UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

ACN—PITTSBURGH, LLC, a subsidiary of
AMERICAN CONTAINER NET, INC.

and Case 6—CA—33970

CHAUFFEURS, WAREHOUSEMEN &
HELPERS, TEAMSTERS LOCAL
UNION NO. 538 a/w INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, AFL-CIO

Julie R. Stern, Esq., for the General Counsel.
Robert E. Durrant, Esq., of Pittsburgh, Pennsylvania,
for the Respondent.
Betty R. Fischer, of Washington, Pennsylvania,
for the Charging Party.

DECISION

Statement of the Case

PAUL BUXBAUM, Administrative Law Judge. This case was tried in Pittsburgh, Pennsylvania, on September 2, 2004.[1] The original charge was filed February 23, and an amended charge was filed May 24. A complaint was issued May 25, and an amended complaint and notice of hearing followed on July 23.[2]

The amended complaint alleges that the Company failed to provide notice to the Union and an opportunity to bargain prior to making unilateral changes to the terms and conditions of employment of the bargaining unit members. The alleged unilateral changes consist of the elimination of a Section 401(k) plan, the cessation of payments to employees who opted not to participate in the Company's health insurance plan, the

[1] All dates are in 2004 unless otherwise indicated.
[2] On August 30, the Union filed another charge, 6-CA-34272, alleging additional unfair labor practices connected to the events already in controversy. At trial, counsel for the General Counsel requested that the record be held open to permit investigation of these matters. I granted this unopposed request. Subsequently, I was notified that the issues underlying the new charge had been resolved among the parties and that the General Counsel was not going to file a new complaint. On September 30, I issued an order closing the record.

termination of meal allowance payments to truck drivers, and the imposition of a requirement that employees work 12-hour shifts. Alternatively, the amended complaint alleges that the Company adopted the collective-bargaining agreement entered into by the Union and the predecessor employer. It is asserted that the previously described unilateral changes in terms and conditions of employment contravene the provisions of this collective-bargaining agreement or the past practices of the employer and its predecessor. Under the theories advanced by the General Counsel, the Company's actions are alleged to violate Section 8(a)(1) and (5) of the Act. The Company filed an answer and supporting memorandum of law, denying the material allegations of the amended complaint.

As described in detail in the decision that follows, I conclude that the Company, through its conduct, adopted the collective-bargaining agreement that had been in effect between the Union and its predecessor. As a consequence, its unilaterally imposed changes in contractually established terms and conditions of employment violated Section 8(a)(5) and (1) of the Act. I further conclude that, by announcing unilateral changes in terms and conditions of employment only after having commenced operations with the full complement of the predecessor's bargaining unit employees, the Company violated Section 8(a)(5) and (1) of the Act. Finally, I conclude that, at the time that the Company announced unilateral changes in terms and conditions of employment, a bargaining obligation had attached under the terms of the Act. As a result, the failure to provide notice to the Union and an opportunity to bargain regarding those changes constituted a violation of Section 8(a)(5) and (1) of the Act.

On the entire record,[3] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Company, I make the following

Findings of Fact

I. Jurisdiction

The Company, a corporation, reconditions and sells plastic and steel drum containers at its facility in Bakerstown, Pennsylvania, where it is projected that it will annually derive gross revenues in excess of $500,000 and sell and ship from its Bakerstown, Pennsylvania facility goods valued in excess of $50,000 directly to points outside the Commonwealth of Pennsylvania. The Company admits[4] and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. The Facts

The events in this case were set in motion under a business plan devised by John

---

[3] On November 10, counsel for the General Counsel filed a motion to correct the transcript. This is unopposed and I grant it.

[4] See, the Company's answer to the complaint, paragraphs 4-8. (GC Exh. 1(f).)

Michael Murphy. For almost four decades, Murphy has been involved in the steel drum reconditioning industry. Having concluded that the industry's pattern of decentralized ownership was undergoing rapid change, he developed a plan to establish a network of facilities owned and managed by one corporation. In his view, such an organizational structure would assure users of containers that a "safety net" existed, allowing them to properly dispose of empty containers possessing residues of hazardous substances without fear of environmental problems. (Tr. 136.) By the same token, the existence of a network of reconditioning facilities would also assure purchasers of drums that a ready supply of reconditioned products would be available as needed.

In furtherance of his plan, Murphy founded American Container Net Incorporated (ACNI) in 2003.[5] This is a Florida corporation with headquarters in Winter Park. Murphy serves as president of the Company. Having established this umbrella organization, it was necessary to obtain the web of scattered facilities essential to the business plan. Among the facilities that Murphy considered for acquisition was the Bakerstown Container Corporation located in Bakerstown, Pennsylvania. The owner of that company was Vance M. Smith, III. Murphy testified that he greatly appreciated Smith's skill as a salesperson and wished to retain his services for the new venture. In order to bring Smith on board, Murphy decided to add the Bakerstown facility to his network. He reached this decision despite having concerns regarding the high cost of operations at Bakerstown.

Unlike other facilities being considered for acquisition by Murphy, the Bakerstown plant had an organized work force. Since 1973, Teamsters Local 538 represented the facility's production and maintenance workers, as well as, its truck drivers. The Union's key contact person with the plant management was Betty Rose Fischer, the secretary/treasurer of Local 538. She had been involved with Bakerstown since 1985. Fischer testified that she was the sole person authorized to engage in discussions with management. None of the bargaining unit members employed at the plant had authority to speak on behalf of the Union.

A collective-bargaining agreement between Bakerstown and the Union was set to expire in March 2003. Negotiations for a new agreement extended through July of that year. On July 17, Fischer prepared a draft of a new collective-bargaining agreement based on the parties' agreements reached in those negotiations and the ratification of those terms by the bargaining unit members.[6] She requested that management notify her if they observed any problems or errors in this draft. Management did not indicate that it had any such concerns. Although the contracting parties never signed the draft agreement, Bakerstown implemented all of its terms.[7]

---

[5] The use of the term "Net" is designed to convey the two key concepts involved, the provision of a safety net for disposal of hazardous materials and the availability of a network of suppliers of reconditioned containers.

[6] This draft agreement is GC Exh. 2. Fischer testified that portions of the contract language that are struck through represent deletions from the previous collective-bargaining agreement. Portions that are printed in boldface and underlined represent new language inserted into the prior agreement.

[7] Fischer testified that delays in formal signing of collective-bargaining agreements with Bakerstown were not unusual. Despite such delays, management had always implemented the agreements reached with the Union. I note that the Board does not require formally signed collective-bargaining agreements. *E.S.P. Concrete Pumping,*

This new collective-bargaining agreement covered the period from March 8, 2003, through March 7, 2006. (GC Exh. 2, p. 19.) As in past agreements, it contained a union security provision that included deduction and remittance of dues to the Union. It also included a grievance procedure culminating in arbitration, and a prohibition of strikes, slowdowns, or other work stoppages by the employees. It committed the Union to "further and promote the best interests of the Company at all times" and "to make every effort to see that employees covered by this Agreement obey all reasonable rules and regulations laid down by the Company." (GC Exh. 2, p. 4.) The contract established a wage increase to become effective March 8, 2004.[8] (GC Exh. 2, p. 7.) For the first time in the history of the parties' relationship, the new agreement also provided that Bakerstown would not be required to pay the entire cost of health insurance premiums. Its obligation was capped at $720 per month during 2004. (GC Exh. 2, p. 15.) As a result, it was anticipated that the bargaining unit members would have to contribute a co-payment in the monthly amount of $130.

Having decided to incorporate Bakerstown into his new network, Murphy engaged in negotiations with Smith. Although the parties signed a confidentiality agreement, word of the discussions leaked out. Jerry Maharg, the plant manager of Bakerstown and future general manager of the new entity, testified that it became "pretty clear" to the work force that the company would be sold. (Tr. 121.) In December 2003, Murphy asked Smith,

> [i]f he would please, on a selective basis, try to calm the situation down and explain as best he could that yes, there was going to be a transaction, but there was no dramatic change. We are not laying off people and things like that.

(Tr. 141.)

Acting on Murphy's request, Smith did meet with employees. Although Smith did not testify, Maharg was present at two such meetings and described the discussions. Maharg indicated that Smith spoke to Lee Daluisio, the union steward, and Charles Choura, a member of the Union's negotiating committee. According to Maharg, Smith told these men that the company was being sold, but he "reassured everybody that everybody would be able to have their job as far as he knew." (Tr. 122.) He went on to note that, "there would be a few changes, but he didn't expect anything major to change within the company." (Tr. 122.) He added that he would still be involved with the company's management. Murphy testified that it was his understanding that Smith told the bargaining unit members, "there is a transaction coming, but don't worry, the big items aren't going to change." (Tr. 168.)

Inc., 327 NLRB 711 (1999) (longstanding rule that parties may enter into collective-bargaining agreement without having reduced to writing their intent to be bound). ACN-Pittsburgh acknowledges that the collective-bargaining agreement "[t]hough unsigned," was the agreement in effect between the Union and its predecessor. (GC Exh. 1(f), memorandum of law in support of answer to complaint, p. 2. See also, R. Br., at pp. 3-4.)

[8] Fischer testified that she listed the March date for the wage increase in error. Actually, Bakerstown and the Union had agreed that the date of the increase would be in January.

On December 30, 2003, ACNI acquired its first production facility, a plant located in Charlotte, North Carolina. On the very next day, Murphy added two more reconditioning operations to the network, a facility in Cleveland, Ohio, and the Bakerstown Container Company plant. Murphy testified that he had not intended to add three plants at the same time, "[i]t just happened that way." (Tr. 140.) He noted that at this point ACNI had only 4 employees. As a result,

> it was an enormous task to close all 3 [transactions] and then begin the work of integrating the companies into what was then a brand new company.

(Tr. 140.) In the case of Bakerstown, the transaction was implemented through an 85-page document dated December 31, 2003, and entitled, "Section 351 Asset Contribution Agreement among Bakerstown Container Corp., American Container Net, Inc. and ACN—Pittsburgh, LLC." (Jt. Exh. 1.) This agreement provided for the transfer of all assets apart from real estate to the new entity, ACN—Pittsburgh, LLC.[9]

Coincident with the acquisition of the Bakerstown plant, ACNI hired Smith as its vice president of national accounts. ACNI currently owns five reconditioning plants, the three already mentioned and facilities in Providence, Rhode Island, and Baltimore, Maryland. It also has two sales and distribution operations in Richmond, Virginia, and Columbus, Ohio.

There was a dispute in the testimony regarding when the new entity began operation. The parties agree that the asset contribution agreement became effective on December 31, 2003. They also agree that Bakerstown Container Corporation always shut down its production during the week between Christmas and New Year's Day. Murphy testified that the first day of operation for ACN—Pittsburgh, LLC, was Monday, January 5. By contrast, Choura testified that the plant was engaged in normal production on Friday, January 2. He added that, on Saturday, only maintenance personnel were present, while on Sunday, the facility was closed. I credit Choura as to this sequence of events. The Company did not produce any payroll records or other documentary evidence as to this issue despite the fact that one would expect that such records would have been readily available and highly probative. In addition, the collective-bargaining agreement between the Union and Bakerstown addressed the traditional holiday closing. It provided that the plant would be closed and the employees would receive holiday pay for 4 days "on the week between Christmas and New Years." (GC Exh. 2, p. 12.) This fits Choura's testimony precisely. As a result, I conclude that the new entity's first day of operation at Bakerstown was January 2.[10]

The Company agrees that it did not communicate with Fischer prior to the commencement of its operations at the beginning of the year. As Murphy put it, there were no "official communications" with the Union, just conversations by Smith with "some of the men who were on the Union committee." (Tr. 168.) Fischer testified that the first contact between the Company and the Union was made on either January 2 or

---

[9] The real estate would continue to belong to Bakerstown and would be leased to the new company.

[10] I also note that, in his brief, counsel for the Company quite properly conceded that "[t]he plant was open for production on the 2nd." (R. Br. at p. 4.)

3. It consisted of a telephone call from Robert Durrant, the Company's attorney, to Stephen Jordan, the Union's counsel. While neither lawyer testified, Fischer indicated that Jordan called her on the same day to report the contact and to notify her that the Company was requesting a meeting.

The meeting took place on January 5 in Jordan's offices. It lasted approximately 45 minutes to an hour. Murphy, Durrant, Jordan, and Fischer were present. Of these, Fischer and Murphy testified regarding what was said during the meeting.

Fischer reported that the meeting began with Murphy introducing himself as the new owner. As she put it, "[w]e then got into some discussions regarding the contract and what problems the company had with the contract." (Tr. 35.) At trial, counsel for the General Counsel and counsel for the Company elicited from Fischer a comprehensive list of the items that she recollected as being discussed. She indicated that Murphy promised "[t]o retain the full work force that's covered under the collective-bargaining agreement." (Tr. 74.) Concomitantly, he acknowledged that, by retaining the existing work force, he "understood he would be recognizing the Union."[11] (Tr. 74.) He also told Fischer that he would continue to deduct union dues. Beyond this, Murphy made a commitment to honor the upcoming wage increase, observing that while the wage rate at Bakerstown was the highest for any of the Company's facilities, "he wasn't going to do anything to effect the wages." (Tr. 75.)

According to Fischer, having made these assurances of continuity, Murphy asserted "there were a few things in the contract that they felt they needed to bargain over and some changes that they perhaps needed in the collective-bargaining agreement." (Tr. 35.) He described health insurance as a "big issue," noting that it affected both the Company's budget and the employees' costs due to the requirement of a co-payment. On cross-examination, Fischer reported that, as counsel described it, there was discussion about "how the parties were going to capture the employee contribution to cover the health premium cost beyond the capped level [in the collective-bargaining agreement]." (Tr. 74.)

In addition to health insurance, Fischer indicated that Murphy raised an issue regarding the method for determining eligibility for overtime pay. He wanted to change the existing method to provide for overtime only for work performed in excess of 40 hours per week, rather than simply in excess of 8 hours per day. He also sought "the right to assign" employees to overtime tasks instead of using the existing seniority-based system. (Tr. 36.) Also regarding scheduling, Murphy stated that he "wanted more flexibility with regard to driver start times." (Tr. 36.) Finally, he sought a minor change concerning payroll. Because the new employer used a payroll firm that issued checks on a different day than the current payday, he indicated a need to move the payday by one day.

Fischer summarized her understanding of the Company's position by observing that after raising these issues,

> [t]he Company had said that that's what they needed to look at with regard to the contract and problems they had with the collective-bargaining agreement.

---

[11] These are counsel for the Company's words. Fischer confirmed their accuracy.

(Tr. 37.) She went on to note that she responded to this by stating that, "in order to do the changes, that I felt we needed to have a bargaining session or a meeting with the [employees'] committee." (Tr. 38.) She described Murphy's reaction, testifying, "if I remember correctly, Mr. Murphy said that he thought also that that was a good idea." (Tr. 39.)

Because Murphy indicated that management "was kind of pushed to get these changes done," Fischer agreed to a meeting with Murphy and the committee on the following day. (Tr. 39.) Fischer reported that, as the January 5 meeting reached a conclusion, Jordan commented that the parties had developed a good working relationship and "we were going to sit down and we were going to work through the issues." (Tr. 76-77.) She opined that all four of those present indicated that it was a "positive meeting." (Tr. 77.) Finally, she testified that there were no decisions made or agreements reached regarding any of the issues raised by the Company.

Murphy also provided detailed testimony regarding the discussions on January 5. As with Fischer, his recollections were probed on both direct and cross-examination. He began his account by noting that he told the Union about the "major" items. (Tr. 143.) As he put it, "number one we would recognize them." (Tr. 142.) In addition, the new company would continue to deduct union dues. Furthermore, he informed Fischer "we were going to hire all of the bargaining unit." (Tr. 143.) Beyond these commitments, he also advised her that,

> [t]here would be no wage cuts. And we would not let any gap develop in health insurance. We didn't promise to continue the Union [health insurance] plan, but there will be health insurance we said and you know without a gap developing.

(Tr. 143.)

After disposing of the items that represented continuity in operations, Murphy then addressed areas of concern to the new entity. He told Fischer that the work rules set forth in the collective-bargaining agreement were a substantial problem for the new management. He explained to Fischer that

> there is a lot of work rules and, you know, work rule type of things in this agreement that we can't live with. And I do believe I gave one or two examples. But in so many months of talking about this, I'm not sure which examples they were. One that sticks in my mind because it was so striking to me is this 42 hour notice to work on Saturday, which is much more notice than customers usually give us.

(Tr. 170.) Murphy conceded that, although he expressed great concern about this work rule, he did not state a specific alternative to it.

In his direct testimony regarding the concerns discussed on January 5, Murphy indicated that, "[m]y memory is that I did mention the 401(k) plan." (Tr. 144.) On cross-examination, he sounded more certain as to this topic, noting that he "definitely" told Fischer that the new company was not going to "absorb or roll over, inherit [the] Bakerstown 401(k) plan." (Tr. 171.) He also asserted that he was "almost positive" that

he raised the issue of payments to employees who opted out of the health insurance program. (Tr. 165.) He told Fischer,

> unless I find out why this makes sense, we are not going to continue making those payments.

(Tr. 171.) In common with Fischer, Murphy reported that, as the meeting concluded, the Union's attorney, Jordan, commented that it had been a "good start" to the new relationship. (Tr. 152.)

As arranged on the preceding day, on January 6, the new entity's management met with the Union's employee committee. Murphy, Smith, and Maharg were present on behalf of the Company. Fischer joined the members of the committee in attending. Both Murphy and Fischer gave the committee members a "recap" of what had been discussed at the meeting on January 5.[12] (Tr. 41.)

Two days after the union committee meeting, Fischer held a meeting with the membership. At that time, employees informed her that the Company had eliminated the Bakerstown 401(k) plan. They had verified this by contacting the plan's administrative office. Fischer testified that this was her first indication that this had occurred. She had received no notice from the employer.

One week later, the Company addressed the 401(k) issue through a memorandum from Murphy to "ALL EMPLOYEES." (GC Exh. 3.) [Capitalization in the original.] He began by assuring the work force that the new entity would have a 401(k) plan "as soon as possible." (GC Exh. 3.) He promised that employees would continue to be able to contribute the same amounts as under the Bakerstown plan. He opined that the new plan would offer advantages and expressed confidence that "you will be pleased with this new plan." (GC Exh. 3.) Finally, Murphy noted that there would be a gap in the continuous operation of the plan, and explained that, if permissible, the Company would allow employees to make up the lost contributions once the new plan became effective.

Approximately a week later, the Company again addressed the employees by memorandum regarding another change in terms and conditions of their employment. In this communication addressed to "ACN—Pittsburgh Employees not enrolled in Health Insurance," Murphy provided notice that, effective February 1, the Company would no longer pay "a monthly cash bonus in the amount of the normal health insurance premium to those employees who are not enrolled in the company group plan." (GC Exh. 5.) This change was explained with reference to the larger background issue, the skyrocketing costs of health care and the need for employees to begin making co-payments for coverage. Murphy noted that he and Smith were actively seeking a new health insurance policy that would avoid the need for this co-payment.

The next change in Company procedures was also announced by memorandum. Unfortunately, the parties have been unable to locate a copy of the document. Nevertheless, it is undisputed that the memo was issued on February 15. It announced that the meal allowance for truck drivers was being eliminated with a retroactive

---

[12] The record of what transpired at the January 6 meeting is sketchy. Fischer provided a brief account in her testimony. Murphy was not asked about it at all.

termination date of February 1. One of the Company's drivers, Neal Nanna, testified that such meal payments have not been made since that date.

Shortly thereafter, Fischer made the first formal response to the series of alterations announced by the Company. On February 20, she filed a grievance against management, using a union grievance form.[13] It alleged that the Company had violated "[t]he entire Labor Agreement," by unilaterally changing the "status quo of the Labor Agreement." (GC Exh. 7.) Among the specific changes listed were the failure to continue payments to the 401(k) plan, changes in work schedules, failure to pay health insurance premiums, and cessation of drivers' meal allowances.

Fischer followed the issuance of her grievance by also filing the initial unfair labor practice charge in this case on February 23. It alleged unlawful unilateral changes, including elimination of the 401(k) plan, health insurance opt-out payments, and meal allowances to drivers. It also alleged improper unilateral changes to work schedules. (GC Exh. 1(a).)

As March began, the Company provided the pay raise described in the collective-bargaining agreement. Shortly thereafter, Murphy addressed a letter to Fischer and other interested parties on the subject of the 401(k) plan. He noted that the Company had

> assumed no responsibilities under the BCC 401(k) Plan, and beginning with the first ACNP payroll, no deductions of employee retirement plan allocations were made from employee wages.

(GC Exh. 4, p.1.) Observing that the Company's efforts to provide its own 401(k) plan had run into unexpected delays, he announced that it was now ready for implementation and would become effective on April 1.[14] Unfortunately, the administrators of the new plan refused to allow employees to make contributions to remedy the gap in coverage that had developed. The Company proposed a voluntary arrangement to make up the lost coverage through contributions to the Bakerstown plan that would subsequently be reimbursed through payroll deductions. Attached to the letter was an authorization form that employees could complete if they elected to participate in the proposed catch up plan. Using rather curious language, the form recited that the signatory employee understood that

> due to an administrative error associated with the sale of the company's assets to ACN—Pittsburgh, LLC on December 31, 2003, no payroll allocations have been deducted from my pay since that time.

(GC Exh. 4, p. 3.)

Against this unsettled background, the parties met for a negotiating session on

---

[13] The collective-bargaining agreement between the Union and Bakerstown Container Corporation contained a multi step grievance procedure culminating in arbitration. (GC Exh. 2, pp. 14-15.)

[14] The process took more time than expected. Murphy testified that he believed the Company's Section 401(k) plan actually began operation in June.

March 19. Fischer, Jordan, Daluisio, and the members of the employees' committee were present on behalf of the Union. Murphy, Durrant, and Maharg represented the Company. As with the January 5 meeting, only Fischer and Murphy provided testimony regarding what transpired. They agreed that the meeting began with a request from Jordan. Due to concerns about the nature of the change in ownership, he asked to examine the documents regarding the sale.[15] There was a discussion about whether to continue the talks immediately or wait for the review and analysis of these documents. According to Fischer, Jordan decided to "talk about the issues, talk about what we needed to talk about with the contract." (Tr. 56.) Conversation then turned to the filing of the grievance and the unfair labor practice charge.

Fischer testified that, after these preliminary matters were addressed, Murphy went through the collective-bargaining agreement "article by article and told us the things that he could live with or couldn't live with in the contract." (Tr. 56.) She opined that the list of unsatisfactory items was "far more extensive" that those Murphy had raised during the initial meeting in January. (Tr. 57.) There was a lengthy discussion of the 401(k) issue, an item that was made more complex by the realization that some employees had taken out loans against their Bakerstown 401(k) accounts. Murphy expressed frustration with the complexity of the problem and deferred further discussion of it. Fischer concluded her account of the meeting by asserting that

> the way the meeting was left was th[at] Mr. Durrant was going to get us a draft agreement of what ACN felt they needed for the agreement.

(Tr. 57.)

Murphy agreed that the meeting began with preliminary issues such as the demand for production of the documents of sale. He testified that much of the subsequent discussion focused on health insurance. Murphy described the problems and expenses associated with the current Teamsters plan and informed the participants that he had researched the available options. He believed that he had located a "much better deal," but decided to leave the current plan in place until the Company completed acquisition of the Providence, Baltimore, and Richmond facilities. At that point, there would be a sufficiently large work force to enable the Company to obtain bids from national health insurance plans.

Apart from vexing benefit issues, Murphy testified that the discussion did turn to consideration of the work rules. He contended that it was with reference to those issues that, "I went through the agreement item by item." (Tr. 152.)

In May, the parties held another meeting. Murphy and Maharg attended on behalf of management. The employees' committee represented the Union. Fischer had been invited, but a scheduling conflict prevented her attendance. The discussion involved changes in work rules. In addition, the committee informed the managers that the Union had decided to reject any changes in the health insurance carrier.

---

[15] The Company provided these materials to Jordan. The Union does not contend that the change in ownership was not a bona fide event. All parties agree that ACN—Pittsburgh is a legitimate successor to Bakerstown Container Corporation.

On May 24, the Union filed an amended unfair labor practice charge, alleging that the Company had failed to bargain in good faith, "by unilaterally eliminating Section 401(k) plan and contributions therein, payments to those opting out of health care plan and payment of meal money paid to drivers." (GC Exh. 1(c).) On the following day, the Regional Director issued a complaint incorporating these allegations. (GC Exh. 1(d).)

Murphy testified that during this early period of operations, the Company thrived. In order to meet the strong demand for its products, on June 25, management issued a memorandum informing the bargaining unit members that "all employees will be required to work 12 hours a day. This is a temporary situation." (GC Exh. 6.) On July 22, the Union responded by filing a second amended charge, alleging an additional violation of Section 8(a)(5) of the Act arising from a unilaterally imposed requirement that its employees work 12-hour shifts. (GC Exh. 1(g).) On the next day, the Regional Director issued an amended complaint, adding an allegation that the Company unilaterally "started to require Unit employees to work twelve-hour shifts, thus changing regularly scheduled work hours." (GC Exh. 1(h).)

On July 30, the Company reached an important milestone in its development plan, acquiring its facilities in Providence, Richmond, and Baltimore. Purchase of the Baltimore plant was of particular significance for the Bakerstown unit. Given its geographical proximity, addition of the productive capacity of that facility reduced the pressure on Bakerstown. As a result, management scaled back the 12-hour shift requirement. Although employees are no longer required to work 12 hours a day, their shifts continue to be longer than those authorized by the predecessor's collective-bargaining agreement.[16]

As of the day of trial, matters remained in this posture. There have been no discussions or negotiations between the Company and the Union since May.

B. Legal Analysis

As the Third Circuit has colorfully phrased it when addressing issues similar to those
presented in this case, correct adjudication requires the decision maker to undertake a voyage upon the "treacherous waters of the Supreme Court's labor law successorship doctrine." *AmeriSteel Corp. v. Teamsters,* 267 F.3d 264, 267 (3d Cir. 2001). The stage was set in 1970, when the Board imposed what appeared to be a straightforward rule governing cases of successorship. It held that:

> [t]he question before us thus narrows to whether the national labor policy embodied in the Act requires the successor-employer to take over and honor a collective-bargaining agreement negotiated on behalf of the employing enterprise by the predecessor. We hold that, absent unusual circumstances, the Act imposes such an obligation.

William J. Burns International Detective Agency, Inc., 182 NLRB 348, 350 (1970).

---

[16] The collective-bargaining agreement caps the length of mandatory work shifts at 10 hours per day. (GC Exh. 2, p. 10.) Murphy testified that employees continue to be required to work shifts of 10.5 to 11 hours per day.

On ultimate appeal, the Supreme Court sifted through the competing policy considerations and rejected the Board's approach. Noting that the employer had done nothing to indicate that it was assuming the predecessor's collective-bargaining agreement, the Court declined to affirm the Board's decision requiring the successor to honor that agreement. Instead, the Court held that, "ordinarily," a successor employer is free to set its own initial terms and conditions of employment. *NLRB v. Burns Int'l Sec. Servs.,* 406 U.S. 272, 294 (1972).

While the Court granted successor employers considerable latitude in establishing initial
working conditions, it made two observations that frame the issues presented in this case. First, while rejecting any automatic rule requiring contract adoption, the Court noted that,

> [i]n many cases, of course, successor employers will find it advantageous not only to recognize and bargain with the union but also to observe the pre-existing contract rather than to face uncertainty and turmoil.

406 U.S. at 291. It followed that, in appropriate circumstances, "the Board might properly find as a matter of fact that the successor had assumed the obligations under the old contract." 406 U.S. at 291. In the present case, the General Counsel contends that certain conduct by the successor employer mandates such a finding.

In addition to preserving a portion of the contract-adoption doctrine, the Court imposed a second potential restriction on a successor's freedom of action. In oft-cited language referred to as the "perfectly clear" caveat, the Court noted that,

> [a]lthough a successor employer is ordinarily free to set initial terms on which it will hire employees of a predecessor, there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms.

406 U.S. at 294-295. As an alternative to his contract adoption argument, the General Counsel contends that this case falls within the terms of the Supreme Court's caveat restricting the employer's authority to impose its own initial terms and conditions of employment.

I will now address each of these theories of liability asserted as justification for the General Counsel's conclusion that the Company's conduct violated Section 8(a)(5) of the Act.

1. Adoption of the Predecessor's Collective-Bargaining Agreement

In implementing the Supreme Court's language outlining the Board's remaining power to
find that a successor employer has adopted the predecessor's collective-bargaining agreement, the Board has taken pains to note that it must exercise "restraint." *Field Bridge Associates*, 306 NLRB 322, 323 (1992), enf. 982 F.2d 845 (2d Cir. 1993), cert.

denied 509 U.S. 904 (1993), and *All State Factors*, 205 NLRB 1122, 1127 (1973) ("utmost restraint" required in applying contract adoption theory). As a consequence, the Board utilizes a clear and convincing evidence standard when adjudicating the issue. See, the cases just cited and the Board's recent decision in *Cora Realty Co., LLC,* 340 NLRB No. 55, slip op. at 5 (2003).[17]

Keeping in mind the enhanced burden faced by the General Counsel, I will now examine the circumstances presented in this case in light of the precedents involving allegations of contract adoption. At the outset, I am struck by the similarity between the facts of this case and those relied on by the Board in one of its first post-*Burns* contract adoption cases, *Eklund's Sweden House Inn*, 203 NLRB 413 (1973). In that case, the successor employer's agreement with the predecessor expressly provided that the existing collective-bargaining agreement "has not been assigned to nor assumed by Eklund's Sweden House Inn, Inc. as part of this transaction." 203 NLRB at 414. Despite this, the Board affirmed the administrative law judge's conclusion that the successor had adopted the collective-bargaining agreement. The judge's decision was based on three aspects of the successor's conduct toward the work force that demonstrated that it had consented to be bound by the contract. First, the successor made specific reference to the provisions of that contract when granting a raise to the employees. Second, the employer initially continued to honor the dues checkoff provision of that contract. Finally, the successor treated the contract as "a base upon which renegotiations would take place." 203 NLRB at 418. For these reasons, the successor was found to have adopted the predecessor's collective-bargaining agreement.

It is noteworthy that, in the present case, the contract between the successor and its predecessor did not disavow an assumption of the collective-bargaining agreement.[18] To the contrary, the asset contribution agreement between Bakerstown Container Corporation and ACN-Pittsburgh, LLC, specifically and repeatedly raised the possibility that the successor could become liable to obey the terms of the collective-bargaining agreement. The agreement absolved the successor for any liability under any plans relating to payroll, pension benefits, health insurance plans, and a variety of other matters, "except to the extent, if any, that the contract between [Bakerstown] and Teamsters Local Union 538 is applicable to the Transferee Parties and such Liability arises from or is in connection with such contract." (Jt. Exh. 1, pp. 5-6.)[19] Beyond this, the asset contribution agreement recites that the predecessor has provided the successor with a complete copy of the collective-bargaining agreement and that:

> (A) the agreement is legal, valid, binding, enforceable, and in full

---

[17] The Board's selection of the clear and convincing standard was criticized by a District Court in *United Steelworkers of America v. Deutz-Allis Corp.,* 1986 WL 6852, 122 LRRM (BNA) 2035 (W.D. Mo., 1986) ("I find nothing . . . in any language employed in *Burns* which mandates a higher than ordinary standard of proof for demonstrating an actual adoption.").

[18] Both counsel for the Company and Murphy have contended that the contract between ACN-Pittsburgh and Bakerstown specifically provided that the successor would not assume the predecessor's collective-bargaining agreement. I disagree. For the reasons shortly to be described, I conclude that the contract took pains to reserve the successor's right to decide to assume the collective-bargaining agreement if the Union consented to such a course.

[19] This concept is reiterated later in the agreement at pp. 61-62.

> force and effect; (B) the agreement will continue to be legal, valid, binding, enforceable, and in full force and effect following the consummation of the transactions contemplated hereby, except to the extent that consent may be required for assignment [of the agreement] . . . .

(Jt. Exh. 1, p. 42.) Thus, instead of a disavowal of the collective-bargaining agreement, the asset contribution agreement contained the successor's explicit recognition of the potential continued applicability of the collective-bargaining agreement and expressly contemplated the ongoing vitality of that agreement, providing that the Union consented to the assignment of the agreement to the successor.

The Company's purchase agreement provides ammunition to the General Counsel of a type that was entirely absent in *Eklund's.* Additionally, each of the three factors supporting adoption in *Eklund's* is present here to the same or an even greater extent. As in *Eklund's*, the Company granted a wage increase. The employer in *Eklund's* relied on the predecessor's collective-bargaining agreement as authorization to grant the wage increase. In this case, the Company initially relied on Bakerstown's collective-bargaining agreement to delay the onset of a pay raise from January to March. Fischer's testimony indicated that she raised the issue of a January pay raise with the new employer. This was the commencement time for the raise that Fischer believed she had negotiated with Bakerstown. However, it will be recalled that in the draft of the agreement that she presented to Bakerstown's management she had mistakenly listed the start date for this raise as March 8. Because the collective-bargaining agreement contained this later date for the raise, the Company denied Fischer's request for an earlier raise. When March 8 arrived, the Company did grant the raise specified in the agreement. Thus, the Company used the collective-bargaining agreement as a shield to deflect the Union's request for a raise in January, insisting on compliance with the written contract language delaying the raise until March. As counsel for the Company put it,

> Ms. Fischer indicated to the company that the wage increase in '04 was due in January and the company's response was to take a look at the collective bargaining agreement and to say well, it wasn't what we saw.[20]

(Tr. 88.) From this it can be seen that the Company relied on the very contract that it seeks to disown in order to postpone a pay raise. Furthermore, it relied on the same contract language a couple of months later when it granted the raise. The Company's positions with regard to the compensation issue strongly support a conclusion that the Company was acting in reliance on the collective-bargaining agreement. Having used the agreement as a defense when convenient, it could not cast it away later when its terms became viewed as inconvenient.[21]

---

[20] At that point in the discussion, I observed that counsel's account did not constitute evidence. Subsequently, Fischer provided uncontroverted testimony that supported counsel's version of these events. (Tr. 88-89.)

[21] In his pretrial memorandum of law, counsel for the Company contended that the decision to refuse to grant the January pay raise was an act that demonstrated the intent to disavow the collective-bargaining agreement. At trial, the evidence showed that the opposite was the case. The Company relied on that collective-bargaining agreement

A key factor cited in *Eklund's* was the successor's initial continuation of the dues checkoff provision of the predecessor's collective-bargaining agreement. Once again, this factor looms even larger in this case. From the time it took over the Bakerstown operation and continuing throughout these proceedings, the Company has adhered to the dues checkoff obligation set forth in the Bakerstown collective-bargaining agreement. Even more tellingly, during this same period, the Company has continued to enforce the related union security provision of that agreement. As counsel for the Company put it, "[w]e would stipulate that it's our intention to honor the Union security provision." (Tr. 62.) In addition, counsel for the General Counsel introduced a letter from American Container Net's manager of administrative services addressed to Fischer on August 24, 2004, more than 8 months after commencing operations. This letter clearly states the Company's intention to fully enforce the union security and dues checkoff provisions of the agreement as to three newly hired employees. (GC Exh. 10.)

Finally, the last factor relied on in *Eklund's* was the successor's use of the predecessor's contract as a basis for further negotiations between the successor and the union. Fischer testified that, during the parties' initial meeting on January 5, Murphy informed her that,

> [t]hey did not have a problem recognizing the Union, but there were a few things in the contract that they felt they needed to bargain over and some changes that they perhaps needed in the collective bargaining agreement.

(Tr. 35.) While Murphy did not endorse Fischer's assertion that the Company's position in that meeting was that it simply sought to negotiate some changes in the existing agreement, his testimony on cross-examination tended to support Fischer's claim. As Murphy put it,

> I definitely as indeed Ms. Fischer said this morning, said there is a lot of work rules and, you know, work rule type things in this [collective-bargaining] agreement that we can't live with. And I do believe I gave one or two examples. But in so many months of talking about this, I'm not sure which examples they were.

(Tr. 170.) Thus, to a significant extent, Murphy's testimony supports a finding that the Company relied on the existing agreement as the starting point for further negotiations.

The evidence reveals that the same pattern occurred at the parties' second important meeting on March 19. Fischer contended that during this meeting, "Mr. Murphy went through the contract article by article and told us the things that he could live with or couldn't live with in the contract." (Tr. 56.) Once again, Murphy testified that he only used the collective-bargaining agreement as a reference point for work rules. He did agree with Fischer's testimony that, as to those items, "I went through the agreement item by item." (Tr. 152.) I find that the evidence supports a conclusion that during the two key meetings, the Company utilized the predecessor's collective-bargaining agreement as a basis for further negotiations with the Union.

---

when declining to grant the pay raise in January. Instead, it granted the raise in March, on the precise date established in the collective-bargaining agreement.

Applying the teachings contained in *Eklund's* to the facts of this case, I readily conclude that this precedent supports a finding of contract adoption. Each of the salient dispositive factors cited in that case is present to an equal or greater degree in this case. Beyond that, the Board in *Eklund's* was forced to explain its decision to find contract adoption despite specific language in the closing agreement that disclaimed any intent by the successor to adopt the collective-bargaining agreement. By contrast, the asset contribution agreement in this case does not contain any such disclaimer and specifically contemplates the possibility that the collective-bargaining agreement will remain "legal, valid, binding, enforceable, and in full force and effect following the consummation of the transactions contemplated hereby." (Jt. Exh. 1, p. 42.)

In the decades since *Eklund's* was decided, the Board has consistently applied the same approach in resolving allegations of contract adoption. For example, in *NLRB v. Amateyus, Ltd.,* 817 F.2d 996 (2d Cir. 1987), cert. denied 484 U.S. 925 (1987), the successor followed the predecessor's collective-bargaining agreement as to hours, wages, holidays, and layoff procedures. It also checked off union dues and vacation fund deductions and remitted the sums collected to the union. Finally, it sought modifications to the collective-bargaining agreement related to work classifications and certain assessments. On these facts, the Second Circuit affirmed a finding of contract adoption, concluding that the Board was "perfectly entitled" to reach this outcome. 817 F.2d at 998. Once again, I note the similarity between the Company's conduct and that found to constitute adoption in *Amateyus*. Upon commencing its operations, the Company made no instantaneous change in working conditions. It continued to enforce dues checkoff and also enforced the union security provision in the collective-bargaining agreement. Similarly, it utilized the agreement as the starting point for proposed modifications.

In a case arising several years later, the Board added an additional consideration while endorsing a claim of contract adoption. In *Rockwood Energy & Mineral Corp.*, 299 NLRB 1136 (1990), enforced on other grounds, 942 F.2d 169 (3d Cir. 1991), the successor again continued to provide the wages and benefits required under the predecessor's collective-bargaining agreement. It also deducted and transmitted dues to the union and made payments to the union's pension fund.[22] Beyond this, when the union complained that the successor was using nonunion workers to perform unit work, the employer referred the union officials to the grievance procedure established in the collective-bargaining agreement. The present case also raises the question of the probative impact of resort to the contractual grievance procedure. Unlike the successor in *Rockwood*, the Company did not raise the issue. Nevertheless, although it was the Union that resorted to the grievance procedure, the Company failed to disavow that contractually created process and treated the Union's grievance as a legitimate subject for discussion.

It will be recalled that approximately 6 weeks after the change in ownership, Fischer filed a grievance alleging that the Company had violated the contract by instituting unilateral alterations that "changed the status quo of the Labor Agreement." (GC Exh. 7.) Instead of any assertion that the grievance procedure was defunct, the Company chose to treat the grievance as an appropriate topic for dialogue with the

[22] While ACN-Pittsburgh did not make payments to the Union's pension fund, it did continue to remit payments to the Union's health insurance plan.

Union.

In uncontroverted testimony, Fischer described the portion of the March 19 meeting that involved the grievance:

> Mr. Murphy wanted to get into some discussion because we had a grievance pending at the time that had a list of several things that we felt the company was violating the contract. He wanted to address that grievance.

(Tr. 56.) In order to clarify this, I asked Fischer which company she was referring to. She responded by indicating that the grievance was filed against "ACN." She went on to note that, "we spent some time going over that grievance and where the issues stood." (Tr. 56.)

As in *Rockwood*, the Company continued to maintain key contract terms after assuming operation of the facility, including enforcement of the dues checkoff. Significantly, it treated a grievance filed under the terms of the predecessor's contractually established grievance procedure as a genuine and legitimate topic for discussion and resolution.[23] Its conduct in these critical regards manifested an intent to adopt the predecessor's collective-bargaining agreement.

In *U.S. Can Co.*, 305 NLRB 1127 (1992), the Board paid particular attention to the probative weight to be accorded to a successor's decision to comply with the dues checkoff and union security provisions of a predecessor's collective-bargaining agreement. In finding adoption of a predecessor's contract, the Board observed that,

> we note particularly that the Respondent honored the union-security and checkoff provisions of the predecessor's contract. These are matters which are dependent on the existence of a current contract. [Footnote omitted.]

305 NLRB at 1127. The Board's rationale was the subject of careful scrutiny on appeal. The Seventh Circuit noted of the successor's conduct that,

> [t]o keep union officials happy, it deducted union dues from its employees' checks and remitted the money to the union, as [its predecessor] had done, and enforced the union-security clause of the existing agreement. Checkoffs of dues and other payments from the employer to the union, like enforcement of a union-security clause, depend on the existence of a real *agreement* with the union. Otherwise the payment of money is a subvention barred by 29 U.S.C. § 186(a)(2), and the requirement to join the union (or pay dues to it) coerces employees in a way forbidden by 29 U.S.C. § 158(a)(3). Having done things that are lawful only if a collective bargaining agreement is in force, U.S. Can is in a pickle. . . . If there was no contact, however, then the

---

[23] The Company also accepted two similar grievances filed in June by an employee named Thomas Swigert. Those grievances alleged unilateral changes to employees' work schedules. (GC Exhs. 8 and 9.)

> checkoffs and union-security provisions were illegal.
>
> The only other option is that U.S. Can, frustrated in its desire to negotiate new terms, assumed the old agreement as an unwelcome burden, but less of a burden than the strike that might have followed the cessation of dues payments. [Italics in the original. Citations omitted.]

U.S. Can Co. v. NLRB, 984 F.2d 864, 869-870 (7th Cir. 1993).

It is apparent that the Company's readily acknowledged decisions to maintain in effect the dues checkoff and union-security provisions of Bakerstown's collective-bargaining agreement constitute powerful evidence that it adopted that agreement. In addition, it is noteworthy that the reasoning underlying *U.S. Can*, does not represent an isolated reading of the unique status of dues checkoff and union-security provisions. As long ago as 1963, the Third Circuit affirmed the Board's observation that,

> [t]he Union's right to such checkoffs in its favor, like its right to the imposition of union security, was created by the contracts and became a contractual right which continued to exist so long as the contracts remained in force.

Bethlehem Steel Co., 136 NLRB 1500, 1502 (1962), enf. in pertinent part, 320 F.2d 615, 619 (3d Cir. 1963) ("we agree with the reasoning of the Board.").[24] Perhaps most significantly, the Supreme Court has taken note of the Board's position as to these provisions, observing that "it is the Board's view" that union security and dues check-off provisions are only permitted by the Act when "specified by the express terms of a collective-bargaining agreement." *Litton Financial Printing Div. v. NLRB,* 501 U.S. 190, 199 (1991), citing *Bethlehem Steel* among other authorities.[25]

Bringing the analysis full circle, I am struck by the fact that the Board has recently found clear and convincing evidence of contract adoption through application of the factors outlined decades before in *Eklund's*. In *Brookville Health Care Center*, 337 NLRB 1064 (2002), the Board found contract adoption based on three factors: the successor's "failure to expressly reject the contract or any of its terms;" its compliance with those terms, "including contractually required mid-term changes, and the union-security and dues-checkoff provisions;" and its participation in several arbitration proceedings. 337 NLRB at 1065. In its discussion, the Board placed particular emphasis on the continued effectuation of the union-security and dues checkoff provisions, noting that,

---

[24] See also, pertinent language from the D.C. Circuit, holding that the Act prohibits union shop and dues checkoff provisions, "unless they are codified in an *existing* collective-bargaining agreement." *Southwestern Steel & Supply, Inc. v. NLRB,* 806 F. 2d 1111, 1114 (D.C. Cir. 1986), citing the Third Circuit in *Bethlehem Steel*. [Italics in the original.]

[25] The Board continues to rely on *Bethlehem Steel*. In *Wilkes Telephone Membership Corp.,* 331 NLRB 823 (2000), it approved an administrative law judge's reliance on that case for the proposition that "union-security and checkoff provisions are creatures of contract and remain in force only for the life of the collective-bargaining agreement."

> [b]ecause these last provisions are entirely creatures of a binding contract between the employer and a Union, the Board has found a successor employer's continued implementation of such provisions a basis for inferring an employer's adoption of the predecessor's contract by its conduct. [Citations, including one to *Eklund's*, omitted.] In addition, [a union official's] testimony indicates that the Respondent not only maintained working conditions as they were when it took over Brookville, but actually implemented the new raise schedule and the new vacation and sick day accrual schedules laid out in the memorandum of agreement.

337 NLRB at 1065. I note that these factors are present in the case under consideration and have the same probative impact. Application of the Board's consistently articulated and applied analytical framework for assessment of contract adoption leads me to conclude that the General Counsel has presented clear and convincing evidence demonstrating that the Company tacitly adopted its predecessor's collective-bargaining agreement. This is readily inferred through reference to its failing to expressly disavow the contract upon commencing operations at the facility, continuing to comply with key provisions including dues checkoff and union security, relying on the contract to first delay a pay raise and later implement that raise as required under the agreement, and failing to reject a grievance filed under the contract, choosing instead to discuss resolution of that grievance with the Union.

Because I have concluded that the Company adopted the Bakerstown collective-bargaining agreement, it follows that when it unilaterally made changes to terms and conditions of employment established in that collective-bargaining agreement, the Company violated Section 8(a)(5) of the Act. Specifically, the Company's unlawful unilateral changes were the elimination of the existing 401(k) plan, the cessation of payments to employees who opted out of the health insurance plan, and the imposition of a requirement that employees work in excess of 10 hours per shift.

2. The "Perfectly Clear" Successorship Issue

In *Burns,* the Supreme Court held that a successor who did not adopt its predecessor's collective-bargaining agreement was nevertheless precluded from unilaterally imposing new terms and conditions of employment if "it is perfectly clear that the new employer plans to retain all of the employees in the unit." In such cases, the successor is required to "initially consult with the employees' bargaining representative before he fixes terms." *NLRB v. Burns Int'l Servs.,* 406 U.S. 272, 294-295 (1972). The General Counsel contends that ACN-Pittsburgh's conduct brought it within the confines of this exception to the Supreme Court's general grant of authority for successors to unilaterally establish initial terms and conditions of employment for the new enterprise.

In its leading case on the subject, the Board gave careful attention to the policy considerations underlying the Supreme Court's "perfectly clear" caveat.[26] In setting the

---

[26] The Board began its discussion by noting that, "the precise meaning and application of the Court's caveat is not easy to discern." *Spruce Up Corp.,* 209 NLRB 194, 195 (1974), enf. 529 F.2d 516 (4th Cir. 1975).

precise boundaries of the caveat, it elected a rather narrow scope for application of the exception to limit a successor's right to impose initial terms. The Board concluded that,

> [w]e believe the caveat in *Burns*, therefore, should be restricted to circumstances in which the new employer has either actively or, by tacit inference, misled employees into believing they would all be retained without change in their wages, hours, or conditions of employment, or at least to circumstances where the new employer . . . has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment. [Footnote omitted.]

Spruce Up Corp., 209 NLRB 194, 195 (1974), enf. 529 F.2d 516 (4th Cir. 1975). Application of this standard was illustrated by the Board's resolution of the controversy involving the *Spruce Up* employer.

Spruce Up was a concessionaire retained to provide barber services at a military base. Its work force was organized. The events at issue began when the military reopened bidding for the concession contract. The successful bidder was one Fowler. The union requested that Fowler enter into negotiations. He declined, noting that he had not yet hired any employees. Approximately 2 weeks later, Fowler addressed letters to all of the barbers employed by his predecessor. He described the rate of commission that he intended to pay, a rate that differed from his predecessor's. The letter instructed those barbers who desired to work for Fowler under that compensation structure to return the letter with their signature. Four days later, the new entity commenced operations. On this record, the Board concluded that,

> Fowler's expressions to the old employees were not within the Court's caveat, and we conclude that those expressions did not operate to forfeit his right to set initial terms. Accordingly, we find no violation of the Act in his having done so. [Footnote omitted.]

209 NLRB at 195.

Very shortly after its decision in *Spruce Up,* the Board was called upon to further parse the meaning of the "perfectly clear" caveat. In *Arden's,* 211 NLRB 501 (1974), the successor addressed a letter to the union representing the predecessor's employees. The letter announced its intention to unilaterally establish initial terms and conditions of employment and to hire former employees at a level consistent with its staffing needs. Although mailed some days earlier, the union did not receive this letter until the very day the new operation commenced. On that day, each former employee was simultaneously offered employment and informed of the new wage rates and terms.

The Board, noting that "it would be difficult to find a closer borderline case," observed that proper adjudication required "the most delicate kind of balance." 211 NLRB at 502. It concluded that employees were not mislead into believing that they would be retained without change to the terms and conditions of their employment by the predecessor. Critically, the Board found that "it cannot be said that there was any period whatever of adoption by the successor of the predecessor's terms and conditions of employment." 211 NLRB at 502. This key factor led the Board to determine that the

employer was not a "perfectly clear" successor under the test established in *Spruce Up.* In other words, to escape the terms of the caveat, an employer could institute new initial terms at even the last moment before initiating its operations with the predecessor's work force, so long as it avoided any period of actual operation under the predecessor's previous terms.

In *Arden's*, the employees were given notice of new terms and conditions at the very moment they were offered employment by the successor. The perils of delaying any such announcement past this precise moment were illustrated in *C.M.E., Inc.*, 225 NLRB 514 (1976). A successor held a meeting with the union representing the predecessor's workers on February 25. At that meeting, the union was informed that all of the prior employees would be hired. In addition, possible contract changes were discussed, but no conclusions were reached. Hiring began on March 1. Later that month, the successor met with the predecessor's employees and passed out and collected job applications. On April 30, the new employer made a unilateral change to the terms of employment. The Board held that the new employer was a "perfectly clear" successor whose bargaining obligation attached on February 25, the day it had announced its plan to hire the former work force. In reaching this result, the Board observed that, "the instant case is exactly the situation referred to by the [Supreme] Court." 225 NLRB at 514.

Reading *Arden's* and *C.M.E.* together, it is evident that at the moment an employer announces its intention to employ the prior work force, it must made a choice. It can adopt its predecessor's collective-bargaining agreement, announce its own initial terms and conditions of employment, or consult with the union over new terms and conditions while continuing to preserve the status quo during such consultation. What it cannot do is hire the previous work force, commence operations, and then unilaterally impose initial terms and conditions of employment. This was made very clear in *Starco Farmers Market*, 237 NLRB 373 (1978):

> The Board has consistently adhered to this [*Spruce Up*] interpretation of *Burns.* Thus, where the new employer's offer of different terms was simultaneous with the expression of intent to retain the predecessor's employees, the Board has found no duty to bargain over initial employment terms. However, where the offer of different terms was subsequent to the expression of intent to retain the predecessor's employees, the Board has regarded the expression of intent as controlling and has found that the new employer was obligated to bargain with the union before fixing initial terms. [Citations omitted.]

237 NLRB at 373. Because the employees in *Starco* were not aware of any proposed changes to their benefits at the time the successor expressed its intent to hire them, the Board found the case to fall within the "perfectly clear" caveat. The Board reiterated this view of the last moment at which a successor may avoid the strictures of the caveat in *Harbor Cartage, Inc.*, 269 NLRB 927, 928 (1984), noting that there is "no duty to bargain over initial employment terms where [the successor's] offer of different terms is simultaneous with its expression of intent to retain its predecessor's employees." [Footnote omitted.]

Although the Board has consistently held that the final opportunity to escape the confines of the caveat is at the moment of a successor's announcement of its intent to hire a predecessor's work force, employers have attempted to persuade the Board to permit changes made shortly thereafter. In *Hilton's Environmental, Inc.*, 320 NLRB 437 (1995), the successor employer unilaterally imposed a new probationary period approximately 1 week after its announcement that it would retain the predecessor's workers. The Board reversed an administrative law judge's conclusion that this was permissible. Similarly, in *Dupont Dow Elastomers, LLC,* 332 NLRB 1071 (2002), affd. 296 F.3d 495 (6th Cir. 2002), the Board rejected a successor's effort to avoid the caveat when it unilaterally imposed new terms of employment 17 days after manifesting its intention to retain the predecessor's work force.

Thus far, the focus has primarily been on situations where a successor announces an intention to hire the predecessor's employees before it commences operations. The Board has also addressed the situation involving a successor who makes no advance announcement, but simply commences operations with the predecessor's labor force. In particular, this fact pattern was addressed in a leading case with an unusual and rather fascinating procedural history on appeal, *Specialty Envelope Co.*, 321 NLRB 828 (1996), enf. in part, rev. in part, 153 F.3d 289 (6th Cir. 1999).[27] This case involved two successors and neatly illustrates the Board's view of the "perfectly clear" caveat. Events began with the insolvency of the original employer. Upon this unfortunate occurrence, the company ceased operations on January 9. It fell into receivership and one Peters was appointed in that capacity. The first day of the receivership was January 13. On that day, the receiver notified the predecessor's employees that they should report to work. They were not required to complete job applications, nor were they informed of any changes in terms and conditions of employment. Operations commenced. Later that day, Peters held meetings with the employees assigned to each of the two shifts. At the first shift's meeting, Peters told workers that he was guaranteeing them their jobs, but changing the vacation policy. At the second shift's meeting, Peters also told the employees that they would have jobs, but added that the union contract was null and void.

In considering Peters' actions, the Board applied its longstanding rule regarding the need for at least a simultaneous announcement of intent to hire the predecessor's workers and imposition of specified new terms and conditions of employment. As the Board described its key conclusion,

> We think these notices [at the two meetings] of changed terms and conditions of employment came too late, because they were given after it was clear that Peters intended to retain the employees.
>
> . . . .
>
> [A]fter being sent home by [the predecessor] on January 9, the employees returned to work on January 13, the first day the Receiver assumed control of operations as a successor to [the predecessor], without being required to complete employment applications or otherwise

---

[27] The appellate procedural history I have just cited, while technically accurate, is misleading. The reader is directed to my upcoming discussion in the body of this decision.

> ask to be employed by the Receiver. Under these circumstances, and viewing the situation from the employee's perspective, we find that it was perfectly clear on January 13 when the employees returned to work that the Receiver intended to employ them. Prior to that time, however, the Receiver had not informed the employees that their terms and conditions of employment had changed. We therefore conclude that the Receiver has failed to show that it clearly announced an intent to change those terms and conditions before it was perfectly clear that the Receiver intended to employ all of the predecessor employees. [Citations omitted.]

321 NLRB at 830.

Approximately 6 months after assuming the receivership, Peters announced to the employees that the *Specialty Envelope Company* had obtained court approval to purchase the operation. Later that month, *Specialty* sent each employee an application packet that included a page listing new terms and conditions of employment. Because *Specialty* followed this procedure prior to commencing its hiring and operations, the Board reversed the administrative law judge's finding that it was obligated to bargain with the union regarding the changes. It held,

> [h]ere, before extending job offers to its predecessor's employees, Specialty distributed application packets in which it announced what terms of employment would be in effect, thereby informing applicants that if they applied and were accepted for employment, there would be different terms. Thus, as in *Spruce Up*, Specialty stated from the outset that it would be hiring the predecessor's employees only pursuant to new terms and conditions of employment. Accordingly, Specialty was not a "perfectly clear" successor that was obligated to consult with the Union before setting initials terms of employment. [Footnote and citation omitted.]

321 NLRB at 832.

Peters appealed the portion of the Board's decision concluding that he had violated the Act by imposing initial terms and conditions on the day he commenced his receivership. A panel of the Sixth Circuit agreed with his position. It found Peters' actions to have been reasonable since they fostered continuity of employment for the facility's workers. It further held that, in announcing new terms during the first day of operation, Peters had afforded those workers adequate notice of the changes. The Court noted that, upon learning of the changes, the employees could have refused to continue working. As a result, "[t]hey were not put in a worse situation as a result of Peters' actions." *Peters v. NLRB,* 153 F. 3d 289, 298 (6th Cir. 1998). Although warning that, "it would be wise for a successor employer to make its intentions known immediately and affirmatively," the panel interpreted the "perfectly clear" caveat to require an announcement of new terms either "before or immediately after commencing operations." 153 F.3d at 298.

For a time, matters rested in this position. The Board continued to require announcement of new terms prior to the commencement of operations with the predecessor's workers, but it acknowledged that in the Sixth Circuit, the announcement could be made during the period immediately after the commencement of those

operations. Furthermore, in a case arising in that Circuit, the Board took the occasion to express the view that the Court's holding in *Peters* could not be "divorced" from the unique circumstances involving Peters' succession as a receiver in bankruptcy. *Dupont Dow Elastomers, L.L.C.,* 332 NLRB 1071, fn. 10 (2000). In that case, the Board held that the new employer was a "perfectly clear" successor under either its own test or the test required by the Sixth Circuit in *Peters*. Another panel of the Court affirmed the Board's conclusions. In so doing, it squarely rejected the prior panel's ruling in *Peters* on both procedural and substantive grounds. *Dupont Dow Elastomers, L.L.C. v. NLRB,* 296 F.3d 495 (6th Cir. 2002), rehearing and suggestion for rehearing en banc denied (2002).

Procedurally, the *Dupont Dow* panel noted that the *Peters* panel had failed to cite a prior Sixth Circuit precedent, *Spitzer Akron, Inc. v. NLRB,* 540 F.2d 841 (6th Cir. 1976), cert. denied 429 U.S. 1040 (1977). In *Spitzer Akron*, the Court had affirmed the Board's finding that the employer's conduct placed it within the terms of the "perfectly clear" caveat. The employer had announced an intention to retain the predecessor's work force. The Board found that the successor then announced changes to the terms of employment "shortly after" commencing operations. *Spitzer Akron, Inc.,* 219 NLRB 20, 22 (1975). The Court held that this sequence of events caused the employees to be "mislead by 'tacit inference' into believing they would be retained without change in the conditions of employment." 540 F.2d at 846.

Because the panel in *Dupont Dow* concluded that the *Peters* panel had failed to consider the holding in *Spitzer Akron*, it had violated the Circuit's procedural rules and precedents precluding one panel from overruling an earlier decision of another panel. Interestingly, the *Dupont Dow* panel also took the occasion to express support for the substance of the Board's position regarding the "perfectly clear" caveat. It noted that,

> [u]nder [Dupont Dow's] reading of *Peters*, the employer can have it both ways: it can lure experienced workers into accepting job offers by promising the same terms and conditions of employment, yet can reserve its ability to set the initial terms and conditions by simply announcing the changes post-hire, but "before or immediately after commencing operations." This interpretation cannot be reconciled with the *Burns* caveat or our holding in *Spitzer*.

296 F.3d at 506.

I have described this bit of procedural history in some detail because it casts strong light on the appropriate standard for assessment of the General Counsel's contention that ACN-Pittsburgh's conduct brought it within the confines of the "perfectly clear" caveat. Examination of the sequence events involved in the Company's purchase of Bakerstown, commencement of operations with the full complement of bargaining unit employees, and the subsequent imposition of unilateral changes in terms of employment reveals that the General Counsel's claim is well founded.

It will be recalled that the Company announced no changes whatsoever before or at the time it commenced operations.[28] Those operations commenced on Friday,

---

[28] While the Company claims that it provided some sort of meaningful advance notice of changes during conversations between Smith and the union steward and a

January 2. The predecessor's employees reported for work and began performing that work as usual. There is nothing in the record to indicate that the employees were even aware that a change in ownership had occurred. This was illustrated through counsel for the General Counsel's examination of a bargaining unit member, Nanna, who was called as a witness during the trial:

> COUNSEL: Did you notice any change in your working conditions during the first few days of January from the end of December?
>
> NANNA: No, I did not.

(Tr. 97.) Nanna's account was fully supported by the Company's general manager, Maharg, who also testified that during the period from December 1, 2003 through January 9, 2004, the day-to-day operations of the plant remained basically identical.

On the first or second day of operations, the Company's attorney called the Union's counsel to request a meeting. As the Company's brief correctly notes, "[p]rior to January 2nd or 3rd, Ms. Fischer had not received any official notification of a sale or impending sale." (R. Br. at p. 4.)

The next workday was January 5. Employees reported for work and production continued. Meanwhile, management and union officials met. During the meeting, managers emphasized continuity, including recognition of the Union and continuing compliance with dues checkoff. Although the possibility of changes in working conditions was raised, management did not announce any specific alteration of the predecessor's terms and conditions of employment. To the contrary, the only specific announcements were of terms and conditions, such as wage rates, that would remain the same.

Because the Company failed to provide the Union or its employees with any advance notice of the termination of the Bakerstown 401(k) plan, it is impossible to determine with precision the date of this first unilateral change in terms and conditions of employment. Fischer testified that she first became aware of the elimination of the predecessor's 401(k) plan on January 8. On that day, several employees who had learned of it by contacting the plan's administrators informed her of this event. The Company itself made a formal after-the-fact announcement of this change by

---

union committee member, I reject this view. Maharg, the Company's witness who testified regarding these conversations, indicated that the employees initiated the discussions with Smith. When asked, Smith did inform the men that the employees "would be able to have their job[s] as far as he knew." He added that there "would be a few changes," but they would not be "major." (Tr. 122.) These informal chats conducted with merely two of the employees did nothing to inform the work force that the employer was setting new and different initial terms and conditions of employment. If anything, these conversations were intended to convey the opposite impression, that the successor employer would continue the prior operation with the same work force and under substantially identical terms and conditions of employment. The contrast to the successor's conduct in *Spruce Up* could not be clearer. That employer sent all of the employees a letter specifying the precise change in initial terms of employment. Nothing remotely comparable happened here.

memorandum dated January 15. (GC Exh. 3.) This was followed on January 21 by formal announcement that employees who opted out of the Company's health insurance plan would no longer receive payments equivalent to the cost of health care premiums. (GC Exh. 5.) It was not until February 15 that formal notice was provided of the elimination of payments to drivers for meals. Finally, almost 6 months after commencing its operations, the Company notified employees that they would henceforth be required to work up to 12 hours per day. This was communicated on June 25. (GC Exh. 6.)

As *Specialty Envelope (Peters)* makes plain, a successor who, without advance notice to the predecessor's employees, simply continues operations with those same employees must specify any changes in terms and conditions of employment no later than the final moment before its operations begin. In this case, that moment would have been immediately prior to the start of work on January 2.[29] Because the changes to the predecessor's terms and conditions of employment were implemented and announced after the commencement of operations with the entire complement of the predecessor's bargaining unit employees, the Company's conduct brought it squarely within the terms of the Supreme Court's "perfectly clear" caveat. It follows that, by unilaterally imposing changed terms and conditions without affording the Union notice and an opportunity to bargain, the Company violated Section 8(a)(5) of the Act.

3. The Changes at Issue Were Not Initial Terms and Conditions of Employment

The General Counsel argues that the Company's conduct during its transition to ownership of the Bakerstown plant brought it within the two exceptions established in *Burns.* As just discussed, I agree. I also conclude that the Company's conduct in making unilateral changes to working conditions would be deemed unlawful even if those exceptions were not found to apply. In other words, if one were to assume that the Company was an ordinary *Burns* successor free to establish its own initial terms and conditions of employment, its actions still violated Section 8(a)(5) of the Act.

Shortly after the *Burns* decision, the Board addressed an additional aspect of successorship. In *Ranch-Way, Inc.*, 203 NLRB 911 (1973), the successor's general manager met with each of the predecessor's employees. During those meetings, he tendered offers of employment coupled with an explanation that the new company would pay lower wages. Only those employees who agreed to the lower pay scale were hired. The Board held that the successor's conduct fell outside the parameters of the "perfectly clear" caveat. As a result, it "was privileged unilaterally to set the initial terms on which it would hire employees for its operation." 203 NLRB at 912. During his employment interviews, the general manager had not discussed fringe benefits. Two weeks after hiring its work force, the employees were informed of unilateral changes to seniority, vacation, and health benefits. No notice had been provided to the employees' union. The Board found this to constitute a violation of Section 8(a)(5) because the unilateral changes to fringe benefits were implemented after the company had already set its initial terms and conditions of employment.

In *Banknote Corp. of America,* 315 NLRB 1041 (1994), enf. 84 F.3d 637 (2nd Cir. 1996), cert. denied 519 U.S. 1109 (1997), the Board again found that a successor had

---

[29] Even if one were to credit Murphy's assertion that operations began on January 5, the evidence clearly shows that no specific alterations to terms and conditions of employment were announced before work began on that day.

carefully structured its transition so as to avoid the "perfectly clear" caveat. On March 23, it sent notice to the unions representing the predecessor's employees, advising that it would not adopt the collective-bargaining agreements and would impose new terms and conditions. Subsequently, meetings were held with employees and union officials. During these meetings, management announced new terms and conditions. Employees were hired on April 19. Because the new company was not a "perfectly clear" successor, the Board held that it was "free to set initial terms and conditions of employment prior to its April 19, 1990 hiring of [the predecessor's] former employees." 315 NLRB at 1041. However, on April 23, the successor announced additional unilateral changes in working conditions. The Board found those changes to be in violation of Section 8(a)(5) because, after April 19, "a bargaining obligation had attached with respect to any subsequent changes the Respondent wished to make." 315 NLRB at 1041.

I have already commented on the central importance of the *Specialty Envelope (Peters)* case in guiding my thought processes. Interestingly, one aspect of that case involved the principle now under discussion. It will be recalled that, unlike Peters, the *Specialty Envelope Company* was found to have avoided the strictures of the "perfectly clear" caveat, having provided the predecessor's employees with a written statement containing the new terms and conditions at the same time they were issued employment applications. Because of this, the Board upheld the unilateral imposition of those listed changes. Approximately a month after commencing its operations, *Specialty* unilaterally changed its attendance policy. Finding that this change occurred "after *Specialty's* duty to bargain had taken effect," the Board concluded that this change did violate the Act. 321 NLRB at 832.

The temporal limitation on a successor's authority to announce unilateral changes in terms of employment has been noted in two recent cases. In a decision affirmed by the Board, an administrative law judge, citing *Banknote* and *Ranch-Way,* observed that,

> [e]ven in circumstances . . . where a successor employer may announce certain changes in employment prior to a bargaining obligation attaching, it is precluded from making other unilateral changes after that obligation attaches.

ELF Atochem North America, Inc., 339 NLRB 796, 828 (2003).

Perhaps the most expansive reading of this limitation on the successor's freedom to make a staggered series of what are asserted to be "initial" terms and conditions of employment is contained in *Cora Realty Co., LLC,* 340 NLRB No. 55 (2003). In *Cora*, the Board assumed without deciding that the successor did not fall within the "perfectly clear" category. That employer met with the predecessor's employees and offered them employment. At the same time, it informed the employees that their schedules would change. After commencing operations with the predecessor's staff, the new employer imposed unilateral reductions in wages and fringe benefits. The Board found no violation in the schedule changes, but noted that when the new employer told the workers that scheduling would change, it was also "implicitly telling them that all other terms and conditions would remain the same." 340 NLRB No. 55, slip op. at p. 3. As a result, the unilateral changes in wages and fringe benefits were found to have violated Section 8(a)(5).

Given the chronology of ACN-Pittsburgh's unilateral changes to conditions of employment, it is apparent that they occurred from days to weeks to months after the Act's bargaining obligation attached. This is true regardless of whether one finds that the Company had conducted itself in a manner that would escape the confines of the "perfectly clear" caveat. Because the Company failed to meet its statutory obligation to bargain with the Union before imposing the changes, it violated Section 8(a)(5) of the Act.

4. The Unilateral Change Regarding the Drivers' Meal Allowance

The Company's unilateral changes regarding the employees' 401(k) plan, cessation of payments to employees who opted out of health insurance coverage, and increase in the length of mandatory work shifts all contravened specific provisions of the collective-bargaining agreement between the Union and Bakerstown. Since I have found that, through its actions, the successor adopted that agreement, these unilateral changes violated Section 8(a)(5) of the Act. In addition, I have concluded that these changes were also unlawful because the Company was a "perfectly clear" successor that was not privileged to alter established terms and conditions of employment of its predecessor.

One remaining unilateral change requires additional discussion. The General Counsel alleges that the unilateral cessation of payment of meal allowances to drivers was also a violation of the Act. The predecessor's collective-bargaining agreement with the Union was silent regarding such payments. As a result, unilateral abolition of the allowances cannot constitute a unilateral change made in violation of the terms of the agreement. It remains to assess the legality of this change by reference to alternate theories of liability. Under this approach, because I have determined that the Company was a "perfectly clear" successor, the unilateral elimination of meal allowances was an unlawful unilateral change in existing terms and conditions of employment. Furthermore, I have concluded that, even if the Company were not found to be a "perfectly clear" successor, its decision to unilaterally eliminate the meal allowance was not privileged because it was imposed after a bargaining obligation attached, instead of being promulgated as an initial term and condition of employment.

The Board has clearly held that the terms and conditions of employment that must be considered in successorship cases include more than simply those provisions set forth in a predecessor's collective-bargaining agreement with the employees' representative. In *Holiday Inn of Victorville*, 284 NLRB 916 (1987), a case in which the new owner was not found to be a "perfectly clear" successor, the Board noted,

> [e]xcept for matters on which a successor employer sets its own initial terms, the terms and conditions of employment of union-represented employees will normally be those established by the predecessor's collective-bargaining agreement or by the predecessor acting unilaterally to the extent that the union had waived bargaining. Practices thus established are the existing practices. They are kept in place simply by virtue of Section 8(a)(5) of the Act rather than by force of contract, however, because a successor employer is not bound to adopt a predecessor's collective-bargaining agreement. [Citation omitted.]

284 NLRB at p. 916.

The Company argues that the payment of meal allowances to drivers was not a past practice.[30] It notes that the payments were not part of the collective-bargaining agreement and that this agreement contained language stating that it constituted the entire agreement of the parties. The answer to this argument is contained in the Board's language cited above. The payment of meal allowances became a term and condition of employment when it was unilaterally imposed by Bakerstown many years ago.[31] This practice continued in effect after the negotiation of the collective-bargaining agreement and after the purchase of Bakerstown by ACN-Pittsburgh. It does not derive its existence or continuing vitality from the agreement with the Union.

The Company also notes that it was completely unaware of the practice because it was not described in the collective-bargaining agreement. It does appear that Murphy was unaware of the existence of the meal allowance when he purchased the facility. Indeed, he reported that the description of the procedures for the allowance given by Nanna in his trial testimony was "the most complete explanation I've ever heard on how it was supposed to work." (Tr. 164-165.) The Board, however, has rejected any contention that a successor's ignorance of a past practice would serve to excuse a unilateral decision to terminate that practice. In *Pepsi-Cola Distributing Co. of Knoxville, Tenn.,* 241 NLRB 869 (1979), enf. 646 F.2d 1173 (6th Cir. 1981), cert. denied 456 U.S. 936 (1982), the successor had no knowledge of the predecessor's practice of paying a yearend bonus to route salesmen at the time it promulgated its initial terms and conditions of employment. It learned of the bonus 6 months prior to the time the employees were due to receive it. The Board found the unilateral discontinuation of that bonus to be a violation of the Act, noting that the successor "should have bargained with the Union prior to discontinuing its predecessor's established practice of paying the yearend bonus." 241 NLRB at p. 870.

The Company's arguments regarding the meal allowance are particularly undercut by its own conduct upon assuming the operation. Employee Nanna testified that he continued to receive the meal allowance during January. It was not until February 15 that the Company issued a memorandum advising drivers that the allowance was terminated as of February 1. The Board's precedents clearly establish that, regardless of whether the Company was a "perfectly clear" successor, it had no right to terminate the past practice of its predecessor and itself by unilaterally discontinuing the meal allowance a full 6 weeks after commencement of its operations, a time when its bargaining obligation was clearly in effect. *Ranch-Way, Inc.,* 203 NLRB 911 (1973), and *Banknote Corp. of America*, 315 NLRB 1041 (1994), enf. 84 F.3d 637 (6th Cir. 1996), cert. denied 519 U.S. 1109 (1997).

---

[30] I reject the argument that the allowances were somehow too vague to constitute a past practice. Nanna described the procedures with considerable precision. Even more tellingly, Maharg, a management official for both the Company and its predecessor, characterized the allowances as a "past practice thing." (Tr. 120.) While I recognize that Maharg was speaking as a layperson, his choice of words is probative. Ultimately, I conclude that a practice effectuated by the issuance of specific checks to employees for precise sums of money is hardly too vague to be cognizable.

[31] There was evidence that Bakerstown paid these meal allowances since at least 1988.

5. Some Final Thoughts Regarding the Equities

At first blush, it may appear that the employer in this case has simply been ensnared by
a set of highly technical and obscure rules. Indeed, it has been noted that the rules regarding successorship have been criticized as "confusing, formalistic, and arbitrary." Edward B. Rock & Michael L. Wachter, *Labor Law Successorship: A Corporate Law Approach,* 92 Mich. L. Rev. 203 (1993).[32] My own initial impression was to this general effect.

Based on consideration of the Board's articulation of the rationale and policies undergirding the successorship doctrine, as well as similar discussion from the appellate courts and the commentators, I now reject such a characterization of the doctrines that have guided the result in this case.[33] Instead, it appears to me that the outcome reflects a series of reasoned economic decisions by the employer and a similarly carefully reasoned and calibrated set of responses by the Board to successor employers' economic actions.

The Company presents its position here as merely that of a hapless newcomer, overwhelmed by the practicalities of creating a nationwide network of container reprocessing facilities in a very short timeframe. Counsel for the Company asked Murphy whether it would have been possible on taking over the Bakerstown operation to present the Union with a "list of all the changes you intended to make in the terms and conditions of employment." Murphy responded, "practically speaking, no. Theoretically, I suppose." (Tr .156.) He based this response on the fact that management was "totally absorbed" with the negotiations for purchase of the facilities and subsequently with the "hundreds of details" involved in integrating the newly acquired operations. (Tr. 156.) In my view, this explains nothing. Despite the demands on its attention, the Company was able to successfully negotiate an 85-page asset contribution agreement with Bakerstown and similar purchase agreements with the owners of two other reprocessing facilities. Had promulgation and implementation of significant changes in initial terms and conditions of employment been viewed as a significant corporate objective, I am confident that it would have been accomplished, particularly since it appears that the desired changes to the predecessor's terms and conditions of employment were largely limited to the four items in controversy in this case, perhaps coupled with some alterations in work rules.

In fact, it seems to me that the Company's decision to remain almost entirely silent regarding the status of the predecessor's collective-bargaining agreement and the terms and conditions of employment for the work force reflects careful and reasonable economic calculation. Critical to the success of the network concept that formed the premise for the Company's existence was the ability to reliably fulfill all of the needs of its potential customer base. For those customers in the Pittsburgh region, this required a highly productive and efficient operation at Bakerstown. Essential to meeting this

---

[32] Interestingly, based a highly technical analysis focused on differences in corporate structure, the authors reject this characterization of the successorship doctrine, finding that it is subject to "relatively simple, positive explanation." 92 Mich. L. Rev. at 204.

[33] The Board has also rejected description of its successorship rules as "arbitrary." *Bekins Moving & Storage Co.,* 330 NLRB 761, fn. 1 (2000).

objective was the acquisition of the predecessor's skilled and experienced work force and the maintenance of a labor relations environment free of strife and the potential for disruption of production. Indeed, Murphy testified that by volunteering to continue the dues checkoff and union security arrangements set forth in the collective-bargaining agreement, he obtained the Union's good will, "which was exactly the effect that I hoped we would have." (Tr. 153.) Similarly, by remaining silent regarding specific changes in working conditions while offering generalized promises of continuity, the Company obtained the services and initial good will of the employees. All of this achieved an important objective, a seamless transition.

Hindsight validates the employer's decision to place the highest priority on the smooth and efficient transition process, including the retention of the entire skilled work force developed by the predecessor. As Murphy testified, the Company immediately experienced "a wonderful degree of sales success" that placed "a real demand, especially on the Pittsburgh plant." (Tr. 157.) Every ounce of productive capacity from the experienced work force was required to meet that demand, thereby establishing the validity of the Company's promise of a safety net to its customers.

In formulating the rules regarding contract adoption and "perfectly clear" successorship, the Board and the courts have been alert to the types of economic considerations just described. Because of the labor law policies embodied in the Act, a successor employer's decision to emphasize continuity must call into play protections for the employees. From the outset, the Supreme Court noted that when a successor decides to avoid "uncertainty and turmoil" by taking steps consistent with an intention to adopt the predecessor's contract, the Board may find that the agreement continues in force and effect. *Burns,* supra. at 291. In my view, the Company, having obtained the fully seamless transition it sought, must bear the consequence of the election it made. By signaling its intent to maintain the collective-bargaining agreement in effect, it has become bound by that agreement, including not only those provisions it finds onerous, but also the very provisions that appeared so attractive, including the Union's commitment to forego work stoppages during the life of the contract.

By the same token, the Company's decision to place the highest value on continuity brought into play the core principles underlying the Board's *Spruce Up* doctrine. When workers find that their employing entity has been purchased, they are confronted with the urgent need to make fundamental economic decisions. The D.C. Circuit has highlighted the appropriateness of the Board's role in guaranteeing to those employees the right to make the needed decisions without being misled by the successor employer's promises of continuity or silence regarding any changes in working conditions. The Court noted that it was the Board's view that,

> the successor more commonly may endeavor to conceal, or to at least postpone publicity on, reemployment objectives in order to avoid the onus of bargaining during the usually difficult period of takeover, and incumbent employees may thereby be deprived of early appraisal of their retention prospects.

International Ass'n of Machinists & Aerospace Workers, AFL-CIO v. NLRB, 595 F.2d 664, 675 (D.C. Cir. 1978), cert. denied 439 U.S. 1070 (1979). The Court concluded that the Board's *Spruce Up* doctrine provided "an important measure of protection" to employees in such circumstances because,

> [o]nce the duty to bargain has thus attached, the successor is obliged to consult the incumbent union before institution of less satisfactory terms. That is significant because unconditional retention-announcements engender expectations, oftimes critical to employees, that prevailing economic arrangements will remain essentially unaltered. Even when incumbents are not affirmatively led to believe that existing terms will be continued, unless they are apprised promptly of impending reductions in wages or benefits, they may well forego the reshaping of their personal affairs that necessarily would have occurred but for anticipation that successor conditions will be comparable to those in force. [Footnote omitted.]

595 F.2d 674-675.[34] In my view, application of the "perfectly clear" caveat and the *Spruce Up* doctrine to the facts of this case restores the required balance in the relations between the employer and the work force. The employer, having received precisely the benefits it desired from the retention of the experienced work force, must be precluded from imposing subsequent unilateral changes in the continuity of the conditions of employment that formed the basis for the employees' decisions to continue to work for that successor.

Finally, I note that application of these principles does not impose any undue hardship on a successor employer. The core concept remains that the course of action to be taken is entirely in the hands of the successor. As the Seventh Circuit has noted,

> [t]he approach of the Board is compatible with the practical reality expressed by the Supreme Court in *Fall River*, 482 U.S. at 40-41, 107 S.Ct. at 2234: "[T]o a substantial extent, the applicability of *Burns* rests in the hands of the successor." It may explore all options with respect to the composition of its workforce. However, when it determines that it will retain the workforce of its predecessor, it cannot ignore the Union those employees have chosen when it comes time to determine the conditions of employment.

Canteen Corp. v. NLRB, 103 F.3d 1355, 1364-1365 (7th Cir. 1997).

In addition to vesting the crucial initial decision making in the hands of the successor employer, it does not appear to me that the Board's rules are murky or difficult to apply. For example, I note the existence of a thorough guide for employers. Jan W. Sturner, *Understanding Labor Law Successorship: A New Employer's Guide to Setting Initial Terms and Conditions of Employment at a Newly-Acquired Business with a Unionized Workforce*, 2001 L. Rev. Mich. St. U. Det., C.L., 1173 (2001). In his initial overview of the law, Sturner succinctly encapsulates the straightforward concepts involved:

> [f]rom a practical standpoint, a "labor law" successor generally will be entitled to set initial terms and conditions of employment prior to

[34] The D.C. Circuit does not stand by itself in this regard. For example, the Seventh Circuit held that the Court in *Machinists*, "correctly grasped the wisdom of the Board's position." *Canteen Corp. v. NLRB,* 103 F.3d 1355 (7th Cir. 1997).

> bargaining if it adheres to one basic rule: the successor must clearly inform all prospective job applicants, prior to or simultaneous with offers of employment, that the initial terms and conditions of employment will be different from the prior labor contract.
>
> . . . .
>
> [A] "labor law" successor can lose the right to set initial terms and conditions of employment, if: (1) it does not make a sufficiently clear and timely *Spruce Up* announcement, or in the alternative, it is completely silent with respect to the initial terms and conditions of employment it will apply; or (2) the Board finds that the new employer has in any way, directly or indirectly, misled the predecessor's employees into believing that they would be rehired under the preexisting terms of employment . . . . If one of these exceptions applies, the new employer will be compelled to abide by the terms of the predecessor's labor contract, including preexisting wages and benefits, unless or until it is able to complete the bargaining process with the Union for new terms under a new contract.

2001 L. Rev, Mich. St. U. Det. C.L., at 1176-1177.[35]

I conclude that the Company's entirely rational economic choices made at the time it acquired the Bakerstown facility require invocation of the mechanisms established by the Board to protect employees' freedom to make their own rational economic decisions based on full and fair disclosure of the prospective terms and conditions of employment offered by the successor employer.

Conclusions of Law

1. By making unilateral changes to the terms and conditions of employment of the unit employees following its December 31, 2003 takeover without notifying the Union or providing the Union with an opportunity to bargain about those changes, the Company has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

2. By failing and refusing to apply the collective-bargaining agreement covering the period from March 8, 2003 through March 7, 2006, to its unit employees since its December 31, 2003 takeover, the Company has violated Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

Remedy

Having found that the Company has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Company violated Section 8(a)(5) and (1) of the Act by unilaterally changing employees' terms and conditions of employment, I recommend that it be ordered, upon request of the Union, to rescind the unilateral changes in those terms and conditions of

---

[35] I have deleted the author's additional discussion regarding the impact of any unfair labor practices committed by the predecessor. That factor is not involved in this case.

employment implemented following the December 31, 2003 takeover.

Having also found that the Company violated Section 8(a)(5) and (1) of the Act by failing to apply the collective-bargaining agreement covering the period from March 8, 2003 through March 7, 2006, to the bargaining unit members, I recommend that it be ordered to apply the terms of that agreement to the unit employees retroactive to December 31, 2003.

As to those unilateral changes for which rescission is requested by the Union and as to the post-December 31, 2003 application of the collective-bargaining agreement, I recommend that the Company be ordered to make whole the unit employees for any loss of wages and other benefits suffered, as calculated in accordance with *Ogle Protection Service*, 183 NLRB 682, 683 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

In addition, I recommend that the Company be ordered to reimburse the contractually-established Section 401(k) benefit plan for contributions not paid on behalf of the employees, with interest computed as prescribed in *Merryweather Optical Co.,* 240 NLRB 1213, 1216 (1979). I note that the contours of the remedy to be applied to the unilateral termination of the Section 401(k) plan required by Article 23 of the collective-bargaining agreement are somewhat complex. Because I have found that the Company adopted the predecessor's collective-bargaining agreement, the cessation of contributions to the 401(k) plan was not merely a failure to maintain an existing term and condition of employment, it also constituted a violation of that agreement. However, that agreement also provides that,

> [s]hould any company purchase Bakerstown [Container Corporation], and if their 401K savings plan is better, then the employees will be rolled into that 401K plan.

(GC Exh. 2, p. 18.) Counsel for the Company argues that this provision should be automatically implemented because "[i]t is uncontested in the record that the American Container Net, Inc. 401K plan is superior to the pre-existing (BCC) 401K plan." (R. Br. at p. 7.) I disagree. Murphy testified that, during a meeting with management, the Union's negotiating committee brought in an employee who indicated that he had done research and concluded that the Bakerstown plan was better than the new employer's proposed substitute. Thus, the record does not establish that a consensus exists as to this issue.

I conclude that the applicability of the contractual provision covering the issue of roll over into a purchaser's 401(k) plan remains to be resolved. The Board's administrative compliance process affords a proper forum for such resolution. In the first instance, I certainly anticipate that, under the auspices of the compliance officer, the parties will discuss the relative merits of the 401(k) plans. It may be, as powerfully asserted by Murphy, that the Union will conclude that the successor's plan is superior. If the parties cannot reach agreement, then the compliance process should be utilized to determine the appropriate action to be taken. The complexities involved in remedial issues regarding 401(k) plans are certainly illustrated in the Board's discussion of the issue in *Alaska Pulp Corp.,* 326 NLRB 522, 525 (1998), enf. in part and remanded, 231 F.3d 1156 (9th Cir. 2000). I note that, even if it is determined (through agreement or otherwise), that the successor's 401(k) plan is superior and must be implemented

pursuant to the terms of the collective-bargaining agreement, a remedial issue will still exist regarding the interruption of 401(k) benefits caused by the Company's unilateral cessation of payments to the predecessor's plan before the implementation of its own plan. I recommend that the Company be ordered to make its employees whole for the losses suffered through this unilateral cessation in the manner I have earlier described. I also note that the Company took certain steps designed to mitigate the adverse effect on its employees of its unilateral cessation of payments to the predecessor's 401(k) plan. The financial impact of those steps should certainly be taken into account in determining the scope of the remedy.

Finally, I recommend that the Company be ordered to post a notice in the usual manner.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[36]

ORDER

The Respondent, ACN—Pittsburgh, L.L.C., of Bakerstown Pennsylvania, a subsidiary of American Container Net, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally changing the terms and conditions of employment of its bargaining unit employees without notifying or providing Chauffeurs, Warehousemen & Helpers, Teamsters Local Union No. 538 a/w International Brotherhood of Teamsters, AFL-CIO with an opportunity to bargain about those changes.

(b) Failing and refusing to apply the collective-bargaining agreement covering the period from March 8, 2003 through March 7, 2006, to its bargaining unit employees retroactive to December 31, 2003.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Upon request of the Union, rescind the unlawful unilateral changes in the bargaining unit employees' terms and conditions of employment that were implemented following the December 31, 2003 takeover and make the affected employees whole for losses they incurred by virtue of those unilateral changes in the manner set forth in the remedy section of this decision.

[36] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Apply the collective-bargaining agreement covering the period from March 8,
2003 through March 7, 2006, to the bargaining unit employees retroactive to December 31, 2003, including but not limited to: (i) making whole the unit employees for any loss of wages or benefits they incurred because of the Company's failure to apply the terms of the agreement; (ii) making required contributions to the benefit funds established by the agreement; and (iii) reimbursing the unit employees for any expenses they incurred by reason of the Company's failure to make the contributions; all as set forth in the remedy section of this decision.

(c) Preserve and, within 14 days of a request, or such additional time as the
Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of compensation due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facility in Bakerstown,
Pennsylvania, copies of the attached notice marked "Appendix."[37] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 31, 2003.

(e) Within 21 days after service by the Region, file with the Regional Director a
sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C.

____
Paul Buxbaum
Administrative Law Judge

---

[37] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT make unilateral changes in wages, benefits, or other terms and conditions of employment of our unit employees without notifying or providing Chauffeurs, Warehousemen & Helpers, Teamsters Local Union No. 538 a/w International Brotherhood of Teamsters, AFL-CIO with an opportunity to bargain about these changes.

WE WILL NOT fail and refuse to apply the collective-bargaining agreement covering the period from March 8, 2003 through March 7, 2006, to our unit employees retroactive to December 31, 2003.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Federal labor law.

WE WILL, upon request of the Union, rescind the unlawful unilateral changes in the unit employees' wages, benefits, and terms and conditions of employment that were implemented following the December 31, 2003 takeover, and make the affected employees whole for losses they incurred by virtue of these unilateral changes to their wages and benefits, with interest.

WE WILL apply the collective-bargaining agreement covering the period from March 8, 2003 through March 7, 2006, to our unit employees retroactive to December 31, 2003, and make the affected employees whole for losses they incurred by virtue of our failure to apply the agreement, with interest, including lost wages, lost benefits, required contributions on the employees' behalf to benefit funds established by the agreement, and expenses employees incurred by reason of our failure to make the required benefit fund contributions.

____

ACN—Pittsburgh, L.L.C.

Dated ______________________ By ____

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

1000 Liberty Avenue, Federal Building, Room 1501, Pittsburgh, PA 15222-4173

(412) 395-4400, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (412) 395-6899.