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

Advice Memorandum

DATE: February 23, 2000

TO: Rosemary Pye, Regional Director
Region 1

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

SUBJECT: Tenet-Metrowest Medical Center 530-4825-6700
Case 1-CA-37535 530-4850-6700

This Section 8(a)(5) case was submitted for advice as to whether the successor Employer was a "perfectly clear" successor and thus not privileged to unilaterally set its own initial terms and conditions of employment, when its takeover of the predecessor's hospital was conditioned by a Massachusetts governmental entity on the Employer honoring its predecessor's collective-bargaining agreement.

FACTS

The Union had a collective-bargaining agreement with the predecessor employer Columbia-HCA (Columbia) for a unit of registered nurses at the Metrowest Medical Center. In 1998 Columbia began exploring the possible sale of the Medical Center. A "grassroots" coalition, called the Metrowest Health Care Coalition (Coalition), was formed among community organizations to address various concerns raised by the sale. Among the approximately 20 groups in the Coalition was "Metrowest Jobs with Justice" (Jobs), a coalition of labor groups. While the Coalition's staff chair states that the Union is neither a member of, nor has a representative on, the Coalition, the volunteer coordinator of Jobs states that the Union was part of Jobs and that Union representatives attended meetings between the Coalition and the successor Tenet (the Employer) as well as hearings held by the Massachusetts Department of Public Health (DPH) concerning the sale of the Medical Center.

On November 6, 1998, Columbia applied to DPH to transfer ownership of and operating licenses for the Medical Center to the Employer. DPH held a public hearing on the application on November 24, resulting in a January 26, 1999 DPH "Staff Summary" document recommending approval by DPH of the transfer with conditions enforceable by DPH through its "determination of needs" process. The January

26 Staff Summary letter recommended a condition that Jobs requested at the November 24 hearing, that the Employer "recognizes the right of employees to organize and select a bargaining agreement in accordance with the law and commits to honor the existing collective bargaining agreements and bargain in good faith at the expiration of the contracts." DPH and the Coalition state that that language came from one of the provisions of a December 23, 1998 "partnership agreement" between the Coalition and the Employer.

On February 23, 1999, DPH voted to approve Columbia's application to transfer ownership to the Employer "with conditions". By letter dated March 5, DPH notified Columbia and Tenet of the approval with 11 conditions, one of which contained commitments in language almost identical to that quoted above from the January 26 staff summary regarding honoring the collective-bargaining agreements. Another of the conditions provides that the Employer agreed to appear before the Public Health Council within 6 months and annually thereafter to report on its compliance with the conditions.

On March 4, 1999, the Employer distributed a letter to the Medical Center employees stating that it expected to finalize its acquisition on March 5 and stating:

> We are offering to employ you in your current position at your current wage rate. Your future employment will be governed by the terms of your current union agreement subject to implementation of Tenet's benefit plans as described in the accompanying Attachment. When Metrowest converts to the Tenet payroll system later this year, you will transition from your current earned time and extended illness plans to Tenet's plans called Cash Plus and Reserve Sick. Under Cash Plus and Reserve Sick you will not lose any of your accrued time and will continue to earn additional benefits under these new plans.

The Employer began operations on March 6, hiring virtually its entire workforce from Columbia's employees. The Employer has recognized the Union and other unions in other units. The parties have applied the Union-Columbia collective-bargaining agreement, including the union security clause, dues checkoff and grievance arbitration, with the exceptions announced in its March 4 letter to

employees, i.e., in May 1999 it implemented the announced changes in health and welfare benefits and in August it implemented its Cash Plus and Reserve Sick plans.

While the Employer states that it and Columbia signed an initial purchase and sale agreement in November 1998, it has not provided a copy of that agreement. The Employer did provide portions of a first amended purchase and sale agreement executed on March 5. Among the terms in that March 5 agreement were provisions that the Employer "shall have no obligation to assume or maintain in effect any of the collective bargaining agreements (or individual provisions thereof)" and that the Employer "shall . . . offer employment to all employees . . . on such terms and conditions as are established by Purchaser".

The Union states that it was not aware of the announced changes until May 1999, when it received a copy of the March 4 letter from an employee. At an August meeting between the Union and Employer, the Employer refused to bargain about the May benefits changes or the August leave changes. The Union filed two grievances over the changes and made a request for information. The grievance over the August leave changes asked for a return to the leave provisions of the contract; the grievance over the benefits changes did not seek such rescission, since the changes represented an economic gain.

On September 28, 1999, DPH issued a report on the Employer's compliance with the conditions imposed on the approval of the transfer. That report states, in part, that the Employer "reports it has honored the terms and conditions of the collective bargaining agreements, changing only the benefit packages as announced by letter . . . . The Coalition indicates that it has no information to report on this condition. Staff noted that Metrowest appears to be in compliance with this condition."

ACTION

We conclude that the Employer was not privileged to unilaterally implement different terms and conditions of employment, since it was a "perfectly clear" successor that was required by a Massachusetts state agency to honor the predecessor's collective-bargaining agreement as a condition of the agency's approval of the transfer by which the Employer became a successor.

Under the Board's successorship doctrine, a successor normally has the freedom to set initial terms and conditions of employment for its newly-hired work force.

However, in Burns[1] the Supreme Court enunciated an exception to this rule, involving "instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms." In Canteen Co.,[2] the Board applied this "perfectly clear" exception to hold that:

> when the Respondent expressed to the Union its desire to have the predecessor employees serve a probationary period, the Respondent had effectively and clearly communicated to the Union its plan to retain the predecessor employees. [Footnote omitted]. Therefore, as it was "perfectly clear" on [that date] that the Respondent planned to retain the predecessor employees, the Respondent was not entitled to unilaterally implement new wage rates thereafter.

The Board relied on the fact that at the time the employer contacted both the union to say that it wanted employees to serve a probationary period and the employees to say that it wanted them to apply for employment, it "did not mention in these discussions the possibility of any other changes in its initial terms and conditions of employment."[3] Thus, in applying the "perfectly clear" exception, the Board scrutinizes not only the successor's plans regarding the hiring of the predecessor's employees but also the clarity of its intentions concerning existing terms and conditions of employment. In Canteen and other cases, a bargaining obligation has been imposed under the "perfectly clear" exception based upon the successor's silence as to changing or continuing the existing working conditions at the time it indicated it would be hiring the predecessor's employees.[4] The Board has also applied the "perfectly

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[1] NLRB v. Burns International Security Services, Inc., 406 U.S. 272, 294-95 (1972).

[2] 317 NLRB 1052, 1053 (1995), enfd. 103 F.3d 1355 (7th Cir. 1997).

[3] Id. at 1052.

[4] See, e.g., Roman Catholic Diocese of Brooklyn, 222 NLRB 1052 (1976), enf. denied in relevant part sub. nom. Nazareth Regional High School v. NLRB, 549 F.2d 873 (2d Cir. 1977) (Board imposed an obligation to bargain about initial terms of employment prior to the new employer's extension of formal offers of employment to the

clear" exception where the new entity retained the entire predecessor bargaining unit, but also indicated that at some time in the future it would implement certain unspecified changes in terms and conditions of employment.[5]

The Board has also applied a "perfectly clear" successor analysis, and an obligation to bargain before changing existing terms and conditions of employment, where a successor was bound to a predecessor's collective-bargaining agreement as a condition of its taking over the predecessor's operations. Thus, in Springfield Transit Management[6] the successor that took over the management of a public transportation system was bound by the requirements of Federal and Massachusetts transit funding law to hire the predecessor's employees and apply the existing

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predecessor's employees where the employer made an unequivocal statement to the union of an intent to hire all of the predecessor's lay teachers, but did not mention any changes in terms and conditions of employment; 8(a)(5) violation found when it later submitted an employment contract with unilaterally changed terms and conditions of employment); Fremont Ford, 289 NLRB 1290, 1296-1297 (1988) (initial bargaining obligation imposed under "perfectly clear" exception where new employer manifested intent to retain the predecessor's employees prior to the beginning of the hiring process by informing union it would retain a majority of the predecessor's employees and did not announce significant changes in initial terms and conditions of employment until it conducted hiring interviews; employer's stated desire to alter the seniority system and institute a flat pay rate insufficient to indicate intent to establish new terms and conditions). In Canteen, 317 NLRB at 1053, the Board distinguished its dismissal of the complaint in Spruce Up Corp., 209 NLRB 194, 195 (1974), enfd. 529 F.2d 516 (4th Cir. 1975), where the employer was not a "perfectly clear" successor because representatives explicitly stated in its initial meeting with the union that initial pay rates would be different from those of the predecessor.

[5] East Belden Corporation, 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 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").

[6] 281 NLRB 72 (1986).

collective bargaining agreements. That obligation was set forth in its agreement with the public transit authority, not in an agreement or understanding with the predecessor management company. Therefore, the successor violated Section 8(a)(5) by offering the predecessor's employees employment at a lower rate of pay than that paid by the predecessor, 281 NLRB at 78.

In the instant case, the Employer was required, as a condition of DPH approval of the transfer of the Medical Center, to honor the existing contract with the Union. That condition arose out of the Employer's December 1998 agreement with the Coalition and also constituted, as found by the Region, a "perfectly clear" commitment to hire Columbia's employees. Such a commitment to a "third party" to adopt an existing contract and, thereby, to hire the existing workforce because to do otherwise would violate Section 8(a)(2), was found in Springfield Transit to create a "perfectly clear" successor obligated to bargain with the incumbent union over initial terms and conditions.[7] Further, to the extent that there is evidence that the commitment to the Coalition and/or the condition imposed by DPH were known prior to March 4 by either the Union and/or unit employees, such evidence would also establish that the Employer was a "perfectly clear" successor.

Therefore, complaint should issue alleging that the Employer's two unilateral changes, the May changes to health and welfare benefits and the August changes to sick leave policies, violated Section 8(a)(5).[8]

B.J.K.

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[7] Cf. The Denham Co., 206 NLRB 659, 660 (1973) and 218 NLRB 30, 31 (1975)(in finding a "perfectly clear" successor bargaining obligation the Board relied, in part, on the successor's agreement with the predecessor to retain its employees for at least 30 days).

[8] We agree with the Region that the fact that the changes did not take place until some months after the Employer began operations would not render them unlawful even if we were to conclude that the Employer was not a perfectly clear successor, since the prospective changes were clearly announced in the March 4 letter to employees. See, e.g., Holiday Inn of Victorville, 284 NLRB 916, n. 2 (1987); Henry M. Hald High School, 213 NLRB 415 (1974).