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A MATTER IN ARBITRATION

In a Matter Between: SERVICE PERFORMANCE CORPORATION (Employer) and SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1877 (Union)	Grievance:	Termination of Carlos Fuentes; Luis Munguia; and Agustina Cruz
	Hearing:	September 29, 2004
	Award:	January 12, 2005
	McKay Case No.	04-292

DECISION AND AWARD

GERALD R. McKAY, ARBITRATOR

Appearances By:

Employer: Allison W. Woodall, Esq.
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STATEMENT OF PROCEDURE

This matter arises out of the application and interpretation of a Collective Bargaining Agreement, which exists between the above-identified Union and Employer.[1] Unable to resolve the dispute between themselves, the parties selected this Arbitrator in accordance with the terms of the contract to hear and resolve the matter. A hearing was held in San Francisco, California on September 29, 2004. During the course of the proceedings, the parties had an opportunity to present evidence and to cross-examine the witnesses. At the conclusion of the hearing, the parties agreed to submit written briefs in argument of their respective positions. The Arbitrator received a copy of the briefs from the parties on or before December 5, 2004. Having had an opportunity to review the record, the Arbitrator is prepared to issue his decision.

[1] Joint Exhibit #1

ISSUE

Did the termination of the three Grievants violate Article XI and/or Article XIX of the Collective Bargaining Agreement? If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE XI - MAINTENANCE OF WORKING CONDITIONS

Section 1. Registration of all Job Locations

(A) The Employer shall furnish the Union with a written list of all jobs of the Employer, including the exact address and location of each job. Lists will be delivered to the Union in January of each contract year.

As new persons are hired, the Employer will submit to the Union the following information:

1. Employee name, address, phone number, and social security number.
2. Address of employment, and name of account.
3. Full time or part time status.
4. Wage rate.
5. Date of hire.
6. Zone and Area.

(B) Upon receipt of such information the Union will treat the information on a confidential basis and will release it to another Employer in accordance with the provisions of this Agreement, only when it has been determined that bona fide bids are being requested and that said Employer requesting the information is also signatory to a SEIU Agreement covering this jurisdiction.

(C) All new employees shall be probationary for a period of sixty (60) work days and shall have no recourse to the grievance procedure. Employees shall not attain building site seniority until they have completed a probationary period of sixty (60) work days. This probationary period may be extended by mutual agreement between the Union and the Employer. Termination for any cause during this period shall not be subject to the Grievance Procedure.

Section 2. Job Bidding Procedures

The following rules shall be observed when an Employer is bidding on or taking over the servicing of an establishment where Union members are employed: . . .

3. Recognize the work time and overall employment service of all permanent employees retained at the job location, building or establishment, including those who might be on vacation or off work because of illness, injury, Workers' Compensation or authorized leave of absence and shall be considered as continuous regardless of change of employers, for all purposes including seniority, sick leave and vacation benefits, so that no employee will lose any such benefits because of the change of Employers.

Employees transferred to a site or building where the incumbent contractor lost the service contract shall in all instance be informed that such a transfer shall be voluntary and shall be in writing and the employee shall at all times be informed that they are on probationary status under the incoming contractor for a period of sixty (60) work days.

If the Employer fails to notify the employee that they are on probation because of the transfer, the employee is to be returned to previous or other site without loss of wages or benefits.

ARTICLE XIX - DISCIPLINE AND DISCHARGE

(A) No employee shall be disciplined without just cause. The reason for discharge or other disciplinary action must be given to the employee and the Union Representative or the Steward.

BACKGROUND

The Employer is in the business of providing janitorial services to various buildings in the Bay Area, including in Oakland, California. The building at 1111 Franklin Street in Oakland sought bids for cleaning services at that location, and the present Employer was the successful bidder beginning service effective February 1, 2004. The prior contractor that had been providing service at that location was ABM Both the present Employer and ABM are signatory to the Collective Bargaining Agreement (Joint Exhibit #1). The present Grievants were

employees of ABM and were considered permanent employees, as that term is used in the Collective Bargaining Agreement, at the 1111 Franklin Street location. When the contract was transferred from ABM to the present Employer, the present Employer required employees to present I-9 identification, which all of three of the Grievants did. The identification presented included a social security card and another authorized piece of identification. The Employer asserts that the three employees who were terminated were new employees and under the Employer's policies with respect to new employees, it had an obligation to check on the authenticity and accuracy of the social security numbers. The Employer checked with the Social Security Administration and was informed that the social security numbers for the three employees did not match. As a result, the Employer terminated the employees.

The Employer took over the contract at 1111 Franklin Street in Oakland and offered employment to all of the ABM employees who were working at that location. The Employer considered all of the employees to be new employees and required the existing employees to fill out applications and comply with the Employer's new hire procedures. The procedures included filling out the application, signing an offer letter, accepting the terms of their employment, verification by the Employer of their legal right to work in the United States, and verification that they had a valid social security number. The Employer used the Social Security Administration's telephone verification service. The Employer calls that number, provides the individual's name, date of birth, gender, and social security number. The Social Security Administration then provides a statement that indicates the information either matches the record of the Social Security Administration or does not match. The Employer stated that it does this

same procedure for every new hire whether the employee is under a Union contract, or not under a Union contract. When it checked the social security numbers of a number of employees at 1111 Franklin Street, a number of them matched and those employees were put to work. The three Grievants were found to have discrepancies, and the Employer informed the Grievants that there were discrepancies and told them to resolve the issues before they would be permitted to work. According to the Employer, as of the date of the arbitration hearing, the employees have not advised the Employer that they did anything to correct the discrepancies identified by the Social Security Administration's telephone line.

Ms. Cherie Elliott testified that she is the Vice President of Human Resources for the Employer and has served in that position for the past seven years. When the Employer learned that it was the successful bidder for 1111 Franklin Street, Ms. Elliott testified:

> "We have a supervisor who works over in the East Bay, and they -- the supervisor went out to the site and told the employees that we would be taking over the account on February the 1st, and handed them an application -- all of them an application and told them to come in -- complete the application and come in to our office in San Jose to complete an interview and new-hire paperwork."[2]

This process took place sometime in January between the 19th and the 23rd of 2004. Once the applications were received, Ms. Elliott testified, the applicants were interviewed and an offer of employment was made. If an offer is accepted, then the employee fills out all the new hire paperwork. Ms. Elliott stated:

> "We then verify Social Securities, and then we'll either say to you that you report to work at this time, at this site, on this date.

[2] Transcript page 18

> If there is a no-match, then we ask you to please go down and take care of any discrepancy that there is, and then to come back to us."[3]

Ms. Elliott stated that any new employee, or potential employee, with this Employer is subject to a social security verification process.

Ms. Elliott testified that the Employer started checking social security numbers when she became an employee in 1997. However, around the year 2000, the owner of the company, David Pasek, told her that the Employer was going to stop checking social security numbers because the Union was putting great pressure on him to do so. Ms. Elliott testified that she told Mr. Pasek she disagreed, but she discontinued checking social security numbers for new hires. This process continued from 2000 to January 2004. In October 2001, the FBI in Dallas, Texas, where the Employer's headquarters are located, seized records and files from all of the contractors working at the Dallas Airport. Service Performance was part of that raid and there is a potential that Service Performance will be indicted. As of the date of the arbitration hearing, Service Performance has not been indicted. Ms. Elliott believed that the reason the Employer has not been indicted is because it is now verifying social security numbers. According to Ms. Elliott, the U.S. Attorney in Texas has threatened to indict her personally, and threatened her with jail if she does not cooperate by checking social security numbers of all new employees. She stated:

> ". . . the U.S. Attorney does believe that there is a corporate culture in — it is our corporate culture to, in fact, hire illegal people and put them to work not just at the airport, but at all of our locations."[4]

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[3] Transcript page 19 and 20

[4] Transcript page 42

The Employer's corporate attorney told Ms. Elliott that by checking social security numbers, as she is now doing, this has "staved off an indictment with regard to myself and some other people in the office and corporation."[5] On cross-examination, Ms. Elliott acknowledged that she had never brought up any of these concerns about being indicted as the reason the Employer was engaging in the social security card checks during the course of the grievance procedure. The first time this was raised was at the arbitration hearing.

Ms. Elliott acknowledged that the three Grievants, when they filled out the new hire application, provided the Employer with an original social security card, which the Employer examined and copied. They also provided an original California drivers' license, which the Employer looked at and copied. The employees filled out the I-9 Form in Section 1, and the Employer filled out Section 2. Section 2 is filled out by the Employer based on the information provided to it by the employee. When the Employer called the Social Security Administration number to determine whether there was a match for the social security numbers provided by the employees that call was not brought about by a suspicion on the part of the Employer that the original social security cards provided to it by the employees were false. The Employer had no reason to believe that there was anything wrong with the documentation that the employees presented to it.[6] Until the Employer called the Social Security Administration and got the no-match information, everything appeared to be normal and appropriate with respect to the employees' I-9 information. Ms. Elliott testified that she has no idea why the Social Security Administration gave no-match information. She acknowledged that she does not know whether

[5] Transcript page 42 and 43

[6] Transcript page 52

it is because the employees do not have a right to work in the United States, or whether there is some other mistake or discrepancy that exists, which generated the no-match response. She explained that one of the problems might be that the name of the individual was spelled differently than from the records in the Social Security Administration office. If that were the case, even if the individual had been born in the United States and could legally work here, that would still generate a no-match letter.[7]

Ms. Elliott stated that she directed the three Grievants to go down to the Social Security Administration office and clear up the no-match information that the Employer had received as a result of the Employer's inquiry. According to Ms. Elliott, "Because I have knowledge that there is a mismatch, and I cannot knowingly, with that knowledge, transmit data." In other words, Ms. Elliott believed that if she employed the three Grievants and submitted information to the Social Security Administration using the social security numbers provided by the three employees that she would be violating the law. She stated, "I just know that it's a crime to transmit erroneous data."[8] Ms. Elliott acknowledged that she had no idea what was erroneous about the data, but believed she could not transmit erroneous data. Ms. Elliott acknowledged that she never checked with ABM to see what information they had gotten from the three Grievants at the time that they employed the Grievants at 1111 Franklin in Oakland. Ms. Elliott acknowledged that she had no idea whether the three Grievants were illegal aliens or had a legal right to work in the United States.

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[7] Transcript page 54-56

[8] Transcript page 58

Alyssa Giachino testified that she works for the Union as a Lead Organizer for the East Bay office. She is familiar with the contract and is familiar with the process of one contractor leaving a building and a new contractor taking over the cleaning services at the building. When this occurs, Ms. Giachino testified, the employees working at the building become the employees of the new employer. They are not new employees for that employer and are not considered probationary. The only probationary employees are those who are newly hired. The other probationary status for an employee in a building where a contractor transition is occurring are those employees who have been transferred to that building by the existing contractor within 60 days of the change over. Those employees transferred in that fashion are considered probationary employees for the new employer who is free to discontinue their employment. If the new employer does so, however, the old employer is obligated to continue those employees on its own payroll. With this exception, all employees who will work at a building where a new contractor is taking over and who are permanent employees at that building continue in their same shift, at the same rate of pay, and remain permanent employees.

All three of the Grievants working at 1111 Franklin were permanent employees earning 10.04 an hour, which is the master rate, meaning that they had been at that facility for more than a year. The provision in the contract, Ms. Giachino testified, that requires the employer leaving the building because it has been replaced by a new contractor to terminate the employees who were working for it is there for the purpose of liquidating any of the wages or earnings that those employees are entitled to receive from the prior employer. The balances are not transferred to the new contractor, but are paid out directly to the employees. Sick leave is transferred to the new employer, but vacation is not transferred. The health plan coverages continue uninterrupted between the old employer and the new employer. If an employee was truly a new employee,

Ms. Giachino testified, there is a waiting period of twelve months of 110 ten hours worked per month before the employee is covered by the health plan.

POSITION OF THE PARTIES

EMPLOYER

The Employer argued that it did not violate Article XI of the contract in verifying the Grievants social security numbers. The Union argued that the Employer's use of its standard new hire procedures for employees hired in connection with its assumption of a service contract violates Article XI, Section 2. The Union's argument that the Grievants were not new employees of Service Performance Corporation and, therefore, should not have been treated as new hires is meritless. The Grievants previously worked for ABM. They were paid by ABM and had no relationship at all with Service Performance Corporation. The contract supports this conclusion as it states that the employees of a contractor that loses a job are terminated on their last day of service and receive payment of all accrued but unused vacation. The contact gives the Employer the right to adopt its own hiring standards and procedures. Article XI is silent on the issue of an employer's hiring practices and procedures. Contrary to the Union's assertion, this article does not obligate the Employer to retain the specific employees working at the jobsite upon the change in contractors. It only requires the Employer to maintain the same staffing level as it existed 60 day's prior to the bid. The Union's argument that the Employer's social security verification process is unnecessary and violates the immigration laws is likewise incorrect. Since the Employer is not a successor employer under the immigration laws, it is required to independently verify the Grievants' work authorization. Regardless of the type of

documentation presented by an employee of the I-9, the Employer still will verify the employee's social security number, as the law allows it to do.

The Employer did not violate Article XIX of the contract because no just cause was required. Even if it was, the Employer had just cause to not put the Grievants to work until they corrected the problems with their social security numbers. As new hires, the Grievants were probationary employees and the just cause provision does not apply. Even if just cause were required, the Employer had just cause. The Employer is permitted to adopt its rules and regulations for the conduct of its business. The employees were required to have social security numbers that did not result in no-match responses from the Social Security Administration. The employees were given an opportunity to correct the no-match problem, but did not do so. The employees failed to respond to the Employer's request and, therefore, must suffer the consequences of the Employer's decision not to employ them.

The Employer's requirement for the employees to correct the discrepancy was reasonable and not a violation of the contract. The Employer was justifiably concerned about the possibility of civil and criminal liability if it employed individuals with discrepant social security numbers. The Employer cooperated with the U.S. Attorney in Texas in order to stave off an indictment by adopting a process of checking social security numbers. The Employer's decision not to put the employees to work is supported by other court decisions and arbitration awards. The Employer pointed to a decision by Arbitrator William Riker involving American Baptist Home for the West and Health Care Workers Union Local 250 as an example of an Arbitrator upholding an

employer's decision to terminate an employee for a no-match letter. For all of the reasons, stated above, the Employer asked that the grievance be denied.

UNION

The Union pointed out that the parties stipulated to a number of critical facts First, that the Employer was the successful bidder to provide janitorial service at 1111 Franklin Street in Oakland effective February 1, 2004, succeeding ABM, the prior contractor. The parties stipulated that both ABM and this Employer are signatory to Joint Exhibit #1. Finally, the parties stipulated that the Grievants are considered permanent employees at 1111 Franklin Street under the terms of the Collective Bargaining Agreement. The parties further stipulated that the three employees presented both a facially correct social security card and one other piece of identification to this Employer prior to the time of the transfer of the janitorial service contract to this Employer.

Ms. Elliott testified that beginning in the middle of January 2004, the Employer unilaterally instituted a "new hire" procedure, and applied those procedures to the employees working at 1111 Franklin in Oakland. Ms. Elliott confirmed that the Employer did not notify the Union of any change in its hiring practices in January. Ms. Elliott confirmed that the Employer's call to the Social Security Administration did not arise from any concern over any of the documents presented being not genuine. The Employer had no reason to believe that the social security cards for any of these three employees were not legitimate. There was nothing facially wrong or suspicious about either the identification card or the social security card, which were presented by the individuals. Ms. Elliott confirmed that although the Employer received a no-

match indication verbally from the Social Security Administration, she had no idea why the Social Security Administration said the Grievants' social security cards did not match. Ms. Elliott acknowledged that no-match letters could arise because of the transposition of names or numbers so it acknowledged that the no-match letters said nothing with respect to the employees' legal ability to work in the United States. Since 1997, Ms. Elliott acknowledged, the Employer has received no-match letters from the Social Security Administration office every year for various employees working for this Employer. In the last letter from Social Security, Ms. Elliott stated, the Employer received 420 names of employees whose social security numbers allegedly did not match.

Ms. Elliott stated that she did not contact ABM to determine what, if any, inquiry they had made about the social security status of the Grievants working at 1111 Franklin Street in Oakland. The Union stated that the fundamental violation of the contract by the Employer involves the provision in Article XI. Among other aspects of the provision, Article XI, Section 3 requires the successful signatory contractor to recognize the work time and overall employment service of all permanent employees retained at the job location. These employees must be considered as "continuous regardless of change of employers, for all purposes including seniority, sick leave and vacation benefits, so that no employee will lose any such benefits because of the change of Employers." By virtue of these provisions, the Employer became the successful bidder and it was obligated to assume the employment of all permanent employees identified as working in the building.

There is nothing in any of the provisions of Article XI that conditions the right of an employee who is permanent at the worksite to become employed by the successor employer based upon the Social Security Administration's statement that there is a "match" relative to social security numbers. Nor does the contract permit the Employer to treat these employees as "new hires" requiring them to submit an application and requiring them to be recertified in the fashion that the Employer did in this case. The Employer's violation of Article XI is separate and distinct from any violation of Article XIX. Violation of Article XI is that the Employer failed to continue the employment of the three Grievants in clear violation of its obligation to do so under Article XI.

It is undisputed that each of the employees presented a facially valid social security card, and a facially valid secondary identification. As to each, an I-9 document was completed and certified by the Employer. The no-match response from Social Security says absolutely nothing about the employees' legal ability to work in the United States. In fact, Social Security Administration tells employers that this is the case. The Social Security Administration advises employers specifically that "a no-match" is not "a basis, in and of itself, for you to take any adverse action against the employee such as laying off, suspending, firing, or discriminating against an individual who appears on the lists." The Union asked the Arbitrator to take judicial notice of United States Code Section 8 U.S.C. § 1324a. First, the provision in Section 1324a(a)(1) requires the government to establish a *mens rea* on the part of the employer for hiring a person without complying with the subsection (b). It is a defense for an employer to an alleged violation to establish that it has "complied in good faith" with the requirements of (b).

Subsection (b) addresses the process of completing an I-9 Form and indicates that when it "reasonably appears on its face to be genuine," the employer can hire an employee and have a "good faith" defense.

In this circumstance, the Employer had further avenue to avoid even the possibility of any external legal complication. Section 1324a(6)(A) specifically relates to this employment setting. It is concerned with an employee, such as the Grievants, who is a member of a collective bargaining unit and who is employed under a Collective Bargaining Agreement between one or more employee organizations and an association of two or more employers. Under this language, if another participating employer has already gone through the "good faith" process, the subsequent employer of that same employee "shall be deemed to have complied" with the requirements of subsection (b). The Union cited a regulation adopted by the INS in C.F.R. § 274a2 at page 643 for the purpose of establishing when an employer will be deemed not to have hired an individual for employment as if the individual "is continuing in his or her employment and has a reasonable expectation of employment at all times." One of the examples used is that a successor employer employs an employee. The record establishes that the Employer made no effort to contact to ABM to determine what process that company had used to verify the eligibility of the Grievants to work. The evidence taken together establishes that there was no legal compulsion upon the Employer, which justified its failure to employ the three Grievants.

The Employer was required to have just cause to terminate the employees. In the present case, the Union stated, it does not get to that question since the Employer never hired the

employees, which is a clear violation of Article XI. However, if they were considered to have been hired, the Employer had no just cause to terminate them, which in fact it did by not putting them to work. The Union submitted several arbitration decisions; one involving HERE Local 2 and the San Francisco Travel Lodge, and another involving HERE Local 100 and an employer named Box Tree. In both those circumstances, the employers' termination of employees for having no-match letters from the Social Security Administration were set aside and the employees were reinstated. The Union in the Local 2 case took the position that after the employer had notified the employees of the no-match letter and sent them to the Social Security Administration, the employer had no further obligation, and would be violating the contract if it terminated the employees on that basis. The employer presented a similar array of potential legal problems as those alleged in the present case. Arbitrator Luella Nelson found that the employer had not presented any compelling evidence that it was subject to "penalties by either the IRS or the INS for continuing to employ the Grievants . . ." In the Local 2 case, the employees have presented facially valid documentation establishing their right to work. The Arbitrator found that there was no just cause for the termination, and ordered the reinstatement of the employees. The same result occurred in the Local 100 case. For all these reasons, the Union asked that the Grievants be reinstated with full back pay and benefits.

DISCUSSION

The Arbitrator has been involved with janitorial contracts between Local 1877 and its various predecessor SEIU Unions for approximately 30 years. He has resolved disputes in arbitration under those contracts for approximately that same amount of time. During this entire

career, the concept of an employer assuming employees who work at a building from a prior contractor has been a part of the collective bargaining process in one form or another. The commercial building cleaning business in the San Francisco Bay Area presents a different employment circumstance than exists in many other businesses where employees work directly for an employer doing the work of that particular employer. The commercial buildings in the Bay Area are generally owned by various individuals or corporations. These individuals or corporations generally hire a management service that takes responsibility for leasing the space in the building and maintaining the cleanliness and integrity of the facilities. Normally, the lease signed by the tenants in the building provides that the building will clean the offices and certainly it will always clean the common spaces and bathrooms. The management company that manages the building on behalf of the owners then has the option to hire the cleaners directly and have them clean the spaces in the building. The other alternative, which is followed by most of the buildings with which this Arbitrator is familiar, hire contracting services to provide the cleaning of the building rather than to hire the employees directly to clean the building. This provides the management company of the building several advantages. First, it does not have all of the individual employment and supervisory problems associated with having employees directly on one's payroll. Secondly, it permits the management company the flexibility to get rid of employees who provide cleaning that it does not like without the inconvenience and problems associated with having to establish just cause for termination. The management company simply requests that the contractor get rid of the employee and the contractor must comply. The burden then to establish just cause is on the contractor or, in the alternative, the contractor must move the employee to another location and keep that employee employed.

It is because of these business practices that the present Collective Bargaining Agreement has developed the various provisions that one finds in Joint Exhibit #1. Individuals who go to

work at a building generally work only at that one building five days a week, forty hours a week. While a number of employees in the cleaning business move from building to building, those generally are associated with specialty crews such as floor cleaning where the contractor moves them around to do major cleaning at one building or another. All of the Grievants involved in the present dispute were employees who worked continuously on a five-day per week basis at the location 1111 Franklin Street in Oakland. As a result of the fact that employees work in this fashion, the Union negotiated a provision with the employers in its Master Labor Agreement that recognizes that employees are regular employees in a building. Employees obtain what is referred to as building seniority. An employee who has been in a building longer than another employee has greater rights to remain in that building in case of a layoff or reduction in force than an employee who has just arrived in the building even though the new employee may have greater seniority in the industry. Employees establish permanent status by remaining in the building for a sufficiently long period of time as dictated by the contract.

Once an employee has established permanent status then successor employers are obligated to employ those individuals on a continuing basis. The Employer's assertion that it is not a successor employer ignores not only the specific language of the contract, but it ignores the reality of the work experience in the area. Building management from time to time becomes dissatisfied with the supervision process provided by the contractor who supervise the janitors who work in the building. As a result, the buildings will put the work out for bid in hopes of obtaining a new or different janitorial contracting service. In the present case, that occurred with 1111 Franklin Street in Oakland when it put out a bid for a new contracting service since it was apparently not satisfied with the work performed by ABM. When it put that contract out for bid, one of the bidders in this process was the present Employer. The Employer obtained the

Employer knew at all times prior to obtaining the bid who the employees were in the building and how many employees it was expected to continue working in that building. Once the Employer obtained the successful bid, and was assigned the work by the building management, the Employer came under the strictures contained in Section 2, paragraph 3. Contrary to the Employer's assertion that it had no obligation to continue the permanent employees in the building, the language states quite to the contrary that the Employer is obligated to "recognize the work time and overall employment service of all permanent employees retained at the job location, building, or establishment, including those who might be on vacation or off work because of illness, injury, Workers' Compensation, or authorized leave of absence and shall be considered as continuous regardless of change of employers, for all purposes including seniority, sick leave and vacation benefits, so that no employee will lose any such benefits because of the change of Employers." The Arbitrator is not sure how one can read that language other than to conclude that those employees who are permanent remain in that building and the successor employer is obligated to assume their employment.

This is not a circumstance where the Employer is free to have those permanent employees fill out job applications, interview them, and then make a decision whether to hire them or not. The Employer's assuming the building cleaning contract at 1111 Franklin Street in Oakland obligated it to employ the permanent employees. Under the Collective Bargaining Agreement, which binds this Employer, it had no option to do anything else. The only option the Employer had was to assume the employment of those employees who were permanent and then, if it chose, to reduce the number of those employees by negotiating with the building owner in accordance with the formulas provided in the contract. The Employer is specifically prohibited from treating permanent employees as "new hires."

The Employer's first assumption, which is entirely incorrect and inconsistent with this Collective Bargaining Agreement, is that the three Grievants were "new" employees. They are not new employees because this Employer is a successor employer to ABM by terms of this Collective Bargaining Agreement. These employees, as permanent employees, are not probationary employees, which would permit the Employer to terminate them under the probationary language in the Agreement. From the moment the Employer took over the contract at 1111 Franklin Street, it was obligated to have just cause to terminate these employees and could not terminate them without any cause as would occur in the context of a probationary employee. It was not up to the Employer to make an offer of employment to these employees, it was the obligation of the Employer to continue the employment of these employees. Having premised its entire case on the fact that it believed that these employees were "new hires" and "probationary employees," the Employer's case comes completely unraveled.

There is no obligation under this Collective Bargaining Agreement, or under the law, as the Arbitrator understands it from the information presented in this record, which obligated the Employer to call the Social Security Administration to determine whether the employees working 1111 Franklin Street had social security numbers that matched with those numbers maintained by the Social Security Administration. The no-match information, as the Employer must understand because the Social Security Administration informed the Employer of this fact, does not establish that the employee is legally able to work in the United States or not. The no-match information simply establishes that there is a discrepancy between the record information provided by the employee and the record information maintained by the Social Security Administration. That discrepancy could be caused by factors such as an employee getting married and changing a name. This Arbitrator has had a number of cases involving employers who have terminated employees for no-match letters when in fact those employees were born in

the United States and clearly were citizens with a legal right to work. The no-match was caused as a result of an administrative snafu at the Social Security Administration.

When this Employer called the Social Security Administration and discovered that the three Grievants in the present case had no-match social security numbers, it knew nothing more about their legal status to work in the United States than it did before it made the call to the Social Security Administration. The Employer took the identification presented by the three employees, which the Employer acknowledged on its face was facially appropriate. There was nothing about the documentation presented by the employees that gave the Employer any concern that it was fraudulent or incorrect. The Employer used the identification documents to fill out the I-9 Form, which both the Employer and the employees signed. Upon the completion of the I-9 Form, the Employer had no reason to believe that the three employees were not legally permitted to work in the United States.

On its own motion, the Employer then took the additional step of checking with the Social Security Administration to see whether the social security number matched. The Employer did so allegedly on the basis that it was in trouble with the U.S. Attorney in Dallas as a result of conduct a different corporation owned by the same owner engaged in at the airport in Dallas. There is nothing in the present record that would suggest that in this circumstance involving 1111 Franklin Street in Oakland that the Employer did anything to violate any law or regulation of the federal government. The Arbitrator has no doubt that the U.S. Attorney, particularly under the present Bush administration, can act in an inappropriate manner usurping the civil rights of citizens, but that does not provide the Employer with protection or justification for violating the terms of the Collective Bargaining Agreement, which it signed.

In summary, the Employer was the successor contractor to provide cleaning services at 1111 Franklin Street under the terms of the present Collective Bargaining Agreement. The contract required the Employer to assume the employment of those permanent employees working at that location. The permanent employees at that location are not "new hires" to the successor employer. They are regular employees who are entitled to all of the benefits, which they enjoyed under the prior employer pursuant to the provisions of this Collective Bargaining Agreement. When the Employer treated them as new hires and interviewed them, offering them employment, it violated the provisions of Article XI. The Employer had two options with respect to determining the ability of the permanent employees at 1111 Franklin Street to work in the United States. First it could have discussed the matter with the prior employer, ABM, to determine how ABM concluded that the employees were able to work in the United States and then relied upon that verification for purposes of continuing the employment of the permanent employees. The second option the Employer had was to require the permanent employees to fill out new I-9 Forms. Once those employees had filled out the new I-9 Forms, assuming they provided documents that were facially appropriate and did not cause the Employer to have any suspicion that they were fraudulent or improper, the Employer then complied with its obligation, and no further action should have been taken.

There is no obligation on the Employer, either by terms of the Collective Bargaining Agreement, or by terms of the law, that required the Employer to call the Social Security Administration to determine whether the social security numbers on the I-9 Forms matched the records of the Social Security Administration. The call does not establish one way or the other whether the employees at 1111 Franklin Street in Oakland are legally permitted to work in the United States or not. When the Employer refused to allow the three Grievants to continue working at 1111 Franklin Street on the same schedules and rates of pay that they had been

working on under ABM, the Employer violated the provisions of Section XI, and violated the provision of Section XIX. The Employer had no cause, whatsoever, to terminate these employees. The Grievants were not probationary employees, which obligated the Employer to have just cause to terminate them. The no-match information the Employer received from the Social Security Administration does not constitute just cause either by terms of this contract, or by the rules of the Social Security Administration. The Employer's conduct violated both Article XI and Article XIX. The appropriate remedy is to reinstated the Grievants to their positions at 1111 Franklin Street in Oakland with full back pay and benefits, less any outside earnings the employees have received in the interim.

AWARD

The Employer violated both Article XI and Article XIX when it refused to allow the three Grievants to continue working as they had been for ABM at the 1111 Franklin Street location. The Employer is directed to reinstate the three Grievants to their positions at that location with full back pay and benefits. Should a Court determine the Grievants are not entitled to back pay because of their legal status, the Employer is directed to pay an equivalent amount to the Union directly as damages for breach of contract.

IT IS SO ORDERED.

Date: January 12, 2005

Gerald R. McKay, Arbitrator