FINAL BRIEF

08-1661-ag

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 32 BJ
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD
Respondent

and

AM PROPERTY HOLDING CORP.; PLANNED BULDING SERVICES, INC.; AND SERVCO INDUSTRIES, INC.
Intervenors

ON PETITION FOR REVIEW OF ORDERS OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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ANTI-VIRUS CERTIFICATION FORM

See Second Circuit Interim Local Rule 25(a)6.

CASE NAME: SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 32 BJ

DOCKET NUMBER: 08-1661-ag

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF JURISDICTION

This case is before the Court on the petition of Service Employees International Union, Local 32 BJ ("Local 32 BJ"), to review an Order of the National Labor Relations Board ("the Board") dismissing in part an unfair labor

practice complaint against AM Property Holding Corporation ("AM");[1] Planned Building Services, Inc. ("PBS"); and Servco Industries, Inc. ("Servco"). AM, PBS, and Servco have intervened in support of the Board.[2]

The Board's Decision and Order was issued on August 30, 2007, and is reported at 350 NLRB 998. (A 610-66.)[3] A subsequent order, granting in part motions for reconsideration filed by the Board's General Counsel and Local 32 BJ, was issued on March 27, 2008, and is reported at 352 NLRB No. 44 (A 699-705). The foregoing Orders are final orders within the meaning of Section 10(f) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(f)) ("the Act"). Local 32 BJ filed its petition for review on April 8, 2008. (A 706.) Section 10(f) of the Act imposes no time limit on the filing of petitions for review of Board orders.

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[1] This employer consists of three entities—AM Property Holding Corporation, Maiden 80/90 NY LLC, and Media Technology Centers, LLC—which are concededly a single employer within the meaning of the Act. The term "AM" will be used herein to refer to all three entities collectively.

[2] AM and PBS initially filed petitions for review of the Board's Orders, but subsequently withdrew those petitions. The Board is not applying for enforcement of its Orders because the employers are currently complying with the Orders to the Board's satisfaction.

[3] "A" references are to the printed appendix. "Tr" references are to transcript pages not included in the appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

The Board had jurisdiction under Section 10(a) of the Act (29 U.S.C. § 160(a)). This Court has jurisdiction under Section 10(f) of the Act (29 U.S.C. § 160(f)), the alleged unfair labor practices having occurred in New York City.

STATEMENT OF THE ISSUES PRESENTED

1. Whether substantial evidence supports the Board's findings that AM was not a joint employer of the employees employed by PBS and Servco at 80-90 Maiden Lane.

2. Whether the Board reasonably concluded that the question whether PBS individually was a successor employer was not properly before it.

3. Whether the Board acted within its broad remedial discretion in declining to grant the extraordinary remedies sought by Local 32 BJ.

STATEMENT OF THE CASE

On charges filed by Local 32 BJ, the Board's General Counsel issued a complaint alleging, *inter alia*, that AM and PBS, and subsequently AM and Servco, were joint employers of the employees of PBS and Servco, respectively, who performed cleaning work at 80-90 Maiden Lane ("80 Maiden") in lower Manhattan;[4] that AM and PBS, as joint employers, were successors to Clean-Right, the employer that had previously performed the cleaning work at 80 Maiden, and AM and Servco, as joint employers, were successors to PBS; that

[4] The record shows that 80 and 90 Maiden Lane are two separate but adjacent buildings. (A 18, 223.)

AM, PBS, and Servco had committed various violations of Section 8(a)(1), (2), (3), and (5) of the Act; and that the employers were jointly and severally liable for remedying the unfair labor practices committed by any of them in their capacity as joint employers. (A 303-17, 422-34.)

After a hearing, Administrative Law Judge Steven Davis found that AM and PBS were joint employers at 80 Maiden during the period when PBS performed cleaning work there; that AM and Servco were joint employers thereafter; that AM and PBS were joint successors to Clean-Right, and AM and Servco were joint successors to PBS; that all three respondent employers had committed numerous violations of the Act; and that, as joint employers, they were jointly and severally liable for remedying the violations found. (A 649-53, 657-58.) He recommended that they be ordered to cease and desist from the unlawful conduct and to take affirmative remedial action. (A 658-66.) The General Counsel and all three employers filed exceptions, and Local 32 BJ filed cross-exceptions.

The Board (Chairman Battista and Member Kirsanow; Member Liebman dissenting in part) found, contrary to the administrative law judge, that AM was not a joint employer with either PBS or Servco (A 611-15); that, since the employers were not joint employers, they could not be joint successors to Clean-Right (A 615-16); and that the General Counsel had not litigated the theory that AM or PBS, taken separately, was a successor employer. (A 615-16.)

Accordingly, the Board majority found no basis for holding that any of the employers had an obligation to bargain with Local 32 BJ, and therefore dismissed all allegations of violations of Section 8(a)(5). (A 615-16, 618.) Similarly, the Board majority found that PBS had not unlawfully recognized the United Workers of America ("UWA") at 80 Maiden, since it was not obligated to recognize Local 32 BJ, and the General Counsel had not filed a timely exception to the administrative law judge's failure to find that the UWA, when recognized, lacked support from an uncoerced majority of the unit employees. (A 617-18.) Finally, the Board majority held that each employer was solely liable for its own violations of the Act. (A 610, 619.) In view of PBS' prior violations of the Act, the Board issued a broad, corporate-wide cease-and-desist and notice posting order against it. However, the Board majority declined to order extraordinary remedies requested by Local 32 BJ. (A 621.)

The General Counsel and Local 32 BJ filed motions for reconsideration. The Board (Chairman Schaumber and Member Liebman) granted the General Counsel's motion for reconsideration and found that PBS' recognition of the UWA was unlawful because the UWA did not have the support of an uncoerced majority of employees when PBS recognized it. (A 700-01.) However, the Board denied Local 32 BJ's motion for reconsideration, finding no extraordinary circumstances warranting reconsideration of the Board's refusal to find that PBS individually was

a successor to Clean-Right or its refusal to order special remedies against PBS. (A 701.) As to the former, the Board inferred from the General Counsel's failure to join in Local 32 BJ's motion for reconsideration that the General Counsel had never intended to litigate an "individual successorship" theory. (A 701 n.8.)

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. The Unfair Labor Practices

The only contested factual issues here relate to the status of AM as a joint employer, first with PBS and later with Servco. This section will describe the conduct whose legal significance turns on resolution of that factual issue. The following section will describe the evidence and factual findings relating specifically to the joint employer issue.

Prior to April 2000, 80 Maiden was owned by the Witkoff Group, which was a party to a contract between Local 32 BJ and a multiemployer association. That contract covered employees of Clean-Right who performed maintenance work at 80 Maiden. (A 630; 40-42.)

In April 2000, AM acquired 80 Maiden, and immediately entered into a contract with PBS to provide cleaning services there. That contract called for employees to receive the wages and benefits specified in a "union collective agreement." (A 631; 467.) However, the hourly wage rates of the PBS employees

at 80 Maiden were less than half the rates specified in the Local 32 BJ contract. (A 632; 512, 576, Tr 232.) The existing Clean-Right employees were told on the day of the sale that they no longer had jobs; PBS was bringing in its own work force. (A 632; 49-52, 57.)

AM retained the existing engineers, who became its direct employees, and also directly employed three individuals to perform day shift maintenance work, two of them in positions previously held by Clean-Right employees. (A 632-33; 20-22, 53.) On PBS' first day, 11 employees, 7 of them newly hired and 4 transferred from other PBS buildings, began working for PBS at 80 Maiden. Within a few days thereafter, PBS added five more employees, three of them newly hired, to the work force at 80 Maiden. (A 633; 109, 131-32, 142, 144, 187-89.)

In early May, 11 of the former Clean-Right employees submitted job applications to PBS, either in person or by mail. They were told that no jobs were available then, but that PBS would contact them when jobs became available. Subsequently, PBS interviewed eight of the Clean-Right employees and offered jobs to all eight. However, only two were offered jobs at 80 Maiden; the others were offered jobs at two other buildings in lower Manhattan. (A 634-36; 47-48, 62-66, 69-71, 75-76, 514-50.)

In May 2000, PBS signed a contract with the UWA covering employees at 80 Maiden and 75 Maiden Lane, a building across the street. The UWA had submitted authorization cards signed by 11 current employees. (A 637; 503-07.) However, several of those cards had been solicited by agents of PBS, some of whom told employees that they had to sign cards and required them also to sign dues-checkoff authorizations. (A 637, 653-54; 111, 146-47, 190-91, 211.) In February 2001, the UWA disclaimed any further interest in representing PBS employees, either at 80 Maiden or at any other location. (A 637; 513.)

In the fall of 2000, AM agents Cunningham and Henry threatened the PBS employees at 80 Maiden that if they joined Local 32 BJ, they would lose their jobs. (A 637-38, 654; 83, 112, 136, 156.) In April 2001, all but one of the PBS employees at 80 Maiden went on strike. (A 640; 32, 127, 265.) On May 15, 2001, AM terminated its contract with PBS, effective June 15, and subsequently contracted with Servco to perform the maintenance work at 80 Maiden. Local 32 BJ demanded bargaining concerning the decision to change contractors and its effect on bargaining unit employees, but AM refused to bargain. (A 640; 470, 491, 569.)

On June 14 and 18, groups of striking PBS employees sought applications from AM officials for employment with Servco, the new cleaning contractor. Night Supervisor Dennis Henry told them that Servco did not want any of the

strikers. Building Manager Jack Constantine said that he could not do anything for the employees because they had gone on strike. (A 641; 113-15.)

Local 32 BJ also wrote to AM on behalf of the striking employees, saying that they wanted jobs with AM or the new cleaning contractor. AM replied that it did not employ building service employees at 80 Maiden, but that the employees were free to apply for work with the new contractor. Neither the strikers nor Local 32 BJ contacted Servco to request that it hire them. (A 616-17, 641; 44, 463-64.)

Servco initially used its own workers at 80 Maiden, but asked the nonstriking PBS employees to train them. On the first day that Servco performed the maintenance work at 80 Maiden, its sales manager, Mark Giacoia, told all the workers that anyone who talked to Local 32 BJ would be fired on the spot. Servco gave applications to all the nonstriking PBS employees and later hired some of them. (A 641-42; 162-64, 175-77.)

B. The Joint Employer Issue

1. AM and PBS

The contract between AM and PBS provided that the employees hired by PBS to work at 80 Maiden were subject to AM's initial approval. (A 631; 501.) However, AM did not exercise its right to reject any employee hired by PBS. On one occasion, Dennis Henry, then on PBS' payroll as night supervisor of its cleaning staff, but found not to be a supervisor within the meaning of the Act,

rejected an applicant, a former Clean-Right employee, when she refused, for health reasons, to mop floors as part of her duties. However, there was no evidence that Henry consulted with any AM official before rejecting the applicant. (A 612, 636, 650; 62-66.)

When AM bought 80 Maiden, the former Clean-Right employees told Jack Constantine, an AM official, that they wanted to apply for jobs. Constantine told them that no positions were available, but took their names, addresses, and telephone numbers and said he would contact PBS and see what he could do, and would call the employees if jobs were available. He did not contact the employees thereafter; they went to PBS headquarters in New Jersey to apply for jobs and were interviewed by PBS officials. Constantine took no part in those interviews. (A 612, 632, 634-36, 653; 47-48, 54-56, 60-61, 67-68, 73-74, 151-52.)

In September 2000, PBS transferred employee Jorge Cea, who had been working for PBS at another location, to 80 Maiden to serve as a temporary replacement for a day porter, directly employed by AM, who had failed to return from vacation. After Cea had worked at 80 Maiden for several days, AM official Constantine told him that he was doing a good job and that Constantine would consider keeping him at 80 Maiden permanently. He asked whether Cea would prefer to work for PBS or directly for AM. Cea said he would rather work for AM because he would make more money. However, a few days later, Constantine

gave the position to a relative of a building engineer at 75 Maiden Lane. Cea thus stopped working at 80 Maiden, but remained an employee of PBS and was reassigned to another location. When PBS' contract at that location expired, PBS offered Cea a job on the night shift at another building. When he refused the job because he was attending evening school, PBS discharged him. (A 612-13, 618, 639-40, 655-56; 25-26, 193-98, 220-22.)[5]

Dennis Henry, a night porter for AM at 75 Maiden Lane, was transferred to 80 Maiden when AM bought that building. When Henry reported to work at 80 Maiden, Constantine told him that he would work for PBS, and a PBS supervisor told him that his duties were to prepare supplies for the cleaning crew and check to see that its work had been done. (A 613, 634; 238-41.)

Henry was unhappy on the PBS payroll because of his low pay and lack of benefits. At the end of July 2000, at his insistence, he was transferred back to the AM payroll, but his duties remained the same. (A 613, 634; 237, 242-46.)

Henry distributed keys and cleaning supplies to employees at the start of the shift, prepared and signed employee timecards, and asked employees to redo their work if it was not done properly. However, he did not train employees or instruct them how to perform their tasks. (A 613 n.10; 227-28, 246-47, 262-64.) When

[5] Local 32 BJ, in its brief, does not challenge the Board's findings that AM did not unlawfully rescind a job offer to Cea (A 618) and PBS did not unlawfully discharge him for refusing a night-shift position (A 656).

employees called in sick, Henry reassigned their work to other employees, who received overtime pay. However, employees were not required to work overtime, and Henry obtained the consent of a PBS supervisor either before or after assigning overtime. (A 613 n.9, 642; 231-33, 249-51, 263-64.) AM officials sometimes asked Diana Vasquez, a day matron employed by PBS, to redo work that was not done properly or to perform tasks not part of her regular duties, such as cleaning a recently rented floor. (A 613-14, 642-43; 81, 105, 107.) A PBS supervisor told her to take a week's vacation when she became ill, and she later asked that supervisor for permission to return to work. (A 643; 86-89.)

2. AM and Servco

The contract between AM and Servco provided that Henry would continue as a night supervisor in AM's employ. (A 614 n.12, 641, 643; 483.) Henry and Constantine directed Servco employees in essentially the same manner that they had previously directed PBS employees. (A 614, 643-44; 16-68, 227-29, 234.) However, Servco also provided onsite supervision, by Isaac Paredes until December 2001, and by Tony Battista thereafter. Paredes had overall responsibility for seeing that employees' work was done properly, and instructed employees that if they had a problem, they should consult him, rather than Henry. (A 614, 643; 173, 234, 249, 284, 286, Tr 476.) Either Paredes or his brother was at 80 Maiden Lane daily. After they ceased work, Servco Sales Manager Giacoia

was at the building up to 4 days per week. He permitted employees to punch out early if their work was finished. (A 643-44; 178-79, 182.) Henry prepared and signed the employees' timecards, but had no responsibility for determining their working hours. (A 615; 231-34, 246-47, 252-60.)

When Servco took over the cleaning contract, Henry recommended that it retain certain named employees. However, Servco independently interviewed the employees and made its own hiring decisions. (A 614, 642; 266-69.) Henry and Constantine unlawfully told striking PBS employees that they were ineligible for employment with Servco because of their participation in the strike. (A 614, 618-19, 641; 114-15, 120-21, 137.) However, there was no showing that Servco had authorized these statements or involved Constantine or Henry in its hiring process.

When Servco took over the cleaning work at 80 Maiden, Sales Manager Giacoia told the employees that they would receive $6 per hour. Henry said that the employees had been good workers and had received $7 per hour from PBS, and that it would only be fair to continue to pay them at that rate. Giacoia said he would have to think about it. Servco's president made the final decision, ultimately deciding to pay the employees $7 per hour. He did not consult Henry before making that decision. (A 615, 642, 651; 165, 282.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Battista and Members Liebman and Kirsanow) found, in agreement with the administrative law judge, that AM, PBS, and Servco violated Section 8(a)(1) of the Act by threats of job loss; that AM also violated Section 8(a)(1) by interrogation, creation of the impression of surveillance, and threats that Servco would refuse to hire strikers; and that PBS also violated Section 8(a)(1) by threats of futility, and violated Section 8(a)(2) and (1) by unlawfully assisting the UWA and (on motion for reconsideration decided by Chairman Schaumber and Member Liebman) by recognizing the UWA when it did not have the support of an uncoerced majority of the employees at 80 Maiden. (A 618-20, 699-701.) Finally, the Board found, in agreement with the judge, that both AM and PBS violated Section 8(a)(3) and (1) by refusing to hire the former Clean-Right employees or consider them for hire because of their support for Local 32 BJ. (A 616.)

The Board ordered all three employers to cease and desist from the conduct found unlawful and from in any like or related manner (in the case of PBS, in any other manner) interfering with, restraining, or coercing employees in the exercise of their statutory rights. Affirmatively, the Board ordered AM to offer instatement to former Clean-Right employees Nehat Borova and Renier Sabajo to their former positions at 80 Maiden or, if those jobs no longer exist, to substantially equivalent

positions and make them whole for any losses of earnings and other benefits suffered as a result of the discrimination against them. The Board also ordered PBS to offer instatement to Borova and 9 other named Clean-Right employees, and to make whole those 10 employees, Sabajo, and Zoila Gonzales, in the same manner, and to withdraw and withhold recognition from the UWA until certified by the Board and reimburse, jointly and severally with the UWA, all employees at 80 Maiden, except those who joined the UWA before its contract with PBS, for all dues and initiation fees collected under that contract. Finally, the Board required each of the employers to post copies of an appropriate remedial notice and required PBS to mail copies of the notice to all former PBS employees at 80 Maiden. (A 621-23, 702-05.)

However, the Board found, contrary to the administrative law judge, that AM was not a joint employer with either PBS or Servco with respect to their employees at 80 Maiden, because there was insufficient evidence that it exercised control over their employees. (A 611-15.)[6] This conclusion led the Board further to conclude, contrary to the judge, that: (1) AM and PBS were not joint successors to Clean-Right, nor were AM and Servco joint successors to PBS, and therefore none of the employers was obligated to bargain with Local 32 BJ (A

[6] Member Liebman agreed that under existing Board precedent, no joint-employer status existed, but criticized that precedent. (A 623-25.) In this Court, Local 32 BJ expressly disclaims (Br 21-22) any challenge to the Board's existing standard.

615-16);[7] (2) Servco did not unlawfully refuse to hire striking PBS employees, since threatening statements to the strikers by AM officials were not attributable to Servco and thus did not show that it would have been futile for the PBS strikers to apply to Servco (A 616-17);[8] (3) AM did not violate Section 8(a)(3) or (5) by terminating its contract with PBS (A 618); and (4) each employer was solely liable for its own Section 8(a)(1) and (3) violations. (A 619.) Accordingly, the Board dismissed the allegations of the complaint which turned on joint-employer status.

SUMMARY OF ARGUMENT

1. AM was not a joint employer with either PBS or Servco. Its contract with PBS (but not with Servco) gave it a theoretical veto power over the hiring of employees, but the record does not show that it ever exercised that power. Its actions in causing the transfer of a PBS employee out of 80 Maiden did not make it a joint employer, since the employee remained in PBS' employ. Its role in the hiring, pay, and benefits of one employee, Dennis Henry, who worked for PBS and later for Servco, did not make it a joint employer of all the employees of either firm. The statements of Henry and another AM official to former Clean-Right

[7] The Board held that it could not find that either AM or PBS was individually a successor to Clean-Right, because the General Counsel had not litigated that theory. (A 615-16, 701 n. 8.)

[8] Member Liebman, dissenting on this issue, would have found that applications to Servco would have been futile and that Servco therefore unlawfully refused to hire the PBS strikers. (A 625.)

employees about PBS' hiring process, and later to former PBS employees about Servco's hiring process, do not show joint-employer status. There was no evidence that PBS or Servco authorized them to discuss hiring with employees. The Board was not compelled to draw an inference that PBS or Servco refused to hire employees as part of a joint scheme with AM, rather than because of their own union animus.

Dennis Henry's direction of PBS and Servco employees was limited to telling them what work to do and where, and did not include training them or telling them how to do their work. The Board has consistently held that such limited and routine direction of employees whose work is largely repetitive does not establish joint-employer status.

The Board's findings here are consistent with prior decisions in which it found joint-employer status. Those decisions were based on evidence that the employers found to be joint employers played a far more substantial role in hiring, or provided far closer supervision to employees, than AM did here.

2. The Board reasonably concluded that the question whether PBS, individually, was a successor to Clean-Right was not before it. The complaint alleged only that AM and PBS, as joint successors to Clean-Right, were obligated to bargain with Local 32 BJ; it did not allege that either was obligated to bargain as

an individual successor. A charging party may not expand the complaint by seeking to raise theories not alleged by the General Counsel.

Decisions permitting the finding of an unalleged violation when it has been fully litigated are inapplicable here, because the "individual successor" theory was not fully litigated. The General Counsel never indicated during the hearing that he was seeking to have a violation found on that theory. The introduction of evidence that would support either the theory alleged in the complaint or another, unalleged theory does not place the respondent on notice that he must defend against the latter.

3. The Board acted within its broad remedial discretion in declining to grant the extraordinary remedies sought by Local 32 BJ. Such remedies are used only when necessary to alleviate the effect of egregious violations of the Act. No such need was shown here. Although PBS has repeatedly violated Section 8(a)(2) and (1) of the Act, that is not the type of violation that traditional remedies cannot cure, especially since the union unlawfully recognized in this case is no longer on the scene. Nor was there a showing that PBS' unfair labor practices precluded its employees from exercising their statutory rights. All but one of the PBS employees working at 80 Maiden went on strike after PBS' unlawful conduct there.

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT AM WAS NOT A JOINT EMPLOYER WITH PBS OR SERVCO

Many of the allegations of unfair labor practices in this case were litigated solely on the theory that AM was a joint employer, first of PBS' employees and later of Servco's employees, at 80 Maiden. Thus, if the Board properly found that no joint-employer relationship existed, it was justified in dismissing those allegations, as well as in finding each employer solely liable for remedying the violations it did commit. As shown below, the record fully supports the Board's conclusion that the General Counsel had failed to prove joint-employer status.

A. Applicable Principles and Standard of Review

The "joint employer" concept, unlike the "single employer" concept, "recognizes that two or more business entities are in fact separate but [requires] that they share or codetermine those matters governing the essential terms and conditions of employment." *Laerco Transportation and Warehouse*, 269 NLRB 324, 325 (1984). *Accord NLRB v. Browning-Ferris Industries*, 691 F.2d 1117, 1122-23 (3d Cir. 1982). To establish joint-employer status, there must be a showing that the employer alleged to be a joint employer "meaningfully affects

matters relating to the employment relationships such as hiring, firing, discipline, supervision, and direction." *Laerco Transportation*, 269 NLRB at 325.

This Court has likewise recognized that "[a] conclusion that employers are 'joint' assumes that they are separate legal entities, but that they have chosen to handle certain aspects of their employer-employee relationships jointly." *Clinton's Ditch Co-op Co. v. NLRB*, 778 F. 2d 132, 137 (2d Cir. 1985). This Court has further held that evidence of immediate control by an employer over its subcontractor's employees is "an essential element under any determination of joint employer status in a subcontracting context . . . ." *Id.* at 138.

Whether a particular employer exercises sufficient control over employees to qualify as a joint employer "is essentially a factual issue." *Boire v. Greyhound Corp.*, 376 U.S. 473, 481 (1964). Accordingly, the Board's findings on that issue are conclusive if supported by substantial evidence on the record as a whole. *See NLRB v. Solid Waste Services, Inc.*, 38 F.3d 93, 94 (2d Cir. 1994). "Where the Board's special expertise is implicated, its findings are entitled to 'a high degree of deference.'" *Id.* (citation omitted). A Board finding that no violation of the Act occurred '"must be upheld unless it has no rational basis.'" *Williams v. NLRB*, 105 F.3d 787, 790 (2d Cir. 1996) (citation omitted).

B. AM Was Not a Joint Employer with PBS

Local 32 BJ (Br 21-22) expressly disclaims any challenge to the Board's standard for determining joint-employer status. However, it contends (*id.)* that the Board misapplied that standard in finding that AM lacked sufficient control over the hiring of employees by PBS and Servco, and did not participate in the supervision of those employees to a sufficient extent, to make it a joint employer. As shown below, the Board's findings are both supported by the record and consistent with prior Board decisions.

With respect to hiring, the contract between AM and PBS allowed AM to approve (or, by implication, disapprove) PBS' hiring of specific employees. (A 501.) However, the Board has declined to give controlling weight to such a contractual provision, relying instead on the actual practice of the parties. *See, e.g., Laerco Transportation,* 269 NLRB 324, 324-25 (1984) (no joint-employer relationship despite one company's contractual right to reject drivers furnished by other company, where in practice only the latter hired and fired drivers). The record here does not show that AM exercised its contractual veto power over PBS' hiring.

The Board noted (A 612-13) that incidents involving three specific individuals—Zoila Gonzalez, Jorge Cea, and Dennis Henry—had been cited as examples of AM's role in PBS' hiring. Henry had rejected Gonzales as an

employee when she refused to mop floors because of her medical condition. However, this incident occurred in July 2000. (A 62-63.) At that time, Henry was still on the PBS payroll. (A 244.) Moreover, Gonzalez did not know to whom, if anyone, Henry had spoken before rejecting her (A 66), and there was no other evidence that he had spoken to anyone from AM. Thus, the General Counsel failed to prove that her rejection was anything but a decision made solely by PBS.[9]

Cea was an employee of PBS before, during, and after his brief tenure at 80 Maiden. AM asked PBS to send someone—not specifically Cea—to fill a position previously held by an AM employee, but later decided to give that position on a permanent basis to a relative of an AM employee, rather than to Cea. However, as the Board noted (A 613), Cea remained an employee of PBS, albeit at another location; the subsequent decision to terminate him was made by PBS alone for reasons unrelated to his work at 80 Maiden. Absent a showing that AM affected Cea's status as an employee of PBS, its actions leading to his transfer out of 80

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[9] Local 32 BJ complains (Br 35-36) of the Board's failure to infer from Henry's going to the building manager's office that "AM made the decision to tell Gonzalez that she had no choice but to mop." However, it fails to explain why the evidence compelled, rather than merely permitted, the Board to draw such an inference. Where the Board has refused to draw an inference in favor of the party having the burden of proof, its decision may be reversed only if, on the record as a whole, '"no rational trier of fact could reach the conclusion drawn by the Board.'" *NLRB v. G&T Terminal Packing Co.*, 249 F.3d 103, 114 (2d Cir. 2001) (citation omitted).

Maiden did not make it his joint employer. *See Flav-O-Rich, Inc.*, 309 NLRB 262, 265 (1992); *Southern California Gas Co.*, 302 NLRB 456, 462 (1991).

The Board found (A 613) that AM did play a significant role with respect to Dennis Henry's employment by PBS. AM transferred Henry from another building to 80 Maiden; transferred him from its own payroll to that of PBS; induced PBS to increase his pay and benefits; and finally restored him to its own payroll in response to his continued complaints. However, the Board properly declined (A 613) to give significant weight to AM's actions with respect to Henry in the absence of evidence that AM similarly affected the hiring, wages or benefits of other PBS employees. *See Bonita Nurseries, Inc.*, 326 NLRB 1164, 1167 (1998) (performance of payroll and accounting tasks for one employer by full-time employee of another employer insufficient to establish joint-employer status where second employer exercised no control over first employer's other employees).

Local 32 BJ also relies (Br 33) on AM officials' failure to tell former Clean-Right employees how to apply to PBS for jobs, and on the conduct of Constantine, one of those officials, in taking the employees' names and telephone numbers, telling them he would contact PBS on their behalf, and then failing to do so. The Board found (A 612) that Constantine's statements did not show that he participated in PBS' actual hiring decisions, since there was no evidence that he was authorized to hire, or speak to employees about hiring, on behalf of PBS. The

Board also noted that the employees did not rely on Constantine's statements, but went to PBS' main office to apply for jobs. They were interviewed solely by PBS officials, and PBS offered them jobs—mostly at other buildings, but in two cases (Zoila Gonzalez and Renier Sabajo) at 80 Maiden (A 527, 539) —without objection from AM.

Local 32 BJ relies (Br 32-33) on an alleged "joint scheme" of AM and PBS not to hire the Clean-Right employees. The failure of AM to exercise its contractual right to veto the hiring of such employees at 80 Maiden belies the existence of such a "joint scheme," and the evidence cited by Local 32 BJ falls far short of proving one. PBS was not shown to have any role in AM's offer of severance pay to the employees. AM's statement to PBS that the existing cleaning staff was gone was hardly "a directive not to hire any of the predecessor's employees" (Br 33), especially since PBS did attempt to hire two of them. In addition, PBS Supervisor Sanchez' alleged "complicity" in the false statements of AM officials to the employees about the availability of applications consisted of being in the building when the statements were made. (A 240-41, 261-63, 272-73.) There is, however, no evidence that he heard the statements or that anyone called them to his attention. Thus, nothing in this record compels the conclusion that PBS' refusal to hire more Clean-Right employees at 80 Maiden was based on a

conspiracy with AM rather than—as the Board found—on PBS' own union animus.

With respect to supervision of PBS employees by AM, Local 32 BJ relies almost entirely on the activities of Dennis Henry.[10] The administrative law judge found Henry not to be a statutory supervisor. (A 645.) The Board found that his direction of PBS employees was, in any event, insufficient to establish joint-employer status. (A 613 n.8.) It found that his direction—consisting of distributing keys and cleaning supplies at the start of the shift; preparing and signing timecards; checking employees' work; and, if it was not properly done, asking them to redo it, but not disciplining them and not training employees or telling them how to do their work—was too "limited and routine" to require a finding of joint-employer status. (A 613.)

It is clear that under Board law, which Local 32 BJ does not challenge, limited and routine supervision of one employer's employees by another employer does not establish joint-employer status. *See, e.g., Southern California Gas Co.,* 302 NLRB 456, 462 (1991). Accord *AT&T v. NLRB*, 67 F.3d 446, 452 (2d Cir.

[10] Local 32 BJ also refers (Br 24 n.11) to AM's occasional direction of, and assignment of work to, PBS employee Diana Vasquez. The Board found (A 614) that AM's oversight of Vasquez was "limited and routine," and Local 32 BJ concedes that it was similar to Henry's oversight of other PBS employees. However, contrary to Local 32 BJ's assertion, AM's assignment of work to Vasquez was not "daily." She cleaned the same offices and bathrooms daily, except on rare occasions when Henry gave her a different assignment (A 102-04), and she was told to redo work about once a week or once a month (A 106).

1995). In addition, when employees' work is largely repetitive, as is true of cleaning employees, an employer does not become their joint employer merely by telling them what to do and when; he must also tell them how to do it. In other words, he must exercise control, not only over the result to be achieved, but also over the means of achieving it. *See Southern California Gas Co.*, 302 NLRB at 461-62; *Service Employees Local 254*, 324 NLRB 743, 748-49 (1997), *enforced mem.*, 158 LRRM 2896 (1st Cir. 1998).

Here, the administrative law judge specifically found that Henry's daily assignment of work "amounted merely to a routine implementation of assignments already known by the employees." (A 644-45.) While Henry told the employees to redo work that had not been done properly, there is no evidence that he told them how to do it properly. It was a PBS supervisor, Sanchez, who initially showed the employees how to do their jobs; Henry merely watched Sanchez do the training. (A 262-63.) Accordingly, the Board was warranted in concluding that Henry's direction of PBS employees was too routine to make AM a joint employer.

C. AM Was Not a Joint Employer with Servco

It is undisputed that, after Servco replaced PBS as cleaning contractor at 80 Maiden, Henry directed the Servco employees in the same manner and to the same extent as he had previously directed the PBS employees. However, Servco, unlike

PBS, had its own supervisor at the building several days per week, and he specifically told the employees to see him, not Henry, if they had any problems. (A 173, 285.) We have shown above, pp. 25-26, that the Board was warranted in finding that AM's direction of PBS employees was too limited and routine to establish joint-employer status. *A fortiori*, the Board was justified in reaching the same conclusion with respect to AM's direction of Servco employees.

Local 32 BJ relies (Br 28-29 n.13) on Servco's increasing the wages of its cleaning employees after Henry urged it to do so. The Board noted (A 615) that Servco's president made the final decision to increase wages, and that there was no evidence that he consulted Henry or otherwise relied on Henry's views. Servco Sales Manager Giacoia testified that he, not Henry, convinced his superiors to pay the higher wage rate. (A 282.) The mere coincidence between their decision and Henry's recommendation does not show that AM had such control over the employees' wages as to be a joint employer.

The contract between AM and Servco provided for the retention of Henry as "night supervisor" at 80 Maiden, and provided that he would remain on AM's payroll. (A 483.) However, the contract did not give AM veto power over the hiring of other Servco employees. As shown above, pp. 21-23, even if AM insisted on Henry's retention, its role in the hiring of one employee would not make it a joint employer of all of the Servco employees.

Local 32 BJ relies (Br 13, 36-37) on Henry's recommendations to Servco concerning which former PBS employees it should hire. Henry testified that he would have preferred to retain all the nonstriking PBS employees, but could not do so because Servco brought in its own employees. (A 269.) Compelled to choose which PBS employees to recommend, he chose those working on the floor where the New York City Department of Investigation offices were located, because they already had the security clearances necessary to work there. (A 268.) The administrative law judge specifically found (A 645) that the selection of workers on that basis did not involve the use of independent judgment. Moreover, it is undisputed that Servco interviewed the employees Henry recommended (A 267), and there is no evidence that Henry's recommendations played a more significant role in its hiring decisions than its own interviews. The recommendation of employees for hiring does not establish joint-employer status where the contractor independently decides to hire them. *See Martiki Coal Corp.*, 315 NLRB 476, 478 (1994).

Local 32 BJ argues (Br 12, 36) that the unlawful statements of Henry and Constantine to PBS strikers, indicating that Servco would not hire them because of their participation in the strike, demonstrate AM's role in Servco's refusal to hire the strikers. The Board found that there was no such refusal (A 617), and that the unlawful statements did not show AM's involvement in the hiring process (A 614),

for the same reason that it found that similar statements did not show AM's participation in PBS' hiring decisions (see above, p. 23): there was no evidence that Servco had authorized Henry or Constantine to say anything to the strikers about its hiring plans. Nor did Servco Sales Manager Giacoia's unlawful threat to discharge employees who spoke to Local 32 BJ representatives constitute ratification of the earlier remarks of Henry and Constantine. As the Board pointed out (A 617), the threat was made to a different group of employees, and there is no evidence that it was disseminated to the strikers.

Local 32 BJ argues (Br 37) that Giacoia's unlawful threat shows that Servco, like AM, had union animus and that the Board was therefore compelled to infer that AM and Servco conspired to deny employment to the PBS strikers. The argument, like the similar argument concerning PBS' refusal to hire the former Clean-Right employees (see above, pp. 24-25), is based on speculation, not on evidence. Local 32 BJ's reference to "AM's role in ensuring that Servco did not hire any PBS workers who supported the strike" (Br 37) assumes that such a role was proved. The Board properly found that it was not. Any union animus on the part of Servco is not enough to overturn this finding. It is equally consistent with a conclusion that, if the PBS strikers had applied to Servco (which they did not), it would have rejected their applications, not because of AM's union animus, but solely because of its own.

D. The Board's Findings Are Consistent With Its Prior Decisions

Local 32 BJ's principal argument is that the Board's failure to find joint-employer status represents an unexplained departure from prior Board decisions. (Br 23-26, 28, 30-32, 34, 36-37.) This contention is based in part on factual assertions properly rejected by the Board and in part on a misreading of the legal significance of the decisions in question.

The Board expressly (A 614 n. 19) distinguished *Le Rendezvous Restaurant*, 332 NLRB 336 (2000), heavily relied on by Local 32 BJ (Br 17, 31-32, 36-37), as involving a hotel that actively participated in a restaurant's hiring of employees and also disciplined the restaurant's employees. In *Le Rendezvous*, the record included a "smoking gun" in the form of a memorandum from the purchaser of the restaurant on how he could rid it of the union, coupled with evidence that the hotel's general manager received the memorandum and commented on which employees were or might be union supporters, as well as threats by several hotel supervisors to employees that they would lose their jobs because the purchaser did not want the union. *See Le Rendezvous Restaurant*, 323 NLRB 445, 449-52, 454 & n.18 (1997). As shown above, p. 28, no comparable evidence exists here, and Local 32 BJ is therefore incorrect in asserting (Br 31-37) that AM's role in PBS' hiring decisions is "just like" the hotel's and that its role in Servco's hiring is "not materially different . . . ."

The Board (A 615) also expressly distinguished *Quantum Resources Corp.*, 305 NLRB 759 (1991), cited by Local 32 BJ (Br 24), on the ground that the employer there found to be a joint employer "designated wage rates, authorized changes in rates, and pushed through raises for employees." In addition, that employer's supervisors "exercise[d] 'a substantial degree of control over the manner and means' by which unit employees performed their jobs." 305 NLRB at 761 (citation omitted). There was "scant evidence" that the other employer made *any* significant personnel moves without the written approval of the first employer. *Id*. The facts here are a far cry from those in *Quantum Resources*.

The Board (A 613 n.95) also distinguished *Computer Associates, International*, 332 NLRB 1166 (2000), *enforcement denied on other grounds*, 282 F.3d 849 (D.C. Cir. 2002), on the basis of one employer's exercise of discretion in authorizing overtime for employees of the other employer. Local 32 BJ itself points (Br 30, 31) to other major distinctions between *Computer Associates* and this case: the "ongoing, close, and substantial supervision" of the contractor's employees by the client in *Computer Associates* (332 NLRB at 1166 n.2) and the client's "substantial role in the selection of applicants for hire" in the case (*id.).* The Board there found that the client interviewed and directly hired applicants, and that its assignments of work were not limited to routine functions, but included complex assignments requiring the exercise of considerable discretion. 332 NLRB

at 1168. The contractor's employees were engineers, not cleaning personnel as in this case, and assignment of work to them thus involved more than the routine direction shown here. In addition, the two employers held themselves out to third parties as joint employers. 332 NLRB at 1169-70. That did not happen here.

Contrary to Local 32 BJ's contention (Br 24), *Syufy Enterprises*, 220 NLRB 738 (1975), is not "factually . . . similar to the instant case." In *Syufy*, the theater owner found to be a joint employer had previously employed the same janitors later employed by the janitorial contractor, and the latter not only did not supervise the janitors or inspect their work, but could not do so, since the theater owner refused to provide the contractor's supervisors and inspectors with keys to the theaters. 220 NLRB at 739 & n.2. This showed a determination on the part of the theater owner to retain the same control over the janitors that it previously had as their direct employer. It also exercised that control. On the one hand, it required the janitors to perform work not in its contract with the janitorial contractor, including cleaning and waxing a theater manager's office, and to stay overtime to pick up trash on busy days without receiving additional compensation. On the other hand, it allowed a janitor to have his girlfriend help him with his work, so that he had to work only half as many hours each day. 220 NLRB at 739-40. Under these circumstances, the Board concluded, the "relationship of the janitors to [the] theater managers remained as a practical matter substantially unchanged by

[the subcontracting of the work]." *Id.* at 740. This is a totally different situation from the present case, where the workforce changed with each new cleaning contractor and AM never controlled the janitors with such a heavy hand.

Contrary to Local 32 BJ's further contention (Br 25), the Board's holding (A 613)—that limited and routine supervision, which does not include instructions as to how work is to be performed, is not evidence of joint-employer status—is not "a new rule that represents a significant departure from settled law . . . ." The Board has applied this principle frequently, both in cases involving maintenance employees and in other cases. *See Service Employees Local 254*, 324 NLRB 743, 749 (1997) (recurring direction of cleaners by college personnel in absence of on-site supervision by their own employer insufficient to make college joint employer); *Southern California Gas Co.*, 302 NLRB 456, 462 (1991) ("routine directions of what tasks were required and where they were to be performed" insufficient to make public utility joint employer of janitors); *G. Wes Ltd. Co.*, 309 NLRB 225, 226 (1992) (daily onsite supervision of asbestos workers by one employer, which told them where to do their work but not how, and absence of onsite supervision by other employer insufficient to establish joint-employer status, since supervision was "limited and routine in nature"); *Laerco Transportation*, 269 NLRB 324, 326 (1984) ("minimal and routine nature" of one employer's supervision and routine nature of work assignments weigh against finding of joint-

employer status). This Court has also viewed "[l]imited and routine supervision" as insufficient to justify a finding of joint-employer status in a case involving cleaning employees. *AT&T v. NLRB*, 67 F.3d 446, 452 (2d Cir. 1995). It is Local 32 BJ's position (Br 16-17, 23)—that any direct supervision by the client of the contractor's employees makes the client a joint employer when the contractor does not provide on-site supervision—that "represents a significant departure from settled law" (Br 25).

The cases that Local 32 BJ cites (Br 25-26) do not establish the proposition it advocates. In *Holiday Inn City Center,* 332 NLRB 1246 (2000), the Board did not decide the joint-employer issue, but declined to review a Regional Director's decision. The request for review did not raise the joint-employer issue. 332 NLRB at 1246 n.1. *Cf. Operating Engineers Local 12*, 270 NLRB 1172, 1172-73 (1984) (lack of Board review "may diminish or even negate the precedential value of the rationale in" ALJ's decision to which no exceptions are filed). In any event, the finding of joint employer status in *Holiday Inn* did not rest solely on the hotel's supervision of the contractors' employees. The Regional Director also relied on the fact that the contractors' employees performed the same duties, wore the same uniforms, and used the same employee facilities as employees directly employed by the hotel. 332 NLRB at 1249. That was not the case here.

In *Holyoke Visiting Nurses Assn. v. NLRB,* 11 F.3d 302, 306-07 (1st Cir. 1993), *enforcing* 310 NLRB 684, 685-86 (1993), the court noted that even slight factual differences between two cases might justify a different conclusion on the joint-employer issue. The court upheld the Board's finding of joint-employer status because the nursing service provider not only had, but exercised, the authority to reject employees referred by the referral agency, and because its supervision of those employees was "more than routine." The employees were instructed to seek advice from the nursing service provider's supervisors, not those of the referral agency, if problems arose during the workday, and at the end of each day they made a written report of their activities to the nursing services provider. These factual differences from the instant case are more than slight.

Di Mucci Construction Co., 311 NLRB 413 (1993), *enforced*, 24 F.3d 949, 952-53 (7th Cir. 1994), involved operators of excavating equipment whom the general contractor's superintendent regularly shifted back and forth between two construction sites and gave "detailed instructions . . . regarding engineering stakes, grades and elevation." 311 NLRB at 417. Such detailed instructions to operators of large machines, unlike instructions to cleaning personnel, necessarily involve instructions on how to accomplish a given task. Moreover, the employees in *Di Mucci* had previously been on the general contractor's payroll, and the general contractor's treatment of them, including assignment and supervision of their work

and granting wage increases and medical leaves of absence, remained the same after they were ostensibly transferred to the subcontractor's payroll. 311 NLRB at 417-18. Except in the case of Henry, there is no evidence of similar continuity here.

II. THE BOARD REASONABLY CONCLUDED THAT THE QUESTION WHETHER PBS INDIVIDUALLY WAS A SUCCESSOR EMPLOYER WAS NOT PROPERLY BEFORE IT

The complaint in this case (A 389, par. 9 (d)) alleged that AM and PBS, as joint employers, were joint successors to Clean-Right. However, it did not allege, in the alternative, that PBS, even if not a joint employer with AM, was independently a successor to Clean-Right and therefore obligated to bargain with Local 32 BJ. The Board concluded (A 615) that, in the absence of such an allegation or of litigation of the issue, it was precluded from considering the question. Subsequently, in denying Local 32 BJ's motion for reconsideration, the Board reaffirmed this conclusion. (A 701 & n.8). Local 32 BJ now contends (Br 39-41, 43-46) that the issue was fully and fairly litigated and that the Board's refusal to consider it was an unexplained departure from precedent. As shown below, these contentions are without merit.

Section 3(d) of the Act (29 U.S.C. § 153 (d)) gives the Board's General Counsel "final authority, on behalf of the Board, in respect of the . . . issuance of complaints . . . ." This language has been interpreted to mean that neither the

Board nor the courts have the power to review the General Counsel's decision not to issue a complaint. *See Beverly Health & Rehabilitation Services v. Feinstein*, 103 F.3d 151, 153-55 (D.C. Cir. 1996); *see also Rizzitelli v. FLRA*, 212 F.3d 710, 712 n.1 (2d Cir. 2000). The General Counsel has exclusive authority, not only to decide whether to issue a complaint at all, but also to determine what issues are to be included in a complaint. *See Williams v. NLRB*, 105 F.3d 787, 790-91 n.3 (2d Cir. 1996).

The Board here, in its initial decision, specifically found (A 615) that "the General Counsel has not litigated a violation based on [the 'individual successor'] theory." The General Counsel, while successfully seeking reconsideration on another issue, did not seek reconsideration of this finding. The Board inferred (A 701 n.8) that the General Counsel had consciously omitted the "individual successor" theory from the complaint—an inference which Local 32 BJ does not contest—and concluded, in accordance with the case law cited above, that "the Charging Party may not enlarge upon or change the General Counsel's theory" (*id.*). Accordingly, the Board reasonably concluded that the "individual successor" theory, having been raised only by Local 32 BJ, was not properly before it.

Local 32 BJ relies (Br 39) on the principle that violations not alleged in the complaint may be found if they are closely related to the violations alleged and have been fully litigated. *See, e.g., Pergament United Sales, Inc. v. NLRB*, 920

F.2d 130, 134-37 (2d Cir. 1990). In *Pergament*, the General Counsel, although not formally amending the complaint to include the theory on which a violation was found, introduced evidence clearly directed to the theory, and asserted the theory in his closing argument. *See Pergament United Sales, Inc.*, 296 NLRB 333, 334 & n.5 (1989). Local 32 BJ cites no case in which the principle it asserts has been invoked to allow a charging party to expand the scope of the complaint by introducing a new theory. To the contrary, the Board has often refused to allow such an expansion, including in another case involving the same parties. *See Planned Building Services, Inc.*, 330 NLRB 791, 792-93 & n.13 (2000).

The Board also found (A 615) that the issue of whether a bargaining unit limited to the employees at 80 Maiden, as opposed to one including cleaning employees at both 75 and 80 Maiden, was still appropriate had not been litigated. An essential element of a finding of successorship is the continued appropriateness of the former bargaining unit. *See Banknote Corp. of America v. NLRB*, 84 F.3d 637, 642 (2d Cir. 1996). This is particularly true where the alleged successor employer takes over only a portion of the predecessor's operations. *See, e.g., Louis Pappas' Restaurant*, 275 NLRB 1519, 1519-20 (1985). Here, the appropriateness of a separate, 80-Maiden unit of PBS employees was not fully

litigated, and PBS therefore cannot properly be found to be an individual successor to Clean-Right.[11]

Local 32 BJ points (Br 45) to places in the record where it and the General Counsel introduced evidence of separate supervision of 80-Maiden employees and minimal interchange of employees between the two buildings. At no time did they suggest that such evidence was being introduced in support of an "individual successor" theory. The introduction of evidence that would support a specific complaint allegation (here, joint successorship) cannot put a respondent on notice that it must be prepared to defend against any theory, whether or not alleged in the complaint, that the evidence might support. *See Champion Intl. Corp.*, 339 NLRB 672, 673 (2003); *Enloe Medical Center*, 346 NLRB 854, 855 (2006).

Contrary to Local 32 BJ's contention (Br 41), the Board's failure to remand the case is not contrary to *Enloe*. The remand in *Enloe* was for the benefit of the respondent, who had not been given a chance to defend against the new theory raised *sua sponte* by the administrative law judge. 346 NLRB at 856. Where the General Counsel fails to prove the theory set forth in the complaint, the Board has

[11] Local 32 BJ contends, in the alternative (Br 45), that, even if the appropriate unit included cleaning employees at both locations, the Board should have found a bargaining obligation, since, but for PBS' discrimination against former Clean-Right employees, Local 32 BJ would have represented a majority of the employees in the combined unit. This alternative theory was not alleged in the complaint, nor did the General Counsel raise it at the hearing. Accordingly, it cannot be raised now. *See Indianapolis Mack Sales and Services, Inc.*, 288 NLRB 1123, 1123 n.5 (1988).

consistently refused to give the General Counsel or the charging party a second bite at the apple by remanding so that they can litigate a new, previously unalleged theory. *See Paul Mueller Co.*, 332 NLRB 1350, 1350 (2000); *Bouley, Inc.*, 306 NLRB 385, 387 (1992).

III. THE BOARD ACTED WITHIN ITS BROAD REMEDIAL DISCRETION IN DECLINING TO GRANT THE EXTRAORDINARY REMEDIES SOUGHT BY LOCAL 32 BJ

Section 10(c) of the Act (29 U.S.C. § 160(c)) empowers the Board to issue an order requiring a violator of the Act to cease and desist from the violations found and "to take such affirmative action . . . as will effectuate the policies" of the Act. This statutory command "vest[s] in the [Board] the primary responsibility and broad discretion to devise remedies that effectuate the policies of the Act, subject only to limited judicial review." *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 898-99 (1984). Consequently, a Board remedial order "should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Electric & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943). *Accord NLRB v. Katz's Delicatessen*, 80 F.3d 755, 769 (2d Cir. 1996). A party objecting to the Board's failure to order additional remedies "must show that the remedy is 'clearly inadequate in light of the findings of the Board.'" *Teamsters Local 639 v. NLRB*, 924 F.2d 1078, 1085 (D.C. Cir. 1991) (citation omitted).

The Board here, noting PBS' repeated violations of Section 8(a)(2) and (1) of the Act, issued a corporate-wide cease-and desist order that broadly prohibited PBS from violating the Act in any manner at any of its facilities. (A 621.) However, the Board rejected Local 32 BJ's request for an order granting Local 32 BJ special access to nonwork areas at PBS worksites, requiring public reading of the notice to employees, and requiring that PBS provide Local 32 BJ with the names and addresses of its employees and refrain from soliciting building owners to deny Local 32 BJ access. (*Id*.) Local 32 BJ contends (Br 46-50) that the Board abused its discretion by not ordering additional remedies because PBS was already subject to a judicially-enforced, broad cease-and-desist order. The Board specifically found (A 621, 701) that the extraordinary remedies sought by Local 32 BJ were not necessary to repair the violations found. As shown below, there is no basis for overturning this finding.

At the outset, contrary to Local 32 BJ's contention (Br 47), the remedies it seeks are clearly extraordinary. This Court has enforced access orders where the effects of an extensive unlawful campaign cannot be offset by traditional remedies. *See NLRB v. S.E. Nichols, Inc.,* 862 F.2d 952, 961-62 (2d Cir. 1988) (access remedy for repeated and deliberate violations by top company officials over 15-year period, including repeated discriminatory discharges). Similarly, a names-and-addresses order has been upheld where necessary to counteract the effects of

"persistent and widespread" unfair labor practices. *Federated Logistics and Operations v. NLRB,* 400 F.3d 920, 929 (D.C. Cir. 2005). But such remedies are not warranted whenever violations occur. *See Ishikawa Gasket America, Inc.*, 337 NLRB 175, 176 (2001) (no notice–reading requirement unless violations are "egregious"); *Alliant Food Services*, 335 NLRB 695, 697 (2001) (no reading or access remedy for unlawful recognition of union, where employer "did not engage in other repeated, serious, and pervasive misconduct").

In this case, the violations repeatedly committed by PBS—the unlawful recognition of unions—are not of the type that would have a lasting effect on employee rights, especially where, as here, the unlawfully recognized union is no longer on the scene. And although the refusal to hire the former Clean-Right employees is a more serious violation, there is no showing that it had an adverse effect that requires the extraordinary remedies sought by Local 32 BJ. It did not prevent Local 32 BJ from organizing the new employees at 80 Maiden and even inducing them to strike.[12]

Local 32 BJ relies (Br 48-49) on several cases in which the Board issued the remedies it seeks. In each of those cases, the Board specifically found that the extraordinary remedies were necessary to dissipate the severe and lasting effects of

[12] AM's termination of its contract with PBS because of the strike, and Servco's subsequent unlawful refusal to hire the strikers, do not warrant a different result. The scope of the remedial order against PBS must be based on its unlawful conduct, not the conduct of other employers.

numerous unfair labor practices. *See S.E. Nichols, Inc.*, 284 NLRB 556, 559 (1987), *enforced in part*, 862 F.2d 952, 961-62 (2d Cir. 1988); *Wallace International de Puerto Rico, Inc.*, 328 NLRB 29, 29-30 (1999); *Smithfield Foods, Inc.*, 347 NLRB 1225, 1233 (2006). Absent findings as to the likely effects of the violations on employees, a history of violations alone does not justify extraordinary remedies. *See Florida Steel Corp. v. NLRB*, 713 F.2d 823, 829-35 (D.C. Cir. 1983). Here, Local 32 BJ cities no evidence of effect, but relies solely on history. That is not enough to show that the Board abused its discretion, for "nothing in the language or structure of the Act . . . require[s] the Board to reflexively order that which a complaining party may regard as 'complete relief' for every unfair labor practice." *Shepard v. NLRB*, 459 U.S. 344, 352 (1983).

CONCLUSION

For the foregoing reasons, the Board respectfully submits that Local 32 BJ's petition for review should be denied.

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December 2008

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 32 BJ	:	
Petitioner	:	No. 08-1661-ag
v.	:	Board Case Nos. 2-CA-33146 et al.
NATIONAL LABOR RELATIONS BOARD	:	
Respondent	:	
and	:	
AM PROPERTY HOLDING CORP.; PLANNED BUILDING SERVICES, INC.; AND SERVCO INDUSTRIES, INC.	:	
Intervenors	:	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 10,463 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2000.

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Dated at Washington, DC
this 18th day of December 2008

UNITED STATES COURT OF APPEALS
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Intervenors	:	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Board has this date sent to the Clerk of the Court by e-mail to agencycases@2.uscourts.gov and by first-class mail the required number of copies of the Board's final brief in the above-captioned case, and has served two copies of that brief upon the following counsel at the addresses listed below:

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