

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

# Advice Memorandum

DATE: January 22, 1996

TO : William C. Schaub, Regional Director  
Region 7

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

SUBJECT: Tuscarora, Inc. 530-8090-7500  
Case 7-CA-37321 530-8090-9000  
625-6601-0000

This case was submitted for advice as to whether an Employer which closed, either temporarily or permanently, a plant which made packaging products, and reopened the facility after a hiatus using a different type of production process, violated Section 8(a)(5) and (1) of the Act by failing to apply a contract with, and/or refusing to recognize and bargain with, the Union upon reopening.<sup>1</sup>

## FACTS

### 1. The Employer's Michigan operations prior to 1993

Tuscarora (the Employer) produces packaging materials and provides warehouse and just-in-time delivery services throughout the United States. Prior to 1993, the Employer operated two custom foam molding production facilities in Michigan, at Chesaning and Saginaw, which produced packaging products out of foam pellets that were heated and formed by molding machines. Both facilities produced packaging parts for Frigidaire, the Employer's principal customer,<sup>2</sup> and various other customers.

Since 1989, the Employer has operated the Saginaw facility, a 67,767 square foot building which consists of

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<sup>1</sup> The Region also requested advice on whether Section 10(j) injunction proceedings are warranted. This issue will be considered by the Injunction Litigation Branch and handled in a separate memorandum.

<sup>2</sup> Frigidaire provides more than half of the Employer's total business in the U.S. and has a manufacturing plant in Greenville, Michigan.

production, warehouse and office space.<sup>3</sup> Teamsters Local 486 (the Union) represented the Employer's 26 hourly production and maintenance employees at Saginaw, and the parties' most recent collective-bargaining agreement was scheduled to expire on January 31, 1995.<sup>4</sup> The Employer has operated the 60,000 square foot Chesaning facility since about 1982. Chesaning is a non-union facility with about 44 employees, including supervisors.

## 2. Negotiations leading to the closing agreement

About September 13, 1993, the Employer informed the Union that it was considering permanently closing its Saginaw facility due to "economic and other business reasons" that have "nothing to do with labor costs in Saginaw."<sup>5</sup> At a September 14 meeting, the Employer explained to the Union that it had tentatively decided to close Saginaw and transfer all bargaining unit work and machinery (but not the unit employees) to the Chesaning facility. The Employer stated that neither plant was meeting the Employer's profitability targets. It provided a written summary of reasons why the two operations needed to be consolidated. These included a downturn in its Michigan customer base (partly due to Frigidaire's partial relocation to South Carolina) and an overall decrease in orders. The Employer indicated that customer needs could be serviced by only one plant with improvements in production technology.<sup>6</sup>

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<sup>3</sup> The Employer built a 15,000 square foot addition to the Saginaw facility in late 1992, doubling its warehouse space.

<sup>4</sup> The unit described in the 1992-1995 collective-bargaining agreement is: "All full-time and regular part-time production and maintenance employees... including leaders, press operators, cutters, molders, warehousemen and truck drivers...."

<sup>5</sup> The Employer had recently closed two of its non-union custom foam molding plants in Baltimore and Louisville.

<sup>6</sup> The document also explained that it was more feasible to consolidate into the Chesaning plant rather than into Saginaw because of Chesaning's location (Chesaning is 35

During this meeting, the Employer told the Union that Chesaning would be able to absorb the increased work moving from Saginaw. The Employer explained that it would shut down a secondary operation at Chesaning, sending that work to Mexico, to allow Chesaning sufficient space to absorb some of the Saginaw molding machines. The Employer also indicated that the plant manager and some of the non-unit salaried personnel from Saginaw would be transferred to Chesaning.

On September 20, 1993, the Employer faxed a letter to the Union informing it of its final decision "to permanently close its Saginaw, Michigan facility and terminate the employment of its Saginaw production, maintenance, and driving employees represented by [the Union]." On September 23, the Employer and Union met and negotiated a closing agreement.<sup>7</sup> The agreement did not provide for preferential rehire of the Saginaw unit employees at Chesaning or elsewhere. Rather, it specifically stated that the employees would be eligible to apply as "new employees" at any of the Employer's other facilities. The closing agreement further provided that the collective-bargaining agreement would terminate automatically "as of the last day worked at the Saginaw [p]lant by the last remaining individual represented by the Union." It also contained a provision that in the event the Employer "re-established a custom foam molding facility in Saginaw, Michigan, prior to January 1, 2000," the Employer would immediately recognize the Union as the collective bargaining representative. The Employer stated during this meeting that it intended to put the Saginaw facility up for sale.

### 3. The October 1993 closure of Saginaw

All production at the Saginaw plant ceased on October 15, 1993. About 21 of the 26 unit employees received

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miles closer than Saginaw to Frigidaire), the higher sale value of the Saginaw plant, and the inadequacy of Saginaw's boiler.

<sup>7</sup> Although an agreement was reached by the end of this meeting, the agreement was not signed until late October by the Union and November by the Employer.

severance pay and ceased working for the Employer as of that date. Some of the molding machines, all raw materials and the finished goods inventory were moved from Saginaw to Chesaning around this time, and the rest of Saginaw's molding machines were shipped to other Employer plants. Parts that had been produced at Saginaw prior to the October 15 shutdown were stored in Saginaw's warehouse until they were delivered to customers. In addition, the Employer began to use the Saginaw warehouse for storage of Chesaning production.<sup>8</sup>

Three unit employees remained working in the Saginaw plant tearing down machinery and doing clean-up work until January 21, 1994, when they received severance pay. In addition, unit employee Wachowicz continued to drive the company truck after the October 1993 shutdown over the same route-- between the Saginaw warehouse, the Chesaning plant, and the Frigidaire plant in Greenville, Michigan.<sup>9</sup> He also continued to report to the same assistant manager, who had transferred to Chesaning after the shutdown. Wachowicz still received the benefits provided for in the Teamsters 1992-95 contract, except for the Union pension plan,<sup>10</sup> and

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<sup>8</sup> Prior to October 1993, the Employer apparently only used the Saginaw warehouse for Saginaw parts and not for Chesaning storage. The Union claims that it was never told that the warehouse at Saginaw would be used for storage after October 1993.

<sup>9</sup> After the October 1993 shutdown, Wachowicz loaded and unloaded his own truck at Saginaw using the forklift in the Saginaw warehouse. Apparently no other employees worked in the warehouse after the shutdown. Prior to the shutdown, Wachowicz occasionally loaded and unloaded his own truck and operated the forklift at Saginaw, although Saginaw unit forklift drivers did most of the loading and unloading of his truck.

<sup>10</sup> The pension plan had been terminated about October 1993, pursuant to the closing agreement.

his dues were forwarded to the Union pursuant to payroll checkoff.<sup>11</sup>

About October 1994, the Employer decided to put Wachowicz on Chesaning's payroll.<sup>12</sup> The Union received a letter from the Employer in mid-October 1994, stating that Wachowicz was transferring to the Chesaning plant as of November 1, 1994, and that Wachowicz had been informed that his dues checkoff would be discontinued.<sup>13</sup> The letter also stated that "[p]er the Saginaw facility closing agreement, this officially terminates our labor agreement."<sup>14</sup> Shortly after Wachowicz transferred, he received a 4% pay raise given to all Chesaning employees. Wachowicz appears to have temporarily retained the somewhat higher benefits he had while on the Saginaw payroll.<sup>15</sup>

The Employer listed its Saginaw plant for sale with a real estate firm from December 1993 through September 30, 1994. In mid-1994, the Employer rejected an offer that was significantly below the appraised value of the facility.

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<sup>11</sup> The Union claims to have been unaware that Wachowicz remained in the same truck driving job until told by the Region.

<sup>12</sup> The Employer asserts in its July 1995 position statement that Wachowicz remained on the Saginaw payroll only due to an oversight, and that the Employer caught the mistake while conducting a study of its facilities in an effort to streamline its payroll system and cut costs.

<sup>13</sup> Wachowicz decided not to pay union dues after his dues checkoff ceased.

<sup>14</sup> The Union did not respond to this letter until June 1995.

<sup>15</sup> An Employer memo indicates that Wachowicz's life insurance policy (previously \$15,000) was to be grandfathered into the \$10,000 life insurance provision for Chesaning employees. The memo also indicates that an exception would be made to exempt Wachowicz from paying co-payments on health care insurance until about January 1, 1996.

There is no indication that the Employer attempted to sell the Saginaw plant after September 30, 1994.<sup>16</sup>

4. The reopening of Saginaw as an IMG operation

Since 1991, the Employer has been involved in Integrated Materials Group (IMG) production, which incorporates a variety of products (plastics, wood and paper) to make packaging materials.<sup>17</sup> According to the Employer, it was producing the IMG product in its Pennsylvania and Tennessee IMG plants for Michigan customers Steelcase and Frigidaire.<sup>18</sup>

In the spring of 1994, the Employer discussed with Frigidaire the production of a new IMG base tray for refrigerators.<sup>19</sup> The Employer claims that Frigidaire desired that these base trays be produced near its Greenville facility. The Employer asserts that about mid-1994, it decided to start up a distinct IMG production facility in Michigan and that it initially leaned towards placing it at Chesaning. In March 1994, the Employer had ordered a die-cutter machine for IMG work at the Chesaning plant.<sup>20</sup> According to the Employer, between August and December 1994, it became clear that there was insufficient

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<sup>16</sup> The Union's business agent noted that a "for sale" sign was not posted at the plant when he drove past the plant at various times.

<sup>17</sup> Currently, the Employer has IMG plants in Tennessee, Wisconsin, Georgia, and Pennsylvania, in addition to the IMG operations that commenced at Saginaw in 1995.

<sup>18</sup> There is some evidence that the work transferred from Chesaning to Mexico just prior to the October 1993 Saginaw shutdown may have been IMG work.

<sup>19</sup> The Employer asserts that it was July 1994 when Frigidaire asked it to design this new product for Frigidaire's Greenville plant.

<sup>20</sup> Although the Chesaning plant address was listed on the purchase order for delivery, the machine was instead delivered to Saginaw in 1995.

room at the Chesaning plant for the IMG work. The Employer looked into purchasing a facility in western Michigan to perform the IMG work. About July 1994, the Employer met with the owner of a Greenville facility to discuss its purchase, but decided against a purchase for price reasons.

After ruling out the purchase of the Greenville plant, the Employer began to consider putting the IMG operation into the Saginaw plant. The Employer asserts that in December 1994 it made both the tentative and final decisions to reopen Saginaw as an IMG plant. It also states that the decision where to locate IMG operations could not wait beyond December 1994, because the production space was needed immediately in order to meet Frigidaire's requirement that refrigerator trays be supplied by March 1995.

In December 1994, the Employer commenced clean-up work and preparation for the new production process at Saginaw using two former Saginaw bargaining unit employees who had been hired at the Chesaning plant. These two employees have worked at Saginaw steadily since December 1994, although they did not switch to the Saginaw payroll until about January 23, 1995.

In a December 15 letter to the Union, the Employer referred to the closing agreement's provision that the Employer would recognize the Union if it re-established a custom foam molding facility in Saginaw prior to January 1, 2000. The letter stated that the Employer had "absolutely no plans" to start up such a foam molding operation, but indicated that it was seriously considering using Saginaw as an IMG facility to produce a different product. The letter explained that IMG products are generally secondary assemblies using corrugated paper and various plastic materials. The Employer indicated that it was advising the Union of these matters "only as a courtesy." The letter stated that the Employer expected the facility to become operational during the first quarter of 1995. The Union did not respond to this letter until April 28, 1995.

By the end of December 1994, the Employer had hired a company to design and engineer a new "figure-4" machine to

do IMG work.<sup>21</sup> As of January 10, 1995,<sup>22</sup> the Employer planned a 500-piece pilot run for the Frigidaire base tray, to be delivered to Frigidaire between January 23 and 27. The Employer expected to commence regular production by about March, but production was delayed until June due to internal delays at Frigidaire.

In January, some new IMG machinery was delivered to Saginaw.<sup>23</sup> About January 23, the Employer started its official payroll for the Saginaw plant. According to the Employer, IMG production began at Saginaw about March or April. As of April 28, the Employer employed nine hourly employees at the Saginaw plant, including five former unit employees.<sup>24</sup> By the end of July, there were fifteen employees at Saginaw, including an operations manager and two clerical employees.

The Union observed some activity at Saginaw in early 1995 but was uncertain whether the plant had actually reopened. It contacted several former Saginaw bargaining unit employees, none of whom had been contacted or recalled by the Employer. About April 28, the Union called the Employer to inquire about the activity at the Saginaw plant. The Union stated its contention that the plant had never closed, and requested bargaining on behalf of the Saginaw employees. According to the Union, the Employer said that "no production" was being performed at Saginaw and that the Employer was getting the plant ready for sale.<sup>25</sup> The Union alleges that it had a second conversation

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<sup>21</sup> Two of the company's drawings for some portions of this machine were dated December 27. The machine was shipped to Saginaw on March 23, 1995.

<sup>22</sup> All dates hereinafter are 1995 unless otherwise noted.

<sup>23</sup> The date the machinery was first ordered by the Employer is unknown. Some other IMG machinery was not shipped to Saginaw until March and May 1995.

<sup>24</sup> This figure does not include the truck driver, Wachowicz.

<sup>25</sup> The Employer alleges that it told the Union that it was no longer a custom foam molding operation and that it did not tell the Union that it was attempting to sell Saginaw.

with the Employer in late May or early June during which the Union again requested that the Employer recognize the Union.

The Union wrote to the Employer on June 5, claiming that since the Employer had reopened Saginaw with employees performing essentially the same work as was performed under the collective-bargaining agreement, the Union still remains the bargaining representative. On June 12, the Employer advised the Union of its contention that the reopening of Saginaw "was not a situation that triggered recognition of the [Union]." According to the Employer, the current manufacturing process at Saginaw was not custom foam molding but an IMG process; thus the employees were not doing the same work. The Employer stated that it would not recognize the Union.

5. A comparison of the custom foam molding and IMG operations

The custom foam molding and IMG operations are similar insofar as they produce packaging materials by feeding raw material through machines and cutting the resulting product into the desired forms. They also use some of the same raw materials.<sup>26</sup> Moreover, both supply packaging materials to similar customers-- automotive customers, Frigidaire and others.

Employees in the custom foam molding operation run two or three molding presses at a time, feeding foam pellets into the machine and taking out the processed parts. The employees also, when necessary, cut and trim the processed foam parts into their finished form using hot wires. Employees in the IMG facility, instead of processing pellet-form materials through foam molding presses, operate "figure-4" machines and several types of cutting machines since the raw materials are in solid form. These forms include fabricated foam blocks, plastic corrugated sheets and chipboard. The IMG machines are more complicated than

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<sup>26</sup> The raw materials used in custom foam operations include expanded polystyrene, polypropylene and polyethylene. The IMG operation uses these same raw materials but in block rather than beaded form.

custom foam molding machines, with several people working at each machine. The IMG employees use a punch-press instead of hot wire to cut the foam parts. The on-the-job training required to operate the IMG machines appears to be minimal and non-technical.<sup>27</sup>

#### 6. The Union's charge

On June 12, the Union filed a Section 8(a)(1), (3) and (5) charge alleging that the Employer negotiated the 1993 closing agreement in bad faith by failing to reveal that it intended to re-open Saginaw to produce a different type of packaging product. The Union contends that since October 1993, the Employer fraudulently concealed from the Union the fact that the Saginaw facility did not permanently and completely close by failing to disclose the continued employment of the unit truck driver and use of the Saginaw warehouse. The Union also argues that because the Employer knew it would reopen, it misrepresented facts in October 1994, when it claimed that the transfer of the last unit employee to the Chesaning payroll officially terminated its collective bargaining obligation "per the Saginaw facility closing agreement" (emphasis added). The Union contends that the IMG operation is substantially similar to a custom foam molding operation, and therefore that the Employer is required to recognize the Union. The Union further contends that the Employer is required to recall former unit employees under the terms of the collective-bargaining agreement, which it regards as still in force.

The Employer maintains that the closing agreement constitutes a waiver by the Union of its right to represent current employees, and that the Employer is free to open any operation at Saginaw, except for a custom foam molding operation, without triggering a bargaining obligation.<sup>28</sup>

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<sup>27</sup> The Employer describes these IMG positions as "unskilled." One employee indicated that machine operators could learn to pack a "corrugated machine" in two days of on-the-job training, and that more experienced employees train new employees on the machines. Another employee testified that there "wasn't much training" and there was "about a month of on-the-job training."

<sup>28</sup> The Region has concluded, and we agree, that the closing agreement's provision requiring the Employer to recognize

The Region has decided to dismiss the Section 8(a)(3) allegation and has submitted for advice only the 8(a)(5) portion of the charge. The Region has also concluded that there is insufficient evidence that the Employer fraudulently negotiated the closing agreement or withheld information from the Union.

#### ACTION

We conclude that the Employer violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union as of the Union's April 28 bargaining demand. We further conclude that the Employer did not have to honor the pre-existing collective-bargaining agreement.

The legal consequences of the hiatus in production operations at Saginaw depend on whether, under Board law, the closure should be considered permanent or merely temporary. Under the cases discussed below, an employer must again recognize a union upon request, even after a permanent closure, if it reopens substantially the same business at the same location using a workforce consisting mostly of its pre-hiatus unit employees.<sup>29</sup> If under all the circumstances, however, the employees had a reasonable expectation of reemployment, the Board considers the closure to have been merely temporary and the employer is bound by any pre-existing collective-bargaining agreements.<sup>30</sup> If the employees did not have a reasonable expectation of reemployment, the Board treats the employer's relationship with the union as if it had

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the Union if it re-establishes a custom foam molding facility in Saginaw within a specified period did not constitute a "clear and unequivocal" waiver of the Union's right to represent the employees if the Employer reopened doing work other than custom foam molding.

<sup>29</sup> See Sterling Processing Corp., 291 NLRB 208, 210 (1988).

<sup>30</sup> See El Torito-La Fiesta Restaurants, 295 NLRB 493, 496 (1989).

terminated and later resumed; that is, any pre-existing bargaining agreement would no longer be in force.<sup>31</sup>

In El-Torito-La Fiesta Restaurants, the Board held that an employer which closed temporarily and reopened at the same location after a fourteen-month hiatus with substantially the same business was required to honor the existing collective-bargaining agreement.<sup>32</sup> The key factor in the Board's finding that the closing was temporary was that the employees had a "reasonable expectation of reemployment." The employer closed its restaurant for remodeling from an American-style grill to a Mexican restaurant and laid off all 72 employees.<sup>33</sup> The employees were told that the closing was only temporary and that they would be recalled, and the employer maintained contact with the employees during the hiatus.<sup>34</sup>

Reasonable expectation of recall is also a key factor in determining whether a bargaining relationship continues when production operations are shut down but the employer does not totally close its facility. In Rockwood Energy & Mineral Corp.,<sup>35</sup> the employer ceased production of its mining operation for five years and laid-off its employees. During the suspension, the mine and equipment were maintained, preserving the capacity to produce, using the services of the mine superintendent and one unit employee.<sup>36</sup> The union remained in contact with management and the employees throughout this period. The Board found that these employees were in layoff status with "some expectation of recall." Thus, the suspension of production

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<sup>31</sup> See, e.g., Sterling, 291 NLRB at 210.

<sup>32</sup> 295 NLRB at 496.

<sup>33</sup> Id., at 493.

<sup>34</sup> Id., at 495. See also Morton Development Corp., 299 NLRB 649 (1990) (4-month hiatus was intended to be temporary and some bargaining unit employees were hired to work during the hiatus).

<sup>35</sup> 299 NLRB 1136 (1990).

<sup>36</sup> Id.

did not interrupt the bargaining relationship and the employer violated Section 8(a)(5) by unilaterally changing terms and conditions of employment, and failing to apply the extant contract, upon reopening.<sup>37</sup>

In Sterling Processing Corp., the employer closed its facility and discharged its employees for economic reasons and reopened after a 19 month hiatus.<sup>38</sup> Because all the employees had been discharged at the closing and none had any expectation of recall, the Board concluded that the employer was free to act unilaterally in setting terms and conditions of employment on reopening, despite the Union's prior request for bargaining.<sup>39</sup> However, the employer was obligated to bargain with the union upon its reopening because a majority of its work force consisted of pre-hiatus employees. In determining whether the employer had violated Section 8(a)(5) and (1) by its refusal to recognize and bargain with the union, the Board looked to factors similar to those applied in determining successorship.<sup>40</sup> Prior to the shutdown, Sterling had been a fully integrated poultry producer and processor. After the reopening, it abandoned saw-cutting of chickens (one-quarter of its former operation) and added a new "Cry-o-Vac" automated packaging process (40 to 60% of its entire output).<sup>41</sup> Nevertheless, the Board found substantial continuity between the Employer's old and new businesses, noting that the employer had "resumed production under the same ownership, corporate form, and management and was engaged in the same business at the same location with

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<sup>37</sup> Id. at 1139, n.11, 1140.

<sup>38</sup> 291 NLRB at 208.

<sup>39</sup> Id. at 210.

<sup>40</sup> The Board noted that while the length of the hiatus between closing and reopening (19 months) might be enough to tip the balance against imposing a bargaining obligation in an ordinary successorship case, it carried less weight where the employer before and after the hiatus was the same corporate identity. Id. at 210, n.10.

<sup>41</sup> Id. at 209.

basically the same production process as prior to the shutdown" and that "substantially the same work force had been rehired."<sup>42</sup> Thus, the new business was sufficiently similar to the old business that the employer was not relieved of its bargaining obligation.

In deciding whether a renewed operation is substantially similar to a pre-hiatus operation, the Board looks to a number of factors, including the similarity of the jobs involved, the amount of employee retraining necessary and the nature of the employer's business. In Morton Development Corp., the employer closed its residential home for mentally retarded adults for economic reasons and attempted to sell the facility.<sup>43</sup> After a four-month hiatus during which it was unable to sell the facility, the employer reopened it as a geriatric nursing home. The Board found that because the employees received a mere two days of training, followed by on-the-job training, the inference was warranted that from the employees' point of view, their jobs remained much the same.<sup>44</sup> Despite changes in employees' duties, equipment and clients served, the Board found that "cooks still cooked; maintenance persons still repaired; and aides still aided residents."<sup>45</sup>

In the present case, although the Employer continued to employ Wachowicz as a truck driver and to use the Saginaw warehouse for storage after the October 1993 shutdown, we do not consider the facility to have "never closed" under the rationale of Rockwood Energy.<sup>46</sup> This case is distinguishable from Rockwood where, during the suspension of production, the mine superintendent and one unit employee continued to work to maintain the mine and

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<sup>42</sup> Id. at 210.

<sup>43</sup> Morton, 299 NLRB at 649.

<sup>44</sup> Id. at 651.

<sup>45</sup> 299 NLRB at 652. See also Cedar Products, 284 NLRB 652, 656 (1987).

<sup>46</sup> 299 NLRB at 1136.

equipment in order to preserve the mine's capacity to reopen and produce.<sup>47</sup> By contrast, none of the four employees remaining at Saginaw after the shutdown was engaged in sustaining the Saginaw operation or preserving the facility's capacity to resume production. Three of the employees remained through January only to dismantle the operation. The only other remaining employee, a truck driver, continued employment but apparently only to deliver leftover inventory from Saginaw or to support operations at Chesaning. To the extent that Saginaw continued thereafter to be used as a warehouse, it apparently was a warehouse in support of the production activity at Chesaning.<sup>48</sup>

Further, there is no basis for the Union's contention that Saginaw should be considered to have never closed or merely closed temporarily because of Employer fraudulent misrepresentation. The Region has found that there is no evidence that the Employer negotiated the closing agreement in bad faith or that it fraudulently concealed information from the Union. Nor is there evidence that the Employer planned all along to reopen the facility, or even that it planned prior to December 1994 to reopen.

We also conclude that the Employer did not close only temporarily. The expectations of the employees here are more akin to those of the employees in Sterling, who were terminated unconditionally and without prospect of rehire,<sup>49</sup> than to those of the employees in El Torito, who were laid off and told by the employer that they would be recalled when the restaurant reopened after remodeling.<sup>50</sup> In the present case, the employees were told that the plant was

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<sup>47</sup> Id.

<sup>48</sup> The present case is also distinguishable from Rockwood Energy in that unlike the employees in that case, who were in layoff status and remained in contact with the employer throughout the hiatus period, the employees here, as discussed below, were discharged with no reasonable expectation of reemployment.

<sup>49</sup> 291 NLRB at 210.

<sup>50</sup> 295 NLRB at 493.

permanently closing as of October 15, 1993. With the exception of the truck driver and the three employees who stayed temporarily at Saginaw doing dismantling work,<sup>51</sup> all employees were discharged and received severance pay on that date. A closing agreement was negotiated that did not provide for recall rights or preferential rehire at Saginaw or at any of the Employer's other plants. Further, there is no indication that the Employer maintained contact with the employees or that these employees otherwise had a basis for perceiving the employment relationship as continuing.

However, we conclude that the IMG operation is sufficiently similar to the custom foam molding operation that an Employer bargaining obligation arose upon the Union's April 28 bargaining demand. The IMG work now being done at Saginaw is somewhat different from the custom foam molding operation in some respects. For example, IMG uses some different raw materials, somewhat more complex machinery, and a different manufacturing process. However, we believe that the Employer's business--producing packaging products-- is essentially the same after the hiatus as it was before, and these differences caused little change from the perspective of the employees. The employees still work feeding raw material through machines and cutting the resultant product into the desired form. A significant amount of retraining of employees to do IMG work does not appear to have been required.<sup>52</sup> Also, the Saginaw facility still supplies materials to the same or similar customers, including the Employer's biggest customer, Frigidaire. Further, the Employer has offered no basis other than the change in its operation to justify its refusal to recognize and bargain with the Union.<sup>53</sup>

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<sup>51</sup> These two employees received severance pay in January 1995.

<sup>52</sup> See Morton, 299 NLRB at 651 (two days of training, followed by on-the-job training, insignificant). See also RTW Industries, 296 NLRB 910, 913 (1989) (training limited to on-the-job).

<sup>53</sup> See Morton, 299 NLRB at 652. We note that the Employer does contend that the closing agreement constitutes a waiver by the Union of its right to represent the current

Accordingly, we conclude that the Employer violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union as of the Union's bargaining demand on April 28, at which point a majority of a representative complement of the Employer's employees consisted of pre-hiatus bargaining unit employees. Therefore, while the Employer was privileged to set initial employment conditions when it re-opened Saginaw in December 1994, a bargaining order similar to the ones ordered by the Board in Morton and Sterling is appropriate in this case. In such cases, where the employer permanently closes its operations and reopens substantially the same business at the same location using a workforce consisting mostly of its pre-hiatus employees, a bargaining obligation attaches only after a bargaining demand has been made. Thus, in Morton, the employees and union knew that the employer had always intended to convert the facility to a nursing home and either sell it or resume operations itself. The employer reopened the facility with a representative complement formed mostly by former unit employees and, despite the union's prior knowledge of the employer's plans for the facility, the union waited until nine days after the reopening to request bargaining. 299 NLRB at 649, n.4. Under those circumstances, the Board found the employer's bargaining obligation arose as of the date of the union's bargaining demand, not the date of the reopening. Id. at 652. Similarly, in the present case, the Employer informed the Union in its December 15, 1994, letter of its intention of reopening Saginaw during the first quarter of 1995 as an IMG facility. The Union's bargaining demand on April 28, three days after a representative complement of employees mostly from the former bargaining unit had been hired, triggered the Employer's bargaining obligation.<sup>54</sup>

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employees. However, the Region has determined that this argument is without merit and we agree.

<sup>54</sup> An employer's denial of its duty to recognize and bargain with a union does not obviate the need for a bargaining demand before the Board will find a bargaining obligation. In Sterling, the employer took the position prior to reopening and hiring a representative complement that it had no obligation to bargain. Nevertheless, knowing the employer intended to reopen, the union demanded bargaining prior to the reopening. 291 NLRB at 208. The Board found

We find no merit to the Union's contention that the Employer is obligated under the recall rights language in the 1992-1995 Teamsters contract to recall former Saginaw unit employees before resorting to new hires. The parties negotiated a 1993 closing agreement which did not contain a recall provision and which superseded the recall provision in the collective-bargaining agreement which might otherwise have given the unit employees a reasonable expectation of recall when they were terminated. In the closing agreement, the parties also modified the collective-bargaining agreement's termination date. Thus, the contract expired on October 31, 1994, the last day worked at the Saginaw plant by the last bargaining unit employee.

In sum, we conclude that complaint should issue, absent settlement, alleging that the Employer violated Section 8(a)(5) and (1) by its refusal to recognize and bargain with the Union as of the Union's April 28 bargaining demand.

B.J.K.

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that, in light of the union's continuing bargaining demand, the employer was obligated to recognize and bargain with the union when it reopened its facility with substantially the same workforce. *Id.* at 210. In the present case, although the Employer in its December 15 letter took the position that the IMG operation was not similar enough to trigger a bargaining relationship and, although a lawful bargaining relationship could have begun on April 25, when a representative complement of employees had been hired, there is no reason to set the bargaining obligation any earlier than the Union's actual demand for bargaining, on April 28.