

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

Advice Memorandum

DATE: May 9, 2001

TO : James S. Scott, Regional Director
Region 32

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

SUBJECT: KJEO-TV currently known as KGPE-TV
Case 32-CA-18419-1 530-4825-6700

This Section 8(a)(5) case was submitted for advice as to whether the Employer was a "perfectly clear" successor obligated to bargain with the Union before setting initial terms and conditions of employment, whether the Employer made unlawful unilateral changes, and whether Section 10(j) injunction proceedings are warranted.¹

FACTS

Background

Sometime prior to 1993, the American Federation of Television and Radio Artists, Fresno Local ("the Union") was certified as the collective bargaining agent for certain employees of Retlaw Broadcasting Company ("Retlaw") d/b/a KJEO-TV, a television station in Fresno, California. The Retlaw unit included all full-time and regular part-time "Artists" who participate in television programs broadcast there. Retlaw and the Union were parties to a collective-bargaining agreement ("the Agreement") that expired on July 1, 1993.

In 1993, after the expiration of the Agreement, Retlaw and the Union were unsuccessful in reaching agreement on the terms of a new collective-bargaining agreement. In 1994, the Region issued complaint alleging that Retlaw had failed to provide the Union with requested information, insisted to impasse on permissive subjects and made unilateral changes by implementing its final offer in the absence of a valid impasse. The Board issued a decision, enforced by the Ninth Circuit in March 1999, affirming the ALJ's conclusion that Retlaw had violated the Act as

¹ The Section 10(j) request will be addressed in a separate memorandum.

alleged.² During the pendency of the unfair labor practice case, between late 1993 and 1999, Retlaw and the Union did not engage in collective bargaining.

On July 1, 1999, Fisher Broadcasting, Inc. ("Fisher") purchased the assets of Retlaw, including KJEO-TV where the Retlaw unit employees were employed. Fisher recognized the Union as the bargaining representative of what had previously been the Retlaw unit. Between July of 1999 and May of 2000, Fisher and the Union had a number of communications regarding bargaining. No agreement was reached.

On May 5, 2000,³ Fisher notified the Union that Fisher had reached agreement for the sale of KJEO-TV to AK Media Group, a wholly owned subsidiary of the Ackerley Group ("the Employer").

The Events Concerning the Current Charge

The sales agreement between Fisher and the Employer provided that the Employer was purchasing Fisher's membership interest in Fisher LLC,⁴ Fisher was responsible for severance payments for laid-off employees, and that, before the closing of the sale, Fisher would provide the Employer with the resignations of the current Fisher LLC managers.⁵

After 5 P.M. on July 28, Employer attorney Blackstone sent a letter (by fax and certified mail) to Union representative Cleaveland officially informing the Union that the Employer was purchasing Fisher LLC (KJEO-TV), and expected to close the sale on August 1. The letter also stated:

It is currently the intention of AK Media Group to generally maintain the current level of wages and benefits of the bargaining unit employees after August 1st, except as necessary to convert

² Retlaw Broadcasting Co., 324 NLRB 138 (1997), enfd. 172 F.3d 660 (9th Cir. 1999).

³ Unless otherwise noted all remaining dates are in 2000.

⁴ The membership interests are equivalent to stock holdings in a regular corporation.

⁵ Once the sale closed, the Employer did in fact install a new, interim general manager, but apparently did not accept the resignation of and replace any other Fisher managers.

employees to Ackerly benefit plans in lieu of the Fischer benefit plans they are currently participating in but will no longer be eligible for after closing. As you might expect there are some differences in benefits, but on balance we believe that employees will be better off under the Ackerly benefit programs. However, it is not the intention of AK Media Group to include Fresno bargaining unit employees in the Ackerly Group's 401(k) plan. We are willing to discuss other alternatives to the Ackerly 401(k) with you.

A few days before August 1, the Fisher unit employees were informed by the Fisher LLC general manager that a "mandatory" meeting would be held for all employees on August 1. It is not clear whether the reason for the meeting was disclosed to the employees.

On July 31, Union agent Cleaveland met in Seattle with Fisher representatives Loihl and Tucker to engage in "effects" bargaining. At this time, Loihl presented Cleaveland with a copy of a letter dated May 2, which set severance terms for Fisher unit employees who would be laid off by Fisher LLC at or after the closing. Loihl said that he had not known of the existence of this document until that morning and took the position that there would not be any "effects" negotiations as the severance terms had already been set by Fisher and the Employer. The meeting ended at that point. On the closing date, August 1, there were approximately 63 employees in the Fisher unit.

At 9:30 A.M. on August 1, the Employer's president and interim KJEO-TV⁶ general manager, David Reid, and its Human Resources Manger, Judy Porterfield, conducted a meeting for all station employees. The Employer informed employees that it would recognize the Union but that they would no longer be under the Fisher benefit plans, including the 401(k) plan. Porterfield also told the Fisher unit employees that they would not be eligible to enroll in the Employer's 401(k) plan, that this issue would be an important part of the negotiations between the Employer and the Union, and that the employees would be covered under the other Employer benefit plans. The employees were told that they needed to complete a new application, but that these applications were simply necessary for the Employer's files. There was no indication that the Employer would use the applications to determine who should be retained, and

⁶ At some time after the sale closed, the Employer made KJEO-TV a part of the its Central California Station Group, and the station's call letters were changed to KGPE-TV.

there is no evidence that the Employer made any hiring decisions based on the new applications. At some point during the meeting, the employees were also informed that the Employer intended to install and use robotic cameras at the station in the near future.

On August 2, the Union replied to the Employer's July 28 letter stating its position that the new owner was bound by the Ninth Circuit Court's enforcement of the Board Order, and that the new owner could not make the proposed changes, or other changes impacting the Fisher unit, without first bargaining with the Union. The Union also suggested a meeting during the week of August 9.

On August 16, the Union began negotiations for a new collective-bargaining agreement. At this meeting, the Employer announced a number of terms and conditions of employment which had already been or would be changed, including programming and equipment changes, vacation and sick leave, and substantive changes in deductibles and coverage in the health and dental plans, respectively. The Employer also reiterated its position that Fisher unit employees would not be covered by the Employer's 401(k) plan. The Union stated that it would come up with one or two 401(k) options, plus a proposal for an overall collective bargaining agreement. The Employer explained the terms of the Employer's various benefit plans. No agreements were reached during this initial session, and the parties agreed to meet again on September 5.

Between August 16 and August 23, a majority of the employees in the former Fisher unit signed a petition stating that they no longer wished to be represented by the Union and gave it to the Employer. On August 24, the Employer notified the Union that it was withdrawing recognition from the Union. On that same date, the Employer provided the Union with severance amounts provided to the four Fisher unit employees terminated by the Employer. It appears that the amounts provided to those employees were less than what should have been provided under the terms of the collective-bargaining agreement.

ACTION

We agree with the Region that there is sufficient evidence that the Employer had a plan to retain all but 4 of the unit employees before it announced that it was offering new terms and conditions of employment, thereby rendering its subsequently announced unilateral changes in those terms unlawful. Accordingly, a Section 8(a)(5) complaint should issue, absent settlement.

First, we conclude that the Employer was a "perfectly clear" Burns⁷ successor to Fisher. 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.⁸ 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 products, and basically has the same body of customers.⁹ The Board views these factors from the employees' perspective, i.e., whether the retained employees would "understandably view their job situations as essentially unaltered."¹⁰ 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,¹¹ and whether the new employer's workforce comprises an appropriate unit.

⁷ NLRB v. Burns International Security Services, 406 U.S. 272 (1972).

⁸ Id. at 280-281.

⁹ Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 43 (1987).

¹⁰ 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).

¹¹ 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).

Here, there was no break in operations when the Employer took over Fisher LLC, and at least a substantial percentage of the Fisher unit employees had already been actually working for the Employer prior to being told that it was their new Employer. The employees continued to perform the same work under the same working conditions and supervisors, for the same customers. The 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 Burns¹² the Supreme Court enunciated an 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.,¹³ 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."¹⁴ 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"

¹² 406 U.S. at 294-95.

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

¹⁴ Id. at 1052.

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.¹⁵ The Board has also applied the "perfectly 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.¹⁶

¹⁵ 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 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.

¹⁶ 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").

In Specialty Envelope,¹⁷ the Board found a "perfectly clear" successor in circumstances where five days after the predecessor ran out of cash and sent the 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.

More recently, in DuPont Dow Elastomers, 332 NLRB No. 98 (2000), the employer announced to the unions on November 15 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 or 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 stated:

The Respondent had announced its clear intent to hire the DuPont unit employees on November 15, while at the same time stating that it would disclose the terms and conditions of employment on November 30. On that later date, the Respondent did not announce any new terms and conditions of employment other than success sharing, thus leading employees to believe that they would be employed on substantially the same basis as before. Id., slip op. at 4.

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." This supports the conclusion that the employer intended to retain the predecessor's employees without any significant changes. Thus, "up to and beyond the time of making formal offers of employment to all affected DuPont

¹⁷ Specialty Envelope Co., 321 NLRB 828 (1996), revd. in rel. part *sub nom.* Peters v. NLRB, 153 F.3d 289 (6th Cir. 1998).

employees, [the successor] manifested a clear desire to retain all those employees under existing working conditions." Id., slip op. at 4. As a remedy, the Board ordered recession, upon request, of all changes made on April 1, the date the employer began operations. However, the Board concluded that the employer lawfully unilaterally implemented the "success sharing" program which it had announced on November 30.¹⁸

In the instant case, the facts indicate that the Employer had a plan to retain all the predecessor's employees. In this regard, we note that the Employer's attorney told the Union on July 28 that it planned to generally maintain the current level of wages and benefits of the bargaining unit employees after August 1, except only as necessary to convert them to the Employer's benefit plans. He also told the Union that the Fisher unit employees would not be eligible for the Employer's 401(k) plan, but that the Employer was willing to discuss other pension alternatives with the Union. The Employer's attorney did not discuss any details concerning its benefit plans. Significantly, the Employer did not announce that it would eliminate or make substantive changes to the benefit plans, only that it would change them as necessary. In Fremont Ford, "perfectly clear" successorship was found despite the employer's announced changes in seniority and flatrate pay. Here, the announced changes in benefit plans are not as significant as those in Fremont Ford. Indeed, the Employer stated that it believed that the employees would be better off with the benefits under the Employer's plans compared with the Fisher plans. As in Dupont Dow (unilateral implementation of "success sharing") this belief that it was offering improved benefits indicates that as of July 28, the Employer intended to retain the workforce without significant changes to the existing terms and conditions of employment. In these circumstances, we conclude that the announced changes in the 401(k) plan and necessary administrative changes to other benefit plans did not preclude the Employer from being a "perfectly clear" successor under Burns.¹⁹

Although the Employer can lawfully refuse to place the unit employees under its 401(k) plan and make only those

¹⁸ 332 NLRB No. 98, slip op. at 5, n.16.

¹⁹ Of course, since the Union requested, pursuant to the Employer's invitation, to bargain over 401(k) options, the Employer has an obligation as a Burns successor to bargain to agreement or good-faith impasse regarding this mandatory subject.

changes necessary to convert the employees to its other benefits plans, it was not free to unilaterally change any

other terms and conditions of employment. Thus, the Employer violated Section 8(a)(5) by announcing and/or implementing the other changes announced on August 16.²⁰

B.J.K.

²⁰ [FOIA Exemption 5