

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

REVISED

DATE: December 17, 2003

TO : Irving E. Gottschalk, Acting Regional Director
Region 30

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Mega Foods/Pick 'N Save
Case 30-CA-16506

530-4825-6700

This case was submitted for advice as to whether the Employer is a "perfectly clear" successor under Burns¹ and Spruce Up,² and therefore not privileged to unilaterally set initial terms and conditions of employment.

We conclude that the Employer is a "perfectly clear" successor when, prior to takeover, it announced to the Union its plan to retain the predecessor employees without also announcing its intent to establish new terms and conditions of employment.

FACTS

Ditto II, d/b/a Mega Foods (Employer) purchased a retail food chain from Rainbow Foods, d/b/a Twenty-Nine Supermarkets (predecessor) in a Bankruptcy Court ordered sale.³ UFCW Local #73A (Union) has represented the predecessor's meat department employees in two stores in Weston and Wausau, Wisconsin, since about 1998. When the Union's most recent collective-bargaining agreement expired on May 11, 2002, it was extended in May 2002 and again in

¹ NLRB v. Burns Int'l Security Services, 406 U.S. 272 (1972).

² Spruce Up Corp., 209 NLRB 194 (1974), enfd. mem. 529 F.2d 516 (4th Cir. 1975).

³ The sales agreement between the predecessor and the Employer provides, in relevant part:

Immediately following the Closing, Buyer shall hire substantially all of the employees employed at the Store upon terms which are substantially equivalent to the terms under which such employees were employed prior to the Closing.... Notwithstanding anything to the contrary, Buyer is not assuming any union contract(s) covering any employees at the Store or any obligations under such union contract(s).

May 2003.⁴ On May 7, the predecessor notified the Union that it was closing the Wausau store (five unit employees) and selling the Weston store (seven unit employees) to the Employer effective June 12.

On June 9, prior to holding meetings with the predecessor employees, Employer president Lambrecht had a short conversation with Union representative Withers, during which Withers asked what would happen to the unit employees after the Employer purchased the store. According to the Union, Lambrecht responded that "[w]e are going to hire all the employees."⁵ Lambrecht then raised concerns about how the meat department employees could assimilate into the Employer's system of rotating employees between the Employer's different stores,⁶ to which Withers responded that he was sure the parties could work something out. The two men made tentative plans to speak about that issue later in the week. After this conversation, Withers went to the Employer's Weston store and told the unit employees that the Employer intended to retain them.

Later that afternoon, following Lambrecht's conversation with Withers, the Employer held a meeting with the Weston employees during which it described its hiring process. Specifically, the Employer's prepared power-point presentation informed employees that if hired, employees' health and dental insurance would change to the Employer's plans, and that employees would learn more about their benefits at the Employer's orientations. At the end of the power-point presentation, the Employer conducted a question and answer session with the employees. When asked about wage rates and vacation amounts, the Employer stated that it could not tell employees their specific wage rates or vacation amounts until the interview process. The Employer did state that its wage scale was different from the predecessor's scale.⁷ Employees were also given more information about changes to their insurance, including the

⁴ All remaining dates are in 2003 unless noted.

⁵ The Employer maintains that Lambrecht responded that the Employer intended to hire "substantially all" of the predecessor unit employees.

⁶ The Employer already operated two stores in the area.

⁷ Employees were advised of their wage rates during subsequent employee interviews. The Employer subsequently reduced meat cutters' wages by \$1.00 per hour but retained the predecessor's wage rates for meat wrappers.

identity of their new carrier and the amount of their premium.

The predecessor's Weston store closed at the end of the business day on June 11. Five out of seven predecessor employees were hired by the Employer and worked on June 12 and 13 preparing the store for its reopening on June 14 under the Employer.⁸ The Employer currently employs approximately 22 meat department employees in its three area stores, including five predecessor employees. The Employer operated the Weston store during the first month using the five predecessor employees and three of its other employees, but has since rotated more of its nonunion employees into the store. The Employer refused to recognize and bargain with the Union, contending that a unit of Weston meat department employees was not appropriate.

The Region's Complaint currently alleges that the historically-established unit in the Weston store remains appropriate and that the Employer, as a successor, violated Section 8(a)(1) and (5) by failing to recognize and bargain with the Union.

ACTION

We conclude that the Region should amend its Complaint, absent settlement, to allege that the Employer violated Section 8(a)(1) and (5) by unilaterally changing unit employees' existing terms and conditions of employment. Thus, the Employer is a "perfectly clear" successor, without the freedom to unilaterally set initial terms and conditions, because it initially informed the Union of its plan to retain the predecessor employees without clarifying that employees would be working under different terms and conditions.

Under the Board's successorship doctrine, a successor normally has the freedom to set initial terms and conditions of employment for its newly-hired work force. However, the Supreme Court in Burns enunciated an exception to this rule, involving "instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms."⁹ In applying the

⁸ The Region dismissed the Union's allegation that the Employer refused to hire two employees in violation of Section 8(a)(1) and (3).

⁹ 406 U.S. at 294-95.

"perfectly clear" exception, the Board scrutinizes not only the successor's plans regarding the hiring of the predecessor's employees but also the clarity of the successor's expressed intentions concerning existing terms and conditions of employment.¹⁰ Thus, the "perfectly clear" exception is limited to circumstances in which the new employer actively or implicitly misleads employees, directly or through their bargaining representative, into believing that they will be retained by the successor under the same terms and conditions, or fails to clearly state its intent to establish new terms and conditions before inviting predecessor employees to accept employment.¹¹

In Canteen Company, for instance, the Board imposed a bargaining obligation under the "perfectly clear" exception because of the successor's silence regarding new wage rates when it initially announced to the union its intent to hire the predecessor's employees.¹² Although the successor in Canteen told the union that it wanted employees to serve a probationary period and told the employees that it wanted them to apply for employment, it failed to mention in either discussion the possibility of other changes in initial terms and conditions.¹³ The successor first mentioned its reduced wage rate to employees one day after it had communicated to

¹⁰ See, e.g., Hilton's Environmental, 320 NLRB 437, 438 (1995) (bargaining obligation where successor's entire course of conduct indicated that it did not intend to establish new terms and conditions of employment); Roman Catholic Diocese of Brooklyn, 222 NLRB 1052, 1055 (1976), enf. denied in relevant part sub. nom. Nazareth Regional High School v. NLRB, 549 F.2d 873 (2d Cir. 1977) (bargaining obligation where new employer made unequivocal statement to union of intent to hire predecessor's lay teachers but did not mention any changes in terms and conditions of employment; 8(a)(5) violation found when it later submitted employment contract with unilateral changes).

¹¹ Spruce Up Corp., 209 NLRB at 195.

¹² Canteen Co., 317 NLRB 1052, 1054 (1995), enf. 103 F.3d 1355 (7th Cir. 1997). The Board in Canteen distinguished its dismissal of the complaint allegation in Spruce Up Corp. that the employer was a "perfectly clear" successor, because the employer had explicitly stated in its initial meeting with the union that initial pay rates would be different from those of the predecessor. See Canteen Co., 317 NLRB at 1053.

¹³ Id. at 1052.

the union its plan to retain the predecessor employees.¹⁴ The Board found that the successor thereby violated Section 8(a)(1) and (5) by unilaterally changing employees' terms and conditions because it had failed to announce its new wage rate until after it had announced to the union its intent to retain the predecessor employees.¹⁵

We conclude that, pursuant to Canteen, the Employer was not free to set initial terms and conditions for the predecessor employees. Although we agree with the Region that the Employer announced significant changes to wages, vacation time, and insurance benefits at its June 9 employee meeting,¹⁶ it was nonetheless obligated to mention these

¹⁴ Id. at 1052-53.

¹⁵ Id. at 1054. See also Specialty Envelope Co., 321 NLRB 828, 830 (1996), enf. denied in relevant part sub nom. Peters v. NLRB, 153 F.3d 289 (6th Cir. 1998) (receiver was not free to set initial terms at commencement of operation when it made it perfectly clear that it intended to hire predecessor employees by inviting them back to work, but later that same day renounced predecessor's contract and announced different terms). Compare Planned Building Services, 318 NLRB 1049, 1049, 1058 (1995) (successor was free to set initial terms and conditions where it announced its intent to retain predecessor employees during employee meeting, but later in same meeting, and in response to employee question, told employees that wages would remain the same but benefits would change).

¹⁶ See Ridgewell's, Inc., 334 NLRB 37, 37 (2001) (no violation where employer announced to union that it intended to use employees as independent contractors, thus signaling that its initial terms and conditions would differ from predecessor's); Banknote Corp. of America, 315 NLRB 1041, 1043 (1994), enfd. 84 F.3d 637 (2d Cir. 1996), cert. denied 519 U.S. 1109 (1997) (no violation where employer stated in letter to unions that it intended to hire predecessor employees but would not honor predecessor's contracts). Compare 301 Holdings, LLC, 340 NLRB No. 55, slip op. at 3 (September 29, 2003) (assuming arguendo that employer was free to set initial terms, violation where it unilaterally departed from those terms after only mentioning to employees a change in work schedules, thus implying that all other terms and conditions would remain the same); DuPont Dow Elastomers, LLC, 332 NLRB 1071, 1074 (2000), enfd. 296 F.3d 495 (6th Cir. 2002) (violation where employer announced it would maintain employees' wages and benefits and only add new hiring incentive bonus, thus leading employees to believe that they would be employed on substantially same basis as under predecessor).

changes during its earlier conversation with the Union in order to preserve its Burns privilege to set initial terms and conditions. Thus, while Employer president Lambrecht made it perfectly clear to Union agent Withers that the Employer at least intended to retain substantially all of the predecessor employees, he failed to qualify this statement by clarifying that the employees would be working under different terms and conditions.¹⁷ Notably, Union agent Withers repeated the Employer's unqualified statement to the Weston employees immediately after his conversation with Lambrecht, thus leaving the employees with the impression that they would be employed on substantially the same basis as under the predecessor.¹⁸ Thus, we conclude that the Employer violated Section 8(a)(1) and (5) by unilaterally changing unit employees' terms and conditions after failing to announce its intent to set different initial terms when it announced its intent to retain a majority of predecessor employees during its initial June 9 conversation with the Union.

Accordingly, the Region should amend its Complaint, absent settlement, alleging that the Employer is a

¹⁷ Assuming that the Employer did inform the Union that it intended to hire "substantially all," rather than "all" of the employees as maintained by the Union, the Employer's intent to hire a majority of the predecessor employees was clear, and this triggered an obligation to bargain over initial employment terms and conditions. See, e.g., Fremont Ford, 289 NLRB 1290, 1296-97 (1988) ("perfectly clear" that employer intended to retain majority of predecessor employees when it told union that it had doubts about retention of only a few employees); Spitzer Akron, 219 NLRB 20, 22 (1975), enfd. 540 F.2d 841 (6th Cir. 1976), cert. denied 429 U.S. 1040 (1977) ("plan to retain all" covers "not only the situation where the successor's plan includes every employee in the unit, but also situations where it includes a lesser number but still enough to make it evident that the union's majority status will continue"; employer there said it wanted "every man to stay on the job" but actually hired only 10 of the 11 predecessor employees in a unit that ultimately contained 12 or 13 employees).

¹⁸ See DuPont, 332 NLRB at 1074. Even absent Withers' actual communication to the employees, the Board would regard the Employer's unqualified statement to the Union on June 9 as a communication with the employees themselves. See Elf Atochem North America, Inc., 339 NLRB No. 93, slip op. at 1 n.3 (July 17, 2003) (citing Marriott Management Services, 318 NLRB 144 (1995)).

"perfectly clear" successor, and violated Section 8(a)(1) and (5) by unilaterally changing employees' terms and conditions of employment.

[*FOIA Exemption 5*

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B.J.K.