

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

Advice Memorandum

DATE: June 19, 2001

TO : F. Rozier Sharp, Regional Director
Leonard P. Bernstein, Regional Attorney
Mike McConnell, Assistant to Regional Director
Region 17

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

SUBJECT: Waste Connections of Nebraska, Inc.
Case 17-CA-20894

This Section 8(a)(5) case was originally submitted for advice on whether the Employer's consolidation of its unrepresented current operation with a newly-purchased unionized operation rendered the two historical bargaining units inappropriate. We issued a memorandum dated April 23, 2001, agreeing with the Region's recommendation and finding that the historical units remained appropriate. On May 9, 2001, the Region submitted a Request for Clarification, seeking additional guidance on the four issues discussed below.

ISSUES AND DISCUSSION

1. **Is the Employer a "perfectly clear" successor, and if not, what is Advice's view regarding the continued appropriateness of the units?**
 - a. **The Employer is a "perfectly clear" successor.**

In the original Advice Memorandum, we concluded that, in addition to being a Burns¹ successor, the Employer was a "perfectly clear" Spruce Up successor with a duty to bargain over initial terms and conditions of employment.² We reiterate that finding here.

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

² Spruce Up Corp., 209 NLRB 194 (1974). See GC Memorandum 99-10 (revised), "Submission of Advice Cases," March 27, 2000 (issues involving "perfectly clear" successorship issues are mandatory Advice submissions).

We based our original conclusion on a September 7, 2000, meeting, before the sale was completed, where the Employer told the former BFI employees that they would all be retained and mentioned no changes in working conditions. In its Request for Clarification, the Region notes that at a meeting two weeks later and still before the sale was finalized, the Employer told employees of certain changes in their benefits and of pay equalization between drivers. We find that the September 7, not the September 25 meeting, controls the "perfectly clear" issue.

When an employer effectively and clearly communicates to employees or a union that it plans on retaining them after the sale, without simultaneously announcing any meaningful changes in working conditions, the employer is a "perfectly clear" successor under Burns and is not free to set initial terms and conditions of employment.³ In Canteen Co.,⁴ a successor employer told the union before the final purchase of a predecessor's facility that it wanted the predecessor employees to serve a probationary period. While the employer and the union also discussed a few minor changes in working conditions, the employer "did not mention in these discussions the possibility of any other changes in its initial terms and conditions of employment."⁵ Subsequently, the employer told several employees that they could retain their jobs but at reduced wages.⁶ Even though the employer announced this change before the sale was completed, the Board found that the employer violated the Act by changing the terms and conditions of employment because it "did not announce the new wage rates until June 23, after it had effectively announced its intent to retain the predecessor employees."⁷

³ Canteen Co., 317 NLRB 1052, 1053 (1995).

⁴ 317 NLRB at 1052.

⁵ Id.

⁶ Id. at 1052-53.

⁷ Id. at 1054 (emphasis in original). See Bekins Moving and Storage, Case 21-CA-32429, Advice Memorandum dated June 28, 1996 (employer was "perfectly clear" successor when it told employees in early May that it planned to retain employees after sale, despite the fact that in late June, before sale, it attempted to promulgate changes to wages and benefits).

Conversely, if at the time it announces its intent to hire the predecessor employees, the employer also announces changes or an intent to make changes in employment terms, it is not a "perfectly clear" successor. In Banknote Corp. of America,⁸ the employer sent a letter to employees announcing an intent to hire its initial work force from the existing employees and stating that it would be making changes in the employment terms. The Board found that the employer was not a "perfectly clear" successor because "*simultaneous* with its stated intention to retain the predecessor's employees, the Respondent announced new terms and conditions of employment."⁹

The Employer here told the predecessor employees at the September 7 meeting: (1) they would be retained; (2) further information about the specifics of the acquisition would not be known until negotiations were concluded; (3) the status of the union after the merger was unknown but the Employer was aware that Papillion paid employees every other week; and (4) whatever happened, the Employer would abide by the provisions of the acquisition-closing package. By making these statements, the Employer expressed its intent to retain employees, without announcing new terms and conditions of employment or an intent to announce new terms and conditions of employment at a future date. Announcing changes for the first time on September 25, without any indication on September 7 that unspecified changes would later be announced, is unlawful under Canteen Co. There, the Board found that since, by June 22, the employer had "effectively and clearly communicated to the Union its plan to retain the predecessor employees," wage changes announced a day later but still before sale were unlawful.¹⁰ This is because once an employer clearly communicates its plan to retain predecessor employees, its

⁸ 315 NLRB 1041, 1043 (1994), *enfd.* 94 F.3d 637 (2d Cir. 1996), *cert. denied* 519 U.S. 1109 (1997).

⁹ *Id.* at 1043 (emphasis added). See also DuPont Dow Elastomers L.L.C., 332 NLRB No. 98, slip op. at 4 (2000) (when employer announced intent to offer employment to existing employees on November 15 under terms and conditions to be announced on November 30, Board considered employer's statements on both dates; since on November 30, the employer announced only minor change, employer was a "perfectly clear" successor).

¹⁰ 317 NLRB at 1052-53.

bargaining obligation attaches, and it is not entitled to unilaterally implement changes thereafter.¹¹ The Employer here was thus a "perfectly clear" successor and was not free to set initial terms and conditions of employment even at the pre-sale date of September 25.¹²

b. Even if the Employer is not a "perfectly clear" successor, the pre-existing bargaining units remain appropriate.

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."¹³ The Board has consistently held that "long-established bargaining relationships will not be disturbed where they are not repugnant to the Act's policies."¹⁴ The party attempting to

¹¹ Id.

¹² After conversations with the Region, the Union apparently withdrew this allegation on December 20, 2000. This fact does not preclude us from including this allegation in a complaint now, even though more than six months have elapsed since October 1, 2000, when the Employer refused to recognize the Union. Under Redd-I, 290 NLRB 1115, 1116 (1988), an allegation is timely even if filed outside of the six-month limitation period if it is "factually and legally related to the allegations of the timely charge, without regard to whether another charge encompassing the untimely allegation has been withdrawn or dismissed." Under Redd-I, the "perfectly clear" allegation here is closely related to the timely filed charge involving the Employer's refusal to bargain. Both allegations involve the same section of the Act and arise out of the same factual situation, and the Employer's defenses regarding the appropriateness of the historical bargaining units are the same for both allegations. See id. at 1118.

¹³ Banknote Corp., 315 NLRB at 1043.

¹⁴ Id. See also Trident Seafoods, Inc. v. NLRB, 101 F.3d 111, 114 (D.C. Cir. 1996) (in a successorship case, "there is a strong presumption favoring the maintenance of historically recognized bargaining units;" the Board "is reluctant to disturb units established by collective bargaining so long as those units are not repugnant to

show that the historical units are no longer appropriate bears a "heavy evidentiary burden."¹⁵

In determining the continued appropriateness of the bargaining unit, the Board considers whether employees still maintain a sufficient community of interest, such that the unit is still "independently appropriate."¹⁶ Key to this inquiry is whether the successor's operational changes have so altered the employees' job functions and duties as to destroy the appropriateness of existing units.¹⁷

In Pioneer Concrete,¹⁸ for instance, the Board found that the employer was not a perfectly clear successor and, thus, lawfully instituted changes in terms and conditions of employment, including wages, 401(k) entitlements, and health insurance.¹⁹ The Board nevertheless found that these changes, coupled with later changes in uniforms and equipment, were insufficient to destroy the appropriateness of the bargaining unit because the employees "retained skills, interests, and working conditions similar to those in existence before the sale;" they "exercise[d] the same duties as before the sale;" they "operated from the same facilities as before the sale, with the same product for the same customers;" and the "Employer's organizational and supervisory structure to the extent that structure was apparent to the employees" was the same.²⁰ The Board also

Board policy or so constituted as to hamper employees in fully exercising rights guaranteed by the Act.").

¹⁵ Banknote Corp., 315 NLRB at 1043.

¹⁶ Kelly Business Furniture, 288 NLRB 474, 478 (1988).

¹⁷ See Banknote Corp., 315 NLRB at 1044 (employer failed to meet burden "to demonstrate that it had instituted such fundamental changes in the employees' duties that the three historical units no longer were separate, appropriate units").

¹⁸ 327 NLRB 333 (1998), *enfd.* 194 F.3d 1309 (5th Cir. 1999).

¹⁹ Id. at 335-36.

²⁰ Id. at 336.

noted that the union and the prior employer had a lengthy bargaining history.²¹

Here, employees in the two pre-existing BFI bargaining units retained the same skills, interests and working conditions, performed the same duties out of the same facilities for the same customers, and maintained the same supervisory structure (even though the identity of some of the supervisors changed). While further changes may have occurred after the sale, the critical time is when the bargaining obligation matured. At that point, despite some standardization of the Employer's Nebraska operations, the units remained functionally distinct and, from the employees' perspective, their working conditions remained the same. In making this argument, the Region should particularly emphasize the lengthy bargaining history within the units and the Employer's heavy evidentiary burden in overcoming the presumption of appropriateness.

2. Questions Regarding the Union's Later Petition to Represent All Employees, Including the Former Papillion Employees.

- a. What was the significance of noting in the original Advice Memorandum that the Union did not at the time of consolidation seek recognition of the former Papillion employees?**

In the original Advice Memorandum, we considered whether the common supervision of the maintenance and mechanical employees of the former Papillion and BFI facilities destroyed the appropriateness of the preexisting bargaining units. In deciding that it did not, we relied upon Pioneer Concrete,²² where mechanics in two separate bargaining units began working together after consolidation. The Board there reasoned that the current mechanics could remain in their original bargaining units and that the placement of future mechanics "may be governed by law or by agreement of the parties."²³ We analogized the future mechanics referenced in Pioneer to the Papillion maintenance and mechanical employees here: In both cases, the issue of their placement could be "governed by law or

²¹ Id. See below, Section 4(a), for further discussion on the applicability of Pioneer Concrete.

²² Id. at 335.

²³ 327 NLRB at 336.

by agreement of the parties." In other words, because the Union had not sought to accrete the former Papillion maintenance and mechanical employees into either of the bargaining units, the issue, as in Pioneer, had not arisen.

b. How does the fact that the Union filed a petition to represent all employees affect the conclusion that the historical units remain appropriate?

Since filing this charge, the Union has filed a petition to represent all former Papillion and BFI employees in a single unit. The Region seeks guidance on how the Union's solicitation of authorization cards from employees throughout the workforce and its filing of a representation petition affects the appropriateness of the existing units, given that the Union is now asserting that the overall unit is appropriate.

The Board has long recognized that more than one unit may be appropriate and that bargaining need not occur in the most appropriate unit.²⁴ Rather, the Board "need only find that 'the Unit' . . . is at least an appropriate one for collective-bargaining purposes; for, if so, it is 'irrelevant' that an overall unit . . . might also be found appropriate."²⁵ Thus, the issue "is not whether the overall unit would be appropriate but whether the former bargaining unit continues to be appropriate after the sale."²⁶

The Union here has not abandoned its argument that the historical units remain appropriate for the representational and bargaining obligations which the Employer has ignored since the sale. Rather, the Union has informed us that it has filed the petition for an overall unit in the event that its unfair labor practice charge is not successful. It is not inconsistent to argue that the former BFI units remain appropriate, and alternatively, that an overall unit would be appropriate.²⁷ The Region

²⁴ Hardin, Developing Labor Law, "Appropriate Bargaining Units," Third Edition, at p.449 (1992).

²⁵ Kelly Business Furniture, 288 NLRB at 478.

²⁶ Id.

²⁷ See Morris Novelty Co., 157 NLRB 1471, 1482 fn. 43 (1966) (finding "nothing inconsistent in a union's request for recognition in an appropriate bargaining unit" and, alternatively, in a larger bargaining unit that Region

thus need not decide whether a wall-to-wall unit is more appropriate than the existing units.

3. How should the Region address the fact that the Employer will have significantly more evidence of inter-unit employee interchange at the time of trial than it had during the investigation?

A successorship bargaining obligation attaches when a "substantial and representative complement" of the predecessor's employees are hired.²⁸ At that particular moment, "the successor has an obligation to bargain with the union that represented these employees."²⁹ Because unilateral changes are not permissible thereafter, the Board examines the changes instituted and planned at the time the bargaining obligation would attach to determine whether an employer is continuing to operate in substantially the same manner as the predecessor³⁰ and whether the pre-existing bargaining unit remains appropriate.³¹ An employer's later operational changes thus are not probative.³²

found to be inappropriate), enf. denied 378 F.2d 1000 (8th Cir. 1967).

²⁸ Fall River Dyeing & Finishing Corp. v. NLRB., 482 U.S. 27, 45-47 (1987).

²⁹ Id. at 47.

³⁰ See East Belden Corp., 239 NLRB 776, 793 (1978) (when employer was "perfectly clear" successor, unilateral changes instituted two months later were unlawful; even though when employer retained predecessor employees, it had alluded to unspecified changes in the future, employees "were not clearly informed of the nature of the changes which Respondent intended to institute in the future" and "announcement was couched in generalized and speculative terms").

³¹ See Burns, 406 U.S. at 280.

³² Pioneer Concrete, 327 NLRB at 335 ("[f]actors that occurred when and before the bargaining obligation attached as opposed to actions taken by the Respondent at a point in time after its bargaining obligation matured . . . are of significant importance.").

In Banknote Corp.,³³ for example, the Board found that the employer could not rely on "commonality of hours, benefits, and other terms to show that the three separate units in question were inappropriate" because those changes were instituted after the employer's duty to bargain took effect. Further, the Board found evidence of employee interchange insufficient to destroy the appropriateness of the bargaining units in part because "many of the changes in duties relied upon by the Respondent actually occurred after the bargaining obligation attached."³⁴

At the time the Employer's bargaining obligation attached here, employees continued driving the same routes under the same basic supervisory structure and, as the Region determined, there was little interchange amongst the different groups of employees. Further, no evidence indicates that the Employer had communicated a concrete plan at the time its bargaining obligation attached to functionally integrate the different groups of drivers. The Employer cannot rely upon subsequent operational changes, including those which created greater interchange among the employees, to change the bargaining unit determination and/or to defeat a successorship determination.

4. How should the Region address the Employer's arguments that this case is distinguishable from Pioneer Concrete and Banknote Corp of America?

b. Pioneer Concrete.

The Region notes that, unlike here, the employer in Pioneer Concrete did not merge the employees of two facilities into one. That distinction is not significant for three reasons. First, the Board in Pioneer Concrete did not rest its decision on the fact that the employees worked at different facilities. Rather, the Board emphasized a variety of factors, focusing on the fact that, from the employees' perspective, their jobs remained unchanged.³⁵ Second, although the employees in Pioneer Concrete were based at different facilities, they often

³³ 315 NLRB at 1042, fn.4.

³⁴ Id. at 1043.

³⁵ See Pioneer Concrete, 327 NLRB at 336. See also Section 1(b), above.

worked together at common sites.³⁶ Third, to the extent that the Board relied on the employees' location, the salient consideration was that the bargaining unit employees were operating "from the same facilities as before the sale." Here, only the former Papillion employees have moved. Thus, from the former BFI employees' perspective, their jobs remain the same.³⁷

b. Banknote Corp. of America.

While Banknote Corp. did not, as here, involve a merger of unrepresented employees into a facility of represented employees, the Board's analysis regarding employee interchange among formerly separate units is fully applicable. The employer there argued that three of the eleven predecessor bargaining units were no longer appropriate because of increased integration in the units and the employees' changed job duties. The Board rejected that argument because "employees in these units continued performing the same or substantially the same work as they had prior to the change in ownership," and such "occasional or sporadic performance of duties across unit lines is insufficient to destroy the integrity" of the units.³⁸ As

³⁶ See also Fisher Broadcasting, 324 NLRB 256 (1997), where the Board found historical units remained appropriate despite consolidation of three radio stations, which remained separate stations, under one roof. Although that case involved radio personalities, whose work at different stations might be more readily distinguishable than that of trash handlers, the two historical bargaining units here have existed for 35 years based solely on the distinction in driving routes, and the Employer maintained that distinction when it took over the operation.

³⁷ The Region also notes that the number of unrepresented employees merged into the former BFI facility is greater than the number of represented employees. This fact would only be important if the issue was whether the former Papillion employees should be accreted into one of the bargaining units. See Central Soya Co., 281 NLRB 1308 (1986).

³⁸ Banknote Corp., 315 NLRB at 1043. The Board also found the employer's argument unpersuasive because it had voluntarily recognized two of the other historical units, when the evidence indicated that employees in those units

discussed above, the former BFI employees also continue performing the same work, and the Employer presented little evidence of interchange. The fact that the Papillion employees are unrepresented does not affect the analysis.

In sum, the Employer is a "perfectly clear" Burns successor and was not free to establish initial terms and conditions of employment. Even if the Employer was not a "perfectly clear" successor, the historical bargaining units remain appropriate. Accordingly, a Section 8(a)(1) and (5) complaint should issue, absent settlement.

B.J.K.

also performed some new duties. This, however, was not the sole basis for the Board's holding.