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

Advice Memorandum

DATE: May 16, 2000

TO : Rosemary Pye, Regional Director
Region 1

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

SUBJECT: Burtman Iron Works, Inc. 332-2560-7033
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775-8780

This case was submitted for Advice regarding whether the Employer violated Section 8(a)(5) by refusing to recognize a group of employees as members of the bargaining unit.

FACTS

Burtman Iron Works, Inc. ("Burtman") is a Massachusetts corporation which, since the 1940s, has manufactured material-handling equipment making pallet racking for warehouses, roll off containers, and mezzanine systems. Burtman's officers and directors are Philip and Mark Goodman and Charles Burtman. Burtman's business has steadily declined since the 1980s, and it declared bankruptcy in 1985. Burtman currently occupies only a small area of the Readville, Massachusetts building owned by the Whiting Trust, whose trustees are Earl and Arthur Burtman and Mark Goodman.

Iron Workers Local 501 ("Union") has represented the production and maintenance employees of Burtman for at least the last 21 years. At present, there are 38 employees in the bargaining unit. The current collective-bargaining agreement is for the term July 16, 1998 through July 15, 2001. It describes the bargaining unit as all production and maintenance employees:

> Engaged in the fabrication of iron, steel, metal and other products, or in maintenance work in or about the Company's plant located at 59 Sprague Street, Readville, Massachusetts (or at such other location in the vicinity to which the operations performed in said plant may be moved under circumstances which legally justify the Company's continuing to recognize the Union as the exclusive collective bargaining representative of such

employees at such other location and to work done by such production and maintenance employees).1

In 1979, the principals of Burtman founded Quality Structures of America, Inc. ("Quality") in order to make small refuse containers.[2] Quality's officers and directors are Charles Burtman and Mark and Philip Goodman. Previously, Burtman had produced small refuse containers, but the Union did not object to the transfer of unit work,[3] and never asserted representational rights over Quality employees while they worked in Rhode Island. Currently, 10 employees work for Quality, and they are unrepresented.

While Quality operated out of Rhode Island, Burtman drivers would deliver raw steel and cut parts to Quality for assembly, Quality employees would weld these parts into containers, Burtman would pay Quality for its labor, and Burtman drivers would pick up the finished containers and either deliver them to Burtman or to Burtman customers. Burtman is Quality's only customer. During peak periods, Quality and Burtman would subcontract work to one another.

In January 1999, an unexplained fire destroyed Quality's Rhode Island facility. The cause of the fire is unclear, and Quality is attempting to recover from its insurance company. During the short term, Quality rented space from Burtman in the Readville, Massachusetts facility. Quality pays the same rent and utilities as other tenants have paid the Whiting Trust, the building's owner.[4]

Quality transferred all of its welders to the Readville, Massachusetts facility because they are the most

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[1] Maintenance employees as defined a "full-time employees of the Company engaged in the ordinary upkeep and repair of the Company's machinery, plant and property, provided, however, major extensions and major remodeling shall not be considered 'maintenance.'"

[2] Quality was created in response to high wage rates in Massachusetts and in order to better serve New England customers.

[3] The Employer assured the Union that the opening of Quality would not mean that Burtman employees would have less work, and that in fact turned out to be true.

[4] There is no written lease agreement. However, the Whiting Trust and Quality agreed that if Quality becomes a permanent tenant, a written lease will be executed.

skilled labor component in the Quality product. Quality transports these employees from Rhode Island on a daily basis. The Quality employees are separated from the Burtman employees by a wall; however, they share common areas, rest rooms, time clock, and time card rack. Quality employees use Burtman welding equipment, which hang down from the ceiling, but otherwise utilize their own equipment. Quality employees are supervised by Quality supervisors, while Burtman employees are supervised by Burtman supervisors. Quality employees start one-half hour earlier, and leave one-half hour earlier, than Burtman employees. Quality employees are paid less than Burtman employees and, unlike Burtman, Quality does not make pension contributions on their behalf. The Quality employees speak only Portuguese.

The only Quality employees not transferred from Rhode Island were the painter and forklift driver. Instead, Quality subcontracts with Burtman for these employees. When the Burtman painter and forklift driver perform Quality work in Quality's building space, they are paid Burtman rates, which are billed to Quality.

The Union demanded that Burtman recognize it as the representative of the Quality employees, but the parties never reached an agreement.[5] The Employer admits that Burtman and Quality constitute a single employer.

On July 29, 1999, the Union filed the instant refusal to recognize and bargain charge.

ACTION

We conclude that, absent withdrawal, the Region should issue complaint against the Employer alleging that it violated Section 8(a)(5) by refusing to recognize and bargain with the Union, unless the Employer can demonstrate with certainty that the Quality employees will be moved from the Reading, Massachusetts building to a new location.[6]

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[5] The Employer at one point offered to acquiesce to the Union's recognition demand, but agreement was not reached due to the Union's insistence that the Quality employees be placed at the bottom of the seniority list.

[6] Should the Employer meet its burden by presenting sufficient non-speculative evidence that the Quality employees ultimately will be moved to another location, then the Region should dismiss the Section 8(a)(5) allegation against the Employer because the Union waived its right to represent employees at another location.

In The Sun,[7] the employer, a newspaper publisher, created new "creative services" positions within the advertising department, but contended that these positions were outside the scope of the bargaining unit, which was defined as work performed. Applying a new presumption, in a unit clarification context, the Board found that since employees in these new positions performed work that is fundamentally the same as the bargaining unit composing room employees, and because the bargaining unit's scope was described in terms of work performed, the "creative services" employees should be included in the bargaining unit.[8]

The Board's new presumption is as follows: where bargaining unit scope is defined by the work performed and the employer creates new job classifications that clearly involve the performance of unit work (which is not incidental to their primary work functions or otherwise an insignificant part of their work), the Board will presume that the new employees should be added to the bargaining unit.[9] The party seeking to exclude the new employees from the bargaining unit bears the burden of showing that they are sufficiently dissimilar that inclusion in the bargaining unit is not appropriate.[10] In determining whether the presumption is rebutted, the Board "will consider community-of-interest factors that relate to changes in the nature and structure of the work," but not factors solely within the employer's control such as wages.[11] The inquiry is whether, given any community-of-interest factors, inclusion of the new employees in the existing bargaining unit would destroy the appropriateness of that unit.[12]

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[7] 329 NLRB No. 74 (September 30, 1999).

[8] Id., slip op. at 6.

[9] Id., slip op. at 6. The Board relied on its prior decision in Antelope Valley Press, 311 NLRB 459, 462 (1993), for the proposition that an employer does not unlawfully insist on a change in unit scope when it seeks to transfer work out of the bargaining unit, so long as it does not attempt to deprive the union of the right to contend that the persons performing the work after the transfer are included in the bargaining unit. Id.

[10] Id.

[11] Id.

[12] Id. at 9.

Here, as in The Sun, the unit scope clause defines the bargaining unit in terms of the type of work performed by production and maintenance employees: "fabrication of iron, steel, metal and other products . . . in or about the Company's plant located at . . . Readville, Massachusetts" or at another location to which the operations of the plant may be moved. The Quality employees clearly fall within the unit description: they are fabricating metal refuse containers, work which used to be performed by unit employees at the Readville Massachusetts facility; the Quality employees work for the Employer, as it has apparently admitted that it is a single employer with Quality; and the Quality employees work at Burtman's Readville, Massachusetts facility, pursuant to a sublease from Burtman. Therefore, assuming that the Employer and Quality are in fact a single employer, then the Board's analysis in the Sun is applicable.

Applying The Sun, the Employer cannot rebut the presumption that the Quality employees should be included in the bargaining unit. The community of interest factors which could be used to rebut the presumption include functional integration, geographical integration, common working conditions, bargaining history, common supervision, employee contact, equipment interchange, and employee interchange.[13] Here, the Quality and Burtman employees are functionally integrated in a production process, where Burtman sends raw materials to Quality, whose employees produce refuse containers, those containers are then painted and transported to Burtman or its customers by Burtman employees. There is also interchange of equipment, as the Quality employees use stationary welding equipment belonging to Burtman. In addition, there is employee interchange, as the Burtman painter and forklift driver work in the Quality area performing Quality work. In addition, Quality employees perform Burtman work when Quality work is slow and Burtman work is busy, and Burtman employees perform Quality work when Burtman work is slow and Quality work is busy. There is geographic integration, as both Quality and Burtman share a section of the Readville Massachusetts building. Finally, the bargaining history indicates that Quality employees are currently performing work that used to be performed by Burtman bargaining unit employees, in the same building that it used to be performed. These community of interest factors between Quality and Burtman employees outweigh other

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[13] See Ryder Integrated Logistics, Inc., 329 NLRB No. 89, slip op. at 7 (November 12, 1999); Cannon Air Conditioning and Heating Co., 252 NLRB 556, 559-60 (1980).

factors (e.g., the lack of communication and contact between Quality and Burtman employees).[14] Consequently, the Employer cannot rebut the presumption that the Quality employees should be included in the Burtman bargaining unit based on community of interest factors.

However, the Employer can still rebut the presumption of inclusion of Quality employees in the Burtman bargaining unit if it is able to demonstrate with certainty, relying on sufficient non-speculative evidence, that the Quality employees will be moved to another location. Since it is undisputed that the Union knowingly allowed bargaining unit work to be moved to another location (Rhode Island) in exchange for the agreement that bargaining unit work would not decrease due to the move, and allowed Quality's unrepresented employees to perform the work for over 20 years without attempting to represent those employees, we conclude that the Union clearly and consciously waived its right to represent Quality employees performing bargaining unit work at a location other than the Readville, Massachusetts building.[15] If the Employer can meet its evidentiary burden regarding the certainty of relocation of Quality employees from the Readville, Massachusetts building, then the Region should dismiss the Section 8(a)(5) allegation against the Employer on the grounds that the Union waived its right to represent employees at another location.

CONCLUSION

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[14] Other factors, such as the difference in wages and working hours between Quality and Burtman employees, are solely within the Employer's control and thus cannot be used to rebut the presumption that the Quality employees are part of the Burtman bargaining unit. See The Sun, 329 NLRB No. 74, slip op. at 6.

[15] If there is clear and unmistakable evidence that a union has "consciously yielded" its representative rights, the Board will find that the union has waived its right to represent those employees. Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 708 (1983); Northern Pacific Sealcoating, Inc., 309 NLRB 759, 759-60 (1992) ("the Act neither gave employees an unqualified right to membership in a particular union or prevented a union from declining to organize and represent certain employees"). Moreover, a union's agreement not to represent certain employees need only be express; it need not be incorporated in the collective-bargaining agreement to be enforceable. Lexington House, 328 NLRB No. 124, slip op. at 3 (June 30, 1999).

For the foregoing reasons, we conclude that, absent withdrawal, the Region should issue complaint against the Employer alleging that it violated Section 8(a)(5) by refusing to recognize and bargain with the Union, unless the Employer can demonstrate with certainty that the Quality employees will be moved from the Reading, Massachusetts building to a new location.[16]

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[16] Should the Employer meet its burden by presenting sufficient non-speculative evidence that the Quality employees ultimately will be moved to another location, then the Region should dismiss the Section 8(a)(5) allegation against the Employer because the Union waived its right to represent employees at another location.