

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

Advice Memorandum

DATE: June 27, 2000

TO : Sandra Dunbar, Regional Director
Region 3

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

SUBJECT: Sodexho Marriott Services, Inc.
Case 3-CA-22050

530-4040-5042
530-4825-6700

This Section 8(a)(5) case was submitted for advice as to whether the Employer violated Section 8(a)(5) by failing and refusing to recognize the Union as the collective-bargaining representative of a unit of employees that had been recognized by the predecessor employer a month before the Employer took over the predecessor's division employing those employees, completing its takeover of all of the predecessor's food service operations.

FACTS

For twenty years UAS operated all of the food service operations at the SUNY-Albany college campuses in Albany, New York, including five "quad" cafeterias for dormitory resident student dining; a "campus center" with a public cafeteria, a retail food court with fast food outlets, and a formal restaurant; six retail convenience stores/snack bars; and catering facilities and a commissary where baked goods are produced and where food is received from vendors. In August 1998, UAS contracted with Sodexho Marriott Services (the Employer or Marriott) to provide consultation services to UAS, with the anticipation that the Employer would contract with UAS to operate and manage the food service operations the following academic year.

In January 1999,¹ due to "management problems," UAS fired its "retail" manager and engaged the Employer to directly run its "retail" operations, i.e., services other than the quad cafeterias. Also in January, the Employer and UAS agreed that the Employer would take over all UAS operations by July 1, with the Employer operating all retail operations no later than January 25 and with those

¹ All dates are in 1999 unless otherwise indicated.

employees being transferred to the Employer payroll no later than March 6. All other employees and operations would be transferred to the Employer by July 1. The Region states that the Employer's assumption of retail operations in March did not follow strict "cafeteria" versus "retail" operations, since UAS remained the direct employer of the employees of four snack bars in the resident quads and the commissary. By letter dated May 3, the Employer announced a series of meetings in early May for the employees still on UAS payroll, described as "quad associates," to prepare for their "conversion to Sodexo Marriott payroll."

The Union had begun organizing UAS employees in the fall of 1998. On May 5, 1999, UAS and the Union executed a "memorandum of agreement" which provided, inter alia, for a card check agreement by an arbitrator. The Union solicited cards and, in a card check on June 1, the arbitrator determined that there was majority Union support in a unit of the employees at the quad cafeterias and the commissary (warehouse/bakery). Out of 252 employees on the UAS early May eligibility lists, the Union obtained 165 cards. The Union also asserts that in May it obtained 67 cards from food service employees already employed by the Employer, out of approximately 137 such employees. On June 22, UAS and the Union held their only bargaining session, where there was discussion of a Union proposal regarding "successor and assigns" language.²

Effective July 1, the Employer assumed formal employment of the remaining UAS employees. By letter dated July 12, the Union requested recognition from the Employer. By letter dated July 20 the Employer expressed doubt as to the Union's majority status, and suggested that the Union file a representation petition. The instant charge was filed July 23. While many employees were not working during the summer school break, the Region states that a representative complement existed by the end of the first school week of the fall semester (September 10), when former UAS employees constituted a majority of the unit for which UAS extended recognition. That majority in that unit remained through the pay period ending October 8. Former UAS employees did not constitute a majority of all of the

² The Employer has provided a copy of a suit filed by the Union against UAS in September 1999, alleging breach of an alleged agreement arising out of the June 22 bargaining session to require the Employer to hire all UAS employees at equal or greater wages and benefits. The status of that suit is unclear.

Employer's employees on or after the September 10 representative complement date.

The Employer operates the food services much as did UAS, with a resident general manager for the quad cafeterias and a retail manager for the retail facilities, both reporting to a single overall manager. Each of the quad cafeterias has a unit manager reporting to the resident general manager. There is common high management, including a human resources manager, marketing manager, controller, and executive chef. While there is a single campus-wide system for classifying employees, with a single wage scale, the Union asserts that students do not receive the same wages as non-students, perhaps because of their lack of seniority. The Union also states that the majority of the retail employees are students, while only 20% of the quad cafeteria employees are students. There appears to be separate immediate supervision, and the Union states that the supervisors do not interchange between the retail and quad cafeteria divisions. There is some intermingling of employees in the sense that retail and quad employees work together on special events, i.e., graduation, homecoming, summer orientation, and holiday parties. There has been minimal interchange of employees and few instances of employees being transferred from a quad facility to a retail facility, or vice versa; there have been more transfers between quad facilities.

ACTION

We conclude that a complaint should issue, absent settlement, alleging that the Employer violated Section 8(a)(5) by failing and refusing to bargain as a successor employer with the Union for the "quad cafeteria" unit recognized by UAS.

The Employer operated the same food service operations at the same campus in substantially the same manner as did UAS, although the Employer took over the operations in two stages, the "retail" or "campus center" services in January-March and the "resident dining" or quad cafeterias unit on July 1. The Region has determined that a majority of the Employer's workforce in the relevant unit, i.e., the quad cafeterias, consisted of former UAS employees at the relevant time. Thus, the only successorship factors in real dispute are whether the recognized unit was appropriate, and whether the fact that UAS recognized the Union during a transition period when the Employer had already taken over some UAS operations and was soon to take over the quad cafeteria operations affects the application of normal successorship law.

Successors are bound to recognize an incumbent union in a unit voluntarily recognized by a predecessor, unless the successor can carry the "heavy burden" of showing that a "historical" unit is no longer appropriate.³ While the facts of Trident Seafoods, Indianapolis Mack and similar cases involved unions that were voluntarily recognized in units by the predecessors for years, the General Counsel, with the concurrence of an ALJ, has taken the position that a successor was obligated to recognize and bargain with a union recognized one day before the successor took over the building maintenance operations in a single building unit which the successor contended was inappropriate.⁴ In USSI all parties knew that the maintenance contract for the particular building in question was to be assumed by the successor the day after recognition was extended pursuant to a card check. The successor contended that the appropriate unit was the employees working on all building maintenance contracts in the area, and that the recognition was invalid because the parties knew that the predecessor had lost the contract. The ALJ rejected those arguments, finding that the successor had not met its burden of demonstrating that a single building unit was inappropriate, and noted that there appeared to be "no extant authority for the proposition that the nature of a successor's bargaining obligation depends upon the duration of the predecessor's bargaining relationship with a union."⁵

³ Trident Seafoods, Inc., 318 NLRB 738, 738-40 (1995), enf'd. in rel part 101 F.3d 111 (D.C. Cir. 1996), citing, e.g., Indianapolis Mack Sales, 288 NLRB 1123 n. 5 (1988), enf. denied 802 F.2d 280 (7th Cir. 1986) (a "mere change in ownership should not uproot bargaining units that have enjoyed a history of collective bargaining unless the units no longer conform reasonably well to other standards of appropriateness").

⁴ United States Service Industries, Inc., Case 5-CA-24575, Appeals Minute December 14, 1994; JD-215-95 (December 13, 1995) (case settled).

⁵ Id., ALJ slip op. at 5-6. See, e.g., D & F Super Market, 208 NLRB 891, 892 (1974), enf'd. unpub. op. 74 LC Para. 10,699 (10th Cir. 1975) (successor obligated to bargain with union voluntarily recognized by predecessor 2 months before takeover). Cf. Service America, Case 3-CA-13950, Advice Memorandum dated July 27, 1988 (successor at SUNY-New Paltz campus obligated to bargain with union certified by New

We conclude that, even where the Employer was in the process of taking over UAS' food service operations in stages pursuant to a commercial arrangement with a definite timetable, the Employer was obligated as a successor to bargain concerning the quad cafeteria unit voluntarily recognized by UAS if that unit was an appropriate unit both under UAS and remaining so under the Employer. If, during a takeover in stages with a definite timetable, a predecessor voluntarily recognizes a union for a unit of employees that the Board would not find appropriate, a successor would not be obligated to recognize and bargain for such a unit.⁶ This test would distinguish such cases as Trident Seafoods, where the test for a successor bargaining obligation for a historical unit, outside the context of a "transitional" takeover in stages by a successor, was described as whether the historical unit was "repugnant" to Board policy.⁷

Here, we conclude that the quad cafeteria unit recognized by UAS was an appropriate unit both under UAS and after the Employer finalized its takeover of all UAS operations. Under both employers, the "retail" or "campus center" and the "quad cafeteria" operations were separate divisions with separate direct supervision and separate employee complements, with only minimal employee interchange. The separateness of the divisions is illustrated to some extent by the manner in which the Employer took over UAS' operations in stages, i.e., first the "retail" division and then the "quad cafeterias," and by its May letter reference to "quad associates." While the employees in both divisions are under the same ultimate labor relations management, the Board has given much weight to separate immediate supervision and lack of interchange in finding less than an overall unit appropriate.⁸ In fact,

York state agency 2 months before successor took over food service contract).

⁶ Compare, e.g., Red Coats, Inc., 328 NLRB No. 28, pp. 3-4 (1999) (employer not privileged to repudiate bargaining obligation with union it voluntarily recognized on the ground that unit was inappropriate) (not in successor situation); Chemetron, 258 NLRB 1202, 1203 (1981), enf. denied 699 F.2d 148 (3d Cir. 1983) (same).

⁷ Trident Seafoods, 318 NLRB at 738, 740.

⁸ See, e.g., Red Lobster, 300 NLRB 908, 911 (1990); Passavant Retirement & Health Center, 313 NLRB 1216, 1218

the primary case relied on by the Employer here is consistent with such an analysis. Thus, in P.S. Elliott Services, Inc.⁹ the Board found a successor not obligated to bargain with the union for a recognized single building maintenance unit, when that unit was no longer appropriate given the lack of separate, on-site supervision and the frequent interchange of employees between buildings maintained by the successor.

The Employer also relies on Cornell University¹⁰ for the proposition that a less-than-overall unit of a campus food service operation is inappropriate. There, the Board found inappropriate a petitioned-for unit that consisted of only 10 of the 18 dining facilities on the Cornell campus. That requested unit consisted primarily of dining rooms and cafeterias and excluded mostly snack bars and coffeehouse, but did mix and match the types of facilities in that it excluded several full-service dining facilities and included a snack bar. The employer contended that an overall unit of all campus employees, not just food service employees, was the only appropriate unit. The Board found that the petitioned-for unit was inappropriate, and directed an election in a campus-wide food service unit.

Here, the recognized unit consisted of all of the resident dining facilities and excluded the "retail" operations, including the snack bars still operated by UAS at the time of recognition. This does not appear to be a case where the Union was taking advantage of the circumstances of the transition to complete Employer operation to "cherry pick" off an inappropriate unit in collusion with UAS. Other cases dealing with the appropriateness of less than overall units in "campus" situations support the finding that the "quad cafeteria" unit at issue here was and is appropriate,¹¹ obligating the

(1994) (accretion case); Washington Palm, Inc., 314 NLRB 1122, 1126-28 (1994) (factors making separate unit of nontipped kitchen employees "an" appropriate unit included separate supervision and physical layout of restaurant).

⁹ 300 NLRB 1161 (1990).

¹⁰ 202 NLRB 290 (1973).

¹¹ Cf., e.g., Control Services, Inc., 319 NLRB 1195, 1195-96 (1995) (successor took over maintenance contracts for 3 of four buildings at office complex, all 3 of which had been separately recognized by the predecessor; Board found bargaining obligation at single Building IV, in which union

Employer to have recognized and bargained with the Union for that unit.

Accordingly, the Region should issue a Section 8(a)(5) complaint, absent settlement.

B.J.K.

had been recognized only the previous year, at which there was no specific collective-bargaining agreement, and which was the only one where the successor had hired a majority of predecessor employees; successor did not prove that single building unit at complex was inappropriate); Southfork Systems, Inc., 313 NLRB 274 (1993) (successor found obligated to bargain with incumbent union for one of three cafeterias on military base, where successor also took over from a different predecessor the two other cafeterias which had a different incumbent union).