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

Advice Memorandum

DATE: June 15, 2000

TO : Gerald Kobell, Regional Director
Region 6

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

SUBJECT: Unipaper Recycling Company
Case 6-CA-31260

530-4080-5012-5000
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, and whether the Employer unlawfully refused to recognize and bargain with the Union, when its refusal was based on the results of polling employees as to whether they wished to have the Union continue to represent them.

FACTS

Briefly, the Union had been certified in 1989 to represent the predecessor (BFI)'s employees in Allegheny County, Pennsylvania. In 1992, when BFI began operating a recycling facility in the county with paper and plastic recycling operations, BFI and the Union agreed to accrete the approximately 20 recycling employees into the existing unit of approximately 110 trash collection and landfill employees in the county. The recycling employees were then covered by successive collective-bargaining agreements.

On March 13, 2000,[1] BFI sold the recycling facility to the Employer, notified the Union of the sale, and terminated the unit employees at the facility immediately. The Employer president, Hudock, hired a BFI supervisor, Lewis, as the recycling plant manager, and told him to hire the "cream of the crop" of the BFI employees. Hudock says that he told Lewis that he was unwilling to maintain the

[1] All dates are in 2000 unless otherwise indicated.

benefits under the Union agreement, and to tell those employees offered jobs that their benefits would change. Lewis interviewed and hired 7 former BFI employees, who began work on March 15.[2] The Region states that there is no dispute that while the 7 employees were told during the interviews that their wages would remain the same, the benefits they enjoyed under BFI and the Union contract would essentially be void. It appears that the employees did receive the same wages, but there is no evidence that the employees received any benefits after beginning work for the Employer. Hudock told the Region that he has still not determined exactly what benefits the employees would receive.

The Union, in two meetings with the Employer on March 27 and 29, demanded that the Employer recognize and bargain with it for the remaining recycling employees. The Employer refused. Although disputed by the Union, Hudock told the Region that on March 29 he told the Union that, based on statements employees supposedly made to Lewis, he doubted whether the employees desired Union representation.[3] [*FOIA Exemptions 6, 7(C) and 7(D)*] they did not tell either Hudock or Lewis that they no longer wanted Union representation, prior to the events of April 3.

On April 3, Lewis called the 6 employees on the payroll as of that date to the lunchroom, told them that the Employer felt that the employees should vote on whether they wanted Union representation, that the Employer did not care which way they voted but would abide by the desire of the majority, and that there would be no job loss or discrimination regardless of which way they voted. After Lewis left the room and closed the door, the employees discussed the issue, voted unanimously that they did not

---

[2] The Employer hired only 7 employees because it operated just the paper recycling line on one shift, dismantling the plastics line equipment and either selling it or moving it to the facility of a sister corporation.

[3] Lewis told the Region that, prior to April 3, only one employee made it clear he did not want the Union to represent the employees, while three other employees told Lewis they did not care for the Union.

want Union representation, signed a paper stating that, and gave it to the Employer.

ACTION

We agree with the Region that the Employer violated Section 8(a)(5) by failing and refusing to recognize and bargain with the Union, and Section 8(a)(1) by polling the employees. However, we conclude that the Employer was not a "perfectly clear" successor obligated to bargain with the Union before setting initial terms and conditions of employment.

Thus, for the reasons stated by the Region, we agree that the Employer was a successor to BFI in an appropriate unit for this portion of the BFI operations, and that there was a Burns[4] successor bargaining obligation. Because the Employer's unit workforce was made up entirely of represented former BFI employees and the Union requested bargaining, the Employer could not lawfully refuse to bargain with the Union even if there was evidence of an untainted loss of majority Union support.[5] Further, under Allentown Mack,[6] the Employer did not have a reasonable good-faith basis for polling its employees on April 3. [*FOIA Exemptions 6, 7(C) and 7(D)*

.][7]

However, we conclude that the Employer was not a "perfectly clear" successor. In Spruce Up Corp.[8] the Board

---

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

[5] St. Elizabeth Manor, 329 NLRB No. 36 (1999).

[6] Allentown Mack Sales & Services, Inc. v. NLRB, 522 U.S. 359, 118 S.Ct. 818 (1998).

[7] [*FOIA Exemptions 6, 7(C) and 7(D)*

.]

found no perfectly clear successor when the employer, in its initial meeting with the union prior to takeover, made clear that initial terms and conditions would be different from those of the predecessor. Here, Lewis invited certain employees to apply for work with the Employer, and at the interviews Lewis told them either that they would not receive benefits or that it was uncertain what benefits they would receive. The employees were, therefore, on notice before or at the same time they were offered employment that their initial terms and conditions would be different.[9] As indicated before, the employees apparently have not received benefits, consistent with what they were told during their hiring by Lewis. Therefore, we would not argue that the Employer was a "perfectly clear" successor obligated to bargain over initial terms and condition of employment.[10] Our conclusion that the successor Employer was not obligated to bargain before setting initial terms, i.e., the absence of benefits, does not mean that it would later be privileged to unilaterally set benefits which were

---

[8] 209 NLRB 194, 195 (1974), enfd. 529 F.2d 516 (4th Cir. 1975), distinguished in Canteen Co., 317 NLRB 1052, 1053 (1995), enfd. 103 F.3d 1355 (7th Cir. 1997).

[9] See, e.g., Holiday Inn of Victorville, 284 NLRB 916, n. 2 (1987)(employer did not forfeit right to set initial terms by offering employment simultaneously with announcing some new terms and that the insurance benefits were subject to change). Compare East Belden Corp., 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, when offered employment, 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") (emphasis added).

[10] [*FOIA Exemption 5*

.]

not specifically announced and implemented before commencement of operations.[11]

B.J.K.

[11] See, e.g., East Belden, 239 NLRB at 793 (successor not allowed to make unilateral changes two months after commencing operations, when nature of changes not clearly announced prior to takeover).