance contractor for Respondent at its building (the building) at 12 East 46th Street in the city and State of New York. It is alleged that on about April 30, Respondent terminated its contract with Supreme and since that time has continued to perform the work in basically unchanged form and is a successor to Supreme. It is further alleged that on about June 1, Respondent hired replacement

¹ Unless indicated otherwise, all dates referred to here relate to the year 1992.

employees, unilaterally changed the hours, wages, benefits, and other terms and conditions of employment of the replacement employees, in violation of Section 8(a)(1) and (5) of the Act.

FINDINGS OF FACT

I. JURISDICTION

Respondent, a New York corporation with an office and place of business in New York, New York, has been engaged in the business of the management of residential and commercial real estate, including the building. Annually, Respondent derives gross revenue in excess of \$50,000 for services performed for customers located outside the State of New York. Respondent 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.

II. LABOR ORGANIZATION STATUS

Respondent admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE FACTS

The building, located at 12 East 46th Street in the city and State of New York, is owned by a partnership, one of whose partners is John Samuelson, who is also the president and chief executive officer of Respondent. Respondent manages real estate and acts as real estate brokers as well. The building is one of the properties managed by Respondent. Supreme, which has no common ownership with Respondent or with the building, is engaged as a building maintenance contractor. Its maintenance employees are represented by the Union through Supreme's membership in the Service Employers Association, which had a collective-bargaining agreement with the Union effective from January 1, 1990, through December 31. From 1984 through May, Respondent performed the maintenance work at the building, pursuant to a agreement with Supreme, using its (Supreme's) employees. For this service, Supreme charged Respondent a certain percentage over the gross payroll of the employees it employed at the building. The most recent employees of Supreme at the building were Hector Delgado and Oswaldo De LaRosa.

The agreement between Supreme and Respondent for the maintenance of the building is by letter dated July 19, 1984, and provides that Supreme will pay the employees and bill Respondent for the gross payroll, "plus a fringe of 50.50%." This letter is from Stephen Engel, Supreme's president and was written to Samuelson, but was not signed by him. There is also a later letter, dated August 19, 1987, from Joseph Marino, Supreme's account executive to William Van Loan, vice president and an agent of Respondent. The letter attaches a 10-page specification for maintenance services at the building. One part of this specification is a "Non-hiring clause," which provides that Respondent shall not employ or hire any of the Supreme employees. Engel testified that he was not aware that Marino had sent this to Respondent, but this will be discussed more fully below. Marino signed the letter and specification, but it was never signed by Respondent. A letter that Supreme sent to Respondent dated March 9, sets forth the "billing factors" for the building. In addition to the usual payroll expenses, it states 3 percent for su-

pervision, 7 percent for supplies and uniforms, and 20 percent for administrative overhead and profit.

In about February, Engel receive a telephone call from Samuelson saying that he wanted to see him. Engel went to Samuelson's office, and Samuelson told him that the building was not doing well financially, that he was going to discontinue Supreme's service in the building, and that he would notify him formally of the change in about May. He testified that Samuelson said that he was going to make arrangements with another union for the people. Engel offered to reduce his fee arrangement at the building if it would help Respondent. Samuelson said that any such reduction would be insignificant compared to the amount Respondent was looking to save. Samuelson testified that the building was losing money, because of vacancies and rent reductions, together with high operating costs. He determined that the building could save money "if we hired our own people we would have less hours at lower fringe benefits and wages." At his meeting with Engel he told him that the building was losing money and that he was going to cancel Supreme's contract, hire his own employees, and reduce the number of hours. Engel offered some relief, but Samuelson rejected the offer as minimal. He testified that he never said that he was going to bring another union into the building, and did not do so. What he told Engel was that he didn't know if the Union would end up in the building.

On about April 14, Respondent informed Supreme that it was canceling its maintenance contract at the building, effective May 31. On April 28, Supreme sent the required notification to the Union that it was losing this contract effective May 31. John Bevona, a union chairman, testified that after receiving this notice from Supreme at the end of April he called Van Loan, who did not testify. He identified himself, and told him that Supreme had notified the Union that they had canceled Supreme's contract at the building effective the end of May. He asked Van Loan if he was going to employ the existing employees directly or whether he was going to contract out the work. Van Loan said that he was not sure; it was up to the building's principals who were out of town and would not return until May 4 or 5. Bevona asked Van Loan to call him back at that time. When Van Loan did not call him, Bevona called Van Loan on May 5. He asked Van Loan if the principals of the building had made a decision about the maintenance of the building after Supreme's contract expired. He said that they had not yet returned and would return by May 12. On that day Bevona again called Van Loan and asked him what the principals of the building had decided. Van Loan said that they had not yet made a decision, but as soon as they did, he would contact Bevona; he never did.

After learning that Supreme was losing the maintenance contract at the building, Kevin McCulloch, assistant to the president of the Union, sent a telegram to Respondent. The telegram is undated. It states that the Union represents Supreme's employees at the building and that the Union has been advised that Respondent was going to perform the maintenance work at the building on its own. It makes "unconditional application for continued employment" of Delgado and De LaRosa at the building, and requests that Respondent contact Bevona. Having received no response, McCulloch sent an identical letter to Respondent on June 25. Respondent, by Van Loan, responded by letter dated July 6.

The letter states that Respondent's contract with Supreme provides that they would not hire Supreme's employees during or following termination of their contract, and that Respondent therefore hired replacement employees and therefore cannot offer employment to either Delgado or De LaRosa. The letter concluded: "Since Local 32B-32J does not represent the employees at 12-14 East 46th Street, we cannot engage in negotiations with your union." After receiving this letter, McCulloch called Engel and asked him if his contract with Respondent contained a restriction on Respondent employing his employees at the building. Engel said that there was no "signed agreement" to that effect, so there was nothing to stop Respondent from employing Delgado and De LaRosa, and the question had never come up.

Engel testified that he negotiated the original 1984 contract with Samuelson; Supreme performed the services as provided by the contract. During the negotiations leading up to that contract, there was no discussion of Respondent being prohibited from employing Supreme's employees. He testified further that in preparation for the instant matter, after being questioned by the General Counsel about Respondent's nonhiring defense, he checked his file and found the August 19, 1987 letter from Marino to Van Loan. Prior to that time, he did not know of the existence of this letter. He never discussed the contract or the nonhiring clause with Van Loan. Respondent introduced into evidence a contract that Supreme sent to Respondent, dated December 6, 1991, covering the maintenance of a building at 101 West 31st Street, in the city and State of New York. Andrew Weisbach, sales executive for Supreme, signed the proposal on behalf of Supreme. This proposal contains the nonhiring clause that is contained in Marino's August 1987 letter to Van Loan. For about the last 15 years Supreme has been providing the maintenance services for Respondent at the 31st Street building.

Engel testified that Supreme performs services for about 300 customers, some big and some small. In addition, some of the customers have more than one location that is maintained by Supreme. He testified that the nonhiring clause that is contained in Marino's August 1987 letter was meant for certain small jobs that Supreme obtained, such as cleaning a loft, requiring less than a day's work. With the startup cost of equipment and personnel that Supreme had, he was concerned that a customer of that size might find it cheaper and easier to employ Supreme's employee directly. He did not have the same concern with his larger customers (such as Respondent) because, under his contract with the Union, the employees go to the customer or the new contractor. He never requested that Delgado and DeLaRosa remain in his employ after Respondent canceled the agreement. The parties stipulated that Delgado and DeLaRosa were good employees with no disciplinary records. When the contract expired, Supreme removed its equipment and supplies from the building.

De LaRosa testified that in about early May, while he was with Delgado, he asked Van Loan whether he and Delgado were going to lose their jobs; he said that he didn't know. Van Loan did not ask him to submit an application for employment after May 31, nor did he submit such an application. Delgado testified that shortly before their employment at the building ended, he and De LaRosa asked Van Loan what was going to happen to them. He told them to go to the Union; with their seniority they could continue working

for Supreme. He never filed an application to work directly for Respondent.

Respondent placed an ad in *El Diario* on May 10 and 11 for porters for the building, although the building is not named in the ad. Beginning on June 1, the porter or porters performing the maintenance work were being supervised by Respondent's agents and they have not been represented by the Union.

Samuelson has ownership interests in about 15 buildings in the city of New York; in some of these buildings the Union represents the employees through an associationwide contract. The 31st Street building is the only one with a maintenance contract. After some discussions that Samuelson had with Engel in about July, Delgado began working for Supreme at the 31st Street building.

IV. ANALYSIS

The law is clear that the purchaser of an existing employer, and a potential successor employer to that employer, is not legally obligated to employer a majority, or even any, of the predecessor's employees. It however is equally clear that the potential successor employer cannot refuse to hire the predecessor's employees to avoid the successorship obligation or simply because the applicants are union members. *NLRB v. Burns Security Services*, 406 U.S. 272 (1972); *Howard Johnson Co. v. Hotel & Restaurant Employees*, 417 U.S. 249 (1974). At times it is easy to determine an employer's motivation in the selection of employees; at other times it is more difficult, as in the instant situation.

Respondent discontinued Supreme's services at the building because the building was losing money. This is not alleged as a violation. Rather, it is alleged that by not hiring Delgado and De LaRosa to perform the work beginning on about June 1, Respondent violated Section 8(a)(1) and (3) of the Act. The General Counsel's theory is that Delgado and De LaRosa were available and Respondent purposely bypassed them to avoid having to deal with the Union. I should initially state that I find absolutely no merit to Respondent's defense that Delgado and DeLaRosa were employed by Supreme and not Respondent. In every potential successorship case the alleged predecessor and successor are separate employing entities, like Supreme and Respondent. Rather, the ultimate issue here is why Respondent refused to hire Delgado and De LaRosa to perform the maintenance work at the building beginning about June 1.

I found Samuelson to be a credible, albeit a "testy" witness, and would credit his testimony. Although Engel was also a credible witness, especially considering that he was testifying against the interest of one of his customers, I would credit Samuelson's version of the conversation that they had in February, not because Samuelson was a more credible witness, but because it was a very narrow point (just the difference of a few words) and Samuelson's version is more reasonable. I therefore find that in this conversation, he told Engel that he didn't know if the Union would end up in the building after the expiration of Supreme's contract.

The evidence clearly establishes that the building was losing money. Respondent had to look to a way to save money, and Supreme's contract at the building was an obvious choice. In addition to the direct wages and benefits that Respondent reimburses Supreme for, Supreme also charges 3 percent for supervision and 20 percent for administrative

overhead and profit. In addition to this savings of 23 percent, Samuelson testified that he could save additional money because: "if we hired our own people we would have less hours at lower fringe benefits and wages." Samuelson was clearly experienced in the field and knew that if he hired Delgado and De LaRosa he would have to recognize the Union at the building and would probably end up paying them the same wage as Supreme paid them. As they were good employees and knew the building, the only reason for not hiring them was to avoid recognizing the Union and paying the Union scale. This is where the division between lawful and unlawful becomes difficult to differentiate. Whereas it is unlawful to refuse to hire employees in order to avoid a successorship obligation and the resulting obligation to recognize and bargain with the Union, is it also a violation of the Act to refuse to hire employees to avoid paying the higher wages under a union contract that the predecessor employer paid? In this situation, I find that it is not.

The cases in this area require that in order to be a violation, there must be substantial evidence of union animus. *Lemay Caring Centers*, 280 NLRB 60, (1986); *State Distributing Co.*, 282 NLRB 1048 (1987); and *U.S. Marine Corp.*, 293 NLRB 669, 670 (1989). In the instant case, I find that although Van Loan failed to respond to Bevona's calls in April and May, Respondent harbored no union animus. Some of Samuelson's other buildings are signatories to contracts with the Union and Supreme continues to perform the maintenance work at Respondent's 31st Street building, with Delgado, beginning in about July. In addition, when Delgado and De LaRosa asked Van Loan about their situation, although he was not honest with them about Respondent's intention to hire others, he recommended they assert their seniority through the Union. All this convinces me that Respondent failed and refused to hire them in order to avoid the union wage scale. In the instant situation, I find that is different from refusing to hire employees in order to avoid the union.

A similar situation occurred in *Vantage Petroleum Corp.*, 247 NLRB 1492, 1493 (1980), where the employer was awarded a license by the State of New York to operate service stations on state parkways. Some of these stations had been unionized. The employer had earlier decided that it would employ its wage scale at these stations, beginning with the minimum wage, and would hire its own employees rather than the predecessors employees. The employer informed union employees of the predecessor employer that its major consideration in selecting employees was economic, and that it could not afford, and would not pay, the wage rates previously paid at the stations. The administrative law judge and the Board found no violation in the failure to hire any of the predecessor's unionized employees. The Board

found that Respondent's main concern was to hire employees willing to work for the minimum wage and that the predecessor's employees were earning considerably more than that. The Board stated:

Respondent had reason to assume that those employees in all likelihood would not want to suffer a reduction in that [previous pay] rate. . . . In these circumstances, therefore, we are unwilling to ascribe a discriminatory motive to Respondent's taking no action to offer the Exxon employees employment

I would make a similar finding here and differentiate between a good-faith refusal to offer employment to a predecessor's employees because the rate of pay being offered was substantially below what they had been earning, and refusing to offer employment to a predecessor's employees in order to avoid a successorship obligation and union representation. I therefore recommend that this 8(a)(1) and (3) allegation be dismissed.

Having found that Respondent did not unlawfully refuse to hire Delgado and De LaRosa, Respondent was not a successor to Supreme in its operation at the building. That being so, obviously, Respondent was not obligated to bargain with the Union over the terms and conditions of employment of the employees at the building, including the hours, wages, and other terms and conditions of employment of the employees. Therefore, Respondent has not violated Section 8(a)(1) and (5) of the Act as further alleged in the complaint.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent did not violate Section 8(a)(1), (3), and (5) of the Act as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²

ORDER

It having been found and concluded that Respondent has not engaged in the unfair labor practices alleged in the complaint, the complaint is dismissed in its entirety.

²If 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.