

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

Advice Memorandum

DATE: September 29, 2000

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

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

SUBJECT: Trustees of the University of
Pennsylvania/Faculty Club
Case 4-CA-27769-1

530-6067-4011-7700
530-6067-4011-8800
596-0420-5500
596-0420-8775

This case was submitted for advice as to: (1) whether the charge is time-barred by Section 10(b) of the Act; (2) whether the moving of the Faculty Club constituted a relocation decision to be analyzed under Dubuque Packing Co.; and (3) whether the Employer violated Section 8(a)(5) of the Act by refusing to bargain about and provide information concerning its decision to move.¹

FACTS

The Faculty Club of the University of Pennsylvania is a non-profit corporation that had long been located in the University of Pennsylvania's Skinner Hall. Since 1995, the Hotel Employees and Restaurant Employees Local 274 (the Union) represented approximately 25 employees providing dining and beverage services to Club members, who consist primarily of the University's faculty.

On July 6, 1998, the University told the Union that it would no longer be operating the Faculty Club at Skinner Hall. The University stated that it was "going out of" the faculty club business altogether, and that the Faculty Club would operate in a University-owned hotel property, the Inn at Penn, located directly across the street. The Doubletree Hotel Corporation (Doubletree) would manage the Inn at Penn. Since August 1, 1999, the Faculty Club at the Inn at Penn has continued to provide beverage and dining services for the same faculty clientele previously served at Skinner Hall. The Faculty Club is set apart from the

¹ The appropriateness of Section 10(j) relief will be addressed in a separate memorandum.

rest of the Inn at Penn, with a separate entrance and identifying sign. The University's contracts with the Faculty Club and Doubletree evidence a strong degree of University control over Faculty Club operations and labor relations. See Request for Advice dated March 29, 2000 ("Memorandum"), pp. 3-6, for quotations of the relevant portions of these contracts.

At a meeting between the parties on July 20, 1998, the University took the position that it had no obligation to engage in decision bargaining. The Union requested copies of the Faculty Club's liquor license and the University's management agreement with Doubletree. The University provided the Union with the liquor license, but only a portion of the Doubletree agreement. The Union later repeated its request for a copy of the entire Doubletree agreement.

ACTION

We agree with the Region, primarily for the reasons in its Memorandum, that the charge is not time-barred by Section 10(b) of the Act, and that the University unlawfully refused to provide information to the Union and bargain over its decision to move the Faculty Club.²

This charge, which is broad enough to encompass the decision bargaining allegation, was filed within six months of July 6, 1998, when the University advised the Union of its decision and eight months *before* it carried out the move. We also agree that even if the decision bargaining allegation were not encompassed within the charge, it would not be time-barred because it is "closely related" to the allegations of bad faith bargaining stated in the timely filed charge.³

As to the Section 8(a)(5) analysis, we agree that the University and Doubletree are joint employers of the Faculty Club employees at the Inn at Penn even under the

² We also agree with the Region's analysis and rejection of the Employer's claim that the Union waived its right to bargain over the relocation decision by failing to make a timely bargaining demand, since the Employer's decision was a *fait accompli*. See Memorandum p. 9.

³ See Ross Stores, Inc., 329 NLRB No. 59 (September 30, 1999); Memorandum pp. 7-9.

extant Board standard.⁴ The University retained substantial control over labor relations, employee compensation and fringe benefits at the new location. We also agree that the University and the Faculty Club, due to their common control of labor relations policies and interrelated operations, were a single employer while the Club was in Skinner Hall.⁵

Having been a relocation of the University's continuing Faculty Club operation, the Employer's decision is subject to analysis under Dubuque Packing Co.⁶ The General Counsel can meet his initial burden of showing that the decision was "unaccompanied by a basic change in the nature of the employer's operation." We agree with the Region (Memorandum pp. 11-13) that the Employer has not rebutted this prima facie case or affirmatively shown either that (1) labor costs were not a factor in its decision, or (2) even if labor costs were a factor, the union could not have offered labor cost concessions that could have changed its decision.⁷ The University's "economies of scale" argument, and its statement to employees that the "cost of Union benefits" motivated the move, show that labor costs were a factor in the University's decision.⁸ We also agree with the Region that the historically University-subsidized nature of the operations and the fact that the employees' wages and benefits exceed the Employer's projected savings show that

⁴ See Memorandum p.9. For a recent application of that joint employer standard, see M.B. Sturgis, Inc., 331 NLRB No. 173, slip op. at 4-5, August 25, 2000. The Region should also make the General Counsel's Jeffboat argument that the joint employer test should be expanded. See OM 00-72, September 13, 2000.

⁵ See, e.g., Radio Union v. Broadcast Service, 380 U.S. 255, 256 (1965); Gerace Construction, 193 NLRB 645 (1971).

⁶ 303 NLRB 386, 393 (1991), enfd. in rel. part 1 F.3d 24 (D.C. Cir. 1993), pet. for cert. dismissed 146 LRRM 2896 (1994).

⁷ Dubuque Packing, 303 NLRB at 391.

⁸ See Holmes & Narver, 309 NLRB 146, 147 (1992) (employer's decision to combine jobs, reassign work and lay off employees was a mandatory subject of bargaining because it involved continuing same work with essentially same technology but with fewer employees).

the Employer has not demonstrated that there is no way the Union could have offered concessions that could have changed its decision.

Because the Employer's decision was a mandatory subject of bargaining, the Employer's failure to provide the Union with the complete Doubletree agreement which was relevant to that decision clearly violated Section 8(a)(5) of the Act. See Memorandum pp. 13-14.

[*FOIA Exemption 5*

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B.J.K.