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

Advice Memorandum

DATE: February 28, 2001

TO : Dorothy L. Moore-Duncan, Regional Director
Region 4

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

SUBJECT: Caesar's Atlantic City
Case 4-CA-29336

420-1209
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530-4825-6700
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This case was submitted for advice on the issues of whether Caesar's was a successor or a "perfectly clear" successor to Atlantis City LLC and even if not, whether Caesar's was privileged to make unilateral changes in the Atlantis employees' terms and conditions of employment.

FACTS

Boardwalk Regency Corporation operates and trades as Caesar's (Employer). Caesar's, in turn, is the sole owner of Ocean One Mall, which has shops and restaurants. Atlantis City, LLC, the Mall's maintenance subcontractor, employed 7-10 employees who did light maintenance and repair work at the Mall. Teamsters Local 331 (Union) has collective-bargaining agreements with some of the Mall shops and, more particularly, with Atlantis covering the Mall maintenance operation. That contract was effective from February 22, 1999 through February 21, 2001.

About January 21, 2000, Park Place Entertainment (PPE) purchased the Employer and converted it into a wholly owned subsidiary of PPE. PPE immediately informed Atlantis that it was terminating the maintenance contract effective April 1. Sometime in March, Caesar's Hotel Project Manager met with the Atlantis employees and informed them that they would no longer be employed by Atlantis at the Mall. The project manager said that all of them could become employees of Caesar's. He told them that nothing would change and that there was no reason to worry about their

jobs. He said nothing to indicate that there would be any change in their terms and conditions of employment.

During the first week of April, the former Atlantis employees filled out applications for Caesar's, were photographed for identification badges, and became employees of Caesar's. Their duties and other terms and conditions of employment remained unchanged.

By fax and letter dated April 3, Caesar's informed the Union that it

> intends to offer employment to the former Atlantis… employees.… Please be further advised that the former Atlantis... operations will be operationally merged and completely integrated [into the HERE unit, which Caesar's said then had 400 employees].... Upon consolidation of the workforce [we] will by operation of law, no longer be able to recognize your union... If you wish to discuss this matter, please contact me.

By fax and letter dated April 10, Caesar's informed the Union that in its letter dated April 3, it

> advised you that the [former Atlantis employees] would be integrated into [Caesar's HERE unit.] Since that time we have reviewed our operational needs and determined that the former Atlantis employees... will now be merged and integrated with [the Operating Engineers unit, which Caesar's said then had 64 employees].... As such, upon consolidation of the workforce, [we] will by operation of law no longer be able to recognize your union... Please contact me if you would like to discuss this matter further.

On April 21, an official of Caesar's labor relations department met with the former Atlantis employees and told them that it would consider them nonunion; that they would have to join Local 68, Operating Engineers; serve a 60-day probationary period; would be ineligible for the Local 68 benefits plan for six months but could buy into the Caesar's plan for that period; and must apply for non-gaming casino licenses for which Caesar's would pay. Their duties and conditions of employment remained the same

during April. On May 8 and 9, the former Atlantis employees attended orientation sessions, began to wear the same uniform as the Caesar's facilities employees; worked at Ocean One Mall only two days a week and at other Caesar's locations at other times; ceased driving forklifts; and became otherwise subject to the Local 68 contract.

The Employer represents that the former Atlantis employees were fingerprinted between April 26 and May 1, the applications and fingerprints submitted to the New Jersey Casino Control Commission on May 2, and the applications approved on May 5. Only then could they work upon the Caesar's casino floor.

ACTION

We concluded that Complaint should issue, absent settlement, alleging that Caesar's was not privileged to set original terms and conditions of employment or to unilaterally implement different terms and conditions of employment thereafter, under the following theories.

1. Caesar's was a "perfectly clear" Burns[1] successor.

Initially, in determining whether an employer is a Burns successor, the focus is on whether there is "substantial continuity" between the predecessor and successor enterprises and whether a majority of the employees of new employer in an appropriate unit had been employed by the predecessor.[2] With regard to "substantial continuity," the Board examines the totality of the circumstances, including whether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same

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

[2] Id. at 280-281.

products, and basically has the same body of customers.[3] The Board views these factors from the employees' perspective, i.e., whether the retained employees would "understandably view their job situations as essentially unaltered."[4] With regard to whether a majority of the employees of the new employer in an appropriate unit had been employed by the predecessor, the Board considers whether the new employer employs a "substantial and representative complement" of employees at the time a union makes a demand for recognition,[5] and whether the new employer's workforce comprises an appropriate unit.

Here, after Caesar's took over the maintenance operations previously subcontracted and performed by the Atlantis employees, the former Atlantis employees continued to perform the same work under the same working conditions for the same customers. The Atlantis employees would have viewed their job situation as essentially unchanged. Thus, it is clear that there was "substantial continuity."

Although a successor normally has the freedom to set initial terms and conditions of employment for its newly-hired work force, in Burns[6] the Supreme Court enunciated an

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[3] Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 43 (1987).

[4] Id., quoting Golden State Bottling Co. v. NLRB, 414 U.S. 168, 184 (1973). See also NLRB v. Jeffries Lithograph Co., 752 F.2d 459, 464 (9th Cir. 1985).

[5] In Fall River Dyeing, the Court approved of the Board's "substantial and representative complement" rule in the successorship context, which fixes the moment when the determination is to be made as to whether a majority of the successor's employees are former employees of the predecessor (482 U.S. at 52), and also approved of the Board's "continuing demand" rule, whereby a union's premature demand for recognition, although rejected by the employer, remains in force until the moment when the employer attains a substantial and representative complement of employees (482 U.S. at 52-53).

[6] 406 U.S. at 294-95.

exception to this rule, involving "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." In Canteen Co.,[7] the Board applied this "perfectly clear" exception to hold that:

> when the Respondent expressed to the Union its desire to have the predecessor employees serve a probationary period, the Respondent had effectively and clearly communicated to the Union its plan to retain the predecessor employees. [Footnote omitted.] Therefore, as it was "perfectly clear" on [that date] that the Respondent planned to retain the predecessor employees, the Respondent was not entitled to unilaterally implement new wage rates thereafter.

The Board relied on the fact that at the time the employer contacted both the union to say that it wanted employees to serve a probationary period and the employees to say that it wanted them to apply for employment, it "did not mention in these discussions the possibility of any other changes in its initial terms and conditions of employment."[8] Thus, in applying the "perfectly clear" exception, the Board scrutinizes not only the successor's plans regarding the hiring of the predecessor's employees but also the clarity of its intentions concerning existing terms and conditions of employment. In Canteen and other cases, a bargaining obligation has been imposed under the "perfectly clear" exception based upon the successor's silence as to changing or continuing the existing working conditions at the time it indicated it would be hiring the predecessor's employees.[9] The Board has also applied the "perfectly

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[7] 317 NLRB 1052, 1053 (1995), enfd. 103 F.3d 1355 (7th Cir. 1997).

[8] Id. at 1052.

[9] See, e.g., Roman Catholic Diocese of Brooklyn, 222 NLRB 1052 (1976), enfd. denied in relevant part sub nom. Nazareth Regional High School v. NLRB, 549 F.2d 873 (2d Cir. 1977) (Board imposed an obligation to bargain about initial terms of employment prior to the new employer's

clear" exception where the new entity retained the entire predecessor bargaining unit, but also indicated that at some time in the future it would implement certain unspecified changes in terms and conditions of employment.[10]

More recently, in Specialty Envelope,[11] the Board found a "perfectly clear" successor in circumstances where five days after the predecessor ran out of cash and sent the

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extension of formal offers of employment to the predecessor's employees where the employer made an unequivocal statement to the union of an intent to hire all of the predecessor's lay teachers, but did not mention any changes in terms and conditions of employment; 8(a)(5) violation found when it later submitted an employment contract with unilaterally changed terms and conditions of employment); Fremont Ford, 289 NLRB 1290, 1296-1297 (1988) (initial bargaining obligation imposed under "perfectly clear" exception where new employer manifested intent to retain the predecessor's employees prior to the beginning of the hiring process by informing union it would retain a majority of the predecessor's employees and did not announce significant changes in initial terms and conditions of employment until it conducted hiring interviews; employer's stated desire to alter the seniority system and institute a flat pay rate insufficient to indicate intent to establish new terms and conditions). In Canteen, 317 NLRB at 1053, the Board distinguished its dismissal of the complaint in Spruce Up Corp., 209 NLRB 194, 195 (1974), enfd. 529 F.2d 516 (4th Cir. 1975), where the employer was not a "perfectly clear" successor because representatives explicitly stated in its initial meeting with the union that initial pay rates would be different from those of the predecessor.

[10] East Belden Corporation, 239 NLRB 776, 793 (1978), enfd. 634 F.2d 635 (9th Cir. 1980) (employer was not free to set initial employment terms where the employees had not been "clearly informed of the nature of the changes which Respondent intended to institute in the future, rather Respondent's announcement was couched in generalized and speculative terms").

[11] Specialty Envelope Co., 321 NLRB 828 (1996), reversed in relevant part 153 F.3d 289 (6th Cir. 1998).

employees home, the Receiver told the employees to return to work. The Receiver did not require an employment application for continued employment and gave no information about changes in employment terms before permitting employees to return. The Receiver renounced the contract and announced changes in employment terms on the first day of operations "but not before employees were invited to return to the plant." 321 NLRB at 830. In finding a "perfectly clear" successor in those circumstances, the Board reasoned that "the notices of changed terms and conditions of employment came too late, because they were given after it was clear that [the receiver] intended to retain the employees." Id. In DuPont Dow Elastomers, 332 NLRB No. 98 (2000), the employer announced to the unions on November 30 that it intended to offer employment to all incumbent employees under terms and conditions to be announced later. Two weeks later, the employer stated that it would not honor the collective-bargaining agreements, but would maintain the employees' wages and benefits under those contracts, adding only a "hiring incentive bonus of success sharing." Id., slip op. at 4. In concluding that the employer was a "perfectly clear" successor as of November 30, and thus obligated to bargain on that date, the Board emphasized that "the addition of success sharing - the only announced change - would have enhanced, not diminished, the likelihood that employees would accept the offers." Thus, "up to and beyond the time of making formal offers of employment to all affected DuPont employees, [the successor] manifested a clear desire to retain all those employees under existing working conditions." Id., slip op. at 4.

In the instant case, during March 2000 before the Employer commenced performing the Atlantis work, Caesar's offered the former Atlantis employees employment and told them that there would be no change in their terms and conditions of employment and there was no reason to worry about their jobs. It appears that the former Atlantis employees were offered and accepted employment before April 3, when the Employer informed the Union that the former Atlantis operations would be "operationally merged and completely integrated" into the HERE unit. But even assuming that the offers and acceptances occurred on or shortly after April 3, unlike Holly Farms, Caesar's did not have a "well defined plan or timetable for achieving full integration of operations" that might, in other

circumstances, have permitted Caesar's to have withdrawn recognition from the Union.[12] On April 3 Caesar's told the Union that the unit would be merged with HERE, and a week later Caesar's told the Union that the Atlantis operation "will now be merged and integrated with" the Operating Engineers unit. Thus, even after April 1, when Atlantis maintenance contract expired, Caesar's was not sure it was going to merge operations. Accordingly, Caesar's was a "perfectly clear" successor that was privileged neither to set original terms and conditions of employment without consultation with the Union nor to modify unilaterally those terms and conditions thereafter.

[12] See Holly Farms Corp., 311 NLRB 273, 279 (1993), enfd. 48 F.3d 1360 (4th Cir. 1995), affd. 517 U.S. 392 (1996), where the Board rejected the same accretion defense raised by the Employer in this case.

2. Under Advanced Stretchforming,[13] Caesar's forfeited its right to set original terms and conditions of employment and implement changes in their terms and conditions of employment thereafter.

In Love's Barbeque Restaurant[14] and similar cases where a successor employer engaged in a scheme of unlawful hiring in order to avoid a union majority, the Board has consistently resolved against the successor employer any uncertainty as to whether that employer planned to retain all of the employees in the unit absent its unlawful purpose. In those circumstances, the Board has found that the successor "would have retained all of the employees had it not decided to avoid hiring them because of their union activity,"[15] and consequently that the "[u]nion's presumption of majority status would have continued" if the predecessor's employees had been hired.[16] Accordingly, the Board finds an independent violation of Section 8(a)(5) and (1) where such a successor unilaterally departs from existing terms and conditions and orders the employer to restore the working conditions that existed under the predecessor employer.[17]

The Board applied the Love's Barbeque rationale in Advanced Stretchforming where the successor declared to a majority of the predecessor's employees that they would be hired, but at different terms and conditions of employment than employees enjoyed under the predecessor. During

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[13] Advanced Stretchforming International, Inc., 323 NLRB 529 (1997), remanded 233 F.3d 1176 (9th Cir. 2000).

[14] 245 NLRB 78, 124 (1979), enfd. in pert. part sub nom. Kallman v. NLRB, 640 F.2d 1094 (9th Cir. 1981).

[15] Love's Barbeque, 245 NLRB at 82.

[16] State Distributing Co., 282 NLRB 1048 (1987).

[17] See, e.g., U.S. Marine Corp., 293 NLRB 669, 672 (1989), enfd. 944 F.2d 1305 (7th Cir. 1991), cert. den. 503 U.S. 936 (1992); State Distributing Co., above; and Love's Barbeque, above.

employment interviews the successor further told the predecessor's unionized employees that there would be no union at its facility. The employer subsequently conducted an unlawful poll of employee sentiment and ultimately refused to recognize or bargain with the union.

Citing the coercive effects of the unfair labor practices, the Board revoked the successor employer's Burns privilege to set initial employment terms. It compared this sort of coercion -- coming "[a]t this unsettling time of transition when 'a union is in a peculiarly vulnerable position'"[18] -- with a deliberate scheme to avoid a bargaining obligation by discriminatorily refusing to hire predecessor employees. In those circumstances, the Board applies a well-established exception to the Burns doctrine in order to revoke the successor employer's privilege to set initial terms and conditions of employment. Thus, even though the employer in Advanced Stretchforming clearly offered to hire employees under different terms than they enjoyed with the predecessor the Board held that, it would be contrary to statutory policy to "confer Burns rights on an employer that has not conducted itself like a lawful Burns successor because it has unlawfully blocked the process by which the obligations and rights of such a successor are incurred." State Distributing Co., 282 NLRB at 1049. In other words, the Burns right to set initial terms and conditions of employment must be understood in the context of a successor employer that will recognize the affected unit employees' collective-bargaining representative and enter into good-faith negotiations with the union about those terms and conditions.[19]

In the instant case, the Employer told the Union on various dates in April, that it would merge the former Atlantis employees into a larger unit and withdraw

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[18] Ibid., quoting Fall River Dyeing & Finishing v. NLRB, 482 U.S. at 39-40.

[19] Advanced Stretchforming, 323 NLRB at 530. Accord: Danfuskie Island Club & Resort, 328 NLRB No. 56 (1999), enfd. 221 F.3d 196 (D.C. Cir. 2000) (discriminatory refusal to hire). Cf. Trans-Lux Corporation, Case 18-CA-14523, Advice Memorandum dated November 12, 1997, where the successor had not evinced a clear plan to retain all.

recognition from the Union. On April 21, Caesar's told the former Atlantis employees, among other things, that it would consider them nonunion and that they would have to join the Operating Engineers and serve a 60-day probationary period. Because the former Atlantis employees continued to constitute a separate appropriate unit,[20] the successor Employer unlawfully denied them representation by their Union, Teamsters Local 331, and forced them to join the Operating Engineers. By so doing, Caesar's unilaterally denied the former Atlantis employees the terms and conditions of employment set forth in their collective-bargaining agreement and representation by their bargaining representative. Thus, the Region should alternatively argue that this case is controlled by Advanced Stretchforming, which stands for the proposition that a successor employer forfeits its privilege to set initial employment terms when it engages in unfair labor practices when it takes over the predecessor's business.

3. Even assuming that Caesar's was not a "perfectly clear" successor and thus could lawfully set initial terms and conditions of employment, Caesar's violated Section 8(a)(5) under Burns by changing those terms and conditions of employment without previous bargaining with the Union.

Under this theory of violation, since the former Atlantis employees continued to have the same working conditions until May, the Region should argue that Caesar's chose as its initial terms and conditions of employment those provided for in the Teamster's contract. Therefore, Caesar's was obligated to bargain with the Union prior to making changes in those working conditions in May under Burns.[21]

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[20] In successorship cases where a party seeks to defeat the successorship by showing that the unit was no longer appropriate, the proponent of that view carries a heavy burden. Lincoln Park Zoological Society, 322 NLRB 263, 264 n.1 (1996) (citing Trident Seafoods, 318 NLRB 738 (1995)), enfd. 116 F.3d 216 (7th Cir. 1997); Banknote Corporation of America, 315 NLRB 1041, 1043-44 (1994), enfd. 84 F.3d 637 (2d Cir. 1996), cert. denied 519 U.S. 1109 (1997).

[21] Since at least NLRB v. Jacobs Manufacturing Co., 196 F.2d 680, 683-684 (2d Cir. 1952), an employer has been obligated

4. Caesar's was under a duty to bargain about merging the historical unit into the Operating Engineers unit.

In Holly Farms Corp.,[22] the successor sought to integrate the predecessor's transportation operations into its own transportation operations. The successor was unwilling to bargain about the decision to merge the operations. The Board held that the successor was not required to bargain about the "decision to functionally integrate" the two transportation departments. 311 NLRB at 277. It found that the integration would permit backhaul revenues, involved the expenditure of capital, and therefore involved a change in the scope and direction of the division. Id. at 277-78. It was therefore

> a third type of management decision, one that had a direct impact on employment... but had as its focus... a concern... wholly apart from the employment relationship.[23]

As such, the Board balanced the benefit of collective-bargaining over the decision against the burden placed on the conduct of the business, and found that the burden outweighed the benefit that might be gained from collective-bargaining. However, the Board concluded that the employer did have a obligation to bargain over the decision to offer Holly Farms employees employment as Tyson's employees under Tyson's terms and conditions of employment "as a effect of the integration decision." Thus, the Respondents were obligated to bargain "about the various ways in which the integration might affect the employment status and wages and benefits of the former Holly Farms drivers." 311 NLRB at 278.

In the instant case, unlike Holly Farms, the Employer's decision to merge the units was a mandatory

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to bargain about genuinely new terms and conditions of employment.

[22] Holly Farms Corp., above 311 NLRB 273.

[23] First National Maintenance Corp. v. NLRB, 452 U.S. 666, 677 (1981).

subject of bargaining because it only involved the assignment of maintenance work, not a true integration of operations that involved an expenditure of capital. Its decision was "almost exclusively 'an aspect of the relationship' between employees,"[24] a different type of management decision which does not involve balancing and instead requires collective bargaining before implementation.[25]

Accordingly, the Region should issue complaint, absent settlement, alleging that Caesar's was not privileged to set original terms and conditions of employment or to unilaterally implement different terms and conditions of employment thereafter, both under a "perfectly clear" successor theory and under an Advanced Stretchforming theory. In addition, the Region should allege that even assuming that Caesar's was free to set the original terms and conditions of employment under which the former Atlantis employees would work, Caesar's could not lawfully change those terms and conditions of employment without previous bargaining with the Union.[26]

B.J.K.

[24] Id. at 677.

[25] See, e.g., Geiger Ready-Mix Co. of Kansas City, 315 NLRB 1021, 1023 n.17 (1994) (transfer of work out of unit mandatory, and analysis closer to Fibreboard Corp. v. NLRB, 379 U.S. 203 (1964) than Dubuque Packing Co., 303 NLRB 386 (1991)), enfd. in rel. part 87 F.3d 1363 (D.C. Cir. 1996).

[26] Since we are alleging that the Employer unlawfully withdrew recognition from the Union, the Region should consider whether Section 10(j) proceedings are warranted.