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

Advice Memorandum

DATE: August 30, 2010

TO : Wayne Gold, Regional Director
Region 5

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

SUBJECT: American Intermodal Solutions, Inc.
and Ports America, Inc. a Single Employer
and/or Alter Ego
Case 5-CA-35670 518-6000-0000
518-6033-4000
530-4825-6700

The Region submitted this case for advice as to whether the Employer is a Burns[1] successor, and if not, whether it violated: Section 8(a)(2) of the Act by recognizing the predecessor union as the representative of a unit of its crane maintenance and repair employees; and/or Section 8(5) of the Act by refusing to recognize and bargain with the Charging Party union regarding those employees.

We conclude that the Employer is a Burns successor because there was substantial continuity of the business enterprise, and the bargaining unit is appropriate. Therefore, the Employer did not violate the Act by recognizing and bargaining with the predecessor union or by refusing to recognize and bargain with the Charging Party union.

FACTS

Background

In 1990, a unit of the Maryland Department of Transportation called the MPA began operating and maintaining Seagirt, one of approximately six deepwater terminals in the Port of Baltimore. The MPA was responsible for either directly performing or contracting out the engineering, construction, dredging, facility maintenance, crane maintenance, and collection of berthing fees from ship owners. The MPA contracted out the dredging, construction, and collection of berthing fees but utilized three separate divisions of its own employees to perform the engineering, facility maintenance, and crane

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

maintenance and repair work at Seagirt. Those three divisions of MPA employees did not work solely at Seagirt; rather, they floated among other terminals as their respective work tasks arose. The crane maintenance division, which included about 58 employees in 7 specific classifications,[2] was responsible for performing the maintenance and repair work at issue in this case on the cranes at Seagirt.

The crane maintenance division was located in a separate maintenance building and shop and was the only MPA operation housed at Seagirt. The work that the crane maintenance employees performed was unique to the cranes that they worked on. The crane maintenance shop had its own supervisor and foreman. And its employees were subject to unique terms and conditions of employment, including their reporting location, locker and restroom facilities, lunch and break area, and tool and equipment storage location. Other working conditions specific to the crane maintenance shop included a different leave selection policy, overtime opportunities/rotation, shifts/work hours, and scheduling/rotations.

In December 1996, the Maryland State Mediation Services certified the American Federation of State, County and Municipal Employees (AFSCME Maryland) as the collective-bargaining representative of a statewide unit of approximately 2,500 labor and trades employees, including the MPA employees at Seagirt.

The Charging Party union, the International Longshoremen's Association, Local 333 (Local 333), is recognized by the member-employers of the Steamship Trade Association (the local management association at the Port of Baltimore) as one of several Longshoremen's locals that represent, among others, maintenance employees employed at Seagirt and other terminals at the Port. Local 333 is understood to be the deep-sea cargo local; since Seagirt opened in 1990, its members have historically performed the majority of tasks related to the loading and unloading of cargoes of deepwater ships that pass through the terminal. Its membership includes employees that perform maintenance and repair work on non crane-related equipment owned and/or leased by Steamship Trade Association member-employers.

New Crane Maintenance and Repair Work At Seagirt

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[2] Including crane mechanic, crane electrician, crane mechanical specialist, crane electrical specialist and electro-mechanical crane technician I, II and III.

In or around 2002, the MPA purchased "rubber tired gantry" (RTG) cranes for use at Seagirt. Unlike the cranes already at Seagirt, which were ship-to-shore (STS) cranes that run along rail lines, the RTGs are mobile cranes used to move shipping containers to various areas at the terminal. The MPA crane maintenance division, which historically performed maintenance and repair on the STS cranes at Seagirt, assumed the same work on the RTGs cranes following their installation.

Local 333, which had historically provided crane operators at Seagirt, assumed the driving/operating duties for the RTGs. But in their respective duties as crane maintenance employees and operators, MPA employees and Local 333 members had very limited interaction. When a mechanical issue arose with a crane, a maintenance and repair employee would radio the crane operator and attempt to talk him through the issue. If the issue could not be resolved in this manner, the crane would be taken out of service and returned to the shop for maintenance or repair. Local 333 members never assisted the crane maintenance and repair employees in maintaining or repairing the cranes.

Not long after the RTG acquisition, Local 333 began to claim that the maintenance and repair work on the RTGs was within its jurisdiction. It brought the matter to the attention of the United States Maritime Alliance, LTD (USMX)-ILA Jurisdiction Committee, the committee responsible for reporting on alleged violations of the jurisdictional provisions of the Master Contract between USMX and the ILA. On January 2, 2005, in a letter to the Executive Director of MPA, the jurisdiction committee argued that maintenance and repair work on the RTGs was within the ILA's jurisdiction. In February 2005, the Maryland Attorney General's Office advised the committee that the RTGs at Seagirt belonged to the MPA, and that the MPA had the sole right to maintain and repair the RTGs. Thereafter, Local 333 withdrew its claim to this work.

The Leasing of the Seagirt Facility

In or around 2008 or 2009, the MPA began to consider the option of leasing Seagirt to a private entity, and approached AFSCME Maryland's representatives about the matter. AFSCME Maryland took the position that it would like to keep the current complement of crane maintenance and repair employees intact and maintain most terms and conditions of employment. As the MPA's plans to lease Seagirt progressed, AFSCME Maryland exercised its contractual right to negotiate the effects of the lease on employees, and maintained its position regarding the crane maintenance and repair employees during those negotiations.

On or about April 15, 2009, the MPA issued a Request for Qualifications (RFQ) from private parties interested in leasing and operating Seagirt. According to the RFQ, any lease agreement would be a "full net" lease, meaning that the lessee would be responsible for preservation and replacement of existing equipment and infrastructure at Seagirt, as needed. The RFQ also advised interested parties that MPA employees performed the crane and facility maintenance services and that AFSCME Maryland represented those employees. The RFQ further stated that the MPA would like as many former state employees as possible to be employed under any long-term lease agreement.

In June 2009, the MPA announced that Ports America, Inc. was one of two bidders that qualified to submit offers to lease Seagirt.[3]

In October 2009, MPA and Maryland Department of Transportation representatives met with AFSCME Maryland to discuss the effects of a likely lease agreement. AFSCME Maryland again stressed its desire that the current work complement and most terms and conditions of work remain unchanged. The State indicated its intent to preserve the employment of former state employees.

As a lease agreement with AIS/Ports America became more likely, the State brought representatives from AIS/Ports America and AFSCME Maryland together for meetings. At meetings on October 20 and 27, 2009, AIS/Ports America advised AFSCME Maryland that it would begin its crane maintenance operations at Seagirt with current MPA employees, and that it would recognize and bargain collectively with AFSCME Maryland to set initial terms and conditions of employment. The parties subsequently began negotiations on November 3, 2009.

On November 20, 2009, the State announced that the MPA and AIS/Ports America had entered into a 50-year lease and concession agreement, whereby AIS/Ports America assumed all tasks formerly performed by the MPA at Seagirt. Sometime between November 20 and December 16, 2009, AIS/Ports

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[3] In August 2009, Ports America established American Intermodal Solutions, Inc. (AIS). Local 333 contends that the timing of the creation of AIS supports an inference that Ports America created it to help avoid its bargaining obligation to Local 333. Although the evidence does not conclusively support that Ports America and AIS are alter egos and/or a single, for the purposes of this Advice Memorandum we will consider the entities as a single employer, referred to collectively herein as AIS/Ports America or the Employer.

America and AFSCME Maryland entered into a four-year collective-bargaining agreement that took effect on January 1, 2010. On December 16, 2009, the State's Board of Public Works approved the lease agreement. The collective-bargaining agreement required AIS/Ports America to interview 58 technicians currently employed by the MPA in the AFSCME Maryland unit, and to hire 27 of them. AIS/Ports America ultimately hired 27 bargaining-unit technicians, all of whom had been MPA employees. The MPA continued to perform maintenance and repair work on the Seagirt cranes until AIS/Ports America assumed control on January 12, 2010. There was no hiatus in operations, as former MPA employees began their employment with AIS/Ports America that same day. They reported to work and performed their duties as they had done in the past, under the same working conditions.

On March 23, 2010, Local 333 filed a charge in the instant case alleging that AIS/Ports America violated the Act by recognizing AFSCME Maryland as the bargaining representative of the employees performing the maintenance and repair work on the cranes at Seagirt, and by refusing to bargain collectively with Local 333 as their representative.[4] AIS/Ports America contends that the allegations are without merit, as it was a Burns successor to the MPA at Seagirt and therefore lawfully recognized AFSCME Maryland as the bargaining representative of its crane maintenance and repair employees.

ACTION

We conclude that the Employer is a Burns successor because there was substantial continuity of the business enterprise, and the bargaining unit is appropriate. Therefore, the Employer did not violate the Act by recognizing and bargaining with the AFSCME Maryland or by refusing to bargain with Local 333.

An employer succeeds to its predecessor's collective-bargaining obligations as a Burns successor if there is substantial continuity between the two enterprises and if a majority of its employees, consisting of a substantial and

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[4] Local 333 asserts that when AIS/Ports America, a USMX member, entered into the lease agreement, it assumed control of the cranes at Seagirt. Therefore, it asserts that the work is within Local 333's jurisdiction, and AIS/Ports America is contractually obligated to bargain with it regarding the maintenance work performed on the cranes.

representative complement in an appropriate bargaining unit, are former employees of the predecessor.[5]

A. Continuity of the Enterprise

In determining whether "substantial continuity" exists, the Board examines the totality of the circumstances of the transfer, including whether there is continuity of business operations, workforce, working conditions, supervision, etc.[6] The Board views these factors primarily from the employees' perspective, i.e., focusing on whether they would view their job situations as essentially unchanged.[7]

In the instant case, there is no doubt as to the continuity of the workforce since all of the employees hired by AIS/Ports America were former MPA employees. As for the continuity of business operations, the lease agreement required AIS/Ports America to maintain and preserve existing equipment, including both types of cranes. And when the employees reported to work on January 12, 2010, they reported to the same location, performed the same tasks, and used the same tools, lockers, restrooms, lunch/break areas, and parking spots as before. Thus, from the perspective of the employees, their work and working conditions remained unchanged. Therefore, we conclude that there was substantial continuity between MPA's crane maintenance and repair work and the crane maintenance and repair work now done by AIS/Ports America.

B. Appropriateness of the Unit

Of course, the Board will find successorship only where the bargaining unit continues to be appropriate.[8] The Act does not require that the unit be the *most* appropriate unit, but that it be *an* appropriate one.[9] Significantly,

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[5] Burns, 406 U.S. at 278-81; Fall River Dyeing Corp. v. NLRB, 482 U.S. 27, 41-43, 52 (1987).

6 Fall River Dyeing, 482 U.S. at 43. See also Morton Development Corp., 299 NLRB 649, 650 (1990).

[7] Aircraft Magnesium, 265 NLRB 1344, 1345 (1982), enfd. 730 F.2d 767 (9th Cir. 1984), cited in Fall River Dyeing, 482 U.S. at 43; Great Lakes Chemical Corp., 280 NLRB 1131, 1132 (1986).

8 See, e.g., Burns, 406 U.S. at 280.

9 See, e.g., Vincent M. Ippolito, Inc., 313 NLRB 715, 717 (1994), enfd. mem. 54 F.3d 769 (3d Cir. 1995); Morand Bros.

this is true even where the successor takes over only a small part of the predecessor's operations.[10] For example, in Bronx Health Plan,[11] the Board found successorship where the employer took over a 16-employee clerical function from a diverse unit of 3,500 employees in hundreds of job classifications. And in M.S. Management Associates, Inc.,[12] the Board found successorship where the employer took over a 4-employee HVAC operation from a 40-employee housekeeping and maintenance employees' unit. Thus, successorship may be found so long as the unit employees in the conveyed portion constitute a separate appropriate unit and comprise a majority of the unit under the new operation.[13]

Here, the crane maintenance unit is not so fragmented from the larger 2,500-member labor and trade statewide unit to be considered inappropriate.[14] The crane maintenance employees possess unique skills such that even as a part of the larger unit, they were always a functionally discrete group with a separate identity. There was never any interchange between them and other MPA employees. Rather, they always had separate supervision, different terms and conditions of employment, and were housed at a different location than the other MPA employees in the larger unit. Since AIS/Ports America assumed the crane maintenance and repair work, the current bargaining unit has retained its functionally discrete nature and separate identity. Local 333 does not dispute the unique nature of the work, but rather acknowledges that its members have never performed this work and do not have the training to do so. We therefore conclude that the current unit of crane maintenance and repair employees constitutes an appropriate unit.

Beverage Co., 91 NLRB 409 (1950), enfd. 190 F.2d 576 (7th Cir. 1951).

10 See generally Mondovi Foods Corporation, 235 NLRB 1080, 1082 (1978).

11 326 NLRB 810, 811-813 (1998).

12 325 NLRB 1154, 1154-1156 (1998), enfd. 241 F.3d 207 (2d Cir. 2001).

13 See, e.g., M.S. Management Associates, 325 NLRB at 1155; Bronx Health Plan, 326 NLRB 810, 812 (1998).

14 See, e.g., Lincoln Park Zoological Society, 322 NLRB 263,264-265 (1996) (successor unit included 70 employees as compared to predecessor's 2,500-person unit).

Accordingly, we conclude that AIS/Ports America was obligated as a Burns successor to bargain with the predecessor union (AFSCME Maryland), and that it did not violate the Act by recognizing and bargaining with AFSCME Maryland or by refusing to bargain with Local 333. The Region should therefore dismiss the charge, absent withdrawal.

B.J.K.