

E.S. Sutton Realty Co. and Local 32B-32J, Service Employees International Union, AFL-CIO.
Case 2-CA-30365

September 28, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS
LIEBMAN
AND WALSH

On February 19, 1999, Administrative Law Judge Eleanor MacDonald issued the attached decision. The General Counsel filed exceptions and a supporting brief. The Respondent filed an answering brief. The General Counsel filed a reply 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.

Respondent E.S. Sutton Realty Co. (Sutton) owns and manages a building at 291 Broadway in New York City. For many years, Sutton contracted with outside companies to provide janitorial services. In April 1997, however, Sutton abruptly ended its relationship with its last contractor, Crisfield, and instead hired its own cleaning employees. Initially, Crisfield had told Sutton that it would provide "nonunion labor," in contrast to its predecessors. But Sutton had recently learned that Crisfield intended to settle unfair labor practice charges arising out of its actions at 291 Broadway and planned to recognize Local 32B-32J of the Service Employees International Union (the Union). Sutton then began hiring its own cleaning employees before Crisfield's contract was terminated. By the time union-represented workers sought jobs, none were left. Among the unsuccessful job seekers was Marlene Connell, who had worked at 291 Broadway since 1980, most recently for Crisfield, and Anthony Moreno, whose firing by Crisfield was among the charges noted above.¹

For the following reasons, we reverse the administrative law judge and find that Sutton unlawfully refused to consider and to hire Marlene Connell, Edwin Martinez, Anthony Moreno, Frankie Rodriguez, and Anthony Thompson. We also find that Sutton was a successor employer obliged to recognize and bargain with the Union, and that by failing to do so and by changing employees' terms and conditions of employment, it violated Section 8(a)(5). A clear preponderance of all the rele-

¹ The charges were settled pursuant to a non-Board settlement, which contained a nonadmissions clause and was approved by the Regional Director on October 10, 1997.

vant evidence demonstrates that Sutton's staffing process was tainted by antiunion animus from beginning to end. The judge did not fully address all of the inconsistencies in the record, relying instead on witnesses whose testimony, contradicted by the documentary evidence, she herself described as inaccurate and incomplete.²

The evidence of antiunion animus is both direct and circumstantial. Brian Coffield, the owner of Crisfield, testified to antiunion statements made to him by Sutton officials Bruce Pirnat and Jeffrey Shalom when Coffield first sought the cleaning contract for 291 Broadway in the fall of 1995. It is not clear whether the judge credited Coffield's testimony or not. But even assuming that the judge was correct in regarding Coffield's testimony skeptically, a view we question,³ the circumstances under which Crisfield was engaged strongly suggest antiunion animus. Crisfield's predecessors were unionized companies, Sutton was in the process of ending its own collective-bargaining relationship with the Union (which represented a single, building service employee), and Crisfield was a newly formed, nonunion company, which proposed a contract offering a "firm fixed price . . . for nonunion labor only." Crisfield's low cost, a selling point bound up with its nonunion status, concededly was what attracted Sutton.

After terminating its relationship with a unionized contractor (Partners Cleaning), Sutton contracted with Crisfield, which had no employees and no cleaning experience. Crisfield, in turn, hired the workers who had been employed by its predecessor at 291 Broadway. But Crisfield insisted that they rescind their union membership in writing, and it refused to recognize the Union. Crisfield's actions (including the discharge of long-time worker Anthony Moreno, who ultimately applied for work with Sutton) led to the issuance of an unfair labor practice complaint by the Board's General Counsel.

² We agree with our dissenting colleague that the Board should reverse a judge's credibility resolutions only in rare cases. To the extent that our ruling entails a reversal of the judge's credibility resolutions, this is one of those rare cases.

³ The judge found that "Coffield's testimony must be approached with caution," citing his settlement of the unfair labor practice case described below and his active role in engineering a nonunion work force at 291 Broadway. According to the judge, "Coffield testified in such a manner as to shield himself from further involvement with the Board and the Union." As a result, she chose to "credit his testimony only when it [was] not contradicted by other more reliable evidence." The judge's rationale for doubting Coffield's testimony is hard to grasp. At the time of the hearing, the unfair labor practice charges against his company had been settled, and Crisfield had no cleaning contracts. Coffield had no clear reason to testify untruthfully in this proceeding, nor did the judge explain how Coffield's testimony would further the motive she attributed to him. In contrast, the potential bias of Shalom and Pirnat, who work for Sutton, is obvious.

The Board proceeding, of course, meant the Union might return to 291 Broadway, as Sutton knew full well.⁴ On behalf of Crisfield, Brian Coffield pursued a settlement with the Union, keeping Jeffrey Shalom of Sutton informed. Coffield testified that in March 1997, the month before Sutton terminated Crisfield's contract, Coffield told Shalom that he intended to recognize the Union and asked that Sutton increase its payments to Crisfield, to cover higher labor costs. According to Coffield, Shalom not only rejected Coffield's request, but also stated that he did not want the Union in the building and that he was unhappy with Coffield's decision to settle.

It is not clear whether the judge credited Coffield with respect to Shalom's statements. Certainly, by the judge's own standard (see fn. 3, *supra*), Coffield should have been credited, since his testimony on this point was "not contradicted by other more reliable evidence." Shalom did not deny making the statements attributed to him. There is some indication that the judge concluded that Coffield changed his testimony on cross-examination and asserted that Shalom's statements were made after April 1997 (and so after the crucial events of this case). If this was the judge's conclusion, then it was clearly erroneous. As the General Counsel points out in his brief, the record establishes that on cross-examination, Coffield was testifying about a separate, later conversation, not that he gave a different account of his March 1997 conversation with Shalom. The record also establishes that Shalom's own uncertain testimony does not contradict Coffield in any material respect.⁵

After it learned of Coffield's efforts to settle the unfair labor practice case, Sutton decided to terminate its contract with Crisfield and to perform cleaning work with its own employees, supposedly because of Crisfield's poor performance and the desire to save money.⁶ In April 1997, Bruce Pirnat, Sutton's agent, informed Coffield of the imminent termination of his company and Sutton's decision to hire its own cleaning employees. According to Coffield, Pirnat told him that Anderson Curtis, a union member who had worked at 291 Broadway for many

years, would be retained as supervisor. Curtis's supervisory status, Pirnat said, would avoid any "concern of the union in the building." Pirnat never squarely denied making this statement, which provides further evidence of Sutton's antiunion animus. Again, by the judge's own standard, Coffield's uncontradicted testimony on this point should have been credited.

There is ample evidence, then, of Sutton's antiunion animus. The circumstances of Crisfield's hiring were suspicious. The circumstances of Crisfield's firing were suspicious. The statements of Shalom and Pirnat were damning. Moreover, Sutton's efforts to insulate itself from a finding of antiunion animus had the opposite effect.

As we will explain, the cornerstone of Sutton's case was Anderson Curtis and his role in the process of hiring Sutton's new cleaning employees. Presumably unlike Sutton, Curtis had no motive to unlawfully exclude union-represented employees. The essential elements of Sutton's case, offered primarily through Curtis's testimony, were: (1) that Curtis was hired on or about April 17, 1997, not before; (2) that Curtis was hired after Crisfield's contract was terminated and after Crisfield employees had left 291 Broadway; (3) that after being hired, Curtis alone hired the rest of Sutton's cleaning employees; and (4) that Curtis tried, but was unable, to reach former Crisfield employees Connell and Moreno to offer them work.

The problem, for Sutton, is that Curtis's testimony was inconsistent with the record evidence, although the judge mistakenly concluded that this was immaterial. Sutton's payroll records show indisputably: that Curtis was hired on April 8 (*before* the Crisfield contract was terminated), that two workers were hired by Sutton on April 7 (the day *before* Curtis was hired), and that two other employees were hired at about the same time Curtis was (also *before* the Crisfield contract was terminated). The plain fact is that Sutton hired its new work force while Crisfield and its employees were still working at the building. Thus, there should have been no difficulty in hiring the incumbent workers, had Sutton's motives been pure. Curtis's claim to the contrary—particularly in light of his demonstrably inaccurate testimony concerning the timing of the hiring process—cannot be accepted. The inescapable conclusion, then, is that Sutton took care to ensure that union-represented employees would not be hired after Crisfield was terminated.

Portraying Curtis as solely responsible for hiring is simply a ruse to escape liability. Sutton insists that it was Curtis, and Curtis alone, who made the crucial hiring decisions in this case and that there can be no question of Curtis's honest motives. The judge accepted this notion

⁴ Sutton itself was named as a joint-employer in the Union's unfair labor practice charge, although the Board's Regional Office later concluded that this status was not established.

⁵ The judge herself observed that "Shalom did not recall much of some of the relevant events." She also concluded that he did not testify falsely. But one need not discredit Shalom to credit Coffield, since their testimony did not conflict.

⁶ If Crisfield recognized and reached agreement with the Union, its labor costs would rise, as Coffield had made clear to Shalom. As for improving performance, Sutton placed its new employees under the direction of a long-time worker at 291 Broadway who had no experience supervising a cleaning operation. The change was made so hastily that the new employees lacked cleaning supplies, hardly a sign that improving services to the building's tenants was an overriding concern.

and specifically found that Curtis was a truthful witness, despite acknowledging that his testimony was repeatedly inaccurate. Unlike Shalom, Curtis had no failure of memory. He testified confidently about how and when he was hired by Sutton, about when he hired additional employees, and about his efforts to reach the union-represented workers who were not hired. Yet Sutton's own records completely contradict Curtis's account.

Following notification letters of April 10 and 15, Sutton terminated Crisfield effective the night of April 15, 1997. Curtis testified, without equivocation and in detail, that he had no advance knowledge of Crisfield's termination and that he was hired by Sutton on April 17, soon *after* he arrived at work to find Crisfield and its employees gone.⁷ In fact (as mentioned above), Sutton's records demonstrate that Curtis first filled out a payroll form on April 8, before Crisfield was terminated. Curtis testified further that *after* Sutton hired him, he hired the remainder of Sutton's cleaning employees. In fact, Sutton's records show that two of the new workers (Derrell Cora and Terry Dixon) signed payroll forms on April 7. These workers were hired before Crisfield was terminated, and before Curtis himself was hired by Sutton, whether one credits Curtis's testimony as to his hiring or, better, relies on Sutton's payroll records. There is only one reasonable inference: Sutton, not Curtis, hired those workers, just as it hired Curtis.

As the General Counsel demonstrates in his brief, Curtis's testimony with respect to the hiring dates of the remaining cleaning employees similarly is contradicted by Sutton's payroll records. Curtis testified that he was the only cleaning employee at 291 Broadway for the first week following Crisfield's termination and that he and his brother (Harry Curtis Jr.) were the only two cleaning employees until sometime in late May 1997. This simply was not the case. The documents establish that the employees who composed Sutton's initial in-house complement signed their W-4 and I-9 payroll forms on dates between April 7 and 21, 1997.⁸ It is undisputed that once

⁷ Curtis, who worked from midnight to 8 a.m., stated that he reported to work shortly before midnight on April 16, and "they was, all the equipment was gone, there wasn't nothing in the building." He stated further that he called a coworker and asked, "[W]hat happened to all the people, what about us . . . what about me . . . I don't know what this is, nobody said anything to me. You know, I come in, all the equipment is gone, just like that you know." The next day, Curtis spoke with Bruce Pirnat. Curtis testified, "Well, I asked him I said, what am I supposed to do now. I've been in the building for almost thirty years, I said [Crisfield] disappeared, all the equipment is gone. [Pirnat] said, I suggest that you go down to the office and talk with [Jeffrey Shalom]."

⁸ Employee Derrell Cora signed his W-4 and I-9 forms on April 7 and started working on April 25. Terry Dixon signed his W-4 on April 7 and his I-9 on April 10, and began working on April 16. Anderson Curtis and his brother Harry Curtis, Jr. signed their W-4 forms on April

the forms were accepted, the applicants were considered hired.

The judge herself acknowledged that "Curtis' recollection about the actual dates when employees began work was not accurate and tended to be shifting." She described Shalom's recollection about Curtis's hiring as "[c]learly . . . not complete." Yet she found that it was Curtis who was responsible for hiring Sutton's cleaning employees—including, inexplicably, the two employees who were hired before he was. The judge also relied on Curtis's testimony that within a few days after his hiring, he tried unsuccessfully to reach former Crisfield employees Connell and Moreno to offer them work.

If Curtis's testimony about the date of his own hiring (April 17) is credited, or if Shalom's two prehearing affidavits are accepted (there Shalom swore that Curtis was hired on April 16), then Sutton's defense collapses. All but one of Sutton's new cleaning employees were hired before April 17, presumably by someone at Sutton other than Curtis.

Recognizing the problems posed by Sutton's payroll records, the judge did not accept this part of Curtis's account. Instead, she reasoned that Curtis must have been hired in early April, before Crisfield's termination, and that his own efforts to seek out Crisfield employees began then. That Curtis's vivid testimony about his hiring was inaccurate, by the judge's own reckoning, should have given her pause about Curtis's credibility in general.⁹ It did not, and she accepted his testimony that he tried to contact Connell and Moreno while there were still job openings.

But even the judge's reconstruction of events, in the face of Curtis's inaccurate testimony, cannot lead to the ultimate result she reached here. Had Curtis been hired in early April (before Crisfield's contract was terminated) and had he promptly sought to hire Crisfield employees then, there should have been no difficulty in reaching and retaining those workers, since they were

8 and their I-9 forms on April 11. Victor Valdez signed his W-4 form on April 9, but his I-9 is not dated and his start date was not provided. Orfa Vasquez signed his W-4 and I-9 forms on April 12 and started working on April 16. Finally, Douglas Gittens III signed his W-4 on April 21 and his I-9 on May 28.

⁹ See *Granite Construction Co.*, 330 NLRB 205, 208 fn. 11 (1999) (administrative law judge erred in rejecting significance of documentary evidence, based on conclusion that witnesses testified honestly about their beliefs as to events). As the Board has pointed out, the demeanor of a witness cannot be dispositive when his testimony is inconsistent with "the weight of the evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole." *Humes Electric, Inc.*, 263 NLRB 1238 (1982) (footnote omitted). Here, the judge's reconstruction of the evidence is based at once on the rejection of a key aspect of Curtis's testimony and on the determination that he was truthful.

still working at 291 Broadway. Curtis could easily have left word at the building for Connell and her coworkers when they arrived for their shifts. Alternatively, Curtis could have contacted the Union to get in touch with them. He did neither. Instead, after Crisfield was terminated, the incumbent employees were terminated, and Connell and Moreno found themselves shuttled between Sutton officials Pirnat and Shalom, in a futile attempt to win work after Sutton had already completed its hiring.

That was no accident. The evidence here compels the conclusion that Sutton took steps to ensure that incumbent cleaning workers could not make timely applications for work as in-house employees, in order to avoid hiring union labor. This violated Section 8(a)(3) and (1). *Daufuskie Island Club & Resort*, 328 NLRB 415 (1999), enfd. mem. sub nom. *Operating Engineers Local 465 v. NLRB*, 221 F.3d 196 (D.C. Cir. 2000); *Systems Management, Inc.*, 292 NLRB 1075 (1989), enfd. in relevant part 901 F.2d 297 (3d Cir. 1990); and *Service Operations Systems*, 272 NLRB 1033 (1984). See also *Love's Barbecue Restaurant No. 62*, 245 NLRB 78, 82 fn. 10 (1979), enfd. in relevant part sub nom. *Kallman v. NLRB*, 640 F.2d 1094 (9th Cir. 1981). The record establishes, and we find, that the number of positions at the start up of the Respondent's in-house cleaning operation was equal to or exceeded the number of discriminatees. Having worked in the building for years prior to the Respondent's unlawful conduct, the discriminatees had the experience and training relevant to the positions, and anti-union animus was a motivating factor in the decision not to hire them.

Just as Crisfield unlawfully sought to avoid successorship status, despite hiring the employees of its unionized predecessor, so Sutton unlawfully sought to avoid becoming Crisfield's successor (and dealing again with the Union it had left behind when it hired Crisfield). It is clear that Sutton is a successor to Crisfield, insofar as it is providing cleaning services at 291 Broadway using similar machines and supplies and similarly skilled employees. *NLRB v. Burns Security Services*, 406 U.S. 272 (1972). Because Sutton discriminatorily refused to hire the incumbents, it is presumed that substantially all of them would have been retained. *Smith & Johnson Construction Co.*, 324 NLRB 970 (1997). In these circumstances, Sutton was obligated to recognize and bargain with the Union, and was not free to unilaterally establish initial terms and conditions of employment anymore than its predecessor was free to do so. By failing to recognize and bargain with the Union, Sutton violated Section 8(a)(5) and (1). *Galloway School Lines*, 321 NLRB 1422 (1996).

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Having found that there were sufficient positions available at the commencement of the Respondent's operations, that the discriminatees were qualified for the positions, and that the Respondent discriminatorily failed and refused to consider and hire them in order to avoid successorship status, we shall order the Respondent to offer Connell, Martinez, Moreno, Rodriguez, and Thompson immediate and full employment, without prejudice to their seniority and other rights previously enjoyed, discharging if necessary any employees hired in their place. We shall also order that these employees be made whole for any losses of earnings and benefits they suffered as a result of the discrimination against them in the manner prescribed in *Abilities & Goodwill, Inc.*, 241 NLRB 27 (1979); and *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as described in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

We shall, inter alia, enter an affirmative bargaining order which requires bargaining at least for a reasonable period of time. We find, for the reasons fully set forth in *Caterair International*, 322 NLRB 64 (1996), that an affirmative bargaining order is warranted in this case as a remedy for the Respondent's unlawful failure to recognize and bargain with the Union. We adhere to the view, reaffirmed by the Board in that case, that an affirmative bargaining order is "the traditional, appropriate remedy for an 8(a)(5) refusal to bargain with the lawful collective-bargaining representative of an appropriate unit of employees." *Id.* at 68.

In several cases, however, the United States Court of Appeals for the District of Columbia Circuit has required that the Board justify, on the facts of each case, the imposition of such an order. See, e.g., *Vincent Industrial Plastics, Inc. v. NLRB*, 209 F.3d 727, 734 (D.C. 2000); *Lee Lumber & Bldg. Material Corp. v. NLRB*, 117 F.3d 1454, 1462 (D.C. Cir. 1997); *Exxel/Atmos, Inc. v. NLRB*, 28 F.3d 1243, 1248 (D.C. Cir. 1994). In *Vincent*, the court stated that an affirmative bargaining order "must be justified by a reasoned analysis that includes an explicit balancing of three considerations: (1) the employees' Section 7 rights; (2) whether other purposes of the Act override the rights of employees to choose their bargaining representatives; and (3) whether alternative remedies are adequate to remedy the violations of the Act." 209 F.3d at 738.

We respectfully disagree with the court's requirement, for the reasons set forth in *Caterair*.¹⁰ Nevertheless, we have examined the particular facts in this case as the court requires, and we find that a balancing of the three factors warrants an affirmative bargaining order.¹¹

(1) An affirmative bargaining order in this case vindicates the Section 7 rights of the unit employees who were denied the benefits of collective bargaining by the Respondent's unlawful failure to recognize and bargain with the Union. At the same time, an affirmative bargaining order does not unduly prejudice the Section 7 rights of employees who may oppose continued union representation because its attendant status is temporary.

Moreover, ordering the successor employer to bargain for a reasonable period of time with the incumbent union, as in this case, serves "to protect the newly established bargaining relationship and the previously expressed majority choice, taking into account that the stresses of the organizational transition may have shaken some of the support the union previously enjoyed." *St. Elizabeth Manor*, 329 NLRB 341, 345 (1999).¹² In successorship situations, the employees' anxiety about their status with the successor employer could lead to their disaffection before the union has the opportunity to demonstrate its continued effectiveness, and could tempt a reluctant successor employer to postpone its statutory bargaining obligation indefinitely. *Id.* at 343. To require bargaining to continue only for a reasonable period of time, not in perpetuity, fosters industrial peace and stability and will ensure that the bargaining relationship established between the Respondent and the Union will have a fair chance to succeed. *Id.* at 346.

(2) An affirmative bargaining order also serves the important policies of the Act to foster meaningful collective bargaining and industrial peace. The temporary decertification bar inherent in this order removes the Respondent's incentive to further delay bargaining or to engage in any other conduct that would further undercut em-

ployee support for the Union. It also ensures that the Union will not be pressured, by the possibility of a decertification petition, to achieve immediate results at the bargaining table following the Board's resolution of its unfair labor practice charges and issuance of a cease-and-desist order. Providing this temporary period of insulated bargaining will also afford employees a fair opportunity to assess the Union's performance in an atmosphere free of the Respondent's unlawful conduct.

(3) A cease-and-desist order, alone, would be inadequate to remedy the Respondent's refusal to bargain with the Union in these circumstances because it would permit a decertification petition to be filed before the Respondent had afforded the employees a reasonable time to regroup and bargain through their chosen representative in an effort to reach a collective-bargaining agreement. Indeed, permitting a decertification petition to be filed immediately might very well allow the Respondent to profit from its own unlawful conduct. We find that these circumstances outweigh the temporary impact the affirmative bargaining order will have on the rights of employees who oppose continued representation by the Union.

For all of the foregoing reasons, we find that an affirmative bargaining order with its temporary decertification bar is necessary to fully remedy the Respondent's unlawful refusal to bargain with the Union in this case.

ORDER

The National Labor Relations Board orders that the Respondent, E.S. Sutton Realty Co., New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to hire or consider for hire any employee for being a member of, or supporting, Local 32B-32J, Service Employees International Union, AFL-CIO, or any other labor organization.

(b) Refusing to meet and bargain in good faith with the Union as the exclusive collective-bargaining representative of employees in the following appropriate unit:

All handypersons, forepersons, and others, including elevator operators, porters, porter/watchmen, cleaning persons, matrons, security porters, fire safety directors and all other service employees employed at 291 Broadway.

(c) Unilaterally changing unit employees' terms and conditions of employment.

(d) 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.

¹⁰ Chairman Hurtgen does not disagree with the court.

¹¹ Member Liebman agrees, for the reasons stated in the Board's decision, that an affirmative bargaining order is warranted here. She believes, however, that the analysis required by the District of Columbia addresses concerns raised when a union's majority support has been challenged. Because no such challenge has been made here, the Board's analysis is not mandated, even to comply with the court's requirement. An affirmative bargaining order, rather, is the necessary remedy in cases like this one, where a successor employer has never recognized an incumbent union and has discriminated against incumbent employees based on their union affiliation.

¹² Chairman Hurtgen does not subscribe to the Board's decision in *St. Elizabeth Manor*, from which he dissented. Although he disagrees with the successor bar doctrine enunciated in that case, inasmuch as he joins in finding that the Respondent was obligated to bargain with the Union, Chairman Hurtgen agrees with the instant bargaining order.

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

(a) Make whole employees Marlene Connell, Edwin Martinez, Anthony Moreno, Frankie Rodriguez, and Anthony Thompson for any losses they may have suffered by reason of the discriminatory refusal to hire them.

(b) Within 14 days from the date of this Order, offer Marlene Connell, Edwin Martinez, Anthony Moreno, Frankie Rodriguez, and Anthony Thompson 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.

(c) Within 14 days from the date of this Order, on request of the Union, rescind the April 1997 unilateral changes in unit employees' terms and conditions of employment.

(d) On request, bargain in good faith with the Union as the exclusive collective-bargaining representative of unit employees with respect to wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its building at 291 Broadway, New York, New York, copies of the attached notice marked "Appendix."¹³ 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 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. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a

copy of the notice to all current employees and former employees employed by the Respondent at any time since April 1, 1997.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

MEMBER WALSH, dissenting.

Contrary to my colleagues, I would not reverse the judge's considered assessment of the credibility of Anderson Curtis. Rather, I would affirm the judge's credibility resolutions and would adopt her recommendation to dismiss the complaint.

The judge watched and listened to Curtis testify. She concluded that he was a truthful witness. She believed that he testified without guile, and she was convinced that he would not lie under oath. She particularly found that although Curtis did not have a good recall of dates, he testified accurately as far as his recollection went. Finally, she credited Curtis that he alone was responsible for the Respondent's hiring. In this regard, she credited Curtis, a 31-year member of the Union, that he asked several tenants to give alleged discriminatee and fellow union member Anthony Moreno a message that Curtis was beginning to hire a cleaning staff. Also, the judge found very convincing Curtis' testimony that he left a message for alleged discriminatee and fellow union member Marlene Connell when he began hiring.

My colleagues would reverse these considered, articulated, demeanor-based credibility resolutions on the grounds that Curtis' testimony at the hearing about when he was hired by the Respondent, when he was given authority in turn to hire other cleaning employees, and when he actually hired them, is inconsistent with the dates on various employment forms in the record. But in believing Curtis' testimonial account of the events in question, the judge was fully aware of and took into account those inconsistencies. She found that his recollection about the actual dates when employees began work was inaccurate and tended to shift. Thus, she found that Curtis obviously forgot that he had met with Respondent officials to discuss interviewing and hiring a cleaning staff before the Respondent formally terminated its contractual relationship with Crisfield. But the judge nevertheless found that Curtis was consistent in his testimony about calling alleged discriminatees Moreno and Connell about possible jobs with the Respondent.

We cannot seat ourselves next to a judge at a hearing. We cannot watch and listen to witnesses testify. We must rely on a judge's assessment of the credibility of witnesses, and the judge's balancing of all of the many

¹³ 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."

factors at work in deciding whether to believe or disbelieve witnesses. The Supreme Court has firmly established the deference due to an administrative law judge's findings, particularly with respect to credibility. In *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951), the Court stated:

The "substantial evidence" standard is not modified in any way when the Board and its examiner disagree. We intend only to recognize that evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's than when he had reached the same conclusion. The findings of the examiner are to be considered along with the consistency and inherent probability of testimony. The significance of his report of course, depends largely on the importance of credibility in the particular case.

In *Ewing v. NLRB*, 732 F.2d 1117 (2d Cir. 1984), in language applicable to the Board in reviewing an administrative law judge's credibility resolutions, the court said:

It is the task of trial judges to separate factual wheat from evidentiary chaff, and appellate courts must accord great deference to these determinations. The temptation to displace the trial court's judgments with our own is often strong, but the integrity of the decision-making process requires that we do so only in cases of clear error. Fed.R.Civ.P. 52(a). The same policies apply in the administrative context when decisions of the finder of fact are brought under review.

In my view, it is not sound administrative policy to re-sift through the facts that the judge has already thoroughly considered, as my colleagues have done, and, on the basis of that re-sifting, to reverse the judge's credibility resolutions. Such appellate second-guessing does not give proper deference to our administrative law judges, and it will ultimately cause the appellate courts to accord even less deference to the Board's decisions. Even if I had a suspicion that a decision may not be exactly right, I would much rather affirm that decision, if it was based on thoroughly considered credibility resolutions, than to second-guess the judge and to risk the possibility that the courts will accord less deference to our decisions. To borrow from the standard applied in the Second Circuit, I would not reverse a judge's decision to credit a witness unless that witness' testimony was hopelessly incredible or flatly contradicted either by the law of nature or undisputed documentary testimony. *Beverly Enterprises v.*

NLRB, 139 F.3d 135, 142 (1998); *Kinney Drugs v. NLRB*, 74 F.3d 1419, 1427 (1996). Notwithstanding the failure of Curtis' testimony to match the dates on the employment documents in question, I cannot find that Curtis' testimony, on the key facts on which the judge's decision was based and on which she credited him, failed either one of those tests. Thus, unlike my colleagues, I would not reverse the judge's credibility resolutions and I would adopt the judge's decision.

APPENDIX

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

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

Section 7 of the Act gives employees these rights.

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

WE WILL NOT refuse to hire or consider for hire any employees for being a member of, or supporting, Local 32B-32J, Service Employees International Union, AFL-CIO, or any other labor organization.

WE WILL NOT refuse to meet and bargain in good faith with the Union as the exclusive collective-bargaining representative of employees in the following appropriate unit:

All handypersons, forepersons, and others, including elevator operators, porters, porter/watchmen, cleaning persons, matrons, security porters, fire safety directors and all other service employees employed at 291 Broadway.

WE WILL NOT unilaterally change your terms and conditions of employment.

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 make whole employees Marlene Connell, Edwin Martinez, Anthony Moreno, Frankie Rodriguez, and Anthony Thompson for any losses they may have suffered by reason of the discriminatory refusal to hire them.

WE WILL, within 14 days from the date of this Order, offer Marlene Connell, Edwin Martinez, Anthony Moreno, Frankie Rodriquez, and Anthony Thompson 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.

WE WILL, within 14 days from the date of this Order, on request of the Union, rescind the April 1997 unilateral changes in your terms and conditions of employment.

WE WILL, on request, bargain in good faith with the Union as the exclusive collective-bargaining representative of our employees in the unit described above with respect to wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

E.S. SUTTON REALTY CO.

Bert Pearlstone, Esq., for the General Counsel
Robert I. Gosseen, Esq. (Gallagher Gosseen Faller Kaplan & Crowley), of New York, New York, for the Respondent.
Ira A. Sturm, Esq. (Raab & Sturm, LLP), of New York, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ELEANOR MACDONALD, Administrative Law Judge. This case was tried in New York, New York, on May 27 and 28, 1998. The complaint alleges that in mid-April, 1997, Respondent, in violation of Section 8(a)(1), (3), and (5) of the Act, failed to consider for employment and failed to hire certain employees because they were represented by the Union and that Respondent refused to bargain with the Union. Respondent denies that it has engaged in any violations of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent in August 1998, I make the following¹

FINDINGS OF FACT

I. JURISDICTION

Respondent, E.S. Sutton Co., a corporation with an office at 1407 Broadway, New York, New York, is in the business of managing office buildings, including a building located at 291 Broadway, New York, New York. The parties agree, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. Crisfield, a New York State corporation, with an office at 19 Glendale Road, Harrison, New York, was engaged in the business of providing janitorial services to commercial customers, including a building located at 291 Broadway, New York, New York. The parties agree, and I find, that Crisfield was at all material

¹ The record is hereby corrected so that at page 205 at lines 16 and 18, Mr. Sturm is speaking and not Mr. Pearlstone.

times an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Partners, Inc., a corporation with an office at 505 Eighth Avenue, New York, New York, is in the business of providing janitorial services to commercial customers. The parties agree, 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.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

For at least 15 years, Respondent E.S. Sutton Realty Co. has owned and managed through various arms of its corporate identity a building at 291 Broadway in New York City.² As managing agent, Sutton contracted with various companies to provide cleaning services for 291 Broadway. These contractors had collective bargaining agreements with Local 32B-32J. In 1995, the cleaning contractor at 291 Broadway was a company named Partners, Inc. The testimony shows that Sutton was dissatisfied with the quality of the service provided by Partners and that it wished to save money on the cost of its cleaning service.

Respondent admits that from September 1995 until on or about December 31, 1995, the Union was the exclusive collective-bargaining representative of the unit employed by Partners at 291 Broadway and that the Union had been recognized by Partners. The recognition was embodied in a collective-bargaining agreement in effect from January 1, 1993, through December 31, 1995. At all times until January 2, 1996, the Union was the exclusive collective bargaining representative of the employees of Partners in the following unit:

All handypersons, forepersons, and others, including elevator operators, porters, porter/watchmen, cleaning persons, matrons, security porters, fire safety directors and all other service employees employed at 291 Broadway.

E.S. Sutton received a solicitation to provide cleaning services from Crisfield, a company newly formed by Brian Coffield and Phil Cristiano.³ Coffield testified that prior to forming Crisfield, he had run the all-night cleaning at the Javits Convention Center for 2 years and that he had managed the cleaning in several buildings in New Jersey for AT&T. In the fall of 1995, Coffield had left his business card at various buildings in lower Manhattan, including 291 Broadway, to see whether any of them might be in need of cleaning services.

Coffield's testimony about how he entered into a contract with Sutton was changing and inconsistent. Under direct questioning, Coffield testified that he walked into the building and met with Bruce Pirnat, the chief engineer and property manager of 291 Broadway.⁴ Pirnat told him that Sutton was unhappy with the cleaning contractor's performance and wanted to make a change. Pirnat said that Sutton was looking for a new com-

² The building is owned by 291 Broadway Realty Associates, one of the affiliated Sutton companies.

³ Coffield testified that he was the owner of Crisfield. Cristiano is named as the vice president on Crisfield's documents. The record shows that Coffield and Cristiano had other companies, and/or used the names of other companies.

⁴ Pirnat is an agent and supervisor of Respondent.

pany and was no longer interested in using the Union. Coffield testified that he put together a proposal and in mid-December, 1995 he went to the Sutton office at 1407 Broadway to discuss it with Jeff Shalom, Sutton's controller and director of real estate management.⁵ Coffield spoke about the service he would provide, and Shalom remarked that he was looking forward to changing the staff because the tenants were not happy with the cleaning services in the building. Shalom also stated that he was looking forward to not dealing with the Union. According to Coffield, Shalom said that Sutton did not want the Union in the building any more. Shalom told Coffield that Sutton used to employ a security guard in the building who belonged to Local 32B. When this person left to join the police force, he was replaced with a nonunion employee. Shalom told Coffield that his building contract with the Union would expire on December 31, 1995.⁶

Although Coffield had testified in response to General Counsel's questioning on direct that he had discussed Sutton's wish to change to a nonunion contractor with Pirnat before he submitted his bid to Shalom, Coffield was not sure about this when questioned on direct by Counsel for the Charging Party. After testifying at length about the circumstances under which he submitted a bid to Sutton, Coffield was no longer sure whether he had actually met Pirnat before he prepared his bid. Coffield did recall that he presented a proposed contract to Shalom. The document dated November 10, 1995, had been prepared with the assistance of people Coffield knew and without any participation by Sutton.⁷ The proposed contract provided that Crisfield would provide cleaning services for \$13,860 per month and that "this firm fixed price is for non-union labor only." Coffield testified that he used this language to insure that he would receive more money if he was forced into using a union. But Coffield did not tell Shalom that if his employees joined a union he wanted to come back to Sutton for more money. Coffield testified that he told Shalom that he would go in with a non-union workforce.

Chief engineer Pirnat has been employed by 291 Broadway Realty Associates for 12 or 13 years.⁸ Pirnat is responsible for the maintenance of the various systems of the building at 291 Broadway. His hours are 7:30 a.m. to 3:30 p.m., Monday through Saturday. Another engineer works from 10 a.m. to 6 p.m. Pirnat is not the superintendent of the building and he has never supervised the cleaning personnel nor is he responsible for any aspect of the cleaning services. Pirnat recalled that he met Coffield when the latter came into the building to see whether he could get the cleaning business. According to Pirnat, many people walk into the building looking for business of one sort or another. Pirnat is not responsible for the building's business, but he directed Coffield to Shalom at the E.S. Sutton office. Pirnat told Coffield that it was a good time to

submit a proposal because there were complaints about the current cleaning company and the Suttons were thinking of changing. Coffield informed Pirnat that he had another job on Greenwich Street and that he had once cleaned the Javits Center. Pirnat denied discussing the cost of cleaning or the Suttons' strategy with Coffield. However, Pirnat acknowledged that Respondent was always looking for ways to save money at the building.

Shalom testified that he spoke to Coffield and Cristiano about cleaning 291 Broadway. Shalom recalled that a representative of Crisfield called him to solicit the business. At one point, Shalom testified that he could not recall when he met with Coffield and Cristiano, but later he stated that he met with them about November 10, 1995. Shalom testified that the two men promised better cleaning for less money. (Sutton paid Partners, Inc., \$22,150 per month and Crisfield proposed to clean the building for a monthly price of \$13,860.) Eventually, Crisfield sent a proposed contract to Shalom and Shalom made some changes on the document in his own hand having to do with extra work, submission of invoices and cancellation. Shalom denied discussing with Coffield and Cristiano the persons to be employed by Crisfield. The contract between E.S. Sutton and Crisfield does not indicate when it was signed. By its terms, it commenced on January 1, 1996 and had a term of two years. The contract provided that Sutton had the right to terminate Crisfield's services upon 7 days notice.

Shalom testified that when E.S. Sutton purchased the building at 291 Broadway the company was required to assume the Local 3213-32J contract for building employees. By the fall of 1995, the building had only one employee in the Local 3213-32J unit.⁹ On November 9, 1995, Respondent withdrew from the multi-employer bargaining for a successor contract. On November 30, Respondent withdrew recognition from the Union as the representative of its single remaining employee.

Coffield testified that he began cleaning 291 Broadway on January 2, 1996. Upon his arrival at the building that night, he met with Pirnat who gave him the keys to the offices. Coffield had arranged for a number of workers to meet him at the building. However, when he walked into the lobby the former Partners employees were waiting for him and they offered to continue working as cleaners in the building. Coffield told the employees that he was a nonunion contractor, that he would only pay \$7 per hour, much less than their current wages, and that he did not currently give any benefits although he would find out about offering benefits through Local 2.¹⁰ Coffield was surprised that the employees would work for such low pay, but he told the employees that they were welcome to stay. He had a document prepared for the employees to sign which provided that employees who agreed to work for \$7 per hour rescind their membership in 32B-32J and will join and become active members of Local 2.¹¹ The document falsely informed employees that Crisfield had a collective-bargaining agreement with

⁵ Shalom is an agent and supervisor of Respondent.

⁶ This collective-bargaining agreement covered any workers employed by 291 Broadway directly. It was different from the contract that covered employees of the cleaning service.

⁷ Coffield's testimony about who prepared the contract was vague; he was not eager to recall whom among his associates or acquaintances had helped him with the language.

⁸ Pirnat is a member of Local 94 of the Operating Engineers.

⁹ The record shows that the remaining employee was a lobby starter who provided security.

¹⁰ Crisfield had no relationship with Local 2, but Coffield had read about that union in the newspaper.

¹¹ Coffield testified that he did not consult anyone from Sutton concerning the preparation of this document.

Local 2. All of the employees signed the document. Then, Coffield instructed the employees to clean the building according to their usual practice.

The former employees of Partners, Inc., were all members of Local 32B–32J. They included:

Dionisio Arismendi
Marlene Connell
Anderson Curtis
Anthony Moreno
Elena Radovic

Marlene Connell testified that she had worked at 291 Broadway for 15 years cleaning offices from 5 to 11 p.m. She said she knew Pirnat because she obtained the keys to the offices from him if she came to work early. Connell was obviously prepared to testify to a number of things, which she did not clearly understand or recollect. After much prompting from counsel for the General Counsel, Connell testified that Pirnat told her “he was trying to get their union members because Curtis was getting six weeks vacation and he was getting too much.” This testimony is incomprehensible. In response to leading questions by counsel for the General Counsel, Connell testified that Pirnat called her a snitch. Connell was unable to recall when this exchange occurred. In response to leading questions from counsel for the Charging Party, Connell eventually recalled that the conversation with Pirnat took place in January 1997. I shall not credit this testimony because I am convinced that Connell had no real recollection of what she was saying. Connell testified that she and the other cleaning employees went to the Union and told a representative that they had been fired by Partners, Inc. The representative instructed the union members to go to work for the new company, signing whatever papers they were required to sign because the Union was going on strike. When Connell arrived at the building on January 2, 1996, she met Coffield and a Crisfield supervisor named Willie Lopez. Coffield told the employees that their wages would be \$7 per hour with no benefits. Connell informed Coffield that she had a medical condition requiring doctor visits, but Coffield just shrugged. Coffield said he was not affiliated with Local 32B–32J; he had his own union, Local 2. After 3 months probation, the employees would be in Local 2. Connell signed a document presented by Coffield and she began cleaning the offices she had cleaned for Partners without any change in her routine.

Anthony Moreno testified that he had spent 13 years cleaning 291 Broadway for a number of contractors including Partners, Inc. He was a security maintainer, watching the lobby, bringing down the garbage at night and doing related cleaning. He worked from 5 to 10:30 p.m., 6 days per week. Moreno said that he had daily contact with Pirnat: Moreno came in to work early or Pirnat stayed late at the building and the two men saw each other if there were weekend emergencies at the building. Moreno is a bus operator for the New York City Transit system. At the time of the material events herein, he was driving from Sam to 3:30 p.m., 5 days per week. Moreno testified that while Partners had the contract to clean the building, Pirnat told him that the Suttons wanted to get rid of the Union because it cost too much money. The Suttons did not want all these people

with many weeks of vacation. According to Moreno, Pirnat told him many times that the cost of cleaning the building was hurting the Suttons and that they wanted to get rid of 32B.

At the end of December 1995, Partners advised its employees that the Suttons did not want to pay to renew the Partners contract and that it was their last day. Partners told the employees to come to the building on the next working day. On Tuesday, January 2, 1996, Moreno, Connell, and Anderson Curtis went to 32B–32J where a Union official instructed them to go to work as usual, accepting whatever wages were offered and signing any documents that were presented to them. The Union official told the employees that a strike was about to take place but that they should not participate in the strike. Moreno accepted a job on Crisfield’s terms that night along with the other employees, performing the same tasks that he had done for Partners.

On January 3, 1996, a worker from an adjacent building gave Moreno some union placards and leaflets in connection with the strike against commercial buildings. Moreno asked the employee in the candy store of 291 Broadway to hold the material for him. Moreno testified that Willie Lopez, the Crisfield supervisor, told him he was not supposed to have the material. Moreno replied that the worker next door had given it to him and that he would take care of it. Later that evening, Moreno’s son called and asked him to come home due to a family emergency. According to Moreno, Lopez gave him permission to leave early that day. On January 5, Coffield fired Moreno saying he could not use him because Moreno was a threat to the building. Coffield said Moreno knew the building was non-Union and that he should not have placards in the building. Moreno testified that on an occasion long after he was fired by Coffield he was speaking to Pirnat in the building and Pirnat remarked that Moreno had a lot of nerve to have union placards in the building.

Pirnat testified that he had had a friendly relationship with Moreno for many years. Moreno has visited Pirnat at home and he purchased a car from Pirnat’s brother-in-law. While Moreno was employed in the building, Pirnat spoke to him every few weeks when their schedules overlapped. After January 1996, Moreno came to 291 Broadway a few times to see friends in the building. Pirnat estimated that from January 1996 to May 1998 he had seen Moreno 10 or 12 times. Pirnat knew that Moreno had been fired in January 1996. Coffield told Pirnat that Moreno had been fired after he left his job without permission. Moreno told Pirnat that he was fired because he had an emergency at home and had to leave work. Pirnat did not participate in Crisfield’s decision to terminate Moreno and he heard about it the day after it took place. Pirnat was sure that Moreno did not say anything about union placards in connection with his discharge; Pirnat would have remembered if something had happened with union placards. Pirnat did recall that Moreno told Pirnat that he thought E.S. Sutton should have given him money when he was fired; Moreno wanted money from the Suttons, the Union, and everybody. Shalom testified that Coffield said he had discharged Moreno for leaving work without giving notice; Shalom was not involved in the discharge.

Unfair labor practice charges were filed against Crisfield on March 14 and April 17, 1996. Coffield made several attempts

to settle the matter. He asked James Fitzpatrick, the contract director of Local 32B–32J, what he could do to resolve the case. Fitzpatrick suggested unionizing the employees at the building. On direct examination by counsel for the General Counsel, Coffield testified that he called Shalom and informed him of his conversation with Fitzpatrick and asked whether Sutton would pay more for the monthly cleaning if Crisfield were paying union wages. Shalom said that he would check with his attorney. Eventually, Shalom informed Coffield that Respondent would not raise its payments to Crisfield and that he was not interested in bringing the Union back into the building. At the end of March 1997, Coffield spoke to Fitzpatrick again and told him that he was not getting an increase from Sutton but that he wanted to settle even if it meant losing money. Coffield offered to give \$15,000 in backpay to the employees and to sign a collective-bargaining agreement. Following this conversation with Fitzpatrick, Coffield told Shalom that he had worked out a deal with the Union and that he would pay the difference between nonunion and union wages out of his own pocket for the remainder of the contract term. Shalom replied that he was not happy with Coffield's decision and that he did not want the Union in the building. Coffield testified that this conversation took place sometime at the end of March 1997. As will be described below, Sutton terminated Crisfield's contract to clean the building on April 15, 1997. On cross-examination by counsel for Respondent, Coffield's testimony changed. He then recalled that after April 16, 1997, he told Shalom that he had settled the case for \$30,000 and he asked Sutton to pay part of the cost of the settlement.

Shalom testified that he could not recall when he first spoke to Coffield about the attempts to settle the unfair labor practice charges against Crisfield. However, Shalom was certain that Coffield first asked for more money to help pay for the NLRB settlement after April 1997 when Coffield called to ask for payment of the last monthly invoice he had submitted to E.S. Sutton. Shalom did not recall that Coffield had said anything about having to sign a contract with Local 32B–32J.

A settlement agreement signed by Coffield on September 29, 1997, and approved on October 10, 1997, provided backpay to 10 named discriminatees. Connell, Curtis, and Moreno each received backpay of \$5,625, Radovic received \$2,250 and Arismendi received \$375. Other employees about whom the record is otherwise silent received lesser sums. I assume these other employees were not former Partners employees but were hired by Crisfield at some point. As part of the settlement, Crisfield mailed a notice to the employees which provided that it would not inform employees that it intended to operate as a nonunion operation when it was obliged to recognize Local 32B–32J, that it would not require employees to resign from the Union, that it would not discharge employees for activities on behalf of the Union, that it would recognize the Union, that it would make whole employees due to Crisfield's failure to abide by the contract between Partners, Inc. and the Union, and that it would expunge from its records references to Anthony Moreno's discharge.

Shalom testified that he was dissatisfied with Crisfield's performance in cleaning 291 Broadway. Shalom transmitted tenant complaints about cleaning to Coffield but the latter never took

care of the problems. On August 1, 1996, Shalom sent a fax to Coffield stating, "We have had numerous complaints from our tenants regarding the cleaning services—specifically regarding the bathrooms. Your intentions seem good & you always respond like a gentleman, but we must have action." On August 23, Pirnat wrote a letter to Coffield informing him that the 18th floor had not been cleaned and that a member of the building staff had been sent to vacuum and empty the waste receptacles. On October 11, 1996, Shalom wrote to Cristiano stating that his "numerous" complaints about poor service had not been attended to and that almost weekly an office was not cleaned at all. Shalom also mentioned complaints about the off hours security guards. Shalom concluded by saying, "If there is not an immediate and noticeable improvement, we will have no choice but to terminate our contract." On March 5, 1997, Shalom wrote to Cristiano enclosing two written complaints from tenants and remarking that, "it seems that approximately once every week or two, one or two offices are not cleaned at all." On March 11, 1997, Shalom wrote to Cristiano stating that there was no security guard in the building on March 8 and emphasizing that the building and its occupants were endangered by this situation. On March 19, Shalom wrote to Cristiano enclosing a tenant complaint about cleaning and security and stating, "This situation must be remedied immediately." On March 31, Shalom again wrote to Cristiano enclosing a report from Pirnat that a tenant had complained about lack of cleaning. On April 2, Sutton received a memorandum from the tenant on the 19th floor detailing dirty bathrooms and garbage not removed and complaining that, "This is not the first time lapses in bathroom cleaning have occurred."

Shalom testified that he finally decided to cancel the contract with Crisfield because of an accumulation of events. He came to the conclusion that he would try to have Sutton do the cleaning "in-house" with its own employees. Shalom thought that solution could not be worse and it might be better, and he could probably clean the building in-house for less money. E.S. Sutton was always trying to reduce expenses.

Pirnat testified that he often told Coffield that he was not doing a good job and that he might be terminated by Sutton. Pirnat often found the Saturday security men sleeping or, absent altogether, and he had to call the Crisfield managers about this "constantly." Pirnat was friendly with many of the tenants in the building, and they told him that the cleaning was not being done properly. If tenant garbage was not being picked up, Pirnat had to deal with it when he came on the premises. Pirnat testified that Crisfield had no backup personnel. Furthermore, some of the cleaning personnel were employed during the day in a construction company owned by Coffield and they were too tired to work at night in the building.¹² About 1 month before the contract was actually cancelled, Shalom told Pirnat that he was terminating Crisfield. Pirnat knew the reasons for this decision: garbage was not being picked up, security was lax, the vacuum cleaners did not work, there were no cleaning supplies and tenants were complaining.

¹² Pirnat was certain that Coffield had a construction company; he asked Coffield to hire his nephew

Shalom told Pirnat that the cleaning should be done in-house. Pirnat thought this was a good idea as long as he himself did not have to be bothered with the job. Pirnat suggested to Shalom that Anderson Curtis, who had worked in the building “forever”, should be selected to run the cleaning services. Curtis cleaned the lobby, took out the building garbage, and acted as the nighttime security person.¹³ Pirnat had seen Curtis every working day for 12 years because Curtis’ shift ended just as Pirnat’s shift began, and Pirnat knew that Curtis was an excellent worker. Sometime after Pirnat had told Shalom to consider making Curtis the cleaning supervisor, Shalom informed Pirnat that he wished to speak to Curtis. Pirnat discussed the possibility of taking over the cleaning with Curtis and he accompanied Curtis to a meeting in Shalom’s office. During the meeting, Shalom told Curtis that they had to do a better job with the cleaning because the tenants were disgruntled. Pirnat was not involved in any subsequent actions Curtis took to hire cleaning employees.

Shalom testified that before he sent a letter canceling the Crisfield contract he talked to Pirnat about Curtis’ abilities. Pirnat brought Curtis to see him at the beginning of April. Shalom told Curtis to draw up a list of the equipment he would need and he told him to hire the same number of people as were currently employed by Crisfield to clean the building. He told Curtis that Sutton would pay \$7 per hour to the employees and that after a while they would receive medical benefits. Shalom did not discuss any particular people who should be hired by Curtis. He told Curtis that he did not want the same kind of complaints from the tenants. Shalom told Curtis to find people to clean the building, but Curtis had no authority to hire them until Shalom gave him that authority. Shalom testified that he informed Curtis that he was hired as of the date that Crisfield was out. But Shalom also stated that he gave Curtis the authority to begin hiring before Crisfield was actually out of the building. Clearly, Shalom’s recollection about the events was not complete.

The Crisfield contract was terminated by letter from Shalom dated April 10, 1997, stating that the termination was to take effect on Thursday, April 17. However, on April 15, Shalom sent a letter to Crisfield stating, “Because of the poor quality and/or lack of cleaning and security services, please notify your employees after they complete tonight’s shift that they should not return to the building.”

Pirnat testified that he took Curtis up to meet Shalom before April 16. Pirnat believed that the in house cleaning crew supervised by Curtis took over the day after Crisfield was terminated and that there was no hiatus in cleaning services at the building. However, Pirnat only sees Curtis in the morning so he could not be sure who was there at night.

Anderson Curtis has worked in 291 Broadway for many different cleaning contractors over the past 31 years. Curtis has been a member of Local 32B–32J during all of that time. Curtis’ duties were to clean and polish the floors, to perform duties in the lobby area and to provide nighttime security. Curtis testified that Shalom interviewed him and hired him on April 17.

¹³ Because Pirnat did not work the same hours as Anderson he was not quite accurate about Anderson’s precise duties.

According to Curtis, he came to work the night of April 16 just before midnight and found that the Crisfield equipment was gone; a worker named Al told him that the rest of the Crisfield employees had been given positions elsewhere; at some point, Crisfield Supervisor Willie Lopez had informed Curtis that they had quite a few buildings.¹⁴ Curtis stated that this first night he sat at the lobby desk to provide security and when Pirnat came to work in the morning he asked Pirnat what had happened. Pirnat told Curtis that Crisfield was out and then he took Curtis to Shalom’s office. Shalom told Curtis that the only good reports he had from the tenants were about Curtis and he asked him to continue working at the building as a supervisor. Shalom offered him \$400 a week to start and promised him insurance coverage. Shalom told Curtis to hire workers; he did not tell him whom to hire and he did not forbid him from hiring anyone in particular. Shalom instructed Curtis to draw up a list of necessary equipment and supplies and give it to Pirnat for bidding and ordering.

Curtis testified that he asked his brother, Harry Curtis Jr., to help him out until the equipment arrived; they made do with brooms and a few plastic bags to clean the building and dump the rubbish. Curtis told the tenants to bear with them until the equipment arrived in 1 week’s time. Curtis testified that Shalom gave Curtis application forms to provide to the people that he wanted to hire. These forms were filled out and transmitted by Curtis to Shalom’s office before the workers actually began work. Curtis’ recollection about the actual dates when various employees began work was not accurate and tended to be shifting. However, when asked about calling the former Crisfield employees for work, Curtis was consistent in his testimony. He testified that he had tried to call Marlene Connell within the first 2 or 3 days after he was hired and that he had left a message on her answering machine, but she did not call him back. Curtis recalled that one of the tenants in the building, a lawyer, had informed him that Marlene was away on a cruise. Curtis testified that he did not have Anthony Moreno’s telephone number, but that he had asked one of Moreno’s friends among the tenants to give Moreno a message.

Pirnat testified that he had known Connell very well because she came to the building early from her other job and he gave her keys to the offices she cleaned. The last time Pirnat spoke to Connell was when Crisfield was going to “disappear”; perhaps around April 14. Connell asked Pirnat what he thought would happen and Pirnat told her that Crisfield would be gone because it was not doing a good job and the owners were unhappy. Connell replied that she was going away on vacation and she would deal with it when she got back. Pirnat stated that Connell had a lot of friends in the building and he often asked them how she was doing. Pirnat testified that Moreno, who had not worked in the building since January 1996, did not speak to him about getting a job at the building around April 17, 1997. When Pirnat and Moreno spoke on the telephone Moreno asked him a lot of questions about fixing electrical problems in his new house but he did not ask Pirnat about working at the building. Pirnat said that none of the Crisfield people approached him about a job.

¹⁴ Al is not further identified in the record.

Connell testified that “a few days” after Crisfield lost the contract to clean 291 Broadway she went to the Union and informed an official named McCullough that she was going to apply for a job at the building. Connell stated that she then went to the building and asked Pirnat for an application. Pirnat said that the hiring was being done at the office and he gave her the telephone number. Connell said that Pirnat gave her the wrong number. A few days later, according to Connell, she returned to see Pirnat and this time he gave her the address of Shalom at the E.S. Sutton management office. Connell and Moreno went to the office and found it closed for the Jewish Holidays.¹⁵ They returned on a second occasion and spoke to Shalom, telling him that they wanted to apply for jobs. Shalom said that Pirnat was doing the hiring and firing. According to Connell, Moreno asked Shalom, “What do we do now, go fly a kite?” and Shalom replied, “Yes, go fly a kite, the Union can’t do anything about it.” Connell testified that she went back to see Pirnat and asked him why he had sent her to the office, and Pirnat still maintained that Shalom was doing the hiring and firing.

On direct examination by counsel for the General Counsel, Moreno testified that in early to mid-April 1997, Connell telephoned him and said that Crisfield was out of the building and she had lost her job. Within a week he telephoned Pirnat and asked Pirnat for a job. Pirnat replied, “You know the deal,” and said that the Suttons would bring in their “own boys.” A few days later, Moreno telephoned Pirnat again because Connell had informed him that Curtis was doing the hiring. When Moreno asked Pirnat whether Curtis was hiring, Pirnat denied that it was true and told Moreno to go see Shalom for an answer. Moreno said that the first people to be hired should be himself, Connell and “Rafael” and Pirnat repeated that he should address his request to Shalom. Moreno went to the Union and then he and Connell went to see Shalom at the end of April. Finding the office closed, they returned the next Monday. Moreno told Shalom that he and Connell were looking for jobs at 291 Broadway. Shalom replied that he was not hiring. Moreno said that Pirnat and the Union had sent them to him for a job. Shalom said that that Moreno and the Union could not tell him what to do. Moreno asked, “Are you telling me to go fly a kite?” and Shalom said, “Yes, go fly a kite.” Moreno testified that he and Connell then went to the Union to file charges. Moreno’s story changed somewhat on cross-examination. In response to questions by counsel for Respondent, he recalled that in mid-April, after Crisfield was out, he went to see McCullough and informed him that Crisfield had lost the contract. Connell was not with him. Moreno asked McCullough whether he should get a job at the building. Moreno told McCullough that the Suttons had done wrong; he believed that they had conspired with Coffield to get everyone fired and hire cheap labor and they failed to talk to the employees about the job. Moreno thought he was entitled to severance pay because he had worked at the building for 13 years. McCullough said that he should get a job at the building and told him to go and apply.

¹⁵ The parties stipulated that in 1997, the first 2 days of Passover were April 22 and 23 and the last 2 days were April 28 and 29. On these 4 days, observant Jews would close their offices.

Moreno wanted a job at his union wage, not the \$7 per hour Crisfield had paid him. Moreno and Connell went to see Shalom on May 5, 1997, and said, “[W]e were there for a job and the Union sent us.” Shalom replied that Curtis was hiring. Moreno insisted that Pirnat had told him that Shalom was hiring. Shalom said that there were no jobs available. In answer to Moreno’s continued insistence that Shalom himself was hiring, the latter said that the Union could not tell him what to do.

Shalom testified that when Moreno and Connell came to ask for a job at 291 Broadway he told them that the staff was fully hired and that Curtis was doing the hiring. Moreno replied that the Union had sent him to the office. Shalom could not recall any more details of the conversation.

The documentary evidence shows that supplies and materials for cleaning the building were invoiced on April 14 and 16, 1997. Anderson Curtis filled out his W-4 form on April 8 and his I-9 form on April 11, 1997. Harry Curtis Jr., filled out his W-4 form on April 8 and his I-9 form on April 11, 1997. The form was signed by the payroll officer for 291 Broadway on April 16, 1997. Vernon Dixon filled out his W-4 form on April 16 and his I-9 form on April 10.¹⁶ The I-9 form was signed by the payroll officer on April 16. Orfa Vasquez filled out her W-4 and I-9 forms on April 12 and the payroll officer signed the I-9 form on April 16. Victor Valdes filled out his W4 form on April 9. His I-9 form is undated but it was signed by the payroll officer on April 16. Derrell Cora filled out his W-4 and I-9 forms on April 7; his I-9 form was signed by the payroll officer on April 30.¹⁷ Douglas Gittens filled out his W-4 form on April 21. His I-9 form is not dated; it was signed by the payroll officer on April 30, 1997. The parties stipulated that James Huayamave began working for Respondent on June 20, 1997.

B. Discussion and Conclusions

Connell was not a reliable witness. She had obviously been primed to tell a story in concert with Moreno but she could not recall it and had to be prompted by leading questions. Even so, Connell’s story differed markedly from that told by Moreno. Connell was clearly unable to recall significant dates but she tried to give the impression that she applied for a job with Respondent in a timely fashion. However, Connell did not deny that she was away on a cruise when Crisfield lost the contract. She did not deny telling Pirnat, in response to the information that Crisfield was about to leave the building, that she would take care of the problem when she returned. I cannot rely on Connell’s testimony to find any unfair labor practices.

Moreno was not an accurate witness. For example, he exaggerated his contacts with Pirnat, saying that he saw Pirnat every day. Yet Moreno’s main job as a bus driver does not end until 3:30 p.m., which is exactly when Pirnat’s workday at the building is over. Moreno was vague about dates, at first making it seem that he and Connell acted immediately to apply for jobs at the building, but then conceding that they did nothing until the end of April when the office was closed on April 28 or the on April 29. Moreno was eager to give testimony linking Respondent to the unfair labor practices committed by Crisfield.

¹⁶ Dixon left employment on April 25, 1997.

¹⁷ Cora left employment on June 19, 1997.

His eagerness went so far as to lead him to accuse his old friend Pirnat of repeatedly lying to him about who was doing the hiring for the building. It would be impossible to separate out the exaggerations and fabrications from Moreno's testimony, and I shall not rely on his testimony to find violations of law.

Shalom did not recall much about some of the relevant events. However, I do not believe that he gave false testimony under oath.

Curtis was a truthful witness. I observed that he testified without guile and I believe that Curtis would not deliberately tell any falsehood. I am convinced that Curtis would not offer a fabrication under oath. Although Curtis did not have good recall of dates, I find that he testified accurately as far as his recollection went. Curtis obviously forgot that he met with Pirnat and Shalom to discuss supervising and hiring the cleaning staff before Crisfield was terminated. It is clear to me from the testimony of Shalom and Pirnat, from listening to Curtis and from examining the documentary evidence, that Curtis met with Shalom in anticipation of Crisfield's termination and that Shalom told him to hire some people to clean the building and to draw up a list of necessary equipment and supplies. From the dates on the invoices in the record, I find that Curtis drew up the list and that the materials were ordered before Crisfield left, but that they were probably delivered after April 16. This would account for Curtis' recollection that when he and his brother first began cleaning the building there was nothing to work with and they had to buy a few items and ask the tenants' indulgence until all necessary materials were on the premises. The documentary evidence shows that although Shalom at first intended Crisfield to clean the building up until the night of the 16th, he changed his mind and ended the contract a day early. This fact would account for Curtis' recollection that he was surprised one night when he came to the building to find that Crisfield was already gone. Curtis' testimony that he left a message for Connell when he began hiring was given with conviction and I found it very convincing. I also credit Curtis' testimony that he asked several tenants to give Moreno a message when he was beginning to hire cleaning staff. I credit Curtis that he alone was responsible for the hiring. I also credit Curtis that he was told that some of the former Crisfield employees had been given jobs at other locations.

I credit Pirnat's testimony. Pirnat is a loquacious individual and the many details he provided had the ring of truth. His testimony was consistent despite vigorous cross-examination and his assertions were supported by the documentary evidence.

Coffield's testimony must be approached with caution. Coffield has paid a substantial sum of money to settle an unfair labor practice case. I observed that Coffield was loath to give any information about his business, his methods of operation and his associates. Coffield testified readily to only one set of facts: that Shalom wanted to save money on cleaning the building and that Shalom did not wish to deal with the Union. However, Coffield himself came to Shalom with a proposal to cut drastically the cost of cleaning the building by using nonunion labor. Coffield was not an innocent who was conned into a scheme by Shalom. Coffield had directed cleaning operations at the Javits Convention Center, a location that has achieved notoriety for the difficulty of its labor-management relations. Cof-

field's proposal to Shalom was no different from the many similar proposals accepted by owners and managers of buildings in New York City which are discussed in numerous AU and Board decisions involving the Union herein. I find that Coffield testified in such a manner as to shield himself from further involvement with the Board and the Union, and I shall credit his testimony only when it is not contradicted by other more reliable evidence.

Based on my credibility determinations about the testimony herein and on the documentary evidence in the record, I find that the following occurred.

Coffield walked into the building at 291 Broadway and told Pirnat that he was looking for customers for his cleaning company. Pirnat told Coffield that Respondent was thinking of changing its cleaning contractors and directed Coffield to Shalom. Coffield gave Respondent a bid to provide cleaning services at 291 Broadway for less than the current cost but with the use of nonunion labor. Respondent signed the proposed contract with Crisfield sometime between November 10 and late December 1995. Shalom told Coffield that the workers employed directly by Respondent were no longer union members and that after the end of the year Respondent would no longer be dealing with the Union at 291 Broadway.

At the Union's direction, all of the employees of the former cleaning contractor went to work for Crisfield on January 2, 1996 despite the decrease in wages and lack of benefits. On January 5, 1996, Moreno was fired by Crisfield. Neither Respondent nor its agents were involved in Moreno's discharge. Both Shalom and Pirnat believed that Moreno had been fired because he left work without permission.

Respondent began receiving complaints from the tenants of 291 Broadway concerning the cleaning performed by Crisfield before August 1996. Beginning on August 1, Shalom put these complaints into writing, citing "numerous" prior complaints and the fact that Coffield always responded to these but that good intentions did not take the place of action. The written complaints continued and on October 11 Shalom warned that there had been numerous complaints about cleaning and security and that these could lead to the termination of Crisfield's contract. More complaints accrued in 1997, and Shalom decided that he would have to fire Crisfield. Pirnat was often the recipient of tenant complaints about Crisfield's failures. About mid-March 1997, Shalom told Pirnat that he would be terminating the Crisfield contract. Shalom and Pirnat discussed Shalom's wish to perform the cleaning in-house and Pirnat suggested making Curtis the cleaning supervisor.

In early April, Curtis met with Shalom and offered him a job supervising the cleaning operations at the building. Shalom said that the tenants were dissatisfied and that cleaning services had to improve. Shalom told Curtis to hire cleaning employees and to draw up a list of needed materials. Shalom did not tell Curtis whom he was or was not permitted to hire; he only said he wanted to see improvements. Curtis ordered equipment and materials by April 14 and 16, 1997. New employees, including Curtis, filled out W-4 and I-9 forms for Respondent beginning on April 7. After meeting with Shalom in early April, Curtis tried to leave a message with friends of Moreno asking him to call about a job. Curtis telephoned Connell and left a message

on her answering machine asking her to call him. Neither Moreno nor Connell responded to Curtis. Respondent terminated Crisfield's contract on April 15, 1997. By April 16, Curtis had hired a full complement of cleaning employees.

Coffield made attempts to settle the unfair labor practice charges filed against Crisfield in March and April 1996. The Union wanted him to sign a collective-bargaining agreement. Coffield informed Shalom of the Union's demands. After Crisfield lost the contract to clean 291 Broadway, Coffield telephoned Shalom and inquired about the late payment for the last month's services. At this time, Coffield asked Shalom if he would contribute to the cost of a settlement with the Union. The settlement agreement was signed on September 29, 1997.

In early April 1997, Pirnat told Connell that Crisfield would lose its contract. Connell replied that she was going on vacation and that she would deal with the situation when she returned. Connell did not ask Pirnat for a job at the building when she returned. Although Moreno was friendly with Pirnat and often spoke to him on the telephone, Moreno did not ask Pirnat for a job at the building.

After she returned from vacation, Connell telephoned Moreno and told him that she was out of a job. Connell informed Moreno that Curtis was in charge of hiring. Neither Moreno nor Connell asked Curtis for a job cleaning the building. Moreno went to the Union and told McCullough that he wanted severance pay and McCullough told him to get a job at the building.

On April 28 or 29, Moreno and Connell went to Respondent's office and found it closed. They returned on May 5 and spoke to Shalom who told them that hiring was complete and that Curtis was in charge of hiring. Moreno replied that the Union had sent him to see Shalom. Later, Moreno and Connell went to the Union so that charges could be filed against Respondent.

Despite the valiant efforts by counsel for the General Counsel in his excellent brief to present the facts in the light most favorable to his position, I find that the credible testimony and documents in the record do not support his assertions about the facts.

I conclude that the testimony and evidence before me show that Moreno and Connell did not timely apply to Respondent for employment cleaning the building at 291 Broadway. There is no evidence that any other union-represented employees applied for such employment nor that Respondent engaged in any actions that would discourage them from applying for employment. Thus, I conclude that the Respondent did not fail to consider employees for employment, did not fail to hire employees, and did not fail to bargain with the Union.

CONCLUSIONS OF LAW

1. The General Counsel has not shown that Respondent violated the Act in the manner alleged in the complaint.
[Recommended Order omitted from publication.]