

P.S. Elliott Services, Inc. and Service Employees International Union, Local 200C, AFL-CIO.
Case 3-CA-14901

December 31, 1990

DECISION AND ORDER

BY MEMBERS CRACRAFT, DEVANEY, AND OVIATT

On June 12, 1990, Administrative Law Judge D. Barry Morris issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondent violated Section 8(a)(5) of the Act by refusing to bargain with the Union. In this regard, the judge found that the Respondent was a successor employer to First Class Maintenance and that the employees located at the Brisbane Building constituted an appropriate unit for bargaining. The judge further found that the Respondent violated Section 8(a)(1) of the Act by stating to prospective employees that it was "a non-union company." For the reasons set forth below, we find, contrary to the judge, that the employees employed at the Brisbane Building do not constitute an appropriate bargaining unit and that, therefore, the Respondent's refusal to bargain with the Union did not violate Section 8(a)(5). We further find that the Respondent's statement to prospective employees did not violate Section 8(a)(1).

In 1986 First Class Maintenance was awarded the contract for providing cleaning services at the Brisbane Building located in Buffalo, New York.¹ The Union and First Class Maintenance entered into a collective-bargaining agreement effective January 1, 1987, to December 31, 1989.

In early January 1989,² the Respondent successfully bid for the contract to perform cleaning services at the Brisbane Building.³ On January 27 First Class Maintenance informed its employees at the Brisbane Building that they would be terminated.

¹ First Class Maintenance also provided cleaning services for the Buffalo Evening News Building.

² All dates are in 1989 unless otherwise indicated.

³ The Respondent is a corporation that provides cleaning services for various companies in the western New York area. The majority of its accounts are located in downtown Buffalo within close proximity of each other. The Respondent employs approximately 175 employees who provide building-cleaning services for approximately 90 accounts.

Charity Edmundson, leadperson for the employees at the Brisbane Building, contacted the Respondent's president, Phillip Elliott, and asked on behalf of herself and the other employees if he would hire them. Elliott offered Edmundson a job, and, based on her recommendation, met with the other First Class Maintenance employees employed at the Brisbane Building. During that meeting, the employees asked Elliott if it would be a "union job," and he replied, "we are a non-union company." Elliott subsequently hired seven of the eight former First Class Maintenance employees to continue performing cleaning services at the Brisbane Building.

The Respondent took over the cleaning services at the Brisbane Building on February 1. On March 10 the Union informed the Respondent that it had authorization cards from all of the Brisbane Building employees and demanded recognition. On March 13 the Respondent rejected the Union's demand, contending that the Brisbane Building employees did not constitute an appropriate unit for bargaining and that no collective-bargaining agreement was in effect for that unit.

The judge found that the employees at the Brisbane Building constituted an appropriate unit for bargaining. The judge concluded that the employees employed at the Brisbane Building by First Class Maintenance had always been treated as a separate bargaining unit, finding that a separate collective-bargaining agreement existed between First Class Maintenance and the Union for the employees at the Buffalo Evening News Building. In light of the fact that the Brisbane Building employees had been treated as a separate unit, that "the bulk" of the employees who were transferred from First Class Maintenance to the Respondent continued to work at the Brisbane Building, and that none of these employees had been transferred out of the Brisbane Building, the Respondent had failed to sustain its burden of overcoming the presumption of appropriateness of a single facility unit.

The Respondent excepts, *inter alia*, to the judge's finding that the employees at the Brisbane Building constitute an appropriate bargaining unit. It contends that the maintenance employees who work at the Brisbane Building share a community of interest with the Respondent's other maintenance employees. The Respondent asserts that there is no difference between the terms and conditions of employment of the employees at the Brisbane Building and those of the employees at any other building where the Respondent performs cleaning services; all employees are commonly supervised; there is frequent and regular interchange of employees; and that there is no history of site-by-site bargaining in the maintenance industry or at the Brisbane Building. We find merit in the Respondent's exceptions.

Critical to a finding of successorship is a determination that the bargaining unit for the predecessor employer remains appropriate for the “successor” employer.⁴ The Board’s longstanding policy is that “a mere change in ownership should not uproot bargaining units that have enjoyed a history of collective bargaining unless the units no longer conform reasonably well to other standards of appropriateness.” *Indianapolis Mack Sales & Service*, 288 NLRB 1123 fn. 5 (1988). From our examination of the record, we find that, even assuming a unit of Brisbane Building employees was an appropriate unit under First Class Maintenance,⁵ it is not an appropriate unit under the Respondent.

The Respondent services 90 cleaning accounts and employs approximately 175 people. The management hierarchy of the Respondent is composed of President Elliott, a coordinator who reports directly to Elliott, and five area supervisors, each of whom is assigned to various accounts in a geographic area. These seven individuals work out of one central office.

At certain jobsites, where three or more employees are needed, one of the employees is designated as leadperson. It is undisputed that the leadpersons are not supervisors within the meaning of the Act and that all supervision is performed by the area supervisors, who are in frequent contact with the sites under their supervision.

All personnel matters are handled exclusively at the Respondent’s central office. All hiring decisions are made by Elliott or one of the area supervisors. Employees are not hired to staff a particular jobsite but are hired based on the overall needs of the company. The wage rates are determined by Elliott based on the market conditions and the experience of the prospective employees. Fringe benefits and vacation benefits are uniform for all employees.

The Respondent’s labor relations and employment policies are centralized and determined by Elliott. All employees are provided with the same rules and regulations and are required to follow the same procedure for completing and mailing time cards. Disciplinary policies are consistent for all employees.

⁴In *NLRB v. Burns Security Services*, 406 U.S. 272, 280 (1972), the Court observed, “It would be a wholly different case if the Board had determined that because Burns’ operational structures and practices differed from those of Wackenhut, the Lockheed bargaining unit was no longer an appropriate one.”

⁵The judge found that although First Class Maintenance’s collective-bargaining agreement with the Union covered employees at two locations—the Brisbane Building and the Buffalo Evening News Building—the agreement in fact applied only to the Brisbane Building employees because First Class had a separate collective-bargaining agreement with the Union for the Buffalo Evening News Building employees. The Respondent excepts, contending that there was no separate collective-bargaining agreement covering the Buffalo Evening News Building employees and that historically the Brisbane Building employees were not treated as a separate unit. In light of our finding that a unit of Respondent’s Brisbane Building employees is not an appropriate unit, we find it unnecessary to pass on the judge’s finding that a Brisbane Building unit was appropriate under First Class Maintenance.

Employee interchange is regular and frequent. Employees are freely transferred between jobsites and at least 50 percent of the Respondent’s employees have been transferred from building to building.⁶ Elliott testified that at least six employees from other jobsites or newly hired employees were assigned to the Brisbane Building on either a permanent basis or a “fill-in basis.” Further, one Brisbane Building employee opted to work at another of the Respondent’s buildings in addition to her work in the Brisbane Building.

On the record as a whole, and particularly in light of the facts that the Respondent’s personnel policies and employee benefits are uniform and centrally administered, that the Respondent’s operation is highly integrated and centralized, that there is frequent employee interchange, and that there are no on-site supervisors so that all employees are commonly supervised out of the central office, we find that the employees at the Brisbane Building do not have a community of interest sufficiently distinct and separate from the Respondent’s other employees to warrant the establishment of a separate appropriate unit. See *Indianapolis Mack Sales & Service*, supra; *Second Federal Savings & Loan*, 266 NLRB 204 (1983); *Orkin Exterminating Co.*, 258 NLRB 773 (1981). It follows, therefore, that the Respondent’s refusal to bargain with the Union for a unit limited to Brisbane Building employees did not violate Section 8(a)(5) and (1) of the Act, and we, accordingly, dismiss this complaint allegation.

Further, we find, contrary to the judge, that the Respondent did not violate Section 8(a)(1) of the Act by Elliott’s statement to the former First Class Maintenance employees that it was “a non-union company.” Elliott’s statement was in response to an employee question and was not accompanied by any threats, interrogations, or other unlawful coercion. Further, in light of the Respondent’s pre-existing operation as a nonunion company, Elliott’s statement constituted a truthful statement of an objective fact.⁷ Under these circumstances, we find that Elliott’s statement was not unlawful, and we, accordingly, dismiss this complaint allegation.

ORDER

The complaint is dismissed in its entirety.

⁶No Brisbane Building employee has been transferred to another site. According to the Respondent, it has not made any such transfers because of the instant litigation.

⁷*Kessel Food Markets*, 287 NLRB 426 (1987), relied on by the judge, is distinguishable. The respondent in that case had no objective basis for stating that its stores “would be” nonunion, and its statements were made in the context of other 8(a)(1) and (3) violations.

Doren Goldstone, Esq. and *Mary Thomas Scott, Esq.*, for the General Counsel.

Michael R. Moravec, Esq. (*Phillips, Lytle, Hitchcock, Blaine & Huber*), of Buffalo, New York, for the Respondent.

DECISION

STATEMENT OF THE CASE

D. BARRY MORRIS, Administrative Law Judge. This case was heard before me in Buffalo, New York, on September 6, 1989.¹ On a charge filed on March 27, a complaint was issued on May 8 and amended on June 28, alleging that P.S. Elliott Services, Inc. (Respondent) violated Section 8(a)(1) and (5) of the National Labor Relations Act, as amended (the Act). Respondent filed an answer denying the commission of the alleged unfair labor practices.

The parties were given full opportunity to participate, produce evidence, examine and cross-examine witnesses, argue orally, and file briefs. Briefs were filed by General Counsel and by Respondent.

On the entire record of the case, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a New York corporation, with an office and place of business in Kenmore, New York, is engaged in providing janitorial cleaning services. Respondent admits that during the 12-month period ending April 13, 1989, it provided services valued in excess of \$50,000 for other enterprises within the State of New York which are directly engaged in interstate commerce. Respondent also admits, and I so find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. In addition, Respondent admits, and I so find, that Service Employees International Union, Local 200C, AFL-CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issues*

The issues in this proceeding are:

1. Is Respondent a successor employer?
2. Are the employees located at the Brisbane Building an appropriate unit for bargaining?
3. Did Respondent violate Section 8(a)(1) of the Act by announcing to prospective employees that it would operate nonunion?

B. *The Facts*

In 1986 First Class Maintenance was awarded the contract for cleaning services at the Brisbane Building in Buffalo, New York. Effective January 1, 1987, it entered into a collective-bargaining agreement with the Union. The agreement, which was effective until December 31, 1989, lists two sites as being covered, the Buffalo News and the Brisbane Building. The record contains a separate agreement between First Class Maintenance and the Union for the Buffalo Evening News, effective January 1, 1984, through December 31, 1986. Tom Beatty, president of the Union, testified that there was also a current agreement between First Class Maintenance

and the Union covering the employees at the Buffalo Evening News. His testimony was not controverted.

Effective February 1, 1989, Respondent took over the cleaning services at the Brisbane Building. On January 27 the First Class Maintenance Brisbane Building employees were informed by their supervisor that they would be terminated. Charity Edmundson, the leadperson of the employees, asked on behalf of herself and the other employees, if they could remain as employees of Respondent. Edmundson met with Phillip Elliott, president of Respondent. Subsequent to that a meeting took place between Elliott and the prior employees of First Class Maintenance. The employees asked Elliott whether it would be a "union job." Elliott replied that it would not be. Seven of the eight employees were hired by Respondent and continued performing the same cleaning duties, with no break in service. Edmundson continued as leadperson with Respondent.

On March 10 the Union served on Respondent a letter stating that it had in its possession signed authorization cards for all of the Brisbane Building employees and it demanded negotiations. On March 13 Respondent, through its counsel, rejected the Union's demand for recognition, contending that the employees at the Brisbane Building did not constitute an appropriate unit for bargaining and that no collective-bargaining agreement was in effect relating solely to the employees at the Brisbane Building.

C. *Discussion and Conclusions*

1. Successor employer

The Board has evolved a set of criteria to determine whether legal successorship exists. The relevant questions include:

- (1) Whether there has been a substantial continuity of the same business operations;
- (2) whether the new employer uses the same plant;
- (3) whether he has the same or substantially the same work force;
- (4) whether the same jobs exist under the same working conditions;
- (5) whether the employer employs the same supervisors;
- (6) whether he uses the same machinery, equipment, and methods of production; and
- (7) whether he manufactures the same product and offers the same services. [*J-P Mfg., Inc.*, 194 NLRB 965, 988 (1972); *Band-Age, Inc.*, 217 NLRB 449, 452-453 (1975), enf. 534 F.2d 1 (1st Cir. 1976), cert. denied 429 U.S. 921.]

See also *Canterbury Villa, Inc.*, 271 NLRB 144 (1984); *Systems Management*, 292 NLRB 1075 (1989).

Respondent began operations immediately upon the expiration of the predecessor's contract, with no hiatus. Wages for the employees are virtually identical. The employees still perform the cleaning services at the Brisbane Building as they did for First Class Maintenance, and, indeed, some of the employees did not even change floors. The employees continued to work during the late afternoon and early evening hours and there has been no change in their physical surroundings. The employees use the same supplies and the same type equipment and the leadperson has remained the same at Respondent as she was under First Class Maintenance. The employee complement remains substantially the same. Respondent hired seven of First Class Maintenance's

¹ All dates refer to 1989 unless otherwise specified.

eight employees, the eighth employee having declined employment and not having been replaced.

Based on the above, Respondent clearly meets the criteria necessary for it to be deemed the legal successor of First Class Maintenance.

2. Appropriate unit

Respondent contends that the employees at the Brisbane Building do not constitute an appropriate unit. The record indicates that for the period January 1, 1984, through December 31, 1986, a separate agreement existed between First Class Maintenance and the Union for the employees at the Buffalo Evening News. Although the record does not contain a copy of the subsequent agreement, I have credited the testimony of the Union's president that at the time of the hearing a separate agreement was in effect between First Class Maintenance and the Union, covering the employees of the Buffalo Evening News. The record contains no evidence to controvert that testimony. Thus, since the employees at the Buffalo Evening News were covered by a separate agreement, Respondent's Exhibit 1, which is the collective-bargaining agreement between First Class Maintenance and the Union effective January 1, 1987, could relate only to the employees located at the Brisbane Building.

In addition, it is well-established Board policy to find a single-facility unit presumptively appropriate. *Orkin Exterminating Co.*, 258 NLRB 773 (1981). As the Board stated (*id.*):

This presumption can only be overcome by a showing of functional integration so substantial as to negate the separate identity of the single-facility unit. In making findings on this issue, the Board looks to such factors as central control over daily operations and labor relations, skills and functions of the employees, general working conditions, bargaining history, employee interchange, and the geographical location of the facilities in relation to each other.

Respondent has not sustained its burden of overcoming the presumption. The record indicates that First Class Maintenance had treated the employees at the Brisbane Building as a separate unit. The bulk of the employees who had transferred from First Class Maintenance have continued to work at the Brisbane Building, and others were not hired. Elliott testified that other than one employee also doing some work in another building, no employee has been transferred out of the Brisbane Building. Based on the above, I find that the employees at the Brisbane Building constitute an appropriate unit for collective-bargaining purposes. See *Eberhard Foods*, 269 NLRB 280 (1984).

3. Violation of Section 8(a)(1)

Elliott testified that at his initial meeting with the employees he told them "we are a non-union company." The complaint alleges that this constitutes a violation of Section 8(a)(1) of the Act.

In *Kessel Food Markets*, 287 NLRB 426 (1987), the Board held that informing the employees of a predecessor employer

that a Respondent would operate nonunion violated Section 8(a)(1) of the Act. The Board stated (at 429):

Burns and Howard Johnson hold that although a purchasing employer has no obligation to hire the seller's unionized employees, it may not refuse to hire those employees solely because they are union members or to avoid being required to recognize the union. Under *Burns*, the purchasing employer has an obligation to recognize and bargain with the union if a majority of the purchaser's employees were previously employed by the seller and were represented by the union. Thus, the employer does not know whether it will be union or nonunion until it has hired its work force. When an employer tells applicants that the company will be nonunion before it hires its employees, the employer indicates to the applicants that it intends to discriminate against the seller's employees to ensure its nonunion status. Thus, such statements are coercive and violate Section 8(a)(1).

Accordingly, I find that Respondent, by informing the former First Class Maintenance employees that it was nonunion, violated Section 8(a)(1) of the Act. See also *D & K Frozen Foods*, 293 NLRB 859, 874 (1989).

CONCLUSIONS OF LAW

1. P.S. Elliott Services, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Service Employees International Union, Local 200C, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. The appropriate unit for purposes of collective bargaining within the meaning of Section 9(b) of the Act consists of:

All building service employees of Respondent employed at the Brisbane Building, 403 Main St., Buffalo, New York, but excluding professional employees and supervisors as defined in the Act.

4. By failing to bargain with the Union as the exclusive collective-bargaining representative of the employees in the above-mentioned unit, Respondent has violated Section 8(a)(5) and (1) of the Act.

5. By informing job applicants that it intended to operate nonunion, Respondent violated Section 8(a)(1) of the Act.

6. The aforesaid unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find it necessary to order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

[Recommended Order omitted from publication.]