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UNITED STATES GOVERNMENT
National Labor Relations Board

Memorandum

A.D. 05233 RELEASE

TO : W. Bruce Gillis, Jr., Director
Region 27

DATE March 23, 1981

FROM : Harold J. Datz, Associate General Counsel
Division of Advice

SUBJECT. Lombardi Bros. Meat Packers, Inc.
Case 27-CA-6920

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This case was submitted for advice on the issues of whether a Great Dane 1/ Section 8(a)(3) per se violation exists when a new Employer terminates only Union-represented employees while retaining unrepresented employees and, if so, whether the new Employer acquires a successorship obligation under Burns. 2/

FACTS

The meat cutters and truck drivers of Lombardi Brothers Meat Packers, Inc., (herein Employer) in which Sam Lombardi was the majority shareholder, have been represented by United Food and Commercial Workers, Local 634, AFL-CIO (herein Union) for many years. The last collective bargaining agreement expired on April 30, 1980, 3/ and the parties met numerous times after that to bargain for a new contract. On June 17 the Employer sent a letter to the Union stating that it was in the process of selling the business and that it was ready to bargain over the effects of such a sale on the current employees. On June 19 David Coffey signed an agreement to purchase the stock from Sam Lombardi. The purchase agreement required that all officers and directors of the company resign and relinquish all control over the operations of the company. Sam Lombardi was retained by Coffey as a consultant.

Coffey told Lombardi to terminate all fourteen production employees and truck drivers, i.e., all the employees in the unit represented by the Union, before Coffey assumed control of the business. Thus, on June 20 Lombardi, apparently acting as Coffey's agent, told the production employees and truck drivers that he was selling the business and that the

1/ N.L.R.B. v. Great Dane Trailers, Inc., 388 U.S. 26 (1967).
2/ N.L.R.B. v. Burns Security Services., 406 U.S. 272 (1972).
3/ All dates hereinafter are 1980 unless otherwise indicated.

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new owner wanted a new crew, that therefore they all would be terminated on June 27 and that they could reapply with the new owner. Coffey did not require that the sales personnel, desk order employees, or office employees be terminated before he assumed operations; thus, they remained on. 4/ Coffey's business justification for the termination of all the unit employees while retaining the unrepresented employees was that he had more personal knowledge of the nonunion employees than of the Union-represented employees and/or cost inefficiency of the unit represented by the Union.

Coffey assumed operations immediately and the following aspects of the business remained the same: location, equipment, work, product, customers, and desk order, sales, and office personnel. Coffey rehired seven of the predecessor's production and maintenance employees and of that seven, three became supervisors. 5/ Three former unit employees applied and were not hired, and four or five former unit employees did not reapply. The production and maintenance unit presently consists of about fourteen or fifteen employees, as did the predecessor's unit. Only four of the current unit members had been in the Union-represented unit. Differences in the business are the following: a change in stock ownership, new officers and management, and a reorganization of the production process, including an increase in the number of supervisors.

On September 8 the Union sent a letter to Coffey requesting that he recognize and bargain with the Union, since he was a successor employer. Coffey responded to the Union's request on September 14, stating that he was not a successor employer and that, therefore, he had no obligation to bargain.

ACTION

It was concluded that complaint should issue, absent settlement, alleging that the new Employer violated Section 8(a)(3) of the Act by its conduct in terminating only the employees represented by the Union and requiring them to reapply, while retaining the unrepresented employees. Also, since the new Employer would have taken over the business with substantial continuity, including the predecessor's employees in sufficient number to constitute a majority of his unit employees, if he had treated the Union-represented employees like the unrepresented employees, the new Employer had a Burns obligation to recognize and bargain with the Union. Consequently, by refusing to recognize and bargain with the Union upon the Union's request, the Employer also violated Section 8(a)(5).

4/ Coffey had Lombardi terminate one of the office employees because of allegedly poor work habits and attitude. This person, unlike the Union-represented employees who were terminated, was not invited to reapply for work.

5/ Coffey personally invited back two of the predecessor employees among the group of seven that he rehired.

It is well established that if an employer's discriminatory conduct is "inherently destructive" of important employee rights, the Board may draw an inference of improper motive to find a violation of Section 8(a)(3) of the Act, even if the employer introduces evidence that the conduct was motivated by business considerations. 6/ The Board and courts have stated that "the most important interest of workers is in working." 7/ It would be argued that the new Employer's disparate conduct in terminating only the employees represented by the Union, while retaining the unrepresented employees was inherently destructive of important employee rights. Thus, even though the Employer is expected to introduce evidence of business justification, such evidence will be no defense to this theory of violation since the Employer's conduct herein in terminating all Union-represented employees constituted conduct which was so "inherently destructive," that it is a per se violation of Section 8(a)(3). 8/

The second issue before Advice is whether the new Employer is a successor and therefore has an obligation to recognize and bargain with the Union under Burns. The major factor in finding a successorship is continuity in the workforce, i.e., whether former employees of the predecessor constitute a majority of the new employer's unit employees, at a date by which the new employer has hired a "representative complement." 9/ Other relevant criteria are continuity of the same business operations, the same jobs and working conditions, the same machinery and method of production, the same product, and the same customers. 10/ In the instant case these criteria are substantially fulfilled, but for the unit majority requirement.

However, numerous cases have held that a new employer who declines to hire the predecessor's employees because they are members of a union commits a violation of Section 8(a)(3), and a successorship status will arise by operation of law. 11/ In those cases there was evidence of anti-union animus and schemes to avoid the union. In the instant case,

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6/ Great Dane, supra.

7/ Borg Warner Corp., 245 NLRB No. 73, ALJD at 14 (1979) and Allied Mills, Inc., 218 NLRB 281, 289 (1975) citing Cooper Thermometer Co. v. N.L.R.B., 376 F.2d 684, 688 (C.A. 2nd 1967).

8/ Sam Lombardi, the predecessor Employer and not David Coffey, the new Employer, told the Union-represented employees that they would be terminated, but it would be argued that since Lombardi was acting on Coffey's instructions in terminating the Union-represented employees, Coffey violated Section 8(a)(3). See Dews Construction Corp., 231 NLRB 182 fn. 4 (1977); Georgia-Pacific Corp., 221 NLRB 982, 986 (1975).

9/ Hudson River Aggregates, 246 NLRB No. 32 (1979), enf. 106 LRRM 2313 (C.A. 2nd 1981).

10/ Crawford Container, 234 NLRB 851 (1978).

11/ C.J.B. Industries, 250 NLRB 184 (1980); Crawford Container, supra; Houston Distribution Services, Inc., 227 NLRB 960 (1977).

the inference of anti-union animus derives from the Employer's "inherently destructive" conduct in terminating only the predecessor's employees that were represented by the union. Therefore, like the aforementioned cases, the successorship obligation will arise by operation of law based on the Employer's per se 8(a)(3) violation.

H. J. D.