No. 07-2695-ag

UNITED STATES COURT of APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

675 WEST END OWNERS CORP., SALOMON MANAGEMENT CO.,LLC, NIV REALTY, LLC, SOLOMON MANAGEMENT CO., LLC, SHARON REALTY, LLC, DAN CO., LLC, TAL CO., LLC, GAL REALTY, LLC, SALOMON REALTY, NIV REALTY, SOLOMON REALTY, SHARON REALTY, UZI EINY D/B/A DAN CO., TAL CO., AND RIV REALTY

Respondents

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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ON APPLICATION FOR ENFORCEMENT
OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the application of the National Labor Relations Board ("the Board") to enforce an Order issued against the respondents

named above.[1] The Board had jurisdiction under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) ("the Act"). This Court has jurisdiction under Section 10(e) of the Act (29 U.S.C. § 160(e)), the unfair labor practices having occurred in New York City.

Because the Board's Order is based in part on findings made in a representation proceeding (Case No. 2-RC-22120), the record in that proceeding is before this Court in accord with Section 9(d) of the Act (29 U.S.C. § 159(d)). *See Boire v. Greyhound Corp.*, 376 U.S. 473, 477-79 (1964). However, Section 9(d) authorizes review of the Board's actions in the representation proceeding only for the limited purpose of deciding whether to "enforce[e], modify[], or set [] aside in whole or in part the [unfair labor practice] order of the Board." The Board retains authority under Section 9(c) of the Act (29 U.S.C. § 159(c)) to resume processing the representation case in a manner consistent with the rulings of the Court. *See Freund Baking Co.*, 330 NLRB 17, 17 n.3 (1999); *Medina County Publications*, 274 NLRB 873, 873 (1985).

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[1] Collective references to all respondents will be to "the Companies." Collective references to all respondents with "LLC" in their names will be to "the LLCs." Separate references to 675 West End Owners Corp. will be to "675 West End." Separate references to one or more of the other respondents will use the first name(s) of the specific respondent(s) in question.

The Board's Decision and Order was issued on August 25, 2005, and is reported at 345 NLRB 324. (JA 67-71.)[2] The Board filed its application for enforcement on June 22, 2007. Section 10(e) of the Act (29 U.S.C. § 160(e)) places no time limits on filing of applications for enforcement of Board orders.

STATEMENT OF THE ISSUES PRESENTED

1. Whether substantial evidence supports the Board's finding that the Companies violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union after its certification and by unilaterally subcontracting work previously performed by a bargaining unit employee. Subsidiary issues are:

a. Whether substantial evidence supports the Board's findings that the building owners are a single employer, that the building managers are a single employer, and that the two single employers, together, constitute a joint employer.

b. Whether substantial evidence supports the Board's finding that the Companies' doormen belong in the unit because they are not guards within the meaning of Section 9(b)(3) of the Act.

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[2] "JA" references are to the volume captioned "Joint Appendix" filed by 675 West End and the LLCs. "SA" references are to the separate "Supplemental Appendix" filed by the Einys. "BA" references are to the separate appendix filed by the Board, consisting of record materials designated by the Board but not included in either the Joint Appendix or the Supplemental Appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

c. Whether the Board reasonably concluded that the Companies' subcontracting unit work after the election, but before the Union's certification, was a mandatory subject of bargaining.

2. Whether various procedural rulings deprived the Companies of due process.

3. Whether alleged changes in circumstances since the issuance of the Board's Order preclude its enforcement.

STATEMENT OF THE CASE

I. The Representation Proceeding

On August 19, 1999, Stationary Engineers, Firemen, Maintenance and Building Service Union Local 670, RWDSU, UFCW, AFL-CIO ("the Union") filed a petition which, as amended on September 24, 1999, sought an election among four categories of employees, including doormen, at seven apartment buildings in Manhattan and two in the Bronx. (BA 131-33.) After a hearing, the Board's Regional Director found, based on the facts set forth below, pp. 17-29, that the LLCs that owned eight of the nine buildings in question were a single employer, that the management companies for the eight buildings were a single employer, and that those two single employers were joint employers of the employees at all eight buildings. (JA 23-29.) Accordingly, he found that the

employees at all eight buildings constituted an appropriate bargaining unit. (JA 32-33.) The Board denied the Companies' request for review. (JA 243.)

The election was conducted on January 28, 2000. The tally of ballots showed 7 votes for the Union, 8 against it, and 8 challenged ballots, 6 of which were cast by doormen, who the Companies alleged were guards under the Act and therefore ineligible to join the proposed unit. (JA 35-36.) On March 20 and 21, Uzi Einy, the Union, and the Companies' election observer all filed objections to the election. (JA 196-97, 201-06.) However, after the Region advised the Companies that it planned to rerun the election, Uzi Einy wrote the Region a letter on April 7, in which he stated: "You can consider . . . this letter as my withdrawal of our objection to the election [ ] . . . ." (JA 190-91.) In an affidavit, the Companies' observer also disavowed her objections, stating that her March letter "was not written as an objection to the election or its result." (BA 138.)

The Region subsequently conducted a hearing on the doormen's challenged ballots. The hearing officer found, based on the facts set forth below, pp. 31-34, that the doormen were not guards and recommended that their ballots be counted.

(JA 36-49.)[3] The Companies filed exceptions. The Regional Director affirmed the

hearing officer's findings and recommendations and directed that the doormen's ballots be counted. (JA 244-251.) The Board denied the Companies' requests for review. (JA 254 & n.1.)

The revised tally of ballots showed that the Union had won the election by a vote of 14 to 9. (JA 257.) The Companies, by letters dated May 17, 2001, attempted to file new objections to the conduct of the January 2000 election. (JA 50-51.) On May 23, the Acting Regional Director rejected the objections as untimely and certified the Union. (JA 54-55, 255.)

II. The Unfair Labor Practice Proceeding

On February 27, 2001, after the hearing officer had issued her report recommending that the doormen's ballots be counted but before the Union was certified, the Companies executed a contract with Command Security Corporation to furnish "reception/doormen/security officers" to work at 675 West End Avenue and 215 West 101st Street. (JA 77, 83; SA 261-64.) Pursuant to that contract, on March 12, 2001, a Command Security employee began working at 675 West End Avenue on the 4 p.m. to midnight shift, replacing a doorman who had quit. (JA

[3] The parties stipulated during the hearing that the other two challenged ballots

77; BA 94-96.) He performed the same duties as the remaining doormen, but, unlike them, wore a uniform. (JA 77; BA 94-95.) The Companies did not notify the Union of their decision to hire Command Security or offer to bargain about that decision or its effect on the bargaining unit employees. (JA 83; BA 97-98, 128-29.)

After its May 2001 certification, the Union, by letter dated August 3, 2001, requested that the Companies bargain with it and furnish relevant information. (JA 80-81; SA 259-60.) By letter dated August 13, the Companies refused to bargain, stating that they were challenging the certification. (JA 81, 82; BA 137.)

The Union filed charges alleging that the Companies' refusal to bargain, as well as the subcontracting of unit work to Command Security, violated Section 8(a)(5) and (1) of the Act. (SA 258.) The Board's General Counsel issued a complaint alleging, *inter alia*, that the Companies had violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union after it had been certified and had requested bargaining, and by unilaterally hiring non-unit security guards to perform work formerly done by bargaining unit employees. (JA 63–64.) After a hearing, Administrative Law Judge Eleanor MacDonald found that the Companies had violated the Act as alleged. (JA 71-86.) The Companies filed exceptions.

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should be counted. (BA 32-33.)

On August 25, 2005, the Board (Chairman Battista and Members Liebman and Schaumber) found, in agreement with the administrative law judge, that the Companies had violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by refusing to bargain with the Union and to furnish it with relevant information after it requested such bargaining and information. (JA 67, 80-83.)[4] The Board further found, in agreement with the judge, that the Companies had violated Section 8(a)(5) and (1) of the Act by hiring a security guard company to perform bargaining unit work without notice to or bargaining with the Union concerning that decision or its effect on unit employees. (JA 67, 83.)

The Board ordered the Companies to cease and desist from the conduct found unlawful and from in any like or related manner interfering with, restraining, or coercing employees in the exercise of their statutory rights. Affirmatively, the Board ordered the Companies to bargain, upon request, with the Union, continue such bargaining as if the initial certification year had not expired, furnish the Union with the requested information, and assign to a bargaining unit employee the

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[4] The Board agreed with the judge that the Companies' challenges to the single employer and joint employer findings and to the rejection of their election objections as untimely were, or could have been, raised in the representation proceeding and could not be relitigated in the unfair labor practice proceeding. (JA 68, 73.)

work which had been subcontracted. Finally, the Board ordered the Companies to post copies of an appropriate notice. (JA 70-71.)[5]

III. The Companies' Motions to Reopen the Record and Recall the Board's Order

On June 7, 2006, approximately 10 months after the Board's decision, the Regional Director notified the parties that the case was being closed because "[t]he Union appears to no longer be interested in pursuing this matter. . . ." (JA 94-95.) However, on August 31, 2006, the Union sent a letter to the Companies demanding negotiations, and the Companies failed to respond. (JA 96-97; BA 139.) On November 22, 2006, the Regional Director reopened the case. (JA 96-97.)

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[5] The Board also ordered the Companies to reimburse the Union and the General Counsel for litigation costs they incurred as a result of Uzi Einy's violation of the judge's instructions, in reissuing a revoked subpoena and issuing a new subpoena after the close of the hearing. (JA 69 & n.11.) The Companies do not contest this aspect of the Board's Order in their briefs. Accordingly, they have waived any objection to it, and this portion of the order (JA 70, paragraph 2(e)) is entitled to summary enforcement. *See NLRB v. Star Color Plate Service*, 843 F.2d 1507, 1510 n.3 (2d Cir. 1988).

The judge recommended that Uzi Einy be disciplined for improperly answering the complaint with a blanket denial and repeatedly disrupting the hearing. (JA 83-84.) The Board did not adopt that recommendation, but referred it to an investigating officer in the office of the Board's General Counsel. (JA 68-69.) A different administrative law judge subsequently found, based on the record in this case, that Einy's blanket denial of the complaint allegations was improper, and that he disrupted and delayed the hearing on 24 separate occasions. The judge recommended that Einy be barred from representing any party before the Board for 6 months. *See In re Uzi Einy*, 2007 WL 3244297 (NLRB Div. of Judges).

675 West End filed a motion to recall the Board's Order because of changed circumstances, citing the Union's failure to request bargaining before the case was closed, an alleged change in the composition of the bargaining unit, and alleged transfer of the previously subcontracted work to another contractor. (JA 102-06.) Shlomo Eini filed a motion to vacate the Regional Director's decision to reopen the case, citing the same grounds. (SA 58-62.) By order dated March 30, 2007, the Board denied both motions. (JA 115-19.)

SUMMARY OF ARGUMENT

1. A bargaining unit consisting of employees of all the Companies is appropriate because all of the ownership companies are a single employer, all of the management companies are a single employer, and the two single employers are joint employers of all the bargaining unit employees. Uzi Einy has a substantial ownership interest in all of the Companies, and all are wholly or primarily owned by members of his family. Uzi also participates actively in the management of all of the Companies and exercises control over labor relations for all of them. He directly supervises the day-to-day work of employees at all the buildings in issue, and he personally engaged in the conduct found by the Board to constitute unfair labor practices. The frequent interchange of employees between buildings owned by different respondents also supports the finding of single employer status, for it shows both common control of labor relations and interrelation of operations.

2. The doormen whose challenged ballots were decisive are not guards. They are not required to enforce rules against other employees, are not trained to use force or weapons, do not use weapons or handcuffs, do not make rounds of the buildings, do not wear uniforms, are not licensed or bonded, and were not fingerprinted or photographed when hired or thereafter. Their control over access to the buildings where they work is incidental to their primary function of

providing courtesy-oriented services to building residents. Their receipt, but not inspection, of packages for residents and storage of the packages in locked rooms when they are away are merely commonsense practices that do not show guard status. Calling the police or fire department in case of emergency is insufficient, without more, to make them guards, since any employee would presumably do so. The Board has previously analogized apartment doormen to receptionists, who have often been found not to be guards, and has declined to find employees to be guards unless they regularly and continually perform traditional security functions.

3. The hiring of an outside firm to perform bargaining unit work was a mandatory subject of bargaining that the Companies could not undertake without first negotiating with the Union. It did not alter the Companies' basic business – owning and managing apartment buildings – but merely replaced a unit employee with an employee of the outside firm to perform the same work at the same location. It adversely affected the integrity of the bargaining unit by removing a job from it.

That the subcontracting occurred prior to the Union's certification does not excuse the Companies' unilateral action. An employer acts at its peril in making unilateral changes while determinative challenges to ballots are pending. If the resolution of the ballot challenges leads to certification of the union, the unilateral

changes will be found unlawful unless justified by compelling economic circumstances requiring immediate action. The Companies failed to show such circumstances.

4. The Companies were not deprived of due process.

a. The Board was not required to provide an interpreter for Uzi Einy at the pre-election hearing in view of his failure to request an interpreter prior to the hearing and his active participation in the hearing in English.

b. The Companies' failure to request Board review of the Regional Director's rejection of their late objections to the election precludes them from challenging that rejection in this Court. That the Regional Director did not advise the Companies of their right to request review did not excuse their failure to do so. He had advised them of this right, and they had exercised it, on two prior occasions during this proceeding. Moreover, the objections, filed more than a year after the initial tally of ballots, were plainly untimely. The Board's Rules and Regulations require that objections be filed within 7 days of the initial tally of ballots, even if it is inconclusive because of challenged ballots.

c. The administrative law judge's refusal to allow Uzi Einy to ask himself questions while testifying was not reversible error. He was able to present the testimony through questions asked by others.

d. The judge did not abuse her discretion in refusing to admit videotapes which Uzi offered into evidence. Uzi improperly sought to use them as a substitute for live witness testimony which could be cross-examined.

e. The Board properly rejected the other Einys' attempt to file cross-exceptions to the judge's decision. Uzi Einy and 675 West End, the only parties who filed exceptions, had represented the other Einys at the hearing and were wholly aligned in interest with them. A party who has already filed exceptions may not file cross-exceptions.

5. The Board was not required to determine, prior to seeking enforcement of its Order, that the Companies had not complied with that order. Even if the Companies had fully complied, the Board would be entitled to enforcement. Moreover, the Companies did not comply, but ignored the Union's bargaining request. Alleged employee turnover is not a defense to the Board's bargaining order. Since the Companies never bargained with the Union, the initial certification year has not expired, and the Union's majority status cannot be challenged.

The alleged replacement of the original subcontractor by another does not affect the validity of the Board's order to restore the unlawfully subcontracted work to the bargaining unit. That Order does not depend on the identity of the subcontractor. The Board properly left the question whether restoration would be

unduly burdensome to compliance proceedings. Delaying enforcement and compliance proceedings until that issue is resolved would invite endless delays.

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDINGS THAT THE COMPANIES VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO BARGAIN WITH THE UNION AFTER ITS CERTIFICATION AND BY UNILATERALLY SUBCONTRACTING WORK PREVIOUSLY PERFORMED BY A BARGAINING UNIT EMPLOYEE

The Companies do not challenge the Board's findings that they refused to bargain with the Union after its certification and that they did not give the Union notice or an opportunity to negotiate before subcontracting bargaining unit work. They contend, however, that the Union was not properly certified because the unit found appropriate was a multiemployer unit and because the employees who cast the deciding votes in the election were guards. Further, the Companies contend that they lawfully subcontracted unit work, even if the Union was properly certified. As shown below, the Board properly rejected these contentions.

A. The Ownership and Management Companies Each Constitute A Single Employer, and Together Constitute Joint Employers

The Board found (JA 28-29) that all of the ownership companies (675 West End and all of the LLCs except Gal) were a single employer, and that all of the management companies were likewise a single employer. Moreover, it found (JA 28, 30) that Uzi Einy controlled the labor relations of all of the Companies. The Board further found (JA 32) that the two single employers were joint employers of the employees at all eight buildings in issue here, and that the employees at all

eight buildings thus constituted an appropriate bargaining unit. As shown below, substantial evidence supports these findings.

1. Background

The apartment buildings involved in this proceeding are six buildings on the Upper West Side of Manhattan and two on Allerton Avenue in the Bronx. 675 West End Avenue is owned by 675 West End Owners Corp. ("675 West End"), a cooperative corporation, and managed by Gal Realty, LLC. (JA 25; BA 26-27.) Each of the other buildings is owned by one of the LLCs and managed by a partnership of the same name. (JA 24; BA 16-23.) The parties stipulated that ownership and management companies at each building were joint employers of the employees of that building, because of their "meaningful [ ] impact on the labor relations of the employees of that . . . building." (SA 102.)

At the time of the hearing, the board of directors of 675 West End consisted of seven persons, including Uzi Einy, president; his wife Sofia, vice-president; and his daughter, Galit Ben-Baruch, assistant vice-president. Uzi and Sofia each owned half of the stock of Gal Realty, which, in turn, owned 60 per cent of the shares in 675 West End. Uzi participated actively in shareholders' meetings and served as the spokesperson for Gal Realty. (JA 25; BA 27.)

Uzi has a substantial ownership interest in each of the LLCs and the same degree of ownership in the corresponding management company. (JA 22 n.5, 24 &

n.7; BA 16-23.) He is the sole owner of the Dan companies, and he and another member of his family each own half of four pairs of companies: Niv and Tal, owned by Uzi and his brother Zvi Eyny; the Solomon companies, owned by Uzi and his brother Shlomo Eini; and Sharon Realty, owned by Uzi and his wife Sofia. Finally, the Salomon companies are owned in equal part by three persons: Uzi, Shlomo Eini, and Rachel Eini. (JA 24; BA 16-23.) [6]

Uzi Einy's office is at 700 West End Avenue, one of the buildings involved in this proceeding. That building, owned and managed by the Salomon companies (JA 26; SA 103-04), is also the business address for the Dan and Sharon companies. (BA 24-25.) The disability and workmen's compensation policies for those three sets of companies, as well as the Niv companies and 675 West End, list 700 West End Avenue as the employer's address. (JA 26; SA 103-05.) Paychecks and payroll documents for employees of each company name that company as the employer. However, Uzi Einy signs paychecks for all the Companies, and the checks list their employer's office as 700 West End Avenue. (JA 26; SA 223-25.)

Employees at all the buildings receive work assignments directly from Uzi Einy. Some of them have also received assignments from Uzi's brothers.

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[6] The record does not show Rachel Eini's relationship to the other family members. However, her surname suggests that she is Shlomo Eini's wife, daughter, or daughter-in-law.

However, for a year and a half prior to the hearing, Shlomo Eini, co-owner of the two Bronx buildings, was out of the country. During this period, the employees at those buildings testified, they received instructions solely from Uzi. The same employees were sent to work at different buildings. (JA 26-28; SA 71-74, 78, 80-81, BA 1-3, 6, 9-10, 13-15, 30-31.) They also called Uzi Einy to request permission to purchase supplies. (JA 28; SA 126, BA 31.)

2. The Board Reasonably Found That The Companies Constituted Two Single Employers That, Together, Were a Joint Employer

The Board found, on the facts set forth above, that all of the LLCs had common ownership, management, control, business purposes, and identities, and thus constituted a single employer. Similarly, the Board found, the management companies were a single employer because they had common ownership, common control of labor relations by Uzi Einy, and interrelation of operations. (JA 28-29.) Finally, the Board found (JA 32) that the two single employers were joint employers of the employees at all eight buildings in issue. As shown below, the record amply supports these findings.

Where the Board finds two or more nominally separate entities to be a single employer for purposes of the Act, all are jointly and severally liable for remedying unfair labor practices committed by any of them. *See Emsing's Supermarket, Inc.*, 284 NLRB 302, 304 (1987), *enforced*, 872 F.2d 1279, 1288-89 (7th Cir. 1989). In

determining whether single-employer status exists, the Board considers four factors: interrelation of operations, common management, centralized control of labor relations, and common ownership. *See IBEW Local 1264 v. Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 256 (1965); *Lihli Fashions Corp. v. NLRB*, 80 F.3d 743, 747 (2d Cir. 1996). Not all of these factors need to be present before the Board can find single-employer status, and no one factor is controlling. *Lihli Fashions Corp. v. NLRB*, 80 F.3d at 747. A Board finding of single-employer status "'is essentially a factual one and not to be disturbed provided substantial evidence in the record supports the Board's findings.'" *NLRB v. Emsing's Supermarket, Inc.*, 872 F.2d 1279, 1289 (7th Cir. 1989) (citations and internal quotations omitted).

a. Common ownership

All of the Companies have substantial common ownership in the person of Uzi Einy, who is sole owner of the Dan companies and half owner of the others, except for the Salomon companies, where his ownership share is one-third. Moreover, all of the Companies are wholly owned by members of the Einy family, with the possible exception of the Salomon companies (see above, p. 18 n.6), which are at least two-thirds owned by the Einys. This Court has held that ownership of different entities by members of the same family satisfies the

common ownership prong of single-employer status. *See Lihli Fashions Corp. v. NLRB*, 80 F.3d 743, 747 (2d Cir. 1996).

The Board properly relied on Uzi's testimony in a prior proceeding to find that Gal Realty, equally owned by Uzi and Sofia Einy, was also the majority owner of 675 West End. (JA 25 & n.8.) Although Uzi Einy (Br. 30) and 675 West End (Br. 21, 23) challenge this finding, neither offered any evidence to contradict the prior testimony. Indeed, Uzi Einy refused to testify in the pre-election hearing in this case (SA 108), as did Sharon Eyny, whom the hearing officer attempted to call as a witness on the jurisdictional issues. (SA 110-11.)[7] The Einys also relied on the record in the prior case (BA 28), and even requested in the post-election hearing, that judicial notice be taken of part of that record. (BA 88-89.) Absent any attempt to show that the prior testimony was wrong, the fact that some of the other respondents were not parties to the prior case does not preclude reliance on that testimony. *See Blankenship and Associates v. NLRB*, 999 F.2d 248, 251 (7th Cir. 1993). In these circumstances, the reliance on Uzi Einy's prior testimony was proper. *See Midland Rubbish Removal Co.*, 298 NLRB 991, 991 (1990) (relying

[7] Contrary to 675 West End's contention (Br. 23), it was not precluded from introducing evidence that its ownership had changed. The only document it sought to offer was admitted into evidence as Employer's Exhibit 2 (SA 92-93); it says nothing about changes in the ownership of 675 West End. (SA 227-30.)

on stipulation in prior case to establish jurisdiction); *EDP Medical Computer Systems, Inc.*, 284 NLRB 1232, 1263 (1987) (relying on stipulations in prior case to find supervisory status).

b. Common management

The Companies stipulated at the pre-election hearing that Uzi Einy managed six of them: the Dan companies, the Sharon companies, Gal, and Riv. (BA 21-22, 27.) Uzi testified at the unfair labor practice hearing that he had been president of 675 West End since 1997 (BA 101-02), and testified at the hearing on challenged ballots that he had been involved for nearly 20 years in the management of 215 West 101st Street, owned and nominally managed by the Niv companies (BA 19, 35.) His brother and co-manager, Zvi Eyny, was in Israel for several months after the election. (BA 36.) Uzi's other brother, Shlomo Eini, co-owner of the Solomon and Salomon companies, was in Israel for a considerably longer period, during which the employees of those companies obtained permission from Uzi to make needed repairs and obtain needed supplies. (SA 125-26.)

Uzi admitted that he participated in drafting security guidelines for doormen at both 675 West End Avenue and 215 West 101st Street. (BA 37-39.) He gave security guard applications to the doormen after the election. (BA 42.) He also negotiated and signed the agreement with Command Security for the provision of guard services at 675 West End Avenue. (JA 139, 150, BA 134-36.) He signed

paychecks for all the employees. (SA 225.) The paychecks and stubs, and workmen's compensation and disability policies for several companies, listed Uzi's office address as the employer's address. (SA 102-04, 223-25.) The foregoing facts amply support the Board's finding of common management of all of the Companies by Uzi Einy.

c. Centralized Control of Labor Relations

The record also shows that Uzi exercised control over labor relations for all the Companies. Five unit employees testified at the pre-election hearing.

- Pierre Samson, superintendent at 675 and 700 West End Avenue, testified that he worked for Uzi, who signed his paychecks and told him which building to go to and what work to do. (SA 71, 74-75, 78, 80.)

- Ramon Tirado, a handyman who worked at 309 and 317 West 99th Street (owned by the Sharon and Dan companies, respectively), likewise testified that he would call Uzi every day, and Uzi would tell him which building to go to and what work to do. (BA 2.)

- Francisco Romero, superintendent at 215 West 101st Street and 214 West 102nd Street (owned by the Niv and Tal companies, respectively), gave similar testimony, adding that Uzi reprimanded him when he failed to fix a boiler. (BA 4-6.)

- Orlando Cabrera, former superintendent at 700 West End Avenue, similarly testified, "I work for Mr. [Uzi] Einy," and added that Uzi would tell him where to work the next day. (BA 10-11.)

- Finally, Lloyd Chambers, superintendent at the two Bronx buildings, testified that Shlomo Eini said he needed Uzi's permission to hire (SA 113); that initially either Uzi or Shlomo would tell him what work to do (SA 114-15, 123), but that later, when Shlomo was out of the country for extended periods, he would call Uzi to get permission to make repairs and order supplies. (SA 126.)

Thus, the record shows that Uzi gave work assignments to employees at all eight buildings in issue.

The testimony of the doormen at the hearing on their challenged ballots also shows Uzi's role in supervising them.

- Gazmir Shtino, who has worked at both 675 West End Avenue and 215 West 101st Street (BA 46), called Uzi his "boss" (BA 49) and testified that Uzi had told him to stop pressing the elevator button for residents of the buildings. (BA 48.)

- Jaime Urena, who also worked at both buildings (SA 132, 158, BA 52), testified to receiving instructions from Uzi about bringing Uzi the list of visitors who had signed in, not letting visitors in without the tenant's permission, and using the keypad. (SA 132-33, 138-39, BA 51.) Uzi also told him how to handle incoming packages. (BA 54-55.)

- Jose Moran, who worked at 675 West End Avenue (BA 56), testified that Uzi hired him (BA 61) and later gave him a security guard application form. (BA 62-63.) He also described Uzi as his "boss" and testified that Uzi had told him not to allow visitors into the building unless they signed in and a resident agreed to let them in (SA 143-44).

- Bardhok Vuktilaj, also a doorman at 675 West End Avenue, likewise testified that he had "no . . . supervisor, just a boss, Uzi" (BA 67-68), and that Uzi told him not to open newspapers, but let the delivery person do so (BA 69), and initially told him to bring the newspapers to individual apartments, later rescinding that instruction (BA 74).

- Waldo Guerra, also a doorman at 675 West End Avenue (BA 81), also testified that he had no supervisor, but that Uzi told him what to do (BA 83) and screamed at him that the superintendent could not replace him when he went to the bathroom (SA 172-73, BA 86), told him to report to Uzi when the doorman on the next shift did not show up (SA 176), and told him, a few days before the hearing, that he had to wear a name tag (SA 159).

Uzi's participation in labor relations matters extended to large as well as small matters, including the conduct found to constitute unfair labor practices. As shown above, p. 22, he negotiated the agreement whereby a Command Security employee replaced a bargaining unit employee. He also refused to bargain when the Union requested bargaining after its certification. (BA 137.) His control over these key labor policy decisions is an important factor supporting the finding of single-employer status. *See Package Service Co. v. NLRB*, 113 F.3d 845, 847-48 (8th Cir. 1997); *Soule Glass and Glazing Co.*, 246 NLRB 792, 795 (1979), *affirmed in pertinent part*, 652 F.2d 1055, 1076 (1st Cir. 1981).

The foregoing evidence of direct supervision by Uzi Einy over minute details of the day-to-day work of the employees at the buildings in issue strongly supports a finding of single-employer status. *See Associated Constructors*, 325 NLRB 998, 999, 1003, 1006 (1998), *enforced sub nom. D'Overo v. NLRB*, 193 F.3d 532 (D.C. Cir. 1999); *Alexander Bistritzky*, 323 NLRB 524, 524-25 (1997).

d. Interchange of employees

Interchange of employees between nominally separate firms supports a finding that the firms are a single employer, for it shows both common control of labor relations and interrelation of operations. *See Lihli Fashions Corp. v. NLRB*, 80 F.3d 743, 747 (2d Cir. 1996); *Naperville Ready Mix, Inc.*, 328 NLRB 174, 179

(1999), *enforced*, 242 F.3d 744, 752 (7th Cir. 2001); *Alexander Bistritzky*, 323 NLRB 524, 524 (1997).

Contrary to the contentions of the Einys (Uzi Einy Br. 27-30, Shlomo Eini Br. 15), the interchange of employees between buildings owned by different respondents was not limited to Pierre Samson.[8] Samson himself testified to far more movement between buildings than the Einys acknowledge. He was superintendent at two buildings – 675 West End Avenue (owned by 675 West End, managed by Gal) and 700 West End Avenue (owned and managed by the Salomon companies) (SA 71) – and worked at all of the other buildings in issue here (SA 72-73, 113). He worked with other employees at five of the buildings: 675 West End Avenue, 215 West 101st Street (owned and managed by the Niv companies),

[8] The Einys challenged the finding of substantial interchange in separate motions for reconsideration after the Board issued its decision in the unfair labor practice proceeding. (SA 52-56.) The Board denied these motions, finding that the Companies' argument "ha[s] already been considered and rejected or [is] otherwise lacking in merit." (JA 92.) The Board cited Section 102.48(d)(1) of its Rules and Regulations (29 CFR § 102.48 (d)(1)), which provides for reconsideration of factual findings only in cases of newly discovered or previously unavailable evidence. The Einys did not show that the alleged cessation of employee interchange was newly discovered or previously unavailable evidence, or explain why they waited until nearly 6 years after the finding of substantial interchange in the representation proceeding (JA 31) to offer this evidence. Their failure to show that they acted with reasonable diligence to uncover a fact peculiarly within their knowledge precludes them from relying on it now. *See Fitel/Lucent Technologies, Inc.*, 326 NLRB 46, 46 n.1 (1998).

214 West 102nd Street (owned and managed by the Tal companies), 309 West 99th Street (owned and managed by the Sharon companies), and one of the Bronx buildings (owned and managed by the Solomon companies). (SA 82, BA 12.) Lloyd Chambers, superintendent of one of the Bronx buildings, testified that Samson had worked at both those buildings (SA 112-113, 120-23) and had worked with him and another employee at one of them. Francisco Romero, superintendent at 215 West 101st Street, and Orlando Cabrera, former superintendent at 700 West End Avenue, also testified that Samson worked with them at their buildings. (SA 80, BA 6-7, 11.)

Other bargaining unit employees also worked at more than one company's buildings. Ramon Tirado worked at 309 and 317 West 99th Street. (BA 1.) Francisco Romero, superintendent at 215 West 101st Street, also worked at 214 West 102nd Street (BA 3), where he had to check the boiler every day (BA 4-5). Orlando Cabrera, former superintendent at 675 West End Avenue, also worked at 700 West End Avenue. (BA 9.) Doorman Jaime Urena worked 3 days per week at 215 West 101st Street and 2 days per week at 675 West End Avenue. (BA 77.)

Thus, at least 5 of the 23 unit employees worked at two or more of the buildings involved in this case. As noted above, p. 25, interchange of employees between nominally separate employers indicates that the employers are, in fact,

one. The significant amount of interchange, along with the other factors shown above, justifies the Board's finding of single-employer status here.[9]

e. The cases relied on by the Companies are not controlling

Since, as shown above, the Board properly found single-employer status, the Companies' argument that a multiemployer bargaining unit may not be formed without the consent of the employers involved necessarily fails because all of the unit's employees are employees of the same employer. Thus, the reliance of the Companies (Shlomo Eini Br. 26-27, Uzi Einy Br. 11, 19-21, 23, 28, 675 West End Br. 22-23) on *Greenhoot, Inc.*, 205 NLRB 250 (1973), and *Oakwood Care Center*, 343 NLRB 659 (2004), is misplaced. In *Greenhoot*, the management company was a joint employer with each of the owners of 14 *separately-owned* office buildings. The Board found that a unit of employees at the 14 buildings would be an improper multiemployer unit. 205 NLRB at 251. In *Oakwood*, two employers were joint employers of some of the employees in issue, but one of them was the

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[9] Uzi Einy contends (Br. 31-32, 34-35) that the Board's finding of single-employer status is contrary to provisions of New York State law requiring the sponsor of a cooperative apartment eventually to cede control to its Board of Directors. However, the Act "is federal legislation, administered by a national agency, intended to solve a national problem, on a national scale," and the statutory definition of employer is not governed by "'whatever different standards the respective states may see fit to adopt for the disposition of unrelated, local problems.'" *NLRB v. Natural Gas Utility District of Hawkins County*, 402 U.S. 600, 603-04 (1971) (citations omitted).

sole employer of other employees. The Board majority held that the two groups of employees had different employers and therefore could not be included in the same bargaining unit, since it would be a multiemployer unit. 343 NLRB at 662. The Board expressly distinguished the traditional joint-employer situation, where "[a]ll of the unit employees work for a single employer, i.e., the joint employer entity . . . Therefore, a joint employer unit . . . is not a multiemployer unit." *Id.*

As the Board here found (JA 92 n.4), this case falls squarely into the latter category. Given the Board's single-employer findings, the employees at the various buildings do not work for different joint employers, but work for the same joint employers: the single employer consisting of the ownership companies and the single employer consisting of the management companies. Accordingly, a unit consisting of those employees is not a multiemployer unit and is not barred by *Greenhoot* or *Oakwood*.

B. Because the Doormen Are Not Guards, They Are Eligible for Inclusion in the Unit

At issue here is the status of six doormen at two of the Companies' apartment buildings: 675 West End Avenue and 215 West 101st Street. The Board found (JA 46-48, 248-51) that the doormen were not guards. As shown below, the record amply supports this finding.

Section 9(b)(3) of the Act (29 U.S.C. § 159(b)(3)) prohibits the Board from including in the same bargaining unit with other types of employees "any

individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises." It also prohibits the certification of a union as the bargaining representative of guards if it "admits to membership, or is affiliated directly or indirectly with [a union] which admits to membership, employees other than guards." Thus, a finding that particular employees are guards severely limits their rights under the Act. The Board cannot compel an employer to recognize any union as guards' bargaining representative except a union consisting solely of guards and unaffiliated with an organization such as the AFL-CIO. *See Teamsters Local 807 v. NLRB*, 755 F.2d 5, 8, 10 (2d Cir. 1985); *Schenley Distilleries, Inc.*, 77 NLRB 468, 469-70 (1948).

The Board has recognized that whether particular employees are guards often presents close factual issues. *See Burns International Security Services, Inc.*, 278 NLRB 565, 569 (1986). Accordingly, an excessively broad definition of guard status would restrict the statutory rights of numerous employees. The focus must be on "the potential for divided loyalty that arises whenever a guard is called upon to enforce the rules of his employer against any fellow union member." *Teamsters Local 807*, 755 F.2d at 9.

Because the limitation on their choice of bargaining representative is an exception to the general rule that employees have the right to bargain collectively

through any representative of their own choosing, the burden is on the party asserting guard status to prove it. *Cf. NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711 (2001) (burden of proving supervisory status is on party asserting it).

1. Background

The Companies employ doormen at only two of the eight buildings here: 675 West End Avenue (owned by 675 West End) and 215 West 101st Street (owned and managed by the Niv companies). The functions of the doormen in both buildings are essentially the same.

The doormen work on three shifts: 8:00 a.m. until 4:00 p.m.; 4:00 p.m. until midnight; and midnight until 8:00 a.m. (JA 37-38; 162.) They may not leave before the doorman for the next shift arrives. (JA 39, 40; 158, 159.) Their duties include opening doors for persons entering and leaving their building, announcing visitors to tenants, and ensuring that the visitors sign in and out. Visitors are not to be allowed in without the tenant's approval. (JA 38-42; 156, 159.) The doormen are also responsible for ensuring that basement and service entrance doors, the lobby door leading to the stairway (at 675 West End Avenue), and the door to the lobby bathroom (at 215 West 101st Street) are locked at the beginning and end of each shift, and they must lock the entrance door to the building whenever they leave the lobby. (JA 38-42; 156, 159.) They also clean the lobby and, during the

midnight shift, stairways, hallways of other floors, and the basement. They also collect garbage from these floors and put it outside for pickup. (JA 37-38, 41-42; 161-62.)

The doormen receive packages for tenants and ensure that the tenants sign for them. If a tenant is not available when a package is delivered, the doorman stores it in a closet (at 215 West 101st Street) or in an office or a desk (at 675 West End Avenue). The storage places are locked, and the doormen have keys. However, they do not inspect the packages. (JA 41-42; SA 141-42, 144, 167-68, BA 65-66, 71-72, 79, 85.)

The doormen are not required to patrol the building or to use physical force against anyone causing a disturbance. A recently installed telephone enables them to call the police or fire department in case of an emergency. They do not wear uniforms and are not fingerprinted or photographed when hired. They do not carry weapons, are not deputized by the New York City police department, and receive no special training in security functions. (JA 41-42; 129, SA 143, 148, BA 60, 64-66, 72-73, 78, 84-85.)

2. The doormen are not guards

The Board correctly found, on the foregoing facts, that the doormen are not guards within the meaning of Section 9(b)(3) of the Act and were therefore eligible to vote in the election. (JA 46-49, 244-51.) The Board has described guard

responsibilities as "those typically associated with traditional police and plant security functions, such as the enforcement of rules directed at other employees; the possession of authority to compel compliance with those rules; training in security procedures; weapons training and possession; participation in security rounds or patrols; the monitoring and control of access to the employer's premises; and wearing guard-type uniforms or displaying other indicia of guard status." *Boeing Co.*, 328 NLRB 128, 130 (1999).

The record here does not show that the doormen possessed most of these characteristics. Most significantly, nothing in the security guidelines for the doormen (JA 156-60) calls upon the doormen to enforce rules against other employees, and Uzi Einy testified (BA 44-45) that they have no such enforcement functions, nor would they in the event of a strike. Thus, the prospect of divided loyalties that Section 9(b)(3) was designed to avoid does not exist here. Moreover, traditional indicia of police functions are close to nonexistent. The doormen have not received training in the use of force or weapons. (BA 73, 78, 85.) They do not carry weapons or handcuffs. (BA 47, 59, 73, 84.) They are instructed not to argue with anyone. (JA 157, 158, 160.) They do not make rounds of the buildings, but stay in the lobby except when they go to pick up trash. (JA 132, BA 40, 50, 55, 60, 65-66, 78, 82.) They do not wear uniforms or insignia that might suggest guard status. (BA 41, 47, 57-58, 75-76, 79-80, 84-85.) They are not licensed or bonded

(BA 41-43), and were not fingerprinted or photographed when hired or thereafter. (BA 72, 78, 84.)

Of the indicia of guard status mentioned in *Boeing*, the only one present to some extent here is the exercise of control over access to the buildings, by ensuring that the doors are locked and refusing admittance to visitors not authorized by residents of the buildings. In *55 Liberty Owners Corp.*, 318 NLRB 308, 308, 310 (1995), on facts essentially indistinguishable from those here, the Board found that individuals who "monitor[ed] and regulate[d] access into the building, den[ied] entrance to unauthorized persons, and observe[d] and report[ed] irregularities" were not guards because the foregoing functions were "incidental to [the employees'] primary function of providing courtesy oriented and receptionist type services to the tenants of the various buildings." The Board cited *Ford Motor Co.*, 116 NLRB 1995, 1997-98 (1956), which held that a receptionist was not a guard even if she refused unauthorized employees access through the lobbies, checked in and issued passes to all vendors and visitors, reported to her supervisor any violation of security rules, required clearance passes for all incoming and outgoing packages, worked under the same supervision as admitted guards, and performed the same duties that admitted guards performed on other shifts. The foregoing cases demonstrate facts far more indicative of guard status than anything in the record here.

Here, the doormen also receive packages for absent residents and store them in locked rooms to prevent theft. However, they do not inspect the packages (BA 66, 72, 79, 85), a fact found significant in *55 Liberty*, 318 NLRB at 310, and *Hoffman Security, Ltd*., 302 NLRB 922, 923 (1991). Although the protection of customers' property can be a guard function, it does not become so merely by following such "commonsense practices" as keeping the property hidden from view when the doormen are present and locked up when they are not. *Purolator Courier Corp*., 300 NLRB 812, 814 (1990).

The Companies rely (675 West End Br. 28, 32, Zvi Eyny Br. 10) on the fact that the doormen were expected to call the police or the fire department in case of emergency, and that keypads had been installed in both buildings to enable them to do so. However, while reporting violations of company rules to a third party rather than taking direct action against violators is not inconsistent with guard status where that status is otherwise shown, it does not alone establish guard status. It does not make the alleged guards "any different from any other employees in nonguard occupations who during the course of the workday would presumably support suspicious job-related activity to their employer or to the police." *Purolator Courier*, 300 NLRB at 814 & n.8. Since, as shown above, the doormen here do not possess other indicia of guard status, any reporting they may do to the police or the Einys does not make them guards.

675 West End relies (Br. 34-42) on 19 cases, 18 of them decided in 1962 or earlier, in which the Board found that various employees were guards. The Board noted here (JA 43) that none of those cases involved doormen, and found (JA 45-46, 250-51) that *55 Liberty Owners Corp*., 318 NLRB 308 (1995), discussed above, which did involve doormen at apartment buildings, was controlling. *55 Liberty* did not announce a special rule for apartment doormen, but found (318 NLRB at 310-11) that doormen were analogous to receptionists, who have often been found not to be guards in both industrial and residential settings. *See, e.g., Wolverine Dispatch, Inc.*, 321 NLRB 796, 797-99 (1996); *Hoffman Security, Ltd.*, 302 NLRB 922, 922-23 (1991); *Guards Local 79*, 297 NLRB 1021, 1023 (1990); *Ford Motor Co.*, 116 NLRB 1995, 1996-97 (1956).

In distinguishing the decisions relied on by 675 West End, the Board also noted (JA 251) that since it decided those cases, it had "reexamined and clarified its analysis of the scope and nature of the duties which confer guard status." Thus, in *Purolator Courier Corp*., 300 NLRB 812, 815 nn.9, 11 (1990), the Board rejected reliance on any single factor as a "bright-line test" of guard status in favor of "analyzing the entire range of actual employee duties." In *Boeing Co*., 328 NLRB 128, 130-31 (1999), the Board stressed that performance of guard functions would not transform employees into guards where those responsibilities were "only a minor and incidental part of their overall responsibilities." There, it

rejected "an overly broad definition of guard status which [includes] employees who do not engage in traditional security functions on a regular and ongoing basis." 328 NLRB at 131.

The Board also distinguished the cases cited by 675 West End (JA 43-45) because the employees in issue in those cases performed traditional functions of watchmen, including patrolling and making rounds of buildings. In addition, in the cited cases, the guard duties were the primary function of the employees in question, whereas the primary functions of the doormen here were maintenance of the buildings and assistance to residents. (JA 44-45.) Although, as 675 West End points out, some of the cases it cites held that an employee could be a guard without possessing all of the guard characteristics mentioned in *Boeing*, none found guard status on the basis of as little evidence as this record contains.

675 West End also relies (Br. 43-45) on two other inapposite cases. In one, *Allen Services Co*., 314 NLRB 1060, 1062 (1994), the job of the employees found to be guards was only to protect the employer's property (trains) by keeping unauthorized persons away from it. Significantly, other employees who were far more analogous to the doormen here were not alleged or found to be guards.

In the other, *Madison Square Garden*, 333 NLRB 643, 645-46 (2001), the employees found to be guards were "supervisors" who wore a distinctive uniform and identification tag, carried a two-way radio that kept them in constant

communication with their superiors, and (unlike the doormen here) received a significantly higher rate of pay than event staff employees. Significantly, the "supervisors," with the assistance of the police, could take direct action to eject unruly patrons, an authority not possessed by the doormen here. 333 NLRB at 644-45. Also significantly, as in *Allen*, there was another group of employees, the event staff employees, who, like the doormen here, could only report to the "supervisors" if a patron possessed prohibited items (such as bottles, cans, or cameras) or got into an altercation with another patron. The event staff employees were specifically found not to be guards. *See Madison Square Garden*, 325 NLRB 971 (1998), *reaffirmed*, 333 NLRB at 644-45. Thus, neither *Allen* nor *Madison Square Garden* supports 675 West End's assertion (Br. 43) that the Board's decisions here and in *55 Liberty* are "an aberration and a marked departure from longstanding Board law" or "in tension, if not clearly at odds, with the overwhelming weight of [prior] Board holdings."

C. The Subcontracting of Unit Work While Election Results Were Pending Was a Mandatory Subject of Bargaining

By hiring an outside firm to perform the work of a doorman who had quit, the Companies, in essence, subcontracted work previously performed by a bargaining unit employee. The remaining doormen testified (BA 94-95, 103-04) that the outside firm's employee performed the same work they did; the only difference was that he wore a uniform and they did not. The Board found (JA 83)

that the decision to subcontract the work was a mandatory subject of bargaining and that the Companies violated Section 8(a)(5) and (1) of the Act by unilaterally subcontracting the work without prior notice to the Union and without giving the Union an opportunity to bargain about the decision or its effects on the unit employees.[10]

The Companies do not dispute that they hired the outside firm without notice to or bargaining with the Union. They contend, however (675 West End Br. 51-55, Uzi Einy Br. 40-46), that such bargaining was not required even if the Union was properly certified. As shown below, the Board properly rejected this contention.

Under Section 8(d) of the Act (29 U.S.C. § 158(d)), the duty to bargain extends to "wages, hours, and other terms and conditions of employment." In *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 213 (1964), the Supreme Court held that the foregoing phrase included subcontracting where the "decision to contract out work did not alter the [employer's] basic operation," but "merely replaced existing employees with those of an independent contractor to do the same work under similar conditions of employment." The Board has held that subcontracting of this type need not be motivated by labor costs to be a mandatory

[10] The administrative law judge also found (JA 79-80) that the subcontracting was motivated by the employees' protected activity and therefore violated Section

subject of bargaining. *See Torrington Industries, Inc.*, 307 NLRB 809, 810-11 (1992).

Applying these principles, it is clear that the subcontracting here was a mandatory subject of bargaining. The Companies' basic business was the ownership and management of apartment buildings. The hiring of an outside firm to supply a doorman at one of those buildings did not alter the nature or scope of that business. It did, however, remove a job from the bargaining unit, and the resulting detriment to the unit was sufficient to make the decision a mandatory subject of bargaining. *See Citizens Publishing and Printing Co. v. NLRB*, 263 F.3d 224, 229-30, 233-34 (3d Cir. 2001) (subcontracting of work formerly performed by employee who had retired was mandatory subject of bargaining).[11]

The Companies do not challenge these principles. Instead, they contend (675 West End Br. 51-54, Uzi Einy Br. 40-52) that they had no obligation to

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8(a)(3) and (1) of the Act. The Board found it unnecessary to pass on these findings, since they would not affect the remedy. (JA 67 n.3.)

[11] The complaint here alleged (JA 64, par. 8(c)), and the Board found (JA 83), that the Companies unlawfully refused to bargain about the effects of the subcontracting decision, as well as about the decision itself. Even where a management decision that adversely affects unit employees is not a mandatory subject of bargaining, the employer is required to bargain about its effect on the employees. *See First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 681-82 (1981). Accordingly, the Board's finding of an unlawful refusal to bargain about the effects of the subcontracting decision, and the corresponding portions of its remedial order, are entitled to affirmance.

bargain about the subcontracting because it occurred before the Union's certification, at a time when the status of determinative challenged ballots was still unresolved. The Board rejected this contention (JA 83), relying on *Mike O'Connor Chevrolet*, 209 NLRB 701, 703 (1974), *reversed on other grounds*, 512 F.2d 684 (8th Cir. 1975), where the Board held that, absent compelling economic considerations, an employer acts at its peril in making unilateral changes in terms and conditions of employment while either objections to the election or determinative challenges to ballots are pending. In such circumstances, the Board held, the unilateral changes will be found to violate the Act if the union is ultimately certified. 209 NLRB at 704.

The foregoing principle has been applied to unilateral subcontracting that occurred when no objections were pending, but when a single determinative challenged ballot remained unresolved. *See NLRB v. Westinghouse Broadcasting and Cable, Inc.*, 849 F.2d 15, 17-18, 20-22 (1st Cir. 1988). The rationale is the same whether objections or challenged ballots are involved: A contrary rule "would allow an employer to box the union in on future bargaining positions by implementing changes . . . during the period when objections *or determinative challenges* to the election are pending." *Mike O'Connor Chevrolet*, 209 NLRB at 703 (emphasis added). Nor does the rule unfairly prejudice an employer, since it can still act unilaterally in emergency situations, and its unilateral actions will also

be upheld if the resolution of the challenged ballots ultimately leads to a determination that the union has lost the election.

The "compelling economic circumstances" that would justify unilateral action are limited to "circumstances which require implementation at the time the action is taken or an economic business emergency that requires prompt action." *RBE Electronics of S.D., Inc.* 320 NLRB 80, 81 (1995). Here, any existing security problems were longstanding, going back more than a decade, and the Companies failed to show a need to take immediate action on them. (JA 79-80.)

Finally, Uzi Einy (Br. 42, 46) cites a statement in *ITT Industries*, 341 NLRB 937, 940 (2004), that "the decision to . . . hire security guards is an issue of the [employer's] own business judgment . . ." *ITT* is completely inapposite. The issue there was not whether an employer must bargain about replacing a unit employee with a subcontractor's security guard, but whether an employer may bar offsite employees from its parking lot when they seek to engage in union activity there. Accordingly, the Board was warranted in finding that the Companies' unilateral postelection subcontracting was unlawful in light of the Union's subsequent certification.

II. THE COMPANIES' PROCEDURAL ARGUMENTS ARE WITHOUT MERIT

The Companies assert a number of procedural errors in both the representation proceeding and the unfair labor practice proceeding that they contend deprived them of due process. It is settled that the constitutional guarantee of due process "guarantees no particular form of procedure; it protects substantial rights." *NLRB v. Mackay Radio & Telegraph Co*., 304 U.S. 333, 351 (1938). As shown below, none of the procedural rulings in issue deprived the Companies of substantial rights.

1. Shlomo Eini contends (Br. 23-24) that the Board denied the Companies due process when, at the pre-election hearing, the hearing officer declined to provide an interpreter for Uzi or Sharon Einy because they consistently demonstrated their English proficiency throughout the hearing. However, she offered to allow them to use their own interpreter. Both Uzi and Sharon refused to testify, allegedly because of this ruling. (SA 107-11.) The hearing officer acted properly.

In *Solar International Shipping Agency*, 327 NLRB 369, 370 (1998), the Board held that Regional Offices are required to pay for interpreters for foreign language witnesses who will give relevant testimony in pre-election hearings. There, however, it was undisputed that the witnesses needed translators to testify. *See* 327 NLRB at 369. *Solar* does not require the Region to pay for a translator

whenever a witness asserts a need for one, nor does it overrule prior decisions holding that a translator may be denied when – as here – the hearing officer is satisfied that the witness can testify in English. *See, e.g., Yaohan U.S.A. Corp.*, 319 NLRB 424, 424 n.2 (1995), *enforced mem.*, 121 F.3d 720 (9th Cir. 1997). Moreover, *Solar* expressly contemplates a determination prior to the hearing as to the need for an interpreter (327 NLRB at 370), and suggests that, if a party fails to request one in advance, it can properly be required to pay for its own interpreter. *See id.* at 370 n.4. Here, Uzi Einy did not request a Board-furnished interpreter prior to the hearing. His first such request was on the third day of the hearing (SA 82-83), a month after the hearing began, and would have required further delay for the Region to find a qualified interpreter.

The Board noted (JA 22 n.5) that the record reflected Uzi's active participation in the proceedings in English.[12] In light of Uzi's ease with English, and the timing of the request for an interpreter, the Board reasonably found (*id.*) that Uzi's refusal to testify without an interpreter, and his instructing Sharon Einy to do the same, "were motivated by his attempt to thwart the purposes of [the]

[12] In the subsequent unfair labor practice proceeding, Uzi testified without an interpreter. (BA 109-10.)

proceedings." The Board was not required to allow further delay by acceding to his untimely request for an interpreter.

2. The Companies contend (675 West End Br. 45-51, Uzi Einy Br. 35-40) that the Board improperly rejected objections filed after a revised tally of ballots showed that the Union had won the election. The Board acted within its discretion in rejecting the untimely objections.

The election was conducted in January 2000. The tally of ballots immediately thereafter showed that the outcome depended on unresolved challenged ballots. (JA 35.) Both Uzi Einy and the Companies' election observer sent letters objecting to the conduct of the election. (JA 201-06.) However, in April 2000, after the Board's Regional Office indicated (JA 192) that it was considering holding a rerun election, both Uzi Einy (JA 190-91) and the Companies' observer (BA 138) sent letters withdrawing their objections. More than a year later, in May 2001, after the doormen had been found eligible to vote, their ballots had been counted, and a revised tally of ballots (JA 187) showed that the Union had won the election, Uzi Einy and counsel for 675 West End attempted to file new objections. (JA 50-51, 183-84.) The Regional Director rejected the objections as untimely (JA 54-55) and certified the Union (JA 255). Neither Uzi Einy nor 675 West End requested Board review of these actions.

The Board, in the unfair labor practice proceeding, upheld the Regional Director's action (JA 68), relying on Section 102.67(f) of its Rules and Regulations (29 CFR § 102.67(f)), which unequivocally states: "Failure to request review [of the Regional Director's decision] shall preclude [a party] from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding." The failure to request review also constitutes a failure to exhaust administrative remedies, which, under Section 10(e) of the Act (29 U.S.C. § 160(e)),[13] precludes this Court from considering the Companies' argument. *See NLRB v. Newton-New Haven Co.*, 506 F.2d 1035, 1033 (2d Cir. 1974); *Seattle Opera v. NLRB*, 292 F.3d 757, 766 (D.C. Cir. 2002).

The Companies contend (675 West End Br. 49-51, Uzi Einy Br. 36, 38-39) that the foregoing principles are inapplicable because the Regional Director failed to advise them of their right to request review of his rejection of their objections. This failure is not an "extraordinary circumstance" within the meaning of Section 10(e). Counsel for 675 West End, who has practiced before the Board for more than 20 years (*see, e.g., Tilden Arms Mgt. Co.*, 276 NLRB 1111, 1111 (1985)),

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[13] Section 10(e) provides, in pertinent part, that "[n]o objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."

cannot plead ignorance of its Rules and Regulations. Moreover, in this case, the Regional Director, both upon directing an election (JA 34 n.21) and upon directing that the challenged ballots be counted (JA 251 n.8), specifically advised the parties of their right to request Board review. Uzi Einy filed a request for review each time. (JA 243, 254.) He cannot claim that the failure to notify him a third time of a right he had already exercised twice was prejudicial error.

In any event, the Board properly rejected the objections. Section 102.69(a) of the Board's Rules and Regulations (29 CFR § 102.69(a)) states, "within 7 days after the tally of ballots has been prepared, any party may file . . . objections to the conduct of the election or to conduct affecting the results of the election, . . . *Such filing must be timely whether or not the challenged ballots are sufficient in number to affect the results of the election*." (Emphasis added.) Here, the May 2001 objections, filed more than a year after the initial tally of ballots, were plainly untimely, while the April 2000 objections, having been withdrawn, could not be revived by later untimely objections. *See Precision Products Group*, 219 NLRB 640, 641 (1995).

This Court has repeatedly held that "[t]he conduct of representation proceedings is the very archetype of a purely administrative function, with no *quasi* about it, concerning which courts should not interfere save for the most glaring discrimination or abuse." *NLRB v. Arthur Sarnow Candy Co.*, 40 F.3d 552,

556 (2d Cir. 1994) (citation omitted). This principle extends to the Board's establishment and interpretation of rules governing postelection proceedings. "'It is for the Board to regulate its own procedures and interpret its own rules, so long as it does not act unfairly or in an arbitrary and discriminatory manner.'" *Piggly Wiggly v. NLRB*, 705 F.2d 1537, 1539 (11th Cir. 1983) (citation omitted).

Here, there were two tallies of ballots, one immediately after the election and another after the challenged ballots were counted. The Board's holding that objections to election conduct must be filed immediately after the election, even if the tally is inconclusive, comports with the plain language of Rule 102.69(a), quoted above, p. 47, and other Board Rules that clearly contemplate a simultaneous resolution of objections and challenged ballots. The Board has frequently ordered a single hearing on both. *See, e.g., Majestic Star Casino, LLC*, 335 NLRB 407, 407-08 & n.5 (2001) (single hearing held on supervisory status of mates whose ballots were challenged and on alleged misconduct by admitted supervisors). This procedure serves the important policy of expediting resolution of representation issues. A contrary rule would allow an employer to wait until after the disposition of challenged ballots, perhaps after a lengthy hearing, and then, if it lost the election, to postpone further its bargaining obligation by filing objections which might require a second lengthy hearing. The Board was not required to allow such delay.

3. Uzi Einy contends (Br. 51-53) that in the unfair labor practice proceeding, the administrative law judge improperly precluded him from asking himself questions while testifying on cross-examination. The judge's precise ruling (BA 105, SA 201) was that another person at counsel table – not necessarily an attorney – had to ask Uzi questions, so that opposing counsel would have a chance to object. Uzi then testified, with counsel for 675 West End asking him questions on direct examination. (JA 149-50, BA 106-08.) Later in the hearing, Uzi's wife called him as a witness and asked him a number of questions, including questions about why he hired an outside company to do a doorman's work. (BA 116-27.) Thus, preventing Uzi from questioning himself did not limit his ability to present relevant evidence. Accordingly, he cannot claim reversible error merely because the evidence came in through his answering questions asked by another, rather than through testimony in essentially narrative form. *Cf. American Industrial Cleaning Co*., 291 NLRB 399, 399 n.1 (1998) (no prejudice where *pro se* respondent was accorded full and fair opportunity to present case).[14]

[14] It is also significant that the administrative law judge found (JA 84) that Uzi repeatedly disrupted the hearing both before and after her ruling on the self-questioning issue, and that he repeatedly attempted to evade that ruling. *See* above, p. 9 n.5. "The right of self-representation is not a license to abuse the dignity of the courtroom." *Faretta v. California*, 422 U.S. 806, 835 n.46 (1975).

4. On several occasions during the hearing, Uzi Einy sought to introduce videotapes into evidence, either to impeach the testimony of witnesses or to justify a discharge not in issue in this case. (JA 152-55, SA 199-200, 209-14, 219-21.) The administrative law judge rejected the videotapes, noting that the alleged inconsistency of the witness's testimony with his prior statements could be determined from a transcript of those statements (JA 155) and that some of the videotapes were unrelated to that testimony (SA 199-200, 221). Uzi now contends (Br. 46-51) that the refusal to admit the videotapes was an abuse of discretion. This contention is without merit.

Audiotapes and videotapes are not always admitted into evidence, and their exclusion is not necessarily prejudicial error. *See, e.g.*, *Local 2, IBEW*, 220 NLRB 785, 785 n.1 (1975). This Court has recognized the Board's wide discretion in determining the admissibility of tapes. *See Carpenter Sprinkler Corp. v. NLRB*, 605 F.2d 60, 66 (2d Cir. 1979). In this case, the administrative law judge based her decision partly on the irrelevance of some of the proffered tapes and partly on the impropriety of using pictures and tapes as a substitute for live testimony, because they are not subject to cross-examination. Uzi Einy has not contended that he had no witnesses available to testify to any material fact which the tapes were designed to prove. Absent such a showing, there is no basis for a claim that refusal to admit

the tapes was reversible error.[15]

5. The Einys contend (Shlomo Eini Br. 29-30, Zvi Eyny Br. 2-5, Sofia Einy Br. 1-4) that they were improperly denied the right to file cross-exceptions. Only Uzi Einy and 675 West End filed exceptions to the administrative law judge's decision. After the time for filing exceptions had expired, the remaining Einys sought to file cross-exceptions. (SA 26-27, 36-38.) The Board rejected the cross-exceptions, noting that Uzi Einy and counsel for 675 West End had represented all of the Companies at the hearing and that the filing of cross-exceptions and answering briefs by the other Einys would amount to filing responses to their own exceptions and briefs. (SA 42-46.)[16]

Section 102.46(e) of the Board's Rules and Regulations (29 CFR § 102.46(e)) permits the filing of cross-exceptions only by "[a]ny party who has

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[15] Moreover, Uzi only asserts (Br. 46) that the judge's refusal to admit the videotapes in evidence prejudiced his ability to defend against the General Counsel's charge that the Companies subcontracted "'in retaliation for employees engaging in protected activities.'" Although the judge found that discriminatory motive, the Board explicitly declined to pass on the issue because that violation would not "materially affect the remedy," given the finding that the Companies also unlawfully refused to bargain over the subcontracting. (JA 67 n.3.) Thus, even if Uzi were correct that the judge should have permitted the videos into evidence, he suffered no prejudice from the error.

[16] The Board did permit Shlomo Eini and Zvi Eyny to file answering briefs to Uzi's exceptions on condition that they disclaim any intent to represent the respondents represented by Uzi or counsel for 675 West End. (SA 43-46.)

not previously filed exceptions . . .” In light of the Board’s findings (see above, pp. 17-28) that all of the ownership companies and all of the management companies are separate single employers, Uzi’s filing exceptions on behalf of Gal Realty and the two Dan companies was sufficient to establish that his exceptions applied to all of the Companies.

Moreover, the record shows that Uzi Einy and counsel for 675 West End represented all of the Companies at the hearing. At the end of the hearing, Uzi admitted on behalf of “[a]ll the Respondents,” for the purposes of this case, that the Board had jurisdiction over them. (BA 130.) At the beginning of the hearing, counsel for 675 West End entered an appearance on behalf of Zvi Eyny, the Niv and Tal companies (on behalf of whom Zvi sought to file cross-exceptions (SA 26)), the Solomon companies (on whose behalf Shlomo Eini sought to file cross-exceptions (SA 36)), and the Salomon companies (on whose behalf Sofia sought to file cross-exceptions (SA 38)). (BA 90-92.) Sofia also sought to file cross-exceptions on behalf of the Sharon companies. (SA 38.) Uzi Einy declared himself a representative of those firms on the first day of the hearing. (BA 93.) On another day, in the absence of Shlomo Eini, Uzi stated that he would represent Shlomo on that day, although later that day, he modified that statement to say that he was only representing Shlomo “for the next five minute[s].” (BA 111.)

Thus, either Uzi or counsel for 675 West End, or both, professed at some point in the hearing to be representing each of the entities on whose behalf the other Einys attempted to file cross-exceptions. Neither attempted to disavow such representation prior to the Board's rejection of the cross-exceptions. The Board was justified in concluding that their subsequent disavowals came too late and that their filing of exceptions therefore barred the filing of cross-exceptions by any of the Companies.[17]

Moreover, Rule 102.46(e) is properly interpreted in light of its basic purpose. It was intended to allow a party satisfied with the judge's ultimate decision to file otherwise untimely exceptions to unfavorable rulings – in essence, to argue alternative grounds for upholding the favorable decision – when an *adverse* party's exceptions place that decision in jeopardy. *See NLRB v. Cast-a-Stone Products Co.*, 479 F.2d 396, 397-98 (4th Cir. 1973). It was not intended to give parties who are dissatisfied with the judge's decision, but who fail to file timely exceptions, a second chance to do so merely because other parties who are clearly aligned in interest with them file such exceptions.

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[17] Moreover, none of the Einys seeking to file cross-exceptions have ever stated what arguments they would have raised that had not been already raised in the exceptions that were filed. Thus, any prejudice to Shlomo, Zvi, or Sofia is purely speculative.

III. NEITHER PARTIAL COMPLIANCE NOR ALLEGED CHANGES IN CIRCUMSTANCES DEPRIVE THE BOARD OF ENTITLEMENT TO ENFORCEMENT OF ITS ORDER

675 West End (Br. 11-12) and Shlomo Eini (Br. 8-9) contend that the application for enforcement is "premature" absent a determination of noncompliance. However, it is settled that no such determination is necessary. "[T]he employer's compliance with an order of the Board does not render the cause moot, depriving the Board of its opportunity to secure enforcement from an appropriate court. . . . A Board order imposes a continuing obligation; and the Board is entitled to have the resumption of the unfair labor practice barred by an enforcement decree." *NLRB v. Mexia Textile Mills, Inc.*, 339 U.S. 563, 567 (1950). An enforcement proceeding becomes moot only when "a party can establish that 'there is no reasonable expectation that the wrong will be repeated.'" *NLRB v. Raytheon Co.*, 398 U.S. 25, 27 (1970) (citation omitted.)

The record does not show that the Companies have complied with the Board's Order. The Order required the posting of remedial notices at all eight apartment buildings where unit employees are employed. (JA 70, par. 2(d).) Although the notices were posted in the two Bronx buildings (JA 95), there is no evidence that they were ever posted in any of the Manhattan buildings. The Order also required the Companies to bargain, upon request, with the Union. (JA 70, par. 2(a).) The Board's Regional Office initially closed the case on the explicit premise

that the Union was no longer interested in representing the unit employees. (JA 95.) When that premise proved incorrect – when the Union requested bargaining (BA 139) and the Companies ignored the request – the Region properly reopened the case. (JA 97.) As the Board noted (JA 118 & n.7), the decision to reopen a case is within the Regional Director's discretion. *See Driftwood Convalescent Hospital*, 302 NLRB 586, 587 (1991). The Board's bargaining order here imposed a continuing obligation on the Company to bargain upon request. *See NLRB v. Mexia Textile Mills, Inc.*, 339 U.S. 563, 567 (1950). The Company's disregard of that obligation was ample justification for reopening the case and seeking enforcement of the Board's Order.[18]

The Companies also contend (675 West End Br. 6, 16, Shlomo Eini Br. 17-18) that the Board's Order should not be enforced because only 7 of the 23 employees who voted in the election are still in their employ and the Union may no longer have the support of a majority of the unit employees. However, this Court, sitting en banc, has unanimously held that a union's loss of majority status is *not* a

[18] 675 West End characterizes the Union's bargaining request as "a miscommunication by an uninformed union official." (Br. 4.) If the Companies truly doubted that the letter requesting bargaining represented the Union's position, they should have contacted the Union for clarification, rather than simply ignoring the letter. The obvious reality is that the Companies had no intention of bargaining.

valid ground for refusing to enforce a bargaining order where an employer has unlawfully refused to bargain with a properly certified union. *See NLRB v. Patent Trader, Inc.*, 426 F.2d 791, 792 (2d Cir. 1970) (en banc).

Moreover, the Board has held, with Supreme Court approval, that a union's majority status is conclusively presumed for one year after its certification following a Board election, and that the employer may not rely on the union's loss of majority status in refusing to bargain during that year. *See Brooks v. NLRB*, 348 U.S. 96, 103-04 (1954). Further, to prevent an employer from profiting by its unlawful refusal to bargain, the Board has long held, with court approval, that the one-year period of irrebuttable presumption of majority status does not begin until the employer begins to bargain in good faith. *See Mar-Jac Poultry Co.*, 136 NLRB 785, 787 (1962); *Bridgeport Fittings, Inc. v. NLRB*, 877 F.2d 180, 184 (2d Cir. 1989). The Companies have never bargained with the Union, and the certification year has therefore never begun to run. Accordingly, the Companies cannot challenge the Union's majority status.[19]

[19] We note that the Companies contributed greatly to the delay in deciding this case by filing numerous motions (listed at JA 6-19), consisting in many cases of

The Board's Order required the Companies to remedy the unlawful subcontracting of unit work "by assigning a unit employee to perform the work currently performed by a nonunit employee of Command Security Corporation." (JA 70, par. 2(c).) 675 West End asserts (Br. 6, 10, 12-13) that the foregoing provision is unenforceable because the Companies have replaced Command Security with a new subcontractor, Murdoch Security. This contention is without merit.

The Companies do not contend that they notified the Union of the alleged subcontracting to Murdoch or offered to bargain about it. Thus, the subcontracting to Murdoch would be just as unlawful as the prior subcontracting to Command Security. Moreover, the validity of the requirement that the Companies return to the bargaining unit the work unlawfully taken from it, even if this requires them to cancel an existing subcontract, does not turn on the identity of the current subcontractor. Such a restoration order is presumptively appropriate unless the employer can show that restoration would be "unduly burdensome" or "would impose an undue hardship." *Lear Siegler, Inc.*, 295 NLRB 857, 862 (1989). The Companies have not made such a showing on the present record, but the Board has

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substantively identical motions by different respondents and attempts to relitigate issues already decided by the Board.

stated that they may seek to do so in a subsequent compliance proceeding. (JA 117-18.)

This Court has also rejected the Companies' claims (675 West End Br. 11, 16, Shlomo Eini Br. 17-18) that the Board should settle all compliance issues before seeking enforcement. In *NLRB v. G&T Terminal Packing Co.*, 246 F.3d 103, 125 (2d Cir. 2001), this Court indicated that, where a respondent asserts that changed circumstances after a hearing have created an undue burden, it will enforce the restoration order and allow the new evidence of undue burden to be presented at the compliance stage.

675 West End relies heavily (Br. 16-18) on *NLRB v. Special Mine Services, Inc.*, 11 F.3d 88, 89-90 (7th Cir. 1993), criticizing the Board for issuing a restoration order while leaving the "undue burden" issue to compliance proceedings. There, however, the Board had failed to rule on a contention that (as this Court found in *G&T*) the existing record established undue burden.[20] To the extent that *Special Mine Services* suggests that claims of changed circumstances

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[20] 675 West End also relies (Br. 17-18) on *Geiger Ready Mix Co. v. NLRB*, 87 F.3d 1363 (D.C. Cir. 1996). There, however, the court approved the precise order issued by the Board in this case; an order to return to the bargaining unit all work unlawfully transferred out of it. *Id.* at 1371. It held only that the Board could not order reinstatement of all employees laid off as a result of the unlawful transfer without determining that there was enough work for all of them. *Id.* The Board's Order here does not require reinstatement or backpay for any employees.

affecting the restoration order cannot be deferred to compliance proceedings, it is inconsistent with this Court's views in *G&T*.

Moreover, in *We Can, Inc.*, 315 NLRB 170, 175-76 (1994), quoted by 675 West End (Br. 13-15), the Board pointed out that such a procedure is not a deferral of the determination of the appropriate remedy, but a finding that a restoration remedy is appropriate on the existing record, coupled with a recognition that future changes in circumstances might warrant a reconsideration of that finding. The Board also pointed out that leaving consideration of changed circumstances to a compliance hearing, where they can be considered along with other compliance issues, is more efficient than the procedure, advocated by 675 West End. That proposal would delay compliance proceedings until after a new hearing and issuance of supplemental decisions, first by the administrative law judge and then by the Board. As the Board noted in *We Can*, it might reach the end of that process only to be confronted with yet another claim of changed circumstances "[a]nd so on, potentially ad infinitum," thus creating the potential for endless delay. 315 NLRB at 176-77. Especially where, as here, the Board is dealing with respondents with a demonstrated propensity for delaying tactics (see above, pp. 56 n.19), it was not required to follow a procedure which invites further delay. *Cf. NLRB v. L.B. Foster Co.*, 418 F.2d 1, 4 (9th Cir. 1969) (remand to consider facts occurring after Board's decision inappropriate).

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment enforcing the Board's Order in full.

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January 2008

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD	*	
	*	
Petitioner	*	
	*	
v.	*	
	*	
675 WEST END OWNERS CORP., SALOMON MANAGEMENT CO., LLC, NIV REALTY, LLC, SOLOMON MANAGEMENT CO., LLC, SHARON REALTY, LLC, DAN CO., LLC, TAL CO., LLC, GAL REALTY, LLC, SALOMON REALTY, NIV REALTY, SOLOMON REALTY, SHARON REALTY, UZI EINY D/B/A DAN CO., TAL CO., AND RIV REALTY	*	No. 07-2695-ag Board Case Nos. 02-CA-33940, 02-CA-34059 and 02-CA-34587
	*	
	*	
Respondents	*	

CERTIFICATE OF COMPLIANCE

As required under the Federal Rules of Appellate Procedure, combined with Local Rule 32, Board counsel certifies as follows:

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Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Local Rule 32, the Board certifies that its brief contains 13,973 words in proportionally spaced, 14-point Times New Roman type, and that the word processing system used was Microsoft Word 2003.

COMPLIANCE WITH CONTENT AND VIRUS SCAN REQUIREMENTS

Pursuant to Local Rule 32, the Board certifies that its PDF brief was scanned for viruses using Symantec Antivirus Corporation Edition, program version 10.0.2.2000 (1/13/2008 rev. 2), and according to that program is free of viruses.

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Dated at Washington, DC
this 17th day of January, 2008

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD	*	
	*	
Petitioner	*	
	*	
v.	*	
	*	
675 WEST END OWNERS CORP., SALOMON	*	No. 07-2695-ag
MANAGEMENT CO., LLC, NIV REALTY, LLC,	*	
SOLOMON MANAGEMENT CO., LLC,	*	Board Case Nos.
SHARON REALTY, LLC, DAN CO., LLC,	*	
TAL CO., LLC, GAL REALTY, LLC,	*	02-CA-33940,
SALOMON REALTY, NIV REALTY,	*	02-CA-34059 and
SOLOMON REALTY, SHARON REALTY,	*	02-CA-34587
UZI EINY D/B/A DAN CO., TAL CO., AND	*	
RIV REALTY	*	
	*	
Respondents	*	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Board has this date sent to the Clerk of the Court by overnight delivery service the required number of copies of the Board's brief in the above-captioned case, and has served two copies of that brief by overnight delivery service and e-mail upon the following at the addresses listed below:

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