

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

833 CENTRAL OWNERS CORP.

and

Case 29-CA-70910

LOCAL 621, UNITED WORKERS OF
AMERICA.

RESPONDENT'S BRIEF IN SUPPORT OF ITS EXCEPTIONS

Respectfully submitted,

BOND, SCHOENECK & KING, PLLC
330 Madison Avenue, 39th Floor
New York, NY 10017
Telephone: (646) 253-2300
Fax: (646) 253-2301

TABLE OF CONTENTS

Table of Authorities..... 1

PRELIMINARY STATEMENT..... 2

STATEMENT OF THE CASE 3

QUESTIONS PRESENTED 7

ARGUMENT..... 8

POINT I 8

 THE ALJ ERRONEOUSLY FOUND THAT WALTER BERGER WAS AN AGENT AND MEMBER OF THE BOARD OF DIRECTORS OF 833 CENTRAL AND THUS ALL FINDINGS THE ALJ BASED ON MR. BERGER'S STATEMENTS CANNOT BE IMPUTED TO 833 CENTRAL. (RESPONDENT'S EXCEPTIONS 1-7)..... 8

POINT II 11

 THE ALJ ERRONEOUSLY CONCLUDED THAT 833 CENTRAL KNEW AD/OR WAS AWARE THAT MR. SHIKARCHY BEGAN SUPPORTING THE UNION BEFORE IT WARNED OR TOOK ANY DISCIPLINARY ACTION AGAINST HIM AND THAT BOARD MEMBERS FRIEDMAN AND HERTZBERG THREATENED HIM BECAUSE OF HIS SUPPORT FOR THE UNION (RESPONDENT'S EXCEPTIONS 8-18)..... 11

 A. The General Counsel Did Not Prove the Respondent Knew Shikarchy was a Union Supporter as of June 20, 2011..... 11

 B. The General Counsel Did Not Prove That The Company Was Put On Notice That Shikarchy Was A Union Supporter By His August 14, 2011 Grievance..... 16

 C. The First Date That The General Counsel Proved Shikarchy Was A Union Supporter Was In or About October 2011. 17

 D. The ALJ Erroneously Failed To Address And/Or Discuss The Evidence Showing That Mr. Shikarchy And Board Member Steven Friedman Were Involved In A Personal Dispute Unrelated To Mr. Shikarchy's Union Activities. 18

POINT III 23

 THE ALJ ERRONEOUSLY DETERMINED THAT THE GENERAL COUNSEL ESTABLISHED 833 CENTRAL HARBORED UNION ANIMUS TO SUPPORT HIS CONCLUSION THAT SHIKARCHY WAS DISCIPLINED AND TERMINATED FOR HIS UNION ACTIVITIES OR SUPPORT (RESPONDENT EXCEPTIONS 19-25) ... 23

A.	Mr. Friedman’s Comments Made In Mid-March 2010 Are Too Remote In Time To Establish Temporal Proximity Between His Comments And Mr. Shikarchy’s Termination.....	23
B.	Mr. Hertzberg and Mr. Herskovitz’s Alleged Comments Made In December 2010 Are Too Remote In Time To Establish Temporal Proximity Between The Comments And Mr. Shikarchy’s Termination.....	24
C.	Mr. Berger’s Comments, Even Assumed <i>argundo</i> They Were Attributable To The Respondent, Made Between June – September 2011 Are Too Remote In Time To Establish Temporal Proximity Between His Comments And Mr. Shikarchy’s Termination.	25
D.	Mr. Friedman and Mr. Hertzberg’s Comments Made Between August – September 2011 Are Too Remote In Time To Establish Temporal Proximity Between His Comments And Mr. Shikarchy’s Termination.	26
E.	Mr. Herskovitz’ Comments Made in September 2011 Are Too Remote In Time To Establish Temporal Proximity Between His Comments And Mr. Shikarchy’s Termination.....	28
POINT IV	29
	THE ALJ ERRONEOUSLY FOUND THAT THE COMPANY’S DISCIPLINE, SUSPENSION AND TERMINATION OF MR. SHIKARCHY WAS PRETEXTUAL IN NATURE AND THE RESPONDENT DID NOT MEET ITS BURDEN OF PROOF UNDER <i>WRIGHT LINE</i> (RESPONDENT EXCEPTIONS 26-34).....	29
A.	Mr. Shikarchy Failed To Make Necessary Repairs To The Building.	31
B.	Mr. Shikarchy Failed To Properly Schedule And Supervise His Employees	37
C.	Mr. Shikarchy Failed To Follow Directives From His Supervisors	39
D.	Mr. Shikarchy Was Excessively Absent	43
E.	Mr. Shikarchy Made False Allegations and Engaged In Deceitful Conduct.	44
F.	Mr. Shikarchy Was Unwilling To Take Responsibility To Perform His Job Duties.....	47
CONCLUSION	50

TABLE OF AUTHORITIES

	<u>Page</u>
CASES	
<i>Amcast Automotive of Indiana, Inc</i> , 348 NLRB 836 (2006)	23
<i>Champion Home Builders</i> , 350 NLRB 788 (2007)	25, 27
<i>Kosher Plaza Supermarket</i> , 313 NLRB 74 (1993)	9
<i>Longshoremen ILA</i> , 313 N.L.R.B. 412, 415 (1993)	9
<i>Oahu Refuse Collection Co.</i> , 212 NLRB 224 (1974)	10
<i>Parmaneer Corp.</i> , 214 NLRB 367 (1974)	23, 24
<i>Personnel Hygiene Services Inc</i> , 2001 NLRB LEXIS 737 (2001)	25, 27, 28
<i>Magic Pan, Inc</i> , 242 NLRB 840 (1979)	26, 27, 28
<i>New Otani Hotel & Garden</i> , 325 NLRB 928 (1998)	26, 27
<i>Shen Lincoln-Mercury-Mitsubishi, Inc</i> , 321 NLRB 586 (1996)	9, 10
<i>Quazite Corp.</i> , 323 NLRB 511 (1997)	25, 27, 28
<i>Waterbury Community Antenna v. NLRB</i> , 587 F.2d 90 (2d Cir. 1978)	3, 22

PRELIMINARY STATEMENT

Imagine a Building Superintendent who is excessively absent, falsely accuses another employee of assault, misses appointments, fails to follow simple directives, fails to properly document employee work hours, fails to properly supervise his employees, lies to other employees and his supervisor, fails to take responsibility for his job duties, allows unauthorized individuals on the premises and generally fails to properly perform the essential functions of his/her job. Any employer would have reasonable justification to terminate an employee who engaged in any one of the failings in performance listed above. However, in this case, the Board of Directors of Respondent 833 Central Owners Corp., a cooperative residential apartment building located in Far Rockaway New York, voted to terminate their Superintendent, Ezra Shikarchy ("Shikarchy"), because he engaged in all of the above misconduct and performance failings. Despite the fact that Mr. Shikarchy was terminated for just and proper reasons, Local 621, United Workers of America ("Union") filed an unfair labor practice charge on behalf of Shikarchy with the NLRB claiming that such termination was due to his Union activity.

The record evidence established that Mr. Shikarchy was terminated from 833 Central Owners Corp. because he failed to adequately perform his job duties and was unable to effectively oversee and operate the building as the Superintendent. It is well settled that:

...there is nothing inherently discriminatory or destructive about the discharge of a single employee for cause, even if that employee is a union activist. It is well established that employees who are active in union affairs do not thereby obtain a special immunity from ordinary employment decisions.

Waterbury Community Antenna v. National Labor Relations Board, 587 F.2d 90, 97 (2d Cir. 1978). As will be demonstrated below, the ALJ erred when he determined that Mr. Shikarchy's discipline, suspension and termination were pretextual in nature and violated the Act. The record evidence established the Employer would have taken the same actions against Mr. Shikarchy even in the absence of his alleged protected activities or support of the union. Therefore, the ALJ's determination and remedy must be reversed and vacated.

STATEMENT OF THE CASE

Procedural Posture

Respondent 833 Central Owners Corp. ("Respondent" or the "Company" or "833 Central") hereby respectfully files this brief in support of its exceptions to the rulings in the decision of Administrative Law Judge William Nelson Cates (the "ALJ") in the above-referenced matter in accordance with Section 102.46(b), (c) and (e) of the Rules and Regulations of the National Labor Relations Board ("NLRB"). The hearing in this case was held in Brooklyn, New York on May 7 and 8, 2012. All parties participated in the proceeding, including the Company, the Union and the Acting General Counsel of the National Labor Relations Board, Region 29 ("General Counsel"). Thereafter, the parties submitted post-hearing briefs. The ALJ rendered his decision on or about September 14, 2012, finding the Respondent violated the Act by terminating Mr. Shikarchy as the Superintendent of 833 Central because of his participation in Union activities. Neither the General Counsel nor the Charging Party have filed any exceptions.

In the Complaint against the Respondent litigated before the ALJ, the Acting General Counsel alleged that the Respondent interfered with Mr. Shikarchy's protected rights by issuing him four written warnings on the same day, suspending Mr. Shikarchy

for three days and finally terminating Mr. Shikarchy's employment in violation of Section 8(a)(3) and (1) of the Act. (ALJ p. 1).¹

The ALJ concluded that the General Counsel met its burden of proof and demonstrated that the Employer violated the Act, by showing that Mr. Shikarchy was terminated due to the fact that the "Company harbored animus specifically against Shikarchy's protected activities and against the Union in general." (ALJ p. 16). In addition, the ALJ determined that the Company's defense that Shikarchy would have "been warned, suspended, and discharged for legitimate business reasons even if he had not engaged in union and/or protected activities" was "pretextual". (ALJ p. 17). The Company excepts to the ALJ's conclusion that the termination, suspension and discipline of Shikarchy was pretextual. Respondent contends that Mr. Shikarchy was terminated because he did not perform his duties in an effective and efficient manner.

The Respondent excepts to the findings of fact and conclusions of law that undergird this portion of the decision and requests that the Board vacate the ALJ's decision and remedy.

Background

833 Central is a cooperative residential apartment building located in Far Rockaway, New York. (ALJ p. 2). 833 Central contains approximately 56 residential units with a majority of the tenants being "senior citizens many of whom are widows". (ALJ p. 3). 833 Central operates through a Board of Directors ("Board") who are elected by the property shareholders and have final authority on all matters pertaining to the

¹ References to the Administrative Law Judge's decision are referenced by "ALJ p. ___" followed by the number. References to the hearing transcript are indicated by "Tr." and the number in parenthesis (Tr. page: line). References to the General Counsel's exhibits are indicated "GC-___"; references to the Respondent's exhibits are indicated "R-___". References to the Respondent's Exceptions are "R.E. ___".

cooperative. (ALJ p. 3). Approximately seven (7) years ago, the Board hired BRG Management ("BRG") to manage the day-to-day operations that occur at the cooperative, including payroll, financials, preparing monthly and annual budgets, monitoring calls/complaints from the property, and enforcing the bylaws and proprietary leases of the cooperative. (ALJ p. 3). The Board employs seven staff members and a live-in Superintendent who is required to be on call at all times. (ALJ p. 3). The Superintendent was Ezra Shikarchy.

On or about February 1, 2010, Mr. Shikarchy was hired to be 833 Central's Superintendent. (ALJ p. 3). Mr. Shikarchy was recommended and hired for the Superintendent's position by Board Member Steven Friedman, who had been Mr. Shikarchy's friend for over twenty (20) years. (ALJ p. 3). Mr. Shikarchy was given an apartment in the building and was supervised by Mr. Jeff Herskovitz, a BRG Manager. (ALJ p. 3).

As the Superintendent it was Mr. Shikarchy's responsibility to schedule and supervise the employees that work at the property, to oversee the maintenance of the property, to order the necessary supplies and materials and to take care of the basic mechanics and necessary repairs of the building. (See Tr. 217, 219, 221). In order to ensure that Mr. Shikarchy was adequately trained for his position, 833 Central arranged for a prior Superintendent of the building to come to 833 Central and train Mr. Shikarchy, and for the prior Superintendent to remain on-call for a 30-day time period. (Tr. 317-318). Thus, if Mr. Shikarchy had any questions about the property or his responsibilities with respect to it, he could not only contact Mr. Herskovitz, but he could also contact the prior Superintendent for advice. (See Tr. 317). While it seemed that

Mr. Shikarchy initially performed his job duties adequately, his job performance began to steadily worsen and decline until he was terminated in December of 2011.

Despite many verbal and written warnings and a suspension of three (3) days, Mr. Shikarchy stopped effectively and efficiently supervising and maintaining 833 Central. He continuously failed to make and/or schedule the necessary repairs to the property; he failed to properly schedule and supervise the other seven (7) employees; he failed to follow directives from his supervisors; he was excessively absent from the building; he engaged in deceitful conduct and made false allegations against another employee; and he was generally incompetent and unable to adequately perform his job duties. (See Tr. 219-293). When taken as a whole, the Board of Directors was completely justified in its decision to terminate Mr. Shikarchy's employment.

On December 13, 2011, Mr. Shikarchy was terminated from his employment, after working for 833 Central for less than two (2) years. (Tr. 125; GC Ex. 23). Such termination was justified by Mr. Shikarchy's inability to perform his job duties in an effective and efficient manner.

Additional facts appear in the argument.

QUESTIONS PRESENTED

1. Did the ALJ err when he found that Walter Berger was an agent of the Respondent? (Exceptions 1 to 7).
2. Did the ALJ err when he found that the Respondent knew and/or was aware that Shikarchy was a supporter of the Union as of June 20, 2011? (Exceptions 8 to 13).
3. Did the ALJ err when he found the Respondent knew and/or was aware that Shikarchy was a supporter of the Union as of August 14, 2011? (Exceptions 15-17).
4. Did the ALJ err when he found the discipline and discharge of Shikarchy was based upon his Union and protected activities? (Exceptions 26-34).
5. Did the ALJ err when he found the Company's discipline, suspension, and termination of Shikarchy was pretextual in nature? (Exceptions 26 to 34).
6. Did the ALJ err when he found the Company failed to meet its burden under *Wright Line* of showing Shikarchy would have been warned, suspended, and discharged for legitimate business reasons even if he had not engaged in Union and/or protected activities? (Exceptions 26-34).
7. Did the ALJ err when he found that the comments made by Steven Friedman and Mark Hertzberg were based on Mr. Shikarchy's Union activity? (Exceptions 14-18).
8. Did the ALJ err when he found that the harassment that was alleged to have occurred in the August 14, 2011 grievance was based upon Mr. Shikarchy's Union activity? (Exceptions 14-18).
9. Did the ALJ err when he found that 833 Central harbored Union animus? (Exceptions 19-27).

ARGUMENT

POINT I

THE ALJ ERRONEOUSLY FOUND THAT WALTER BERGER WAS AN AGENT AND MEMBER OF THE BOARD OF DIRECTORS OF 833 CENTRAL AND THUS ALL FINDINGS THE ALJ BASED ON MR. BERGER'S STATEMENTS CANNOT BE IMPUTED TO 833 CENTRAL. (Respondent's Exceptions 1-7).

The ALJ held that 833 Central engaged in unfair labor practices when it disciplined, suspended and terminated Mr. Shikarchy's employment because he (Mr. Shikarchy) engaged in Union activities. The ALJ primarily based his decision on two telephone conversations that occurred between Mr. Shikarchy and Walter Berger, a shareholder who resides in the building. (See ALJ p. 13-17). The ALJ imputed Mr. Berger's comments to 833 Central and found a violation of the Act because the ALJ incorrectly found that "the parties, in a post trial document received in evidence, stipulated Walter Berger was Company Board treasurer and an agent of the Company." (ALJ p. 2). However, 833 Central did not stipulate that Mr. Berger was an Agent of 833 Central as defined under Section 2(2) of the Act and, in fact, he was not an agent of the Respondent. As such, any statements made by Mr. Berger, who was not acting as an employee, Board Member or Agent of 833 Central was improperly relied upon by the ALJ as a basis for finding anti-union animus on the part of the Respondent.

In the Stipulation upon which the ALJ found the Employer "stipulated that Walter Berger was a Company Board treasurer and an agent of the Company", the parties actually stipulated the "[r]espondent denies that Walter Berger was a member of the Respondents' Co-Op Board at any time." Yet, the ALJ erroneously referred to Mr. Berger, without any discussion or findings, as "Board Treasurer Berger" and/or "Board Member Berger". (ALJ p. 16, 17) The ALJ did not base his decision on this issue on

any facts presented at the hearing, but improperly reached his conclusion solely upon the Stipulation. This erroneous conclusion without any analysis or explanation was improperly used as a basis to impute Mr. Berger's comments to 833 Central.

Contrary to the ALJ's decision, the record evidence shows that the General Counsel failed to establish that Walter Berger was an agent of 833 Central as defined under Section 2(2) of the Act. Section 2(2) states that an employer is liable for unfair labor practices that are committed by any person acting as an agent, directly or indirectly.

The test to determine whether an individual acts as an agent of the employer is determined by common law principles of agency. Longshoremen ILA (Coastal Stevedoring Co.), 313 N.L.R.B. 412, 415 (1993), remanded 56 F.3d 205 (D.C. Cir. 1995) (citing 93 Cong.Rec. 6858-59--remarks of Senator Taft). "Apparent authority is created through a manifestation by the principal to a third party that supplies a reasonable basis for the latter to believe that the principal has authorized the alleged agent to do the act in question." Shen Lincoln-Mercury-Mitsubishi, Inc., 321 NLRB 586 (1996). In order for apparent authority to be applied, two factors must be established: (1) there must be a manifestation by the principal to a third party; and (2) the third party must believe that the extent of the authority granted to the agent encompasses the contemplated activity. Id. The NLRB has interpreted such apparent authority to mean that "an employer can be responsible for the conduct of an employee, as an agent, where under all the circumstances the employees would reasonably believe that the individual was reflecting company policy and acting on behalf of management." Kosher Plaza Supermarket, 313 N.L.R.B. 74, 85 (1993).

The General Counsel simply did not establish that Mr. Berger is an agent of 833 Central. There is no evidence in the record that he was a member of the Board of Directors. He is not an employee or member of the Board of Directors, nor was he given authority by the Board of Directors to make decisions relating to the operation of the building or the employees. In fact, the parties stipulated that the Respondent denied the fact that Mr. Berger was a member of the Board of Directors. Mr. Berger testified that he is not, and never has been a member of the Board of Directors. (Tr. 32-33, 34-35). While he has occasionally attended Board meetings in the past, he never attended such meetings on a regular basis. (Tr. 32-33). Indeed, Mr. Berger testified that for four (4) months out of the year he resides in Florida and during many of the other Board meetings he is often unavailable due to his health and other personal obligations. (Tr. 33). Further, Mr. Berger testified that even though he attended an occasional Board meeting, it was not uncommon for shareholders who are not on the Board to attend such meetings. (See Tr. 34).

Despite the fact that Mr. Berger may have occasionally attended board meetings, he was never permitted to vote on any issues that came before the Board. (Tr. 35). Mr. Berger was not permitted to cast a vote because he was not a board member. Moreover, Mr. Berger had no authority to hire, fire, discipline, cause discharge, supervise employees, assign overtime or work assignments, direct the employees in any way, nor did he exercise any independent judgment over the employees working at 833 Central. Shen Lincoln-Mercury-Mitsubishi, Inc., 321 NLRB 586 (1996) (holding that anti-union remarks could not be imputed to the employer because an agency relationship was not established where the individual did not have the authority to hire,

fire, cause discharge or assign overtime to other employees); Oahu Refuse Collection Co., 212 NLRB 224 (1974) (same). Furthermore, any advice that Mr. Berger may have given to Mr. Shikarchy about the property and how to resolve the personal issues between Mr. Shikarchy and Mr. Friedman was solely in his capacity as a “friend” – not as a shareholder and certainly not as a member of the Board. (See Tr. 46).

Due to the fact that the General Counsel failed to prove that Mr. Berger was an Agent as defined by Section 2(2) of the Act, that the parties never Stipulated that Mr. Berger was an Agent under the Act pursuant to Section 2(2), that the parties Stipulated that the Respondents denied that Mr. Berger was a member of the Board of Directors, and that the ALJ failed to analyze or make any legal or factual findings based upon the record evidence as to Mr. Berger’s status as an Agent or member of the Board of Directors, each and every part of the decision in which the ALJ relied upon comments of Mr. Berger’s to support a finding of union animus on the part of 833 Central must be reversed, as Mr. Berger’s statements made in his capacity as a friend and resident of the building cannot be imputed to 833 Central.

POINT II

THE ALJ ERRONEOUSLY CONCLUDED THAT 833 CENTRAL KNEW AD/OR WAS AWARE THAT MR. SHIKARCHY BEGAN SUPPORTING THE UNION BEFORE IT WARNED OR TOOK ANY DISCIPLINARY ACTION AGAINST HIM AND THAT BOARD MEMBERS FRIEDMAN AND HERTZBERG THREATENED HIM BECAUSE OF HIS SUPPORT FOR THE UNION (Respondent’s Exceptions 8-18)

- A. The General Counsel Did Not Prove the Respondent Knew Shikarchy was a Union Supporter as of June 20, 2011.

The General Counsel attempted to prove that the disciplinary warnings and actions against Mr. Shikarchy were motivated by his support for the Union, which began at an arbitration between the Union and the Company held on June 20, 2012. The

General Counsel contended and attempted to prove it was at that arbitration the Company first learned that Mr. Shikarchy was a Union supporter and, therefore, took subsequent disciplinary actions against him.

The lynchpin of determining whether an employer took action against an employee for engaging in Union activity rests upon proof by the General Counsel that the employer had knowledge of the employee's Union participation or activities at the time the adverse employment action occurred. If an employer does not have the requisite knowledge of such Union activity, then it is impossible for it to take any action against an employee that would violate the Act. Accordingly, it was imperative for the General Counsel to prove and the ALJ to find that 833 Central had knowledge of Mr. Shikarchy's Union activity before 833 Central began warning and disciplining him for his failure to perform his job duties. However, the record evidence showed that the so-called "knowledge" that the ALJ determined 833 Central had about Mr. Shikarchy's Union involvement did not come to fruition until in or about October 2011, months after Mr. Shikarchy had first been written up and disciplined for his work performance.

The ALJ incorrectly found the disciplinary write-ups and actions began after the Company had knowledge that Shikarchy was a Union supporter based on his conclusion that "Shikarchy's first support for the Union, established here, began when Shikarchy did not prepare for his anticipated testimony on behalf of the Company at an arbitration hearing on June 20 involving the discharge of employees Boykin and Gomez. Shikarchy not only did not testify but openly displayed his support for the Union's position by giving a thumb's [sic] up to the Union." (ALJ p. 15, l. 36-40).

The record testimony does not support a finding that 833 Central was put on notice that Mr. Shikarchy had begun to support the Union based on his failure to properly prepare to testify at the arbitration and his attempted “hand sign” to the Union. First, Mr. Shikarchy testified that he did not prepare for the arbitration because the meeting, that was scheduled to take place the day before the arbitration to prepare Mr. Shikarchy for his testimony at the arbitration was cancelled:

Q. Why didn't you do anything, why didn't you prepare?

A. I have to listen to the tape that he send me with me and Boykin. He email this to me. And I tried to prepare for it. They set up some meeting between me, Jeff and the lawyer. And I went there. And I was not prepared. **They make another meeting Sunday, a day before the arbitration, and it didn't happen they cancel.**

(Tr. 131) (emphasis added). Mr. Shikarchy's own testimony shows that he was scheduled to prepare for the arbitration the day before the arbitration, but that such meeting was cancelled, but not by Mr. Shikarchy. At no time did Mr. Shikarchy testify that he cancelled the meeting because he did not want to support 833 Central, nor did he testify that he told any Board Member or any other representative of 833 Central that he no longer supported the employer and that he was now supporting the Union. It was an unfounded and unsubstantiated leap in analysis by the ALJ that the Company would have surmised that Mr. Shikarchy's not preparing for his witness testimony had anything to do with support for the Union, as it was the Company representatives who canceled the preparation meeting, not Mr. Shikarchy. While Mr. Shikarchy may have had “thoughts” about lending his support to the Union, 833 Central cannot be held responsible or be deemed to have been placed on notice based on another person's “thoughts”. There is no testimony by Mr. Shikarchy that he told anyone representing the

Company that he was not prepared to testify at the June 20 arbitration because he decided he was a Union supporter.

The ALJ also improperly determined and relied upon an improper finding of fact that Mr. Shikarchy put the Company on notice that he supported the Union on June 20th because he gave a “thumb’s [sic] up to the Union” at the arbitration which put the Company on notice of his Union support. However, Mr. Shikarchy never testified that he gave a “thumb’s up” to the Union, Mr. Shikarchy actually testified that he made some kind of “hand sign” to the Union. (Tr. 135). Moreover, Mr. Shikarchy did not testify that he made the sign or motion in the presence of or to the knowledge of any representative of the Company. The ALJ improperly found that Mr. Shikarchy’s “hand sign” put 833 Central on notice that Mr. Shikarchy was supporting the Union as of June 20. Mr. Shikarchy’s own testimony proved that the ALJ’s determination is incorrect:

Q. Did you have any communication with the Union at the arbitration?

A. Yes. At the arbitration, when take place, I already make my mind, and I tried to, with the hand sign, when I see Steve Sombrotto, and Al, and Boykin, and Gomez, I make a hand sign, and I went to the bathroom. I thought somebody will come. I want inform him I want to apologize, and I want to tell him that’s it. **But they didn’t understand** because I was really, the way things happen was really terrible to the employee. And they couldn’t believe me, so this why didn’t come. I asked Boykin why you didn’t come after me to the bathroom.

(Tr. 135)(emphasis added). From the record evidence, not only did Mr. Shikarchy’s “hand sign” not put the Respondent on notice of his support for the union, but it did not even put the Union on notice.

Mr. Shikarchy first testified that on the day of the arbitration he had made up his “mind” that he was going to support the Union. However, Mr. Shikarchy did not testify that he told any Board member or any other representative from 833 Central that he had made such a decision. In fact, Mr. Shikarchy never testified that he told anybody from the Union that he had decided to lend his support to them. Rather, Mr. Shikarchy made some sort of “hand sign” that the ALJ erroneously characterized as a “thumbs up” and based upon that, he determined that Mr. Shikarchy put 833 Central on notice that he [Mr. Shikarchy] was now supporting the Union. This determination must be reversed and vacated as Mr. Shikarchy’s own testimony not only did not put the Company on notice of his alleged union support but it did not, according to him, even show that the Union understood what Mr. Shikarchy’s “hand sign” meant. Furthermore, Mr. Shikarchy never testified that any Board Member or representative from 833 Central saw that Mr. Shikarchy gave such “hand sign” or was even present at the time. The ALJ’s determination that 833 Central should have known that from the date of the arbitration that Mr. Shikarchy he begun to support the Union is clearly erroneous, not based on the record evidence and should be vacated by the Board.

The Respondent also excepts to the ALJ’s conclusion that the Board was aware that Mr. Shikarchy began to lend his support to the Union because Mr. Friedman stated to Mr. Shikarchy at the June 20th arbitration “that his not preparing to testify might result in the Board having to reinstate Boykin.” (ALJ p. 16). Mr. Friedman’s statement was correct, since it was Mr. Shikarchy’s job responsibility to supervise the other employees his testimony at the arbitration would have been important to establish the necessary facts. (Tr. 217). At any arbitration, trial or hearing if a witness is not adequately

prepared, there is a high probability that the necessary and relevant facts will not be properly introduced and/or the witness will be unable to handle the questions that arise on direct and cross-examination. At the hearing in this case, Mr. Shikarchy's testimony did not provide any indication that Mr. Friedman's comments were related to Mr. Shikarchy's newly decided support for the Union, or his sudden "mental" determination to lend his support to the Union of which he did not testify he informed the Company or any of its representatives.

B. The General Counsel Did Not Prove That The Company Was Put On Notice That Shikarchy Was A Union Supporter By His August 14, 2011 Grievance.

The ALJ erred in concluding that "[o]n August 14, Shikarchy claimed harassment by Board Member Friedman because he supported the Union." (ALJ p. 15). The grievance filed against Mr. Friedman did not include any allegations suggesting that Mr. Friedman's harassment of Mr. Shikarchy was because of his Union activities. If such conduct had allegedly occurred, Mr. Shikarchy and/or the Union would have undoubtedly included such allegations in the grievance. Such claims were not included, however, because, while Mr. Friedman's conduct may have been inappropriate, it was not motivated by Mr. Shikarchy's participation in union activities. Mr. Shikarchy's grievance did not allege he was being harassed by Mr. Friedman due to the fact that he was participating in union activities, he alleged that he was being harassed because he was not completing the tasks that Mr. Friedman wanted him to do because they were in conflict with his job duties and responsibilities that were provided from the Board. (See R. Ex. E). As Mr. Shikarchy himself testified, Mr. Friedman had "always" given him directives and told him what to do from the time that Mr. Shikarchy was hired. (See Tr.

183). In light of such record evidence, the ALJ's finding that such grievance was made because of his "Union activity" should be reversed and vacated by the Board.

C. The First Date That The General Counsel Proved Shikarchy Was A Union Supporter Was In or About October 2011.

If the Board properly reverses the ALJ's flawed determination that 833 Central was put on notice that Mr. Shikarchy had supported the Union at the arbitration that occurred on June 20, 2011 or in his grievance against Mr. Friedman in August 2011, then the first act established in the record evidence by which Mr. Shikarchy provided notice to 833 Central that he was supporting the Union occurred in or about October 2011 when Mr. Shikarchy began to participate in negotiations for the Union. 833 Central disciplined Mr. Shikarchy for conduct that occurred while he was a Superintendent prior October 2011 (the time at which it first knew Mr. Shikarchy had decided to support the Union), including conduct that occurred in June, July, August and September of 2011. Despite the fact that 833 Central had already disciplined Mr. Shikarchy about his work performance prior to its knowledge that Mr. Shikarchy was participating in Union activity, the ALJ incorrectly found that such discipline was "pretextual". As will be discussed in Sections D and E, *infra*, the ALJ's determination that the Union's decision to discipline, suspend and terminate Mr. Shikarchy was merely a "pretext" for his participation in Union activity because all of the evidence to support his discipline occurred after the June 20 arbitration and August 14 grievance, must be reversed and vacated due to the fact that 833 Central did not have knowledge of Mr. Shikarchy's Union support until October 2011.

D. The ALJ Erroneously Failed To Address And/Or Discuss The Evidence Showing That Mr. Shikarchy And Board Member Steven Friedman Were Involved In A Personal Dispute Unrelated To Mr. Shikarchy's Union Activities.

Respondent's Post Hearing Brief to the ALJ in Point I (A-B) pages 5-8, showed that the record evidence proved that the August 14, 2011 grievance that was filed by Mr. Shikarchy was not based on his Union activity, but rather, was based on a personal dispute between Mr. Shikarchy and Board Member Steven Friedman. However, rather than analyzing and making a finding regarding these defenses, the ALJ merely stated in a conclusory fashion: "I find it unnecessary to address, in detail, each of the asserted defenses raised by the Company..." (ALJ p. 17). Indeed, many of the comments that the ALJ determined "constitute[ed] an unlawful threat of discharge" (ALJ p. 13, l. 27-36, 44-45) should not have been deemed as such. The ALJ incorrectly failed to properly recognize the significance of these arguments or even consider them, even though they show that Mr. Friedman and Mr. Shikarchy, who had been friends for over 20 years, became entangled in a personal dispute that began well before the June 20th arbitration.

The General Counsel tried to make it appear as though the harassment that Mr. Shikarchy complained about in his August 14, 2011 grievance against Mr. Friedman began only after Mr. Shikarchy participated in the June 20, 2011 arbitration. (See Tr. 141-148). However, when Mr. Shikarchy was first questioned at the hearing as to when the harassment by Mr. Friedman began, Mr. Shikarchy testified that Mr. Friedman's harassment began before he participated in the arbitration. (Tr. 148). While Mr. Shikarchy later tried to change his answer, the record evidence established that Mr. Friedman's conduct towards Mr. Shikarchy began well before Mr. Shikarchy participated in the arbitration and was motivated by personal reasons unrelated to any union activity. (Tr. 148). First, the grievance that Mr. Shikarchy initially filed specifically states:

Grievance – **in or about the last 6 months**, Ezra has been harassed by members of the Board on his working duties which from time to time have been in conflict with directives of the managing agent. He has also been threatened by the board with termination as well as intervention into his children custody situation if he didn't do exactly what the board requested.

(R. Ex. E)(emphasis added). Mr. Shikarchy admitted, by and through his grievance, that Mr. Friedman's harassing conduct had been going on for 6 months – or since in or about March 2011 – which was three (3) months before the arbitration that was supposedly the catalyst for the alleged anti-union animus against Mr. Shikarchy. Any alleged harassing conduct began well before the arbitration, and therefore the General Counsel's theory was not proved at the hearing, as the harassment had nothing to do with Mr. Shikarchy's union activity. (R. Ex. E; Tr. 233). Indeed, Mr. Shikarchy testified:

Q. So it was that point well before this arbitration that Mr. Friedman was directing you about what to do and how to treat the employees?

A. **Always.**

(Tr. 183) (emphasis added). Despite such specific testimony by Mr. Shikarchy himself, the ALJ chose to ignore such information and held, without discussing or even addressing the Respondent's argument that Mr. Friedman engaged in an unfair labor practice.

Additionally, while the ALJ determined that "...Friedman, on these occasions, unlawfully threatened Shikarchy with discharge if he did not withdraw his grievance against Friedman" (ALJ p. 13, l. 44-45), he failed to take into consideration the very important fact that if the grievance that Mr. Shikarchy filed had nothing to do with his union activity, but merely reflected a personal dispute between friends of twenty (20) years, then no violation of the Act occurred. Indeed, the ALJ noted in his decision that

“Shikarchy testified the harassment continued in the lobby of the facility Board Member Friedman screamed at him and accused him of ‘torturing’ and ‘making his son [employee Joseph Friedman] miserable’”. (ALJ p. 5). This testimony clearly shows that if Mr. Friedman was harassing Mr. Shikarchy, it was about a personal family matter; specifically, the way Mr. Shikarchy treated his son, Joseph. While Mr. Friedman’s harassing conduct may have been inappropriate, it was not a violation of the Act because it had no connection or relation to Mr. Shikarchy’s union activities. Unfortunately, the ALJ ignored these facts and the Respondent excepts to the ALJ’s conclusion that Mr. Friedman engaged in unfair labor practices and to the fact that the ALJ failed to address this important argument.

Similarly, the amended Complaint alleged that Board Member Mark Hertzberg (a) threatened an employee with discharge if he continued to engage in Union activities, and (b) threatened an employee with unspecified reprisals if he continued to engage in Union activities.” The General Counsel argued that Mr. Hertzberg threatened Mr. Shikarchy with adverse employment actions if he continued to engage in union activities. To support such contention Mr. Shikarchy testified:

After the grievance, he tell me your friend hire you. His eyeball turn. He make – how you do something like this for them. You drop it, you drop the grievance, you better drop it. You bad person. You evil. You’re going to be fired. Something bad going to happen to you. You evil. How do you do this to your friend.

(Tr. 155). (Emphasis added). Noticeably absent from Mr. Shikarchy’s own testimony, even if Mr. Hertzberg made those comments, is any evidence that Mr. Hertzberg threatened to terminate or take any other adverse employment action against Mr. Shikarchy because of his union involvement. Indeed, Mr. Shikarchy’s own testimony

only supported a finding that Mr. Hertzberg thought Mr. Shikarchy should drop the grievance filed against Mr. Friedman because Mr. Friedman was a long time friend of Mr. Shikarchy and played an integral part in getting Mr. Shikarchy the superintendent's job in the first place; and not because Mr. Shikarchy was engaging in union activity or activities on behalf of the Union.

Moreover, in August of 2011, Mr. Shikarchy falsely accused another employee, the son of Steven Friedman, of assaulting him in the lobby of the building in order to get that employee terminated. (See discussion at Point IV(E), *infra*). Mr. Hertzberg simply told Mr. Shikarchy that he could be terminated if the security footage showed that Mr. Shikarchy was not actually assaulted by the other employee. Indeed, Mr. Shikarchy emailed Mr. Herskovitz stating that "the president [Mark Hertzberg] told me he will make a deal, if Yussie didn't push me then I lose my job but all I want to do is see what happened in the video." (R. Ex. I). Once again, Mr. Shikarchy did not testify that Mr. Hertzberg wanted to terminate his employment because of his union activity, but rather, because Mr. Shikarchy made what may have been false allegations against Steven Friedman's son. In fact, the record evidence shows that Mr. Shikarchy never complained about Mr. Hertzberg taking any adverse employment action against him due to his union activities. The first time such complaint was made was in the Amended Complaint. Since Mr. Shikarchy made such a serious allegation against Mr. Friedman's son, Mr. Hertzberg was within his rights to ask Mr. Shikarchy about it and tell him he could be fired if the allegation was untrue.

While the ALJ determined that "...Hertzberg's threatening Shikarchy that bad things would happen to him if he did not withdraw his grievance constitutes threats of

unspecified reprisals for engaging in protected conduct and Hertzberg's telling Shikarchy he would be fired if he did not withdraw his grievance constitutes an unlawful threat of discharge and I so find" (ALJ p. 13, l. 44-45), he failed to take into consideration the circumstances and factual basis surrounding the comments. Such comments, if actually made, cannot be viewed in a vacuum as they were by the ALJ, but within the whole context of the surrounding facts and circumstances. Mr. Shikarchy clearly testified that when Mr. Hertzberg made those statements he asked him "how he could do this to his friend?" The record evidence is that such comments were made to Mr. Shikarchy due to his relationship, as a friend with Mr. Friedman, and not because of his union support. If the comments made by Mr. Hertzberg had nothing to do with Mr. Shikarchy's union activity, but merely reflected a personal dispute between friends of twenty (20) years involving Mr. Shikarchy's treatment of Mr. Friedman's son, then no violation of the Act occurred.

Moreover, the comments made by Mr. Hertzberg to Mr. Shikarchy after he [Mr. Shikarchy] had falsely accused a fellow employee of assault were clearly justified in light of Mr. Shikarchy's misconduct. Indeed, it is well settled that employees who engage in Union activity are not immune from discipline, or even termination when they engage in misconduct:

...there is nothing inherently discriminatory or destructive about the discharge of a single employee for cause, even if that employee is a union activist. It is well established that employees who are active in union affairs do not thereby obtain a special immunity from ordinary employment decisions.

Waterbury Community Antenna v. National Labor Relations Board, 587 F.2d 90, 97 (2d Cir. 1978).

Unfortunately, the ALJ made a determination ignoring the significance of the surrounding circumstances established in the record and the Respondents except to the ALJ's conclusion that Mr. Hertzberg engaged in unfair labor practices.

POINT III

THE ALJ ERRONEOUSLY DETERMINED THAT THE GENERAL COUNSEL ESTABLISHED 833 CENTRAL HARBORED UNION ANIMUS TO SUPPORT HIS CONCLUSION THAT SHIKARCHY WAS DISCIPLINED AND TERMINATED FOR HIS UNION ACTIVITIES OR SUPPORT (Respondent Exceptions 19-25)

The ALJ concluded that the General Counsel adequately established that 833 Central harbored union animus, "specifically against Shikarchy's protected activities and against the Union in general". (ALJ p. 16). The ALJ based his determination on statements made by various 833 Representatives that range in time from March 2010, December 2010, June 2011, August 2011 and September 2011. Mr. Shikarchy was terminated from his employment as 833 Central's Superintendent in December 2011. As will be demonstrated below, the statements relied upon by the ALJ are simply too remote in time to prove that Mr. Shikarchy's termination was motivated by union animus.

A. Mr. Friedman's Comments Made In Mid-March 2010 Are Too Remote In Time To Establish Temporal Proximity Between His Comments And Mr. Shikarchy's Termination.

The ALJ erroneously concluded that the General Counsel established that 833 Central harbored union animus "specifically against Shikarchy's protected activities and against the Union in general" when "in mid-March 2010, Board Member Friedman told Shikarchy union people were very bad and cost the Company lots of money and the Company was going to install security cameras, fire everyone, and no longer need the Union. Friedman also told Shikarchy he hates Unions." (ALJ p. 16).

Shikarchy was terminated in December 2011. Because the above statements were made over 19 months prior to Shikarchy's termination, they are too remote in time to establish any kind of nexus or temporal proximity between Mr. Friedman's comments and Mr. Shikarchy's termination. Permaneer Corp., 214 NLRB 367, 369 fn. 8 (1974) (statements of union animus made 1 year before discharge were "too remote in time to constitute probative evidence of union animus at the time of [] discharge"); Amcast Automotive of Indiana, Inc., 348 NLRB 836, 838-839 (2006) (2-year gap between union activity and discharge too great to support causal nexus).

Accordingly, the ALJ's finding that the above comments prove that 833 Central harbored Union animus against Shikarchy's protected activities must be reversed and vacated.

B. Mr. Hertzberg and Mr. Herskovitz's Alleged Comments Made In December 2010 Are Too Remote In Time To Establish Temporal Proximity Between The Comments And Mr. Shikarchy's Termination.

The ALJ erroneously concluded that the General Counsel established that 833 Central harbored union animus "specifically against Shikarchy's protected activities and against the Union in general" when "[i]n December 2010, Board President Hertzberg told Shikarchy the Union was no good, cost the Company money, prevented them from doing what they wanted, they did not like the Union and wanted to get rid of it. On the same occasion BRG Manager Herskovitz told Shikarchy he did not like Union President Somborro [sic] and the union people and they were going to get rid of the Union." (ALJ p. 16).

Shikarchy was terminated in December 2011. Because the above statements were made one (1) year prior to Shikarchy's termination, they are too remote in time to establish any kind of nexus or temporal proximity between Mr. Hertzberg and Mr.

Herzkovitz's comments and Mr. Shikarchy's termination. Permaneer Corp., 214 NLRB 367, 369 fn. 8 (1974) (statements of union animus made 1 year before discharge were "too remote in time to constitute probative evidence of union animus at the time of []" discharge").

Accordingly, the Respondents except to the ALJ's finding that the above comments prove that 833 Central harbored Union animus against Shikarchy's protected activities that led to his termination and request that ALJ's findings be reversed and vacated.

C. Mr. Berger's Comments, Even Assumed *argundo* They Were Attributable To The Respondent Made Between June – September 2011 Are Too Remote In Time To Establish Temporal Proximity Between His Comments And Mr. Shikarchy's Termination.

The ALJ erroneously concluded that the General Counsel established that 833 Central harbored union animus "specifically against Shikarchy's protected activities and against the Union in general" when "Board Treasurer Berger told Shikarchy, between June and September, the Board was going to destroy him because he switched to leave the Company for his own benefit because he was with the Union and told Shikarchy he hated the Union. Berger also told Shikarchy the Board was going to do something to him that there was no way out for him and he could not win."(ALJ p. 16).

In addition, as previously discussed in Point I, *supra*, Mr. Berger was not an employee, Board Member or Agent of 833 Central, and thus his comments cannot be imputed to the Company to prove a violation of the Act.

Moreover, Shikarchy was terminated in December 2011. Because the above statements were made up to six (6) months prior to Shikarchy's termination, they are too remote in time to establish any kind of nexus or temporal proximity between Mr.

Berger's comments and Mr. Shikarchy's termination. Personnel Hygiene Services Inc, 2001 NLRB LEXIS 737 (2001) (finding that 4.5 months was too remote to establish temporal proximity between employee participation in union activities and the employer's decision to withhold wage increases); Champion Home Builders, 350 NLRB 788, 791-792 (2007) (finding that employer's refusal to bargain and threats to employees approximately 7 months prior to employee petition were too remote in time to have a causal connection to loss of support among employees); Quazite Corp., 323 NLRB 511, 512 (1997) (finding that prestrike unfair labor practices committed 6 months prior to the filing of a decertification petition were too remote in time to taint that petition); New Otani Hotel & Garden, 325 NLRB 928, 939 (1998) (declining to rely on employer's alleged expression of antiunion animus 8 months before discharge in part because temporally remote); Magic Pan, Inc., 242 NLRB 840, 853 (1979) (finding employer's alleged antiunion statements made 6 months before discharge too remote to support finding of animus).

Accordingly, the Respondents except to the ALJ's finding that the above comments prove that 833 Central harbored Union animus against Shikarchy's protected activities which cause him to be disciplined and discharged and request that the ALJ's findings be reversed and vacated.

D. Mr. Friedman and Mr. Hertzberg's Comments Made Between August – September 2011 Are Too Remote In Time To Establish Temporal Proximity Between His Comments And Mr. Shikarchy's Termination.

The ALJ erroneously concluded that the General Counsel established that 833 Central harbored union animus "specifically against Shikarchy's protected activities and against the Union in general" when "Board Member Friedman repeatedly told Shikarchy in August and September he should drop his grievance against his friend Friedman or

something bad would happen to him that he would be fired. Board President Hertzberg told Shikarchy in August he was evil for filing the grievance against Friedman and to drop it or something bad would happen to him he would be fired.”(ALJ p. 16).

As previously discussed in Point II (D), *supra*, the comments made by Mr. Friedman and Mr. Hertzberg to Mr. Shikarchy had nothing to do with Mr. Shikarchy's Union activity, but rather, concern a personal dispute that arose between Mr. Shikarchy and Mr. Friedman, individuals who had been friends for over twenty (20) years. Consequently, the ALJ's findings that such comments violated the Act should be reversed and vacated on that basis as well as the lack of temporal proximity.

Moreover, Shikarchy was terminated in December 2011. Because the above statements were made up to four (4) months prior to Shikarchy's termination, they are too remote in time to establish any kind of nexus or temporal proximity between Mr. Friedman and Mr. Hertzberg's comments and Mr. Shikarchy's termination. Personnel Hygiene Services Inc, 2001 NLRB LEXIS 737 (2001) (finding that 4.5 months was too remote to establish temporal proximity between employee participation in union activities and the employer's decision to withhold wage increases); Champion Home Builders, 350 NLRB 788, 791-792 (2007) (finding that employer's refusal to bargain and threats to employees approximately 7 months prior to employee petition were too remote in time to have a causal connection to loss of support among employees); Quazite Corp., 323 NLRB 511, 512 (1997) (finding that prestrike unfair labor practices committed 6 months prior to the filing of a decertification petition were too remote in time to taint that petition); New Otani Hotel & Garden, 325 NLRB 928, 939 (1998) (declining to rely on employer's alleged expression of antiunion animus 8 months before

discharge in part because temporally remote); Magic Pan, Inc., 242 NLRB 840, 853 (1979) (finding employer's alleged antiunion statements made 6 months before discharge too remote to support finding of animus).

Accordingly, the Respondents except to the ALJ's finding that the above comments prove that 833 Central harbored Union animus against Shikarchy's protected activities and request that the ALJ's findings be reversed and vacated.

E. Mr. Herskovitz' Comments Made in September 2011 Are Too Remote In Time To Establish Temporal Proximity Between His Comments And Mr. Shikarchy's Termination.

The ALJ erroneously concluded that the General Counsel established that 833 Central harbored union animus "specifically against Shikarchy's protected activities and against the Union in general" when "Shikarchy was given four written warnings on September 7, he was told by BRG Manager Herskovitz he had to drop the grievance against Friedman and he did not want to hear anything more about it." (ALJ p. 16).

Shikarchy was terminated in December 2011. Because the above statements were made three (3) months prior to Shikarchy's termination, they are too remote in time to establish any kind of nexus or temporal proximity between Mr. Friedman's comments and Mr. Herskovitz' termination. Personnel Hygiene Services Inc, 2001 NLRB LEXIS 737 (2001) (finding that 4.5 months was too remote to establish temporal proximity between employee participation in union activities and the employer's decision to withhold wage increases; Quazite Corp., 323 NLRB 511, 512 (1997) (finding that prestrike unfair labor practices committed 6 months prior to the filing of a decertification petition were too remote in time to taint that petition); Magic Pan, Inc., 242 NLRB 840, 853 (1979) (finding employer's alleged antiunion statements made 6 months before discharge too remote to support finding of animus).

Accordingly, the Respondent excepts to the ALJ's finding that the above comments prove that 833 Central harbored Union animus against Shikarchy's protected activities and request that the ALJ's findings be reversed and vacated.

Because the comments that the ALJ relied on in determining that 833 Central harbored union animus were too remote in time to show temporal proximity between the comments and Mr. Shikarchy's discharge, the Respondent excepts to the ALJ's finding that the General Counsel established that 833 Central harbored union animus.

POINT IV

THE ALJ ERRONEOUSLY FOUND THAT THE COMPANY'S DISCIPLINE, SUSPENSION AND TERMINATION OF MR. SHIKARCHY WAS PRETEXTUAL IN NATURE AND THE RESPONDENT DID NOT MEET ITS BURDEN OF PROOF UNDER *WRIGHT LINE* (Respondent Exceptions 26-34)

The Respondent excepts to the ALJ's determination that the Company's decision to discipline, suspend and terminate Mr. Shikarchy was only made because Mr. Shikarchy engaged in Union activities. The record evidence is contrary to that conclusion. The Respondent demonstrated at the hearing through extensive testimony and documentary proof that 833 Central took appropriate adverse employment action against Mr. Shikarchy because he failed to effectively and efficiently fulfill his job duties and engaged in blatant misconduct and insubordination. The ALJ initially found that the record evidence presented by the Respondent lead to his belief that the discipline was pretextual in nature because it began after the June 20, 2011 arbitration, the day upon which the ALJ determined the Company became aware that Mr. Shikarchy was lending his support to the Union. (See ALJ p. 17). As has been shown above in Section A of Point II, *supra*, the record evidence clearly shows that no one from the Board or any other 833 Central representative had knowledge that Mr. Shikarchy had decided to

support the Union on the day of the arbitration. Accordingly, the ALJ's theory that disciplinary action was "pretextual [in] nature" because it began after the June 20th arbitration is incorrect, prejudicial to the Respondent and renders his other factual findings that adverse action was taken against Mr. Shikarchy based upon his union support incorrect. Additionally, the ALJ's determination that the Respondent's evidence showing that Mr. Shikarchy was unable to perform his job duties was pretextual was contradicted by the ALJ's finding of facts. The ALJ highlighted the fact that "Union President Sombrotto testified ... [that] he always got complaints from employees regarding harassment by Shikarchy." (ALJ 4). Some conduct never changes. As demonstrated by the Respondent's multiple exhibits showing Mr. Shikarchy's failure to adequately fulfill his job duties was evidence that the other employees continued to complain about Mr. Shikarchy's conduct, yet, the ALJ determined in a sweeping fashion that all of the Respondent's exhibits were pretextual.

The Respondent introduced into evidence numerous documents that evidenced Mr. Shikarchy's failure to perform his job duties resulting in his termination on December 13, 2011. During that time Mr. Shikarchy was given four (4) warning letters, suspended for three (3) days and finally terminated. Many of the exhibits introduced by the Respondent were emails directly from Mr. Shikarchy himself showing his lack of understanding and ability. Through these exhibits and Mr. Herskovitz's testimony, the Respondent unequivocally showed that it had good cause to terminate Mr. Shikarchy's employment and would have taken all of these actions even if Mr. Shikarchy did not become a known Union supporter in October of 2011. The record evidence established the Respondents had six (6) major areas of concerns with Mr. Shikarchy's work

performance: 1) Mr. Shikarchy's failure to make the necessary repairs to the building; 2) Mr. Shikarchy's failure to properly schedule and supervise his employees; 3) Mr. Shikarchy's failure to follow directives from his supervisors; 4) Mr. Shikarchy's excessive absenteeism; 5) Mr. Shikarchy's misconduct in that he repeatedly made false allegations against fellow employees and engaged in deceitful conduct; and 6) Mr. Shikarchy's unwillingness to take responsibility to perform his job duties. Despite numerous warnings and suspension notices showing Mr. Shikarchy's inability to properly perform his job duties, the ALJ determined, with little or no explanation or analysis, that such documents were pretextual. In fact, the ALJ stated "I find it unnecessary to address, in detail, each of the asserted defenses raised by the Company because the evidence is compelling Shikarchy was warned, suspended, and discharged for his union activities and that the reasons advanced by the Company were pretextual." (ALJ 17). Despite the ALJ's blanket conclusion that the Company's evidence was pretextual and that it was "unnecessary" to address the evidence, his analysis of the evidence submitted by the Company and the reasons for the discipline against Mr. Shikarchy, was required and necessary. The evidence set forth by the Respondent shows there was a continuous pattern of poor performance that continued for months and wholly supported the termination of Mr. Shikarchy.

A. Mr. Shikarchy Failed To Make Necessary Repairs To The Building.

Mr. Shikarchy was responsible for making minor repairs around the building. If he was unable complete any of the repairs himself, he was then responsible for arranging for a contractor to come to the building and complete the job. (Tr. 247). Unfortunately, Mr. Shikarchy not only failed to make the necessary repairs that arose at the building, he also failed to arrange for contractors to complete the tasks. Indeed, he constantly

asked other employees, board members and BRG Management how to perform such repairs.

In August of 2011, Mr. Herskovitz received a complaint from a 90 year old resident who informed Mr. Herskovitz that Mr. Shikarchy had failed to make the necessary repairs to a leaky window in his apartment. The resident informed Mr. Herskovitz that not only did Mr. Shikarchy fail to repair the leaky window, but Mr. Shikarchy also neglected to arrange for a contractor to complete the repairs. (Tr. 241; R. Ex H). Mr. Shikarchy failed to contact a contractor despite the fact that BRG management had previously provided Mr. Shikarchy with a list of contractors to contact if repairs needed to be made at the property. (See Tr. 241). All Mr. Shikarchy had to do was call one of the contractors from the list that had been previously provided to him and arrange for the contractor to fix the resident's window. (Tr. 241; R. Ex. H). Yet, Mr. Shikarchy failed to perform even this simple, yet important, task.

In addition to not repairing windows and other minor mechanical issues, Mr. Shikarchy failed to timely install the necessary fire escape plaques that are required under New York City building codes. (See Tr. 220-221; see R. Ex. RR). Mr. Shikarchy was responsible for the "basic mechanics" of the property and installing fire escape plaques to ensure that the building was in compliance with the proper New York codes is unquestionably within Mr. Shikarchy's job duties. (Tr. 221). Instead of completing this task, however, he tried to pass off the responsibility of making these repairs to another employee. (Tr. 221). Mr. Shikarchy provided no reason or justification as to why he assigned the task of installing the fire plaque to another employee. Indeed, Mr.

Herskovitz had to remind Mr. Shikarchy that the installation of the fire plaques was his responsibility and directed him to complete the task himself. (Tr. 221).

Mr. Shikarchy also failed to make necessary repairs to 833 Central's parking lot. The parking lot is the responsibility of the Superintendent. (Tr. 259). A number of deep holes were created in the parking lot after a Hurricane hit New York in early September 2011. (Tr. 260). Mr. Shikarchy emailed Mr. Herskovitz and indicated to him that there were very "dangerous" and "serious" holes that needed to be fixed immediately. (R. Ex. S). However, he did not call one of the pre-arranged contractors to perform the repairs, even though it was his responsibility to do so. Instead, Mr. Shikarchy emailed Mr. Herskovitz about how he should proceed. Mr. Herskovitz told him the obvious, which was to either fix the holes himself or to call a contractor to fix the problem. (Tr. 260). Mr. Herskovitz testified that Mr. Shikarchy did not need his authorization to fix the problem and that Mr. Shikarchy should have known how to handle this situation, especially after working in the building for over a year. (Tr. 260).

Next, Mr. Shikarchy failed to contact the building's exterminator after receiving a complaint from a resident. A resident contacted Mr. Shikarchy to inform him that she needed an exterminator in her apartment. (Tr. 236-238). As the Superintendent, it was Mr. Shikarchy's responsibility to immediately contact an exterminator. Mr. Herskovitz testified:

Q. And what are the superintendent's responsibilities with respect to exterminators?

A. When they do hear a complaint regarding any part [sic] infestation, at this particular property they have a contract with an exterminator who actually posts sign-up sheets in the lobby. When the superintendent finds out about any particular infestation that a particular owner or resident doesn't want to wait for, he ends up calling and

scheduling for the exterminator to come to the particular resident's apartment and have the extermination completed. It falls within the purview of maintaining the mechanics of the property.

(Tr. 236-237). Despite it being one of Mr. Shikarchy's job duties, Mr. Shikarchy never contacted the exterminator, and instead told the tenant to call Mr. Herskovitz about the problem. (Tr. 236-238; R. Ex. G).

In September of 2011, another resident had a leaky window and Mr. Shikarchy still did not properly address the problem. Instead of repairing the window or arranging for a contractor to make the necessary repairs, Mr. Shikarchy again emailed Mr. Herskovitz inquiring how to proceed. Despite multiple verbal and written directives, Mr. Shikarchy continued to ask other people about what his job responsibilities were and, after 18 months of employment, was still unable to make the decisions that a Superintendent is necessarily required to make on a daily basis. (R. Ex. K). Mr. Herskovitz wrote to Mr. Shikarchy:

Ezra, please stop this. Obviously, you continue to ask for permission to fix a pipe, a window, a floor tile, a door etc... You must stop, you have been there for 18 months and you should have the capability to decide for yourself without asking for permission. You have been told too many times to call MBA, AMA, CS Brown for anything you may require as far as tools and supplies my approval is NOT required. The orders are emailed to me and then I approve them through email, nothing has changed in 18 months.

(R. Ex. K). Mr. Shikarchy's constant requests for approval and clarification and failure to make the decisions that were his as Superintendent showed he was incapable or unwilling to fulfill the responsibilities of his position

In addition to Mr. Shikarchy's failure to make the necessary repairs that were requested by the residents, Mr. Shikarchy also failed to make even the simplest of

repairs around the building. In late September of 2011, Mr. Herskovitz had to direct Mr. Shikarchy to replace the light in the stairwell that was located right outside of Mr. Shikarchy's office. (Tr. 265; see R. Ex. Y). It is important for the lights in the common areas of the property to properly function to ensure that none of the residents, especially the elderly residents, trip and fall. (Tr. 264). Despite the fact that Mr. Shikarchy should have known that the light bulb located directly outside of his office was no longer functioning and that such repair was his responsibility to complete, it took a directive from Mr. Herskovitz for Mr. Shikarchy to replace the light. (See Ex. Y). Changing a light bulb could have been done in a matter of minutes, but it took Mr. Shikarchy at least a week to make the necessary and very simple repair. (Tr. 265; Ex. Y).

Despite the numerous verbal and written reminders, requests, complaints and directives, Mr. Shikarchy's job performance did not improve. On or about October 17, 2011 Mr. Herskovitz sent an email to Mr. Shikarchy informing him that he had received several complaints from shareholders that one of the side doors was not working properly. (R. Ex. TT). In fact, when Mr. Herskovitz previously visited the property, he noticed that there was a problem with the top armature of the doors. (Tr. 269). When Mr. Herskovitz noticed the problem, he directed Mr. Shikarchy to "fix the arms on the doors." (Tr. 221). Despite the fact that this required only a simple screw adjustment on the top of the arm, Mr. Shikarchy failed to fix the problem for weeks and Mr. Herskovitz continued to receive complaints from shareholders.

Q. And how long before – the date of the email is October 17th. How long before that had you spoken to Mr. Shikarchy about fixing that side or side doors?

A. **At least weeks before.**

(Tr. 269) (emphasis added).

Mr. Shikarchy's failure to adequately make the necessary repairs continued into November 2011. On or about November 3, 2011, Mr. Shikarchy sent Mr. Herskovitz an email asking whether or not he should change the air valves. (Tr. 273; R. Ex. CC). Again, it was Mr. Shikarchy's responsibility to repair such air valves and he did not need Mr. Herskovitz's permission to make such repairs. (Tr. 273).

Thereafter, in December of 2011 Mr. Herskovitz directed Mr. Shikarchy to fix the leaf blower, the lawn mower and to ensure that the snow plow was working properly. (R. Ex. XX). It is the Superintendent's responsibility to make such mechanical repairs and Mr. Shikarchy had indicated to the board that he was "mechanically inclined". (Tr. 280-81). However, when Mr. Herskovitz asked Mr. Shikarchy to make the necessary repairs to those items, he defiantly refused to confirm whether he could or could not make the repairs. (Tr. 281).

As has been shown above, Mr. Shikarchy failed to make the necessary repairs to the property and instead repeatedly asked for permission to make repairs that he should have known how to handle. As the Superintendent, it was Mr. Shikarchy's responsibility to determine the need for repairs and to make or arrange for the repairs to be completed as necessary. That was not the responsibility of Mr. Herskovitz, nor could it be since Mr. Herskovitz was not at the property to evaluate and assess the problems. 833 Central was certainly justified in not wanting to continue the employment of an individual who, after 18 months, could not effectively and efficiently carry out one his most significant and important job duties; making the repairs for the building and for the building's residents.

B. Mr. Shikarchy Failed To Properly Schedule And Supervise His Employees

Another of Mr. Shikarchy's main job duties was to schedule and supervise the seven (7) other employees who worked at 833 Central. (Tr. 217). Mr. Shikarchy was, as is industry practice, a live-in Superintendent and an important part of his responsibilities was to monitor the employees on a daily basis. However, from having the employees use the proper vacation request forms to properly documenting his employees' work hours; Mr. Shikarchy's performance was wholly inadequate in every respect.

Mr. Shikarchy failed to properly and appropriately document the number of hours that his own employees worked. (Tr. 222-223). Specifically, Mr. Shikarchy was inappropriately deciding, in his sole discretion, to deduct an hour off an individuals' pay if they showed up only twenty (20) minutes late. (Tr. 223; see R. Ex. A). In addition to making such arbitrary deductions, Mr. Shikarchy failed to report the correct number of hours worked by the employees. Ironically, due to Mr. Shikarchy's actions, BRG Management received multiple complaints from the Union about the employees' incorrect pay. (Tr. 224).

Due to the fact that Mr. Shikarchy could not adequately document the number of hours worked by the employees whom he supervised, Mr. Herskovitz was forced to take away this responsibility from Mr. Shikarchy to perform it himself. (Tr. 255; GC Ex, 21A). Instead of having Mr. Shikarchy monitor and supervise the employees' hours as was his responsibility, Mr. Herskovitz was forced to require the employees to call his office every Sunday and to leave a message indicating the number of hours that they worked. (Tr. 255). Properly documenting the employees working hours is one of the major functions

of a superintendent's job duties and Mr. Shikarchy was unable to properly complete this task.

Mr. Shikarchy also failed to follow the proper procedure for granting vacation time. (Tr. 225-226; R. Ex. B). Despite having multiple copies of the vacation request form in his office, which was the same vacation form 833 Central has used for seven (7) years, Mr. Shikarchy failed to require his employees to fill out the form and to follow the proper procedure to request vacation. (Tr. 226). It was the Superintendent's responsibility to require the employees to fill out the vacation forms, to then fax it to Mr. Herskovitz to ensure that the vacation/holiday request got approved. (Tr. 249). Because Mr. Shikarchy failed to follow such procedure, BRG Management could not adequately track and maintain its records regarding the number of vacation days requested and whether or not such days were properly paid to the employee. (See Tr. 226).

As a result, multiple employees complained that they were not paid for the correct number of vacation days or holidays. (Tr. 250). Mr. Herskovitz testified that he never spent as much time and energy at any other building that he manages to straighten out the payroll, than he did at 833 Central. (Tr. 250). This was a direct result of Mr. Shikarchy's incompetence and his failure to properly supervise his employees.

Thereafter, in September 2011, after receiving a warning letter specifically about his failure to properly fulfill this job responsibility in addition to the many verbal counseling sessions, Mr. Shikarchy again asked Mr. Herskovitz about how he should handle scheduling his employees. (Tr. 257; R. Exs. P and Q).

In December of 2011, Mr. Shikarchy was still asking Mr. Herskovitz how to schedule his employees. Specifically, Mr. Shikarchy asked whether or not he could schedule Yisa to fill in for Yussie Friedman during the time that Mr. Friedman would be out on vacation. (R. Ex. JJ). In response to Mr. Shikarchy's question, Mr. Herskovitz told Mr. Shikarchy "[h]e [Yisa] can cover the door hours however, you are always allowed to schedule him". (R. Ex. JJ). Instead of scheduling Yisa or any other employees, however, Mr. Shikarchy waited until 9:24 pm on Sunday, December 11, 2011 to ask Mr. Herskovitz again about scheduling employees for the upcoming week. (Tr. 286). This was a major concern for Mr. Herskovitz because 1) he had previously told Mr. Shikarchy to schedule any employees that he needed, and Mr. Shikarchy had clearly not done so; and 2) Mr. Herskovitz was concerned that if Mr. Shikarchy had not arranged the schedule for the employees by 9:30 pm on a Sunday evening, that the building may be short staffed the next day. (Tr. 287). As with many other complaints about Mr. Shikarchy's ability to complete his job responsibilities, ensuring that the building was properly staffed was the superintendent's responsibility. (Tr. 287).

Properly supervising the employees who worked at 833 Central was one of Mr. Shikarchy's major responsibilities. Unfortunately, Mr. Shikarchy had a pattern of failing to adequately supervise such employees and to make the necessary decisions that a superintendent is required to make on daily basis.

C. Mr. Shikarchy Failed To Follow Directives From His Supervisors

On a number of occasions Mr. Shikarchy failed to follow directives that he received from his supervisor, Mr. Herskovitz and BRG Management. Mr. Shikarchy's failure to follow such directives directly impacted Mr. Herskovitz' and BRG's ability to properly manage the property.

For example, on numerous occasions, Mr. Shikarchy failed to follow Mr. Herskovitz' directive to only use the list of distributors provided to him by BRG Management to purchase materials and supplies for the buildings. (Tr. 219). Indeed, Mr. Shikarchy repeatedly bought materials at local stores (e.g. Target, Wal-Mart etc.) instead of ordering such items from the distributors provided to him by Mr. Herskovitz. (See Tr. 219). Despite being advised on numerous occasions to order the necessary supplies and materials from the distributors provided to him by BRG Management, Mr. Shikarchy disregarded such directives and continued to buy materials from local establishments. (See Tr. 219; see R. Ex. QQ). Mr. Shikarchy's conduct was problematic because Mr. Herskovitz and BRG Management had relationships with distributors that provided 833 Central with the proper materials at a low cost. By purchasing such materials from local establishments, Mr. Shikarchy was unnecessarily increasing the building's costs.

Mr. Shikarchy's defiance did not stop there. Mr. Shikarchy also failed to follow the directives given to him regarding submitting work orders. (Tr. 267). BRG management has a policy and procedure regarding filling out and submitting work orders. Mr. Shikarchy or any other Superintendent was required to contact BRG Management and inform them of the problem that needed to be addressed. (Tr. 267). Management, and not the Superintendent, would then make up a work order and advise the Superintendent to fix the problem. (Tr. 267). Mr. Shikarchy, however, ignored BRG Management's procedures and for some inexplicable reason created his own work order, instead of following the established policies and procedures. (Tr. 267; R. Ex. AA).

In November of 2011, Mr. Shikarchy failed to follow Mr. Herskovitz's directive to order and install a Dexter Alarm for the building's roof doors. (Tr. 274-75; see R. Ex. DD). A Dexter Alarm is a big red paddle emergency exit that is attached to a roof door. (Tr. 274). When touched an alarm goes off. (Tr. 274). The installation of such alarms was important, as such alarm was essential to safeguard the buildings. Mr. Herskovitz testified:

Q. And that installation would be within his responsibilities?

A. Yes.

Q. And did he do it?

A. Actually, no.

Q. And did you have to direct him to do it?

A. Yes.

Q. And are the Dexter Alarms a safety issue?

A. Yes.

Q. In what way?

A. No one is allowed on the roof. It's a very dangerous place to be, especially in New York considering all the cell phone towers and sites, and items like that. So it's incumbent upon the property to actually put those alarms on to not only satisfy insurance but local building codes to make sure that everyone made the best effort that no kids are going to run up there, basically.

(Tr. 275). In violation of these safety concerns, Mr. Shikarchy disregarded Mr. Herskovitz' directive and did not order or install such alarms.

Thereafter, in mid-November 2011, Mr. Herskovitz received a number of complaints from shareholders about the fact that the benches located outside on the property grounds were wrapped in bright yellow tape. (Tr. 276-77; R. Ex. VV). Mr. Shikarchy had taken it upon himself to wrap the benches with yellow tape. (Tr. 276-77). A number of shareholders complained. (R. Ex. VV). Mr. Herskovitz directed Mr.

Shikarchy to remove the yellow tape and the benches from the property. (Tr. 277-78; R. Ex. VV). Instead of following Mr. Herskovitz' directive, however, Mr. Shikarchy simply moved the benches to another part of the parking lot without removing the yellow tape. (Tr. 278; R. Ex. WW). Thereafter, Mr. Herskovitz visited the property and discovered that Mr. Shikarchy had failed to follow his directive. (Tr. 278). Mr. Herskovitz had to again direct Mr. Shikarchy to remove the tape and the benches from the property. (R. Ex. WW).

As if that were not enough, Mr. Shikarchy continued to ignore the directives he received by management. On or about December 8, 2011, the Board of Directors hired a "pointer", Stan Henry, to re-cement the brick on the exterior of the property in order to prevent leaks from occurring. (Tr. 285). Mr. Shikarchy, however, decided to direct Mr. Henry into a resident's apartment to make additional repairs for the resident that he (Mr. Henry) had not been contracted to perform. (Tr. 285). The Board of Directors hired Mr. Henry as an exterior contractor and it was "well beyond [Mr. Shikarchy's] authority" to direct him to enter a tenant's apartment to make repairs for which Mr. Shikarchy was responsible for. (Tr. 285-86). Indeed, common sense should have told Mr. Shikarchy it would be inappropriate to direct a roofer, who had been specifically hired to perform a certain task, inside a resident's apartment in order to make repairs that Mr. Shikarchy was responsible for completing. However, even if had not occurred to Mr. Shikarchy's common sense that such conduct was inappropriate, Mr. Shikarchy had been directed to "cease and desist from directing contractors beyond their bounds" on several occasions by management. (R. Ex. ZZ). Nevertheless, Mr. Shikarchy chose to deliberately disregard such directives and to continue with his insubordinate behavior.

Unfortunately, Mr. Shikarchy continued to disobey the directives he received from management. Only a few days after the December 8th incident Mr. Shikarchy emailed Mr. Herskovitz asking for permission to allow Stan Henry, the same roofer contractor, to be allowed inside an apartment of another resident to make repairs, but this time the resident was not even present! (Tr. 287-88; R. Ex. AAA). Mr. Shikarchy had been directed on several occasions, including only a few days before, to stop allowing contractors that were hired to perform a specific job at the property, inside any of the resident's apartment to engage in work that they had not been hired to perform. (Tr. 288). Not only did he continue to disregard this directive, he now also tried to allow a roofer inside an apartment when the owner was not present. (Tr. 288).

D. Mr. Shikarchy Was Excessively Absent

Mr. Herskovitz testified:

Q. How important is it that the superintendent be in or around the grounds?

A. Extremely important.

* * *

...If the superintendent isn't there, nothing can be fixed. Nothing can be fixed, things start falling apart.

(Tr. 259).

As the Superintendent, it was that Mr. Shikarchy's responsibility to be at the property in order to supervise the employees, to make the necessary repairs that the property may need and to handle any problems that may arise on a daily basis. However, in 2011 Mr. Shikarchy was chronically absent. Whether he was taking sick days or personal leave days, Mr. Shikarchy far exceeded the number of days off that were provided to him in the collective bargaining agreement.

As of August 2011, Mr. Shikarchy had already taken more than the ten (10) sick days provided under the collective bargaining agreement. (Tr. 235; Ex. F). As Mr. Herskovitz testified, the Superintendent is the “heart of the building” who needs to be present in order to efficiently and effectively run the building. (Tr. 234). Despite the many warnings, however, Mr. Shikarchy’s attendance did not improve. Indeed, Mr. Shikarchy continued to leave the building for personal reasons (e.g. going to court, picking up his children). His failure to be in or around the property was “was affecting his ability to act as a superintendent of [the] property.” (Tr. 258-59; see Ex. R).

Mr. Shikarchy’s excessive absenteeism continued in October of 2011 when he took another week off because he was “sick” and failed to provide a proper doctor’s note to BRG management. (Ex. Z). In addition to his excessive sick leave, Mr. Shikarchy also took additional personal days without informing BRG Management of his whereabouts or ensuring that there would be coverage during the time that he planned on being away from the building. (Ex. Z). Indeed, at the end of October/November of 2011 Mr. Shikarchy was suspended due to the fact that he had been absent so much from the property that “items [were] not being fixed or upgraded as needed, [and] schedules [were] not being adhered to.” (Tr. 271; GC Ex. 22). Despite such warnings, Mr. Shikarchy’s attendance did not improve and the residents and the property continued to be negatively affected by Mr. Shikarchy’s excessive absence.

E. Mr. Shikarchy Made False Allegations and Engaged In Deceitful Conduct.

Mr. Shikarchy has engaged in a pattern of manipulative and deceitful behavior that affected his ability to supervise the other employees and to competently carry out his job duties at the building.

In or about June of 2011, a member of the Board of Directors contacted Mr. Shikarchy to meet with an architect and an engineer at 833 Central at 3:30 p.m. (GC Ex. 21B). After being notified of this appointment, Mr. Shikarchy then contacted Mr. Herskovitz and asked him if he could leave the building to go out to lunch with his children. (See Tr. 253). However, Mr. Shikarchy never told Mr. Herskovitz that a meeting with an architect and an engineer had already been scheduled for that afternoon. (Tr. 253; GC Ex. 21B). Without having any knowledge of the meeting, Mr. Herskovitz gave Mr. Shikarchy permission to leave the building and to have lunch with his children as long as he was able to respond to any calls or other circumstances that may have needed his supervision. (Tr. 253; GC Ex. 21B).

On the afternoon of the meeting, Mr. Shikarchy took his children to lunch, failed to attend the meeting at 833 Central and was not responsive to any calls regarding the property or the meeting. (Tr. 253; GC Ex. 21B). To evade responsibility for his actions, Mr. Shikarchy blamed Mr. Herskovitz and said that he missed the meeting only after Mr. Herskovitz told him that he could take the day to go to lunch with his children. (GC Ex. 21B).

Mr. Shikarchy used Mr. Herskovitz as an excuse for skipping the meeting, even though he knew that he never told Mr. Herskovitz that a meeting had been scheduled and that Mr. Herskovitz told him he could leave the building as long as he could be responsive to calls. Mr. Shikarchy manipulated the facts that he gave to Mr. Herskovitz and deliberately left out the information regarding the meeting to hide his misbehavior. Such purposefully conniving and deceitful conduct is simply not acceptable from a person the management must be able to trust to supervise the building.

Unfortunately, Mr. Shikarchy's deceitful conduct continued. On or about August 26, 2011, Mr. Shikarchy sent an email to Mr. Herskovitz claiming that he had been assaulted in the lobby of the building by Yussie Friedman, a porter who worked at 833 Central, and the son of Joseph Friedman. (See Ex. I). After the Board reviewed that day's security video footage from the lobby, they determined that Yussie had not assaulted Mr. Shikarchy at all, but that Mr. Shikarchy fell on his own accord to make it look as though Yussie had pushed him. (See Tr. 242-43, 245-46, 254). The Board determined from watching the video that Mr. Shikarchy actually "faked" his fall in an attempt to get Yussie fired. Rather than focus on his responsibilities as Superintendent, Mr. Shikarchy spent his time making false accusations against his subordinate.

The Board of Directors would have been within its rights to terminate Mr. Shikarchy at that point, but instead, tried to correct his behavior. On September 7, 2011, Mr. Shikarchy was given a "Final Warning" letter stating that "[l]ies will not be tolerated at 833 Central Avenue. If there are any further infractions that are documented by any Board Member or Management you will be suspended without pay for 3 days." (GC Ex. 21D).

As if falsely accusing a fellow employee of assaulting him was not enough, in December of 2011, Mr. Shikarchy lied to the other employees to avoid performing his own work. After Mr. Herskovitz directed him to fix the leaf blower, Mr. Shikarchy told Yussie Friedman that on "jeffs authority" that it was now his (Yussie Friedman's) responsibility to fix the leaf blower. (Tr. 282; R. Ex. AAAA). At no time did Mr. Herskovitz direct Mr. Shikarchy to assign Yussie the job of repairing the leaf blower. (Tr. 283). Making necessary repairs to machinery and to the building is part of the

superintendent's job duties. (See Tr. 283). Mr. Shikarchy lied and manipulated the facts in order to convince Yussie Friedman that he was responsible for making the necessary repairs. (Tr. 283; R. Ex. AAAA). Such conduct established that Mr. Shikarchy as a dishonest person that could not be trusted by management.

F. Mr. Shikarchy Was Unwilling To Take Responsibility To Perform His Job Duties.

In addition to what is set forth above, Mr. Shikarchy was unwilling to take responsibility for performing his job duties. This is evidenced by the fact that Mr. Shikarchy was constantly asking other people, including the employees that he was supposed to be supervising, how to perform his job duties. (See R. Ex. D; Tr. 231). Mr. Herskovitz testified as follows:

Ezra Shikarchy would ask people such as myself and in this particular case the porter for answers as to how to complete a task in his daily duties. In this particular case, he's already been told too many times to order the supplies, I will approve them. What he was doing asking the porter, I do not know

* * *

...It confuses the employees at the property as to what their job duties are as well, as to why the superintendent is asking the porter how to order supplies and why the porter is doing the superintendent's job.

(Tr. 231).

Instead of accepting responsibility and performing his job duties, Mr. Shikarchy performed little to no work and continued to ask other people for permission to perform his job duties or even worse, repeatedly asked other people to complete his responsibilities for him, all while leaving the residents without any solutions to their problems and/or leaving 833 Central in disrepair. (Tr. 241; R. Ex. H). As stated by Mark Hertzberg (Board President) to Mr. Shikarchy:

...I am not to be bothered with a series of calls so you can find yet another excuse not to work. You have a history of calling board members for help, instruction and advice then complaining when one of us answers, claiming we are interfering and confusing you. Marius learned all the guidelines in a week, you've been here 18 months and are still asking basic, 1st day questions, then you complain if we answer.

(R. Ex. H). Mr. Shikarchy was given a "Warning" letter and directed to "stop asking Board Members to order equipment, to ask for authorization to do particular work and to stop asking other Board Members to authorize outside contractors." (GC Ex. 21C).

Despite the warning letters, the counseling sessions, the emails and the directives, Mr. Shikarchy failed to accept his responsibility for performing his work. Because of Mr. Shikarchy's failure to comply with the written warnings and directives, 833 Central suspended Mr. Shikarchy for three (3) days without pay on or about October 27, 2011. (GC Ex. 22). At the time that Mr. Shikarchy received his suspension, Mr. Herskovitz met with Mr. Shikarchy in an attempt to counsel Mr. Shikarchy about his work performance and the steps he should take to improve. (See Tr. 272). Significantly, during that meeting, Mr. Shikarchy never objected to the suspension, nor did he offer any defense or justification for his actions. (Tr. 272).

After Mr. Shikarchy was suspended, it was the Board of Directors' and BRG Management's hope that Mr. Shikarchy would improve his work performance. However, as has been shown above, during the months of November and December of 2011 (after Mr. Shikarchy had been given multiple warnings and suspended for three (3) days), Mr. Shikarchy continued to fail at fulfilling his job duties in every respect: Mr. Shikarchy failed to make the necessary repairs to the property (see Point II Section A, *supra*); Mr. Shikarchy failed to adequately supervise and monitor the employees who

worked at the property (see Point II Section B, *supra*); Mr. Shikarchy continued to ignore and disregard directives that he received from management (see Point II Section C, *supra*); Mr. Shikarchy continued to be excessively absent (see Point II Section D, *supra*); and Mr. Shikarchy continued to lie and engage in deceitful and manipulative conduct in order to benefit himself (see Point II Section E, *supra*). Due to Mr. Shikarchy's unwillingness or inability to improve his work performance, the Board of Directors of 833 Central decided to terminate his employment. (GC Ex. 23).

While the General Counsel argues that such termination was due to the fact that Mr. Shikarchy engaged in union activities, 833 Central terminated Mr. Shikarchy's employment because he was not effectively and efficiently fulfilling his job duties. Indeed, Mr. Herskovitz testified that the Board of Directors had discussed terminating Mr. Shikarchy's employment months before they actually made the decision to do so. If 833 Central was really terminating Mr. Shikarchy due to the fact that he was participating in union activities, they could have terminated him long before they did. Instead, management met with Mr. Shikarchy on numerous occasions, counseled him about his work performance and provided him with multiple warning letters. As a last effort to get Mr. Shikarchy to adequately improve his work performance they suspended Mr. Shikarchy for three (3) days when they arguably had legitimate grounds to terminate him then. 833 Central took numerous proactive measures to allow Mr. Shikarchy to remain in his position. Despite its best efforts, however, Mr. Shikarchy did not accept responsibility for and did not handle the day to day decisions and responsibilities of his job as the Building Superintendent. The Board of Directors of 833 Central decided to and was wholly justified in terminating his employment.

Regardless of whether Mr. Shikarchy was allegedly involved in union activities, 833 Central would have reached the same decision to terminate an employee whose performance was documented as unacceptable. Accordingly, the Respondent excepts to the ALJ's conclusion that such overwhelming evidence was pretextual and to his failure to discuss such evidence by deciding, in a conclusory fashion, that it was "unnecessary".

CONCLUSION

For all the foregoing reasons, the Respondent's Exceptions should be adopted by the Board; and the finding that the Respondent engaged in an unfair labor practice when it disciplined, suspended and terminated Mr. Shikarchy's employment should be vacated.

Dated: October 12, 2012

Respectfully submitted,

BOND, SCHOENECK & KING, PLLC

By: S/
Ernest R. Stolzer, Esq.
330 Madison Avenue, 39th Floor
New York, NY 10017
Telephone: (646) 253-2300
Fax: (646) 253-2301

**UNITED STATE OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29**

833 CENTRAL OWNERS CORP.

and

CASE NO: 29-CA-070910

LOCAL 621, UNITED WORKERS
OF AMERICA

DATE OF FILING: October 12, 2012

STATEMENT OF SERVICE:

I, the undersigned attorney for 833 Central Owners Corporation, hereby state, under penalty of perjury that, in accordance with NLRB Rules & Regulations § 102.114(i), a copy of the foregoing was sent to each party at the addresses listed below and on the dated indicated above:

Via E-File:

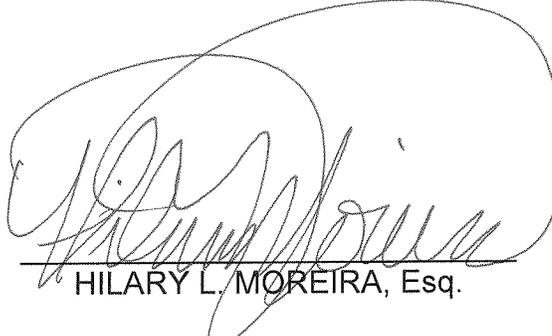
National Labor Relations Board

Via Electronic Mail:

Michael Berger
Counsel for the Acting General Counsel
Michael.berger@nrb.gov

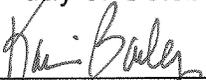
Stephan G. Sombrotton
President of Local 621
ssombrotto@optonline.com

Bryan McCarthy, Esq
O'Connor and Mangan, PC
Counsel for Local 621
bcm@ocmlawyers.com



HILARY L. MOREIRA, Esq.

Sworn to before me this
12th day of October, 2012.



Notary Public

KARIN BAILEY
Notary Public, State of New York
No. 31-4916675
Qualified in Nassau County
Commission Expires December 28, 20 13