

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES  
NEW YORK BRANCH OFFICE**

**C & W CLEANING SERVICE, INC.**

and

**Case No. 2-CA-38343**

**LOCAL 32BJ, SERVICE EMPLOYEES  
INTERNATIONAL UNION**

*Gregory Davis, Esq., and Rachel Preiser, Esq.,*  
for the General Counsel  
*Elizabeth Baker, Esq.,* of New York, NY, for  
the Charging Party  
*Stewart Karlin, Esq.,* of New York, NY, for  
the Respondent

**DECISION**

**Statement of the Case**

**ELEANOR MACDONALD, Administrative Law Judge:** This case was heard in New York, NY, on February 8 and 11, 2008. The Complaint alleges that Respondent, in violation of Section 8(a)(1), (3) and (5) of the Act, refused to consider for hire and refused to hire employees, failed to recognize and bargain with the Union and implemented changes in conditions of employment. 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 parties on March 18, 2008, I make the following<sup>1</sup>

**Findings of Fact**

**I. Jurisdiction**

Respondent, with an office at 309 Lafayette Avenue, Brooklyn, New York, is engaged in providing cleaning services to other businesses and government agencies. Annually Respondent performs services valued in excess of \$50,000 for the New York City Human Resources Administration, an instrumentality of the City of New York which is in commerce. 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, and that Local 32BJ, Service Employees International Union, is a labor organization within the meaning of Section 2(5) of the Act.

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<sup>1</sup> The record is hereby corrected so that at page 15, line 14, the correct date is June 25, 2007; at page 16, line 6-7 and thereafter, the correct name is Fern Vasile.

## II. Alleged Unfair Labor Practices

### A. Background

5 Harold Campbell is the President and CEO of Respondent.<sup>2</sup> Campbell stated that the  
company has been in operation for 18 years. The company's only business office at the time of  
the instant hearing was in Campbell's home, an apartment on the 11<sup>th</sup> floor of a residential  
building with a security desk in the lobby.<sup>3</sup> Visitors are not allowed past the security desk and  
into the elevators unless a resident signifies permission to the security personnel. The business  
10 has a telephone number that doubles as a fax number and Campbell carries a cell phone. The  
only way a person desiring to file an employment application can contact C&W is by telephone.  
Respondent's vice-president for operations is James Blackwell. A secretary, Angelina Alston,  
answers the telephone. The parties stipulated that Campbell and Blackwell are supervisors and  
agents of Respondent within the meaning of the Act. The company employs between 60 and  
15 70 employees.

Campbell testified that he solicits new business, prepares bids and makes all the  
ultimate hiring decisions. Blackwell reviews applications and interviews prospective employees  
and he consults with Campbell when hiring decisions are made.

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As of July 1, 2007 Respondent provided cleaning services at approximately 12 locations  
in New York City. None of the employees at those locations was represented by a union. In  
late June 2007 Respondent was awarded a three-year contract by the New York City Human  
Resources Agency (HRA), to provide cleaning services for a building at 330 West 34<sup>th</sup> Street in  
25 Manhattan commencing on July 2, 2007. Cleaning services at 330 West 34<sup>th</sup> Street had been  
provided by Triangle Services, Inc., whose employees at that location were represented by  
Local 32BJ. Triangle was a signatory to a collective bargaining agreement with the Union.  
Triangle employed 11 employees to clean the building at 330 West 34<sup>th</sup> Street.

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### B. Respondent Obtains a Contract for 330 West 34<sup>th</sup> Street

Campbell subscribes to a service that notifies him of likely jobs for bidding in the  
cleaning industry. He bids on 3 or 4 jobs per month. Campbell testified that he bids on many  
HRA jobs but he limits his bids to those where the total of a three year contract is less than \$1.5  
35 million. For bids over that amount the HRA contract requires that a performance bond be  
obtained by the contractor. The reason that Respondent does not submit bids for \$1.5 million  
and over, Campbell testified, is that, "I don't qualify" for a performance bond because "I can't  
afford it."<sup>4</sup>

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New York State Labor Law Sec. 320 requires that the prevailing hourly wage rate and a  
supplemental benefit rate be paid to building service employees on public contracts. These  
rates and the relevant portions of State and City laws and regulations are set forth in the HRA  
bid and contract documents executed by C&W. The prevailing wage and supplemental benefit  
rates are established each year on July 1; the contract documents executed by Respondent  
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<sup>2</sup> Campbell also identified himself as a shareholder.

<sup>3</sup> There are no other businesses on the 11<sup>th</sup> floor.

<sup>4</sup> Campbell did not explain a current contract for \$1.6 million with the New York City  
50 Department of Finance that Campbell listed in his bid documents for the work at 330 West 34<sup>th</sup>  
Street.

contain only the prevailing rates for 2007. The prevailing rate requirement is qualified by the following language applicable to Respondent's employees

5 New employees: Effective February 4, 1996, a new hire employed in the porter/cleaner title, may be paid a starting rate of eighty (80%) of the hourly rate published above. Upon completion of thirty (30) months of employment, the new hire shall be paid the full wage rate.

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10 Upon completion of two years of employment the new hire receives the full supplemental benefit rate.

15 This provision shall not apply to any experienced employee ("experienced employee") who was employed in the New York City Building Industry ("industry") as of February 3, 1996. "Experienced employee" shall be defined as a person who has worked for thirty (30) days in the "industry" within the 24 months immediately preceding hiring (excluding employment as vacation relief).

20 In August 2006 Campbell submitted a bid on behalf of Respondent to HRA to provide cleaning services at 330 West 34<sup>th</sup> Street for a total cost \$1,478,948.04. HRA awarded the job to Respondent by letter dated June 25, 2007. On Thursday June 28, 2007 Campbell and Angelina Alston met with Fern Vasile, the Assistant Deputy Commissioner for Contracts and Budget of HRA, to discuss the successful bid and to make certain arrangements. Campbell was  
25 informed that he was to start cleaning the building on Monday July 2. At the June 28 meeting, HRA officials offered Campbell contracts at 15 additional sites, but Campbell could not accept all these assignments as he did not have the requisite staff. In the event, Campbell agreed to undertake the cleaning of 4 other sites. It required 11 employees to clean 330 West 34<sup>th</sup> Street, and 17 or 18 more employees were needed for the 4 additional sites making a total of 28 or 29  
30 employees that Campbell had to find for the new work.

Campbell and Vasile gave different accounts of the June 28 meeting in certain material respects.

35 Campbell testified that no one mentioned a union at the June 28 meeting. Campbell stated that Vasile did not inform him that the employees who had been cleaning 330 West 34<sup>th</sup> Street were represented by any union. Campbell denied that Vasile asked him if his company was a union company. In fact, Campbell added, when he signed the contract with HRA on June 29 he did not know that Local 32BJ existed and he was not aware that Local 32BJ represents  
40 cleaning and maintenance workers in his industry.

Commissioner Vasile testified that she is responsible for evaluating bids and overseeing the management of contracts, including janitorial contracts, for HRA. Vasile decides which vendor will be selected as the successful bidder on contracts with HRA. Vasile stated that she  
45 met with Respondent on June 28, 2007. She discussed with Campbell the requirements of the contract and told him when he could move in equipment and supplies. Vasile explained the invoicing requirements to Campbell. Vasile testified that she emphasized that a contractor must pay the prevailing wage. Vasile specifically recalled that she asked Campbell if he was a union vendor. She explained to Campbell that he was not required to have a contract with a union but  
50 there could be problems if he did not have such a contract and a union can "make life tough." Vasile stated that she was certain she told Campbell that Local 32BJ was currently on the job

because she wanted to make him aware of what he would be up against. Vasile testified that Campbell told her that he was not a union vendor.

5 Vasile testified that under the contract beginning July 2, 2007 C & W performs the same work at 330 West 34<sup>th</sup> Street as had been formerly performed by Triangle.

### C. Respondent Hires New Employees

10 Campbell testified that he did not have any current employees to staff the newly acquired job at 330 West 34<sup>th</sup> Street. In order to obtain the required employees he did not advertise in the media nor did he try to hire the incumbent Triangle employees. After the June 28 meeting with Vasile at HRA ended at about 2 or 2:30 pm Campbell telephoned Blackwell and told him to contact the New York State Department of Labor and an employment agency known as "America Works". Campbell instructed Blackwell to search through the resume files regularly  
15 maintained by the company for likely employees. Campbell stated that the company did not require prior janitorial experience when it hired new employees.

20 When questioned by Counsel for the General Counsel pursuant to Rule 611(c) Campbell stated that Blackwell interviewed from 7 to 10 potential employees at the NYS Department of labor and about 5 from resumes on file. Campbell then interviewed some of these candidates at his office. The potential employees were interviewed in groups of 3 with each interview lasting for 5 or 10 minutes. By the end of June 29 Respondent had hired 3 or 4 people referred by the Department of Labor and the rest from resumes on file with the company. The requisite 11  
25 employees were hired by June 29 for 330 West 34<sup>th</sup> Street. None of these people had worked for the company before June 29. Counting the 11 employees for 330 West 34<sup>th</sup> Street plus those hired for the 4 additional sites Respondent had accepted from HRA, the company hired 22 new employees by the end of June 29. Most of these employees had no janitorial experience and they were trained on the job. Campbell made the final decision as to which employees would work at 330 West 34<sup>th</sup> Street and which would go to other locations.

30 James Blackwell is the vice president in charge of operations for C&W. He oversees the daily operations of the company and he performs the initial screening of employees. Blackwell testified that C&W began hiring June 28 or 29. He interviewed 30 to 40 employees at the NYS Department of Labor. Blackwell testified that C&W began cleaning other buildings on July 2 in  
35 addition to 330 West 34<sup>th</sup> Street; the company had to hire about 27 or 28 new employees in total by July 2. Campbell instructed Blackwell to find out if the people he interviewed were qualified to do the job. Blackwell testified that the qualifications consisted of "prior experience in that type of work." However, some non-qualified workers were hired.

40 Respondent's payroll records show that on July 16 it hired 2 more employees to work at 330 West 34<sup>th</sup> Street and on July 26 it hired one more employee for that location. Blackwell testified that Campbell made those hiring decisions. Those employees hired after July 2 were hired from the pool of prospective employees obtained at the State Department of Labor.

45 Campbell testified that he calculated his bid for the work at 330 West 34<sup>th</sup> Street on the basis that the employees would be paid 80% of the prevailing rates as provided in the exception to Sec. 320 of the New York State Labor Law quoted above. According to Campbell, the 80% prevailing rate calculation kept his bid under \$1.5 million for the three-year term. For this reason, Campbell said, he wanted to hire employees who would qualify as new hires in the  
50 quoted language. If the company had chosen employees who had to be paid 100% of the prevailing rates he would have lost money on the contract. Campbell testified that he did not consider hiring the Triangle employees who had worked at 330 West 34<sup>th</sup> Street because his bid

price was based on 80% of the prevailing wage and supplemental benefit rates. Campbell said he never considered hiring them because they had been at the building 36 months.

5 Campbell testified that labor costs under the Local 32BJ collective bargaining agreement were even higher than the State mandated prevailing wage and supplemental benefit rates. Although the Union contract also contains an 80% provision for new hires, Campbell testified that he could not afford to pay those amounts to his employees. Indeed, Respondent's Answer herein states, "Even if the Respondent had been aware of the Union, because the bid was won on a shoestring budget, there would have been no realistic possibility of an agreement being reached with the union and the union workers would not have been hired...." Respondent's brief states that for Respondent to bargain in good faith with the union "would be a futile endeavor."

15 Campbell identified a document that was given to employees hired by C & W for its job sites.<sup>5</sup> The employees at 330 West 34<sup>th</sup> Street received the document before they reported for work on July 2. The document, entitled "C&W Cleaning Service, Inc., On the job policies and regulations", provides in pertinent part

20 12. C&W is a Non-Union company. There will be Union reps at your work site soliciting you to join the Union (Remember C&W is a Non-Union Shop).

15. Anyone found not complying with the above aforementioned will be terminated immediately.

25 **D. C&W Begins Work and the Triangle Employees Apply for Jobs**

30 Officials of Local 32BJ learned that C&W had been awarded a contract for 330 West 34<sup>th</sup> Street in late June 2007. Shirley Aldebol, associate director of the commercial division of the Union, telephoned C&W on June 28 and 29 intending to ask the company to hire the current Triangle employees but no one answered the telephone.

35 Neat Bekteshi, the Triangle working foreman at 330 West 34<sup>th</sup> Street, testified that a custodian employed by the building told him that a company called C&W was coming to work at the building. In the last week of June 2007 a group of people went through every floor of the building. Bekteshi greeted them and asked whether they were union. A man with the group said he was from C&W and Bekteshi asked if he was union. The man replied, "Call the office, they will let you know." The same day Union field representative Michael Graham came to the building and called all the workers together. The employees signed an application sheet that Graham planned to give to the new company.

40 Graham testified that he visited the building at 330 West 34<sup>th</sup> Street and met with the Triangle employees on June 28. Graham informed the employees that a new contractor would be doing the work. Bekteshi told Graham that a group had toured the building that day. Graham gave the Triangle employees an application form dated June 29, 2007 to sign.<sup>6</sup> The application states, *inter alia*, that

50 <sup>5</sup> The version of the document identified by Campbell had recently been revised by him and was effective July 2, 2007.

<sup>6</sup> Graham had the employees sign two copies of the application. He kept one copy to give to C&W and he gave one copy to the Union for its records.

We currently work for Triangle, cleaning the N.Y.C. Human Resource Administration offices located at 330 West 34<sup>th</sup> Street.

5 We have learned that your company may be the new contractor at our site and we wish to apply for work with your company. We are experienced and know how to clean these offices. We are prepared to start immediately.

We are represented by Local 32BJ and our terms and conditions of employment are covered by a Local 32BJ collective bargaining agreement.

10 There followed contact information for Union officials. A page was attached to the application which, when filled out, contained the names, addresses and telephone numbers of 12 bargaining unit employees.<sup>7</sup>

15 Campbell and Blackwell denied visiting the building at 330 West 34<sup>th</sup> Street in the last week of June 2007.

20 On July 2, Graham testified, he went to 330 West 34<sup>th</sup> Street with the Triangle employees at 4 pm. Graham saw some people who looked like workers lined up outside the building. Graham and the Triangle employees entered the building and went to the supply closet. At some point the police came and instructed Graham and the Triangle employees to leave the premises. Later on July 2 Graham and another Union field representative were outside the building when they met a person who told them he was from C&W. Graham gave this person a copy of the application form containing the names of the Triangle employees and he asked that the form be given to the owner of C&W. Bekteshi testified that he recognized three of the new workers who were lined up outside the building as being among the group that had toured the building during the last week of June. Bekteshi was present when Graham handed the application form to the person from C&W.

30 Campbell testified that on July 2 employee Evelyn Rivera telephoned him from 330 West 34<sup>th</sup> Street and said that there was a union at the site. Rivera said the union was not allowing the C & W employees into the building and was giving out pamphlets. Campbell telephoned Vasile who instructed him to tell his employees to go home. Vasile assured Campbell that she would have his employees in the building on July 3. Campbell testified that this was the first occasion on which he heard about Local 32BJ. Campbell said this was the day he found out that the Triangle employees were looking for work with C&W.

40 On July 3 Aldebol telephoned C&W and a woman answered the telephone.<sup>8</sup> Aldebol identified herself, said that the Union represented workers at 330 West 34<sup>th</sup> Street and asked whether C&W would hire the employees who had worked at the building. The woman said the company "was not union." Aldebol replied that some of the workers had been at the building for several years and they had experience. Aldebol asked why C&W would not consider them. The woman said the company would rather hire its own workers and she hung up. Aldebol called again immediately, but there was no answer. Then Aldebol tried to fax the application form given to her by Graham but the fax confirmation sheet printed out for Aldebol stated that the function was not completed. Later Aldebol received a voice mail message from Harold Campbell who identified himself as the president of the company. He said he had received

50 <sup>7</sup> The General Counsel's brief states that one employee was on disability and his work was being done by a replacement employee.

<sup>8</sup> This person did not give her name to Aldebol.

faxes from Aldebol and asked what it was all about. Aldebol tried to return Campbell's call but although she got through to his voice mail she was never able to speak to Campbell.

5 Graham and the Triangle employees were at the building on July 3 at 4 pm. Graham testified that Campbell introduced himself to Graham as the owner of C&W. Graham asked Campbell whether he would consider hiring the workers who had been there for several years and knew the building. Campbell replied that he already had a crew. Then Campbell asked Graham what the Union would do for him and if the Union would help him get more work. 10 Graham said the Union did not cut deals with companies. At that point Campbell told Graham, "If he was to bring in any Union it would be Local 2." During this exchange Graham handed Campbell a copy of the letter of application from the Triangle employees. Bekteshi was present on this occasion. He spoke to Campbell and asked him why he had never approached the Triangle employees to continue working at the building. Campbell replied, "Nothing against you guys, but I have my own workers. They've been with me for a while, and I'm a non union 15 company. If anything, your beef is with HRA, not with me."

20 Campbell testified he was at 330 West 34<sup>th</sup> Street with his new employees on July 3. A Local 32BJ representative, identified as Graham, asked him why he had not hired the employees who had been doing the job. Campbell replied that he had already hired people to work at the site. Campbell did not recall that the Union representative handed him anything on July 3. According to Campbell, he did not ask Graham what experience the Triangle employees had and he did not ask how many years the employees had been employed in the building or in the industry. Campbell testified that he had no way of knowing whether the employees were 25 experienced employees under the prevailing wage law. Campbell did not deny asking Graham what the Union could do for him nor did he deny the statement that if he brought in any union it would be Local 2.

30 On August 20, 2007 Campbell wrote to a Board agent at Region 2, apparently during the course of the Region's investigation of the instant matter. His letter stated, in pertinent part

The reason C&W did not hire any of the former service worker represented by Local 32BJ, is that our company is non-union organization.

35 We take this matter very seriously, however, C&W does not plan to hire any union workers in the near future.

40 Respondent's Answer herein states, "[b]ecause the bid was won on a shoestring budget, there would have been no realistic possibility of an agreement being reached with the Union and thus the union workers would not have been hired and the same action would have been taken." Respondent's Brief herein acknowledges that Respondent, "did not even contemplate hiring the existing work force...."

### III. Discussion and Conclusions

#### 45 A. Credibility Resolutions

I find that Commissioner Vasile gave truthful and reliable testimony. Vasile recalled the June 28, 2007 meeting with Campbell and she gave the details of the discussion in a clear and forthright manner. Vasile is not an interested party herein and she has no reason to shade her 50 testimony. Vasile's demeanor was most impressive and I shall rely on her testimony.

I credit the testimony given by Aldebol concerning her efforts to contact the Respondent. Aldebol's testimony was supported by the documentary evidence and was not contradicted by the testimony of any witness. Aldebol gave the impression of having a precise and detailed recollection of the events about which she was testifying.

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I find that Graham was a truthful witness. He recalled his efforts in detail and his testimony was supported by the documentary evidence and the testimony of other witnesses. Graham's testimony about his conversation with Campbell was not denied by Campbell; the latter said only that he did not recall certain events in Graham's testimony. I shall rely on Graham's testimony.

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I find that Bekteshi was a truthful witness. His testified in a forthright manner, he freely acknowledged that there were certain facts he did not recall and he was cooperative on cross-examination. I shall rely on Bekteshi's testimony.

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I do not find that Campbell was an accurate or credible witness. Campbell's testimony was inconsistent with the documentary evidence. For example, Campbell testified that he was unaware that the Union had represented the Triangle employees and he only became aware of the fact on the afternoon of July 2 when his employees attempted to go to work at 330 West 34<sup>th</sup> Street. Yet the policies and regulations he had recently revised and which were given to his employees before they went to work on July 2 warned the employees that union agents would be at the work site soliciting them to become members and told them to "remember C&W is a Non-Union Shop." Campbell's testimony was inconsistent with the testimony of truthful and reliable witnesses. For example, Vasile testified that on July 28 she informed Campbell that Local 32BJ represented the Triangle employees and that the Union could make it tough for him. Yet Campbell testified that he had never heard of Local 32BJ before July 2 and no one at the June 28 meeting told him that there had been a union on the job. I shall not rely on Campbell's testimony herein where it is contradicted by more credible evidence.

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I note that Blackwell stated that Campbell made all the ultimate hiring decisions. I credit this testimony. Blackwell and Campbell testified inconsistently concerning Blackwell's efforts to screen prospective employees between June 28 and July 2. Campbell said that Blackwell interviewed 7 to 10 workers at the State Department of Labor and 5 from resumes on file. He also stated that prior experience was not necessary. Blackwell stated that he interviewed 30 to 40 employees at the State Department of labor from which 27 or 28 new employees were chosen to staff all the jobs beginning on July 2. Blackwell said that prior experience was a qualification for a job with C&W. I credit Blackwell; Blackwell conducted the actual interviews and he would know more about the details. Campbell's numbers do not add up: the company had to hire 27 or 28 new employees in the space of a few days yet Campbell's testimony does not account for the majority of these. Further, Blackwell, who conducted the interviews, did not mention any interviews based on resumes already in the C&W files. I credit Blackwell's testimony on the hiring process. I find that he was looking for experienced janitorial employees, that he interviewed workers referred by the State Department of Labor and that he did not use any resumes that may have been in the company's files. In other respects, including the prevailing rate requirements, Blackwell's testimony was as inaccurate as Campbell's.

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### **B. Anti Union Animus and the Failure Hire Triangle Employees**

In *Planned Building Services, Inc.*, 347 NLRB No. 64 (2006), the Board set forth the appropriate analysis for establishing a violation of Section 8(a)(3) and (1) in cases where a

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refusal to hire is alleged in a successorship context.<sup>9</sup> The Board stated that the General Counsel has the burden, in a manner consistent with *Wright Line*, 251 NLRB 1083 (1980), to prove that the employer failed to hire employees of its predecessor and was motivated by antiunion animus. The Board listed the following factors as among those that would establish that a new employer violated section 8(a)(3) by refusing to hire the employees of the predecessor<sup>10</sup>:

[S]ubstantial evidence of union animus; lack of a convincing rationale for refusal to hire the predecessor's employees; inconsistent hiring practices or overt acts or conduct evidencing a discriminatory motive; and evidence supporting a reasonable inference that the new owner conducted its staffing in a manner precluding the predecessor's employees from being hired as a majority of the new owner's overall work force to avoid the Board's successorship doctrine.

Once the General Counsel has shown a failure to hire and an anti union motivation, the burden shifts to the employer to prove that it would not have hired the predecessor's employees even in the absence of the unlawful motive.

The evidence is clear that Respondent knew of the Triangle employees' Union membership and the evidence is clear that Respondent harbored anti-union animus. Vasile's credited testimony described above shows that Campbell was aware, at the latest on June 28, that the Triangle employees were members of and represented by Local 32BJ. Vasile told Campbell that the Triangle employees were represented by Local 32BJ and Campbell replied that his company was non-Union. The written policies and regulations Campbell distributed to his new employees on July 2, 2007 informed them that C&W is a "Non-Union company" and warned them that although the Union would solicit their signatures for membership they should comply with the company policy on pain of immediate termination. On July 3 Campbell told Graham that he would bring in another union in preference to Local 32BJ. Campbell's letter of August 20, 2007 also establishes, in plain English, the reason that Respondent did not consider for hire nor hire any of the Triangle employees. The reason given is that C&W is "a non-union organization" and that the company had no plans to hire any union members.

Respondent conducted its hiring for the 330 West 34<sup>th</sup> Street work in such a way as to preclude Triangle employees from applying for jobs with the company and to avoid interviewing and hiring any Union members. Respondent's office is not accessible to job applicants and Respondent's telephone is not manned in such a way as to permit inquiries about potential jobs. Union official Aldebol telephoned the company on June 28 and 29 on behalf of the employees but no one answered the phone. Her efforts to send a fax seemed futile. Despite the fact that the Triangle employees had been performing the work and were thus experienced and qualified Respondent did not ask them to apply for jobs and it hired only workers referred by the New York State Labor Department. Although Blackwell stated that the usual qualifications for hire included experience in the cleaning industry, Respondent hired some unqualified workers rather than the qualified Triangle employees. These facts comport with the admission in Campbell's letter that the reason the Triangle workers were not hired was their Union membership and that Campbell did not contemplate hiring Union members.

<sup>9</sup> The Board's rule in *Planned Building Services* was approved in *W&M Properties of Connecticut, Inc., v. NLRB*, 514 F3d. 1341 (DC Cir. 2008).

<sup>10</sup> 347 NLRB 64, slip opinion page 4.

The testimony of Campbell and Blackwell establishes that they had just a few days to staff the 330 West 34<sup>th</sup> Street job and the 4 other locations they had agreed to clean. Both Campbell and Blackwell knew that there was an experienced crew on the job at 330 West 34<sup>th</sup> Street. Blackwell testified that even after he initially obtained new employees for 330 West 34<sup>th</sup> Street and the other locations at least 3 more employees were hired to work at 330 West 34<sup>th</sup> Street, also from the Department of Labor. On July 2, before Respondent had commenced cleaning the premises, Union representatives handed an application form to one of Respondent's employees stating that the Triangle employees sought work from Respondent. Campbell admitted that by July 2 he knew the Triangle employees were looking for work at his company. Blackwell, who is charged with the initial screening of prospective employees for C&W, testified that the qualifications he looked for included "prior experience in that type of work" yet he was not able to obtain 11 qualified workers from the State Department of Labor. The evidence shows that Respondent avoided hiring experienced and qualified employees formerly employed by Triangle at 330 West 34<sup>th</sup> Street solely on the basis that they were members of the Union.<sup>11</sup>

The justification given by Campbell at the hearing for failing to consider and hire the Triangle employees is not convincing.<sup>12</sup> The excuse based on the prevailing rate language of Respondent's contract with HRA is not supported by the evidence herein. The contract language quoted above clearly establishes that the prevailing wage and supplemental benefit rate is paid at 80% for "new hires." This rate, which Campbell testified was essential to him in making a successful bid on the contract, would apply to anyone Respondent newly hired to begin work on July 2, 2007. The former Triangle employees would have been new hires of C&W and would have been properly paid at 80% of the prevailing rates. The only exception to the 80% rule would have occurred in the case of a newly hired worker who had been employed in the industry as of February 3, 1996, a date 11 ½ years before July 2, 2007. Campbell admitted that he never inquired whether the Triangle workers had been employed in the industry as of February 3, 1996.<sup>13</sup> I note that Vasile testified that at the meeting on June 28 she explained to Campbell about the prevailing rate and proper invoicing procedures. Campbell had successfully bid on other public contracts on behalf of Respondent. A glance at the documents Campbell submitted to HRA shows that a thorough understanding of the language and requirements is required to formulate a successful bid. Campbell has been operating in the industry for 18 years. I find that Campbell's testimonial reliance on a deliberate misreading of the prevailing rate language in the contract was done to avoid the consequences of his prior admissions about his true reasons for failing to consider and hire the Triangle employees.<sup>14</sup> Thus, I find that the testimony based on the prevailing wage issue is a pretext.

I further find that Respondent has not met its burden to show that it would not have considered for hire or hired the Triangle employees in the absence of an unlawful motive.

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<sup>11</sup> In fact, Campbell tacitly admitted to Graham that he did not want to deal with Local 32BJ when he told the latter that if there were any union on the premises he would want to bring in Local 2.

<sup>12</sup> I have found above that Campbell was not a credible witness.

<sup>13</sup> Even though Campbell did not ask about the workers' experience he stated at the hearing that they had all been at the building for 36 months. I do not credit this statement.

<sup>14</sup> I note that a series of leading questions by Counsel for Respondent elicited a similarly incorrect reading of the prevailing rate language by Blackwell. It is indeed astonishing that Counsel would encourage his witnesses to persist in an incorrect interpretation of the plain language of the prevailing rate provisions. This erroneous statement of the prevailing rate language is perpetuated in Respondent's Brief.

Based on my findings above the General Counsel has shown that Respondent's actions meet the standards set forth in *Planned Building Service, supra*. By failing to consider for hire and failing to hire employees of the predecessor employer because they were members of Local 32BJ Respondent violated Section 8(a)(3) and (1) of the Act.

### C. Unilateral Setting of Initial Terms and Conditions

The Board summarized the law in *Planned Building Services, supra*, slip opinion page 5,

In general, a successor employer has the right to set the initial terms and conditions of employment. [*NLRB v. Burns Security Services*, 406 U.S. 272, 294 (1972)] There is an exception where the successor employer "plans to retain all" of the predecessor's employees. Further, under *Love's Barbecue* [245 NLRB 78 (1979), enfd. in relevant part sub nom. *Kallman V. NLRB*, 640 F2d. 1094 (9<sup>th</sup> cir. 1981)], an employer who discriminatorily refuses to hire the employees of the predecessor may not unilaterally set the initial terms and conditions. Although it cannot be said with certainty whether the successor would have retained all of the predecessor employees if it had not engaged in discrimination, the board resolves the uncertainty against the wrongdoer and finds that, but for the discriminatory motive, the successor employer would have employed the predecessor employees in its unit positions.

I have found above that but for Respondent's unlawful motive it would have considered for hire and hired the experienced Triangle employees, all of whom signed an application requesting work with Respondent and all of whom presented themselves for work on July 2 and July 3.

Commissioner Vasile's testimony establishes that the work performed at 330 West 34<sup>th</sup> Street by the C&W employees is the same work that had been performed by the Triangle employees at the same location and for the same customer without any hiatus in operations. The same number of employees, a total of 11, is required to perform the work previously performed by Triangle. I find that Respondent was the successor of Triangle in the performance of cleaning services at 330 West 34<sup>th</sup> Street.

Respondent presented no evidence to indicate that the unit of employees alleged in the Complaint is not an appropriate unit for the purposes of collective bargaining. A single location unit is presumptively appropriate. *RB Associates*, 324 NLRB 874 (1997). I find that the appropriate unit herein is

All housekeeping employees employed by the employer at 330 West 34<sup>th</sup> Street in New York, New York.

The employee application form signed by the Triangle employees, quoted above, informed Respondent that the employees were represented by Local 32BJ and gave the contact information for Union officials. This language was sufficient to express a request that the Respondent should bargain with the Union on the employees' behalf. As the successor of Triangle and having discriminatorily refused to hire the Triangle employees, Respondent was not privileged to set the initial terms and conditions of employment for its employees. By refusing to bargain with Local 32BJ and by unilaterally changing the terms and conditions of employment of its employees at 330 West 34<sup>th</sup> Street, Respondent violated Section 8(a) (5) and (1) of the Act.

### Conclusions of Law

1. By failing to consider for hire and failing to hire employees of the predecessor employer because they were members of Local 32BJ Respondent violated Section 8(a)(3) and (1) of the Act.

2. By refusing to bargain with Local 32BJ and by unilaterally changing the terms and conditions of employment of its employees in the following appropriate unit, Respondent violated Section 8(a) (5) and (1) of the Act:

All housekeeping employees employed by the employer at 330 West 34<sup>th</sup> Street in New York, New York.

### Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. The remedy herein is based on the Board's discussion of the appropriate remedy for such cases in *Planned Building Services, supra*, slip opinion, pages 5-7.

Where a successor employer has violated section 8(a)(3) by unlawfully refusing to hire employees of the predecessor and has violated Section 8(a)(5) by unlawfully implementing initial terms and conditions of employment without bargaining with the union, the Board's traditional remedy requires the successor retroactively to restore as nearly as possible the situation that would have prevailed but for the unfair labor practices. The successor must offer reinstatement to the discriminatees and make them whole for their losses.<sup>15</sup> The successor must, at the union's request, restore the terms and conditions of employment established by the predecessor, rescind the unilateral changes made by the successor and recognize and bargain with the union.

The make-whole remedy, including back pay and benefits, is measured with reference to the predecessor's terms and conditions of employment. It extends from the date of the successor's unlawful refusal to bargain until the successor reaches a new agreement with the union or bargains to a lawful impasse. The Respondent, in the compliance proceeding, may present evidence establishing that it would not have agreed to the monetary provisions of the predecessor employer's collective-bargaining agreement, and may present evidence establishing either the date on which it would have bargained to agreement and the terms of the agreement that would have been negotiated, or the date on which it would have bargained to good-faith impasse and implemented its own monetary proposals. If the Respondent carries its burden of proof on these points, the measure of the Respondent's make-whole obligation may be adjusted accordingly.

Backpay shall be computed on a quarterly basis from July 2, 2007 to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

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<sup>15</sup> The status of the employee who was on disability leave may be determined at the compliance proceeding.

Retroactive restoration of preexisting terms and conditions of employment shall be in accordance with *Ogle Protection Service*, 183 NLRB 602 (1970), enfd. 444 F.2d 502 (6<sup>th</sup> Cir. 1971). Payments owing to employee benefit funds shall be in the manner set forth in *Merryweather Optical Co.*, 240 NLRB 1213 (1971) and reimbursement to employees for any expenses resulting from failure to pay such funds shall be as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn.2 (1980), enfd mem. 661 F.2d. 940 (9<sup>th</sup> Cir. 1981).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>16</sup>

**ORDER**

The Respondent, C&W Cleaning Service, Inc., Brooklyn, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain with Local 32BJ, Service Employees International Union, as the exclusive collective-bargaining representative of its employees in the following appropriate unit

All housekeeping employees employed by the employer at 330 West 34<sup>th</sup> Street in New York, New York.

(b) Unilaterally changing wages, hours, and other terms and conditions of employment of the employees in the above-described unit without notice to and bargaining with Local 32BJ about such changes.

(c) Discouraging membership in Local 32BJ by discriminatorily refusing to consider for hire and refusing to hire employees in order to avoid having to recognize and bargain with Local 32BJ.

(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.

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

(a) On request, bargain with Local 32BJ as the exclusive representative of the employees in the appropriate unit found above concerning wages, hours and other terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(b) At the request of Local 32BJ rescind any departure from terms and conditions of employment that existed prior to Respondent's commencing operations at 330 West 34<sup>th</sup> Street, restoring preexisting terms and conditions of employment until Respondent negotiates in good faith with Local 32BJ to agreement or lawful impasse.

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<sup>16</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

5 (c) Within 14 days from the date of this Order offer to all the former employees of Triangle at 330 West 34<sup>th</sup> Street 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.

10 (d) Make whole, in the manner set forth in the remedy section above, the unit employees for losses caused by Respondent's failure to apply the terms and conditions of employment that existed prior to its commencing operations, subject to Respondent demonstrating in a compliance hearing as described in the remedy section above, that had it lawfully bargained with Local 32BJ it would have at some identifiable time lawfully imposed less favorable terms than those that had existed under its predecessor.

15 (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.

20 (f) Within 14 days after service by the Region, post at the facility at 330 West 34<sup>th</sup> Street, copies of the attached notice marked "Appendix."<sup>17</sup> 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 25 30 July 2, 2007.

35 (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.

Dated, Washington, D.C., April 14, 2008.

40 \_\_\_\_\_  
Eleanor MacDonald  
Administrative Law Judge

45 \_\_\_\_\_  
50 <sup>17</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

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 Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union  
Choose representatives to bargain with us on your behalf  
Act together with other employees for your benefit and protection  
Choose not to engage in any of these protected activities

WE WILL NOT refuse to bargain with Local 32BJ, Service Employees International Union, as the exclusive collective-bargaining representative of our employees in the following appropriate unit:

All housekeeping employees employed by the C&W Cleaning Service, Inc. at 330 West 34<sup>th</sup> Street in New York, New York.

WE WILL NOT unilaterally change wages, hours and other terms and conditions of employment of our employees at 330 West 34<sup>th</sup> Street without first giving notice to and bargaining with Local 32BJ about such changes.

WE WILL NOT discourage membership in Local 32BJ by discriminatorily refusing to consider for hire and refusing to hire employees in order to avoid having to recognize and bargain with Local 32BJ.

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, on request of Local 32BJ, bargain with the Union and put in writing and sign any agreement reached on wages, hours and terms and conditions of employment for our employees at 330 West 34<sup>th</sup> Street.

WE WILL, on request of Local 32BJ, rescind any departure from terms and conditions of employment that existed prior to our commencing operations at 330 West 34<sup>th</sup> Street, restoring preexisting terms and conditions of employment until we negotiate in good faith with Local 32BJ to agreement or lawful impasse.

WE WILL within 14 days from the date of this Order offer to all the former employees of Triangle at 330 West 34<sup>th</sup> Street 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 make whole our employees at 330 West 34<sup>th</sup> Street for losses caused by our failure to apply the terms and conditions of employment that existed prior to our commencing operations, subject to our demonstrating in a compliance hearing that, had we lawfully bargained with Local 32BJ, we would have at some identifiable time lawfully imposed less favorable terms than had existed under our predecessor.

C & W Cleaning Service, Inc.

\_\_\_\_\_  
(Employer)

Dated \_\_\_\_\_

By

\_\_\_\_\_

(Representative)

(Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: [www.nlr.gov](http://www.nlr.gov).

26 Federal Plaza, Federal Building, Room 3614

New York, New York 10278-0104

Hours: 8:45 a.m. to 5:15 p.m.

212-264-0300.

**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 212-264-0346.