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

Advice Memorandum

DATE: December 27, 2002

TO : Rosemary Pye, Regional Director
Ronald Cohen, Regional Attorney
Paul Rickard, Assistant to the Regional Director
Region 1

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

SUBJECT: Health Care Services Group, Inc.
Case 1-CA-40088

530-4825-6700
530-4850-6700
530-4875-6700

This case was submitted for advice as to whether: (1) the Employer was obligated to bargain with the Union as a Burns[1] successor to a unit limited to dietary workers in a nursing home facility; and (2) the Employer violated Section 8(a)(5) by unilaterally setting initial terms of employment, even though it was not a "perfectly clear" successor, because the employer made an unlawful statement to prospective employees that "there was no longer going to be a Union at the facility" and subsequently refused to recognize and bargain with the Union.[2]

We agree with the Region that: (1) the Employer was obligated to bargain with the Union as a Burns successor to the dietary workers' unit because the unit was appropriate even though it constituted only part of the predecessor unit represented by the Union; and (2) the Employer violated Section 8(a)(5) under Advanced Stretchforming[3] by unilaterally setting initial terms of employment after making an unlawful statement to prospective employees that "there was no longer going to be a Union at the facility" and subsequently refusing to recognize and bargain with the Union.

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[1] NLRB v. Burns International Security Services, 406 U.S. 272 (1972).

[2] The Region's request for authorization to seek 10(j) injunctive relief will be addressed in a separate memorandum.

[3] Advanced Stretchforming International, Inc., 323 NLRB 529, 530 (1997), enfd. in relevant part 233 F.3d 1176 (9th Cir. 2000), cert. denied ___ U.S. ___, 122 S.Ct. 341 (2001).

FACTS

Emerald Court is a nursing home facility owned and operated by Beverly Enterprises. Since 1986, UFCW Local 1445 (the Union) has represented a unit of service and maintenance employees at Emerald Court with a unit description that includes nurses' aides, laundry aides, dietary employees, cooks, and maintenance employees.

In June 2002,[4] Emerald Court notified the Union that it intended to subcontract out its dietary services to Health Care Services Group, Inc. (the Employer), effective July 1. On June 26, the Employer attended a meeting with all 12 dietary employees. At this meeting, the Employer's regional manager notified the employees of the coming change in management, that the employees would be able to apply for continued employment in dietary positions for the Employer, and that he would meet with each employee individually later that day. The Employer manager also told the employees that "there was no longer going to be a Union at the facility," and that they were not going to be working under the same Union procedure.

In the individual meetings, the Employer offered continued employment to all of the dietary employees with certain reductions in their terms and conditions of employment, including reduced pay, less flexible hours of work, reduced insurance benefits, and changes in sick leave. The Employer hired 10 of the 12 employees.[5]

On June 27, the Union informed the Employer that it represented the dietary employees, and requested bargaining over any changes in the employees' terms and conditions of employment. The Employer refused, and continues to refuse, to recognize the Union as the collective-bargaining representative of its dietary employees.

On July 1, the Employer took over the operation of Emerald Court's dietary services. Other than the changes in their terms and conditions of employment set forth above, the dietary employees continued their jobs without significant change; they performed the same tasks at the same facility under the same supervision.

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[4] All remaining dates are in 2002, unless otherwise noted.

[5] The Region has determined to issue complaint alleging that one of the two employees not hired was unlawfully constructively discharged.

At the same time as it contracted out its dietary services, Emerald Court also contracted with the Employer for the laundry and housekeeping services at Emerald Court that it had previously subcontracted to New England Maintenance. The Employer hired all 11 of the unrepresented employees performing this work for New England Maintenance -- two laundry aides and nine housekeepers.

The Employer argues that it has no bargaining obligation as a successor employer, because the smallest appropriate unit for the dietary employees must also include the unrepresented laundry and housekeeping employees, who outnumber the dietary employees. In support of this claim, the Employer cites the Board's Rule concerning Collective-Bargaining Units in the Health Care Industry.[6]

ACTION

We agree with the Region that: (1) the Employer was obligated to bargain with the Union as a Burns successor to the dietary workers' unit; and (2) the Employer violated Section 8(a)(5) by unilaterally setting initial terms of employment after having made an unlawful statement to prospective employees that "there was no longer going to be a Union at the facility" and subsequently refusing to recognize and bargain with the Union.

1. The Employer was obligated to bargain with the Union as a Burns successor to the dietary workers' unit.

An employer succeeds to the collective-bargaining obligation of a predecessor if the similarities between the two operations manifest a "substantial continuity between

[6] 29 CFR Part 103, reported at 284 NLRB 1579 (1989). The Employer also argues that only a multi-facility unit would be appropriate based on the integration of its operations. We agree with the Region that as to this contention, a unit limited to dietary employees at Emerald Court is appropriate, as the Region's investigation has adduced no evidence of integration of operations between facilities that would support this claim. The Board has made clear that it continues to presume the appropriateness of a single-facility unit, even in the health care industry. See, e.g., Northern Montana Health Care Center, 324 NLRB 752, 762 (1997), enfd. 178 F.3d 1089 (9th Cir. 1999); Children's Hosp. of San Francisco, 312 NLRB 920, 928-929 (1993), enfd. 87 F.3d 304 (9th Cir. 1996); Manor Healthcare Corp., 285 NLRB 224, 224-227 (1987).

the enterprises," and if a majority of the successor's employees, consisting of a "substantial and representative complement" in an appropriate bargaining unit, are former employees of the predecessor.[7] The factors relevant to determining continuity are whether the business of both employers is essentially the same, whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors, and whether the new entity has the same production process, produces the same products, and has basically the same body of customers. These factors are to be assessed primarily from the perspective of the involved employees, that is, whether the "employees who have been retained will understandably view their job situation as essentially unaltered."[8] If a majority of the new entity's employees had previously been employed by the former employer, it is a successor in an appropriate unit.[9]

Of course, successorship may be found only if the bargaining unit continues to be appropriate.[10] The Act does not require that the unit be the most appropriate unit, but only that it be an appropriate one.[11] Significantly, this is the case even where the successor only takes over a smaller part of the predecessor's operations.[12] For example, in Bronx Health Plan,[13] the Board found

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[7] Fall River Dyeing Corp. v. NLRB, 482 U.S. 27, 41-43 (1987); Sunrise Nursing Home, 325 NLRB 380, 381 (1998).

[8] Fall River Dyeing Corp. v. NLRB, 482 U.S. at 43.

[9] See, e.g., Control Services, 319 NLRB 1195 (1995); Trident Seafoods, 318 NLRB 738 (1995), enfd. in part 101 F.3d 111 (D.C. Cir. 1996) ("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. The party challenging a historical unit bears the burden of showing that the unit is no longer appropriate [and] [t]he evidentiary burden is a heavy one" (citations omitted)).

[10] See, e.g., Burns, 406 U.S. at 280.

[11] See, e.g., Vincent M. Ippolito, Inc., 313 NLRB 715, 717 (1994), enfd. mem. 54 F.3d 769 (3d Cir. 1995); Morand Bros. Beverage Co., 91 NLRB 409 (1950), enfd. 190 F.2d 576 (7th Cir. 1951).

[12] See generally Mondovi Foods Corporation, 235 NLRB 1080, 1082 (1978).

[13] 326 NLRB 810, 811-813 (1998).

successorship where the employer took over a 16-employee clerical function from a diverse unit of 3500 employees in hundreds of job classifications, and in M.S. Management Associates, Inc.,[14] the Board found successorship where the employer took over a four-employee HVAC operation from a 40-employee housekeeping and maintenance employees' unit.

In the instant case, we agree with the Region that there is "substantial continuity" between Emerald Court's dietary services and the Employer's, and that a unit consisting solely of the Employer's dietary employees continues to be appropriate. Thus, the dietary employees continue to operate the dietary services of the same nursing home in the same way at the same location under the same supervision for the same customers. They perform a discrete service with little or no functional integration or employee interchange with the laundry and housekeeping employees, who are the Employer's only other employees at Emerald Court. Significantly, for at least the last seven years, the housekeeping and laundry have not been part of the dietary employees' unit and, in fact were employed by a different employer. Under these circumstances, while there is certainly some community of interest between the dietary employees and the laundry aides and/or housekeepers, the dietary employees remain sufficiently distinct to constitute an appropriate unit, particularly given their history of representation. Finally, all of the Employer's dietary employees came from the predecessor. Therefore, we agree with the Region that the Employer was a Burns successor to a unit limited to dietary workers.

This conclusion is not in any way affected by the Board's Rule concerning Collective-Bargaining Units in the Health Care Industry for two reasons. Initially, we note that the Board explicitly stated in issuing the Rule that it does not apply to nursing home facilities; it only applies to acute care hospitals.[15] Thus, the Board continues to determine the appropriateness of units in nursing homes through case-by-case adjudication.[16]

Second, even if the Employer's facility were within the Rule's coverage, the Board's Rule, by its terms, only

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[14] 325 NLRB 1154, 1154-1156 (1998), enfd. 241 F.3d 207 (2d Cir. 2001).

[15] 29 CFR 103.30(f)(2), reported at 284 NLRB at 1597.

[16] See, e.g., Park Manor Care Center, 305 NLRB 872, 874-877 (1991).

applies to petitions for initial certification filed under Section 9(c) of the Act, not to existing nonconforming units.[17] Since issuing the Rule, the Board has made clear that it will not apply the rule even to units that are only a portion of the historical existing unit. For all these reasons, the dietary employees' unit continues to be appropriate, and the Employer was obligated to bargain with the Union as a Burns successor to the dietary employees' unit.

2. The Employer was not permitted to set initial terms and conditions of employment.

In Advanced Stretchforming, the Board found that a Burns successor violated Section 8(a)(5) of the Act by unilaterally setting initial terms of employment, even though it was not a "perfectly clear" successor, because the employer made unlawful statements to prospective employees during the hiring process that it would not recognize and bargain with the employees' union, and subsequently refused to recognize and bargain with the union.[18] The Board explained that "the Burns right to set initial terms and conditions of employment must be understood in the context of a successor employer that will recognize the affected unit employees' collective bargaining representative and enter into good-faith negotiations with that union."[19] In contrast, the employer in Advanced Stretchforming, by its unlawful statements and refusal to recognize the lawful representative union, sent "a clearly unlawful message to employees that [the employer] would not permit them to be represented by a union,"[20] "blatantly coerce[d] employees in the exercise of their Section 7 right to bargain collectively through a representative of their own choosing," and implemented a "facially unlawful condition of employment. "[21]

In the instant case, the Employer similarly made an unequivocal statement indicating an intention to refuse to recognize the Union, regardless of any legal obligation it might have, and then proceeded to implement that unlawful

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[17] 29 CFR 103.30(a), reported at 284 NLRB at 1596-1597; Kaiser Foundation Hospitals, 312 NLRB 933, 933-935 (1993).

[18] 323 NLRB at 530. See also, e.g., Eldorado, Inc., 335 NLRB No. 76 (2001).

[19] 323 NLRB at 530.

[20] Id. at 529.

[21] Id., at 530.

condition by refusing to recognize the Union after hiring a majority of employees in the appropriate unit. As in Advanced Stretchforming, the employer's statements and conduct taken together "blocked the process" by which obligations as a successor were incurred and the employer unlawfully refused to accept those obligations. Therefore, as in Advanced Stretchforming, it is not appropriate to permit the employer to set initial terms; instead, because of its unlawful conduct, the Employer was initially bound to Emerald Court's terms and conditions of employment.

Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(5) of the Act by refusing to recognize the Union, and by unilaterally setting initial terms and conditions of employment.

B.J.K.