

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

Advice Memorandum

DATE: January 16, 2001

TO : Gerald Kobell, Regional Director
Region 6

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

SUBJECT: Great Atlantic News, et al.
Cases 6-CA-31033; 31269

524-5012-5000
524-5012-7600
524-5029-5050
530-0167
530-2025-6700
530-4080-5054
530-4825-6700
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530-6067-2010
530-6067-4022-1100
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530-8020

These Section 8(a)(5) and (3) cases were submitted for advice as to (i) whether Great Atlantic News, t/a The News Group ("TNG"), is a Burns¹ successor to United Magazine Company, t/a Unimag ("Unimag"), and (ii) whether TNG's decision to subcontract for drivers, rather than hire Unimag's drivers, to avoid paying contractual wages and to avoid incurring accrued pension fund liability under ERISA is unlawful.

FACTS

As of 1999, Unimag was the third largest of the industry's five wholesale magazine and book companies, with a presence in Ohio, Michigan, Indiana, Kentucky, North Carolina and western Pennsylvania. Unimag's customers were primarily grocery and convenience stores.

Unimag's distribution system consisted of four packing centers and 17 depots spread over a six state area. Customer orders were bundled at the packing centers and transported to the appropriate depots. From the depots, orders were delivered to the customers. Thus, Unimag's Solon, Ohio, packing center delivered orders to its Pittsburgh, Pennsylvania, depot, from which Unimag delivered orders to its Pittsburgh customers.

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

At Unimag's Pittsburgh depot, Teamsters Local 211 ("the Union") represented a unit of drivers, general warehouse employees, office clericals and full-time sales-service employees.² The extant collective-bargaining agreement between Unimag and the Union runs from January 23, 1996 through January 31, 2001. All unit employees were paid an hourly wage, received similar benefits, and worked out of the same facility. Unimag also employed between 85 and 99 part-time in-store service coordinators ("ISS employees"), who were not included in the unit.³ Unlike unit employees, the ISS employees were paid on a flat-fee commission basis, received no benefits, worked flexible and unusual schedules, and worked exclusively off-site, with no occasion to visit or perform work at the depot facility. ISS employees were trained by the full-time service employees and submitted paperwork to the full-time service employees, who, in turn, delivered the paperwork to the office clericals. Otherwise, ISS employees had no contact with unit employees.

In 1999,⁴ due to its deteriorating financial condition, Unimag sought to sell its business to a competitor. One deal fell through in the spring. In September, Unimag contacted two other competitors, Anderson and TNG, and offered to sell Unimag's customer list, and the

² The "full-time sales-service" classification included both full-time sales employees and full-time service employees.

³ Unimag created the ISS position to relieve its higher-paid drivers from performing time-consuming in-store work. Pursuant to a side agreement between Unimag and the Union, dated January 23, 1996, the Union was recognized as the collective-bargaining representative of the ISS employees. However, that side agreement was abrogated by a subsequent side agreement, dated November 12, 1997. Pursuant to the latter side agreement, Unimag retained the right to employ ISS employees, but they were excluded from the unit; ISS employees would not work more than 20 hours per week; and in the event that any ISS employee worked in excess of 1,000 hours in a twelve month period the parties agreed to negotiate about increasing the number of full-time service positions.

⁴ All dates hereafter refer to 1999 unless otherwise noted.

accompanying servicing rights, to each.⁵ Anderson purchased Unimag's Columbus, Ohio, Cincinnati, Ohio and Lexington, Kentucky, customer list and the right to service customers in those markets. TNG purchased the remainder of Unimag's customer list and the right to service those customers.

The terms of Unimag's sale to TNG were as follows. Unimag and TNG entered into a contract ("the Agreement") on September 20, which provided that TNG would pay Unimag a sum equal to 2.5 percent of the "annualized sales" of each Unimag customer which became a TNG customer and remained a TNG customer for six consecutive months. In addition, TNG would pay Unimag a sum equal to 0.4167 percent of each customer's "annualized sales" for each month thereafter, up to an additional six months, for which any such customer remained a TNG customer. Although TNG has retained only half of Unimag's former customers, among them is the Giant Eagle grocery chain, the single largest customer in the Pittsburgh market.

Prior to purchasing Unimag, TNG had a very limited presence in Unimag's markets.⁶ TNG wanted to ensure continuity of service to Unimag's customers. Thus, the Agreement also provided that Unimag and TNG would enter into a services agreement to be effective for a period not to exceed ninety days. Pursuant to the services agreement, which was effective from September 20 until December 20, TNG hired Unimag as an independent contractor. Thus, TNG leased Unimag's equipment and employees, for which it paid Unimag's operating costs plus one percent.

By letter dated September 23, TNG informed Unimag's customers that TNG would be their new wholesaler and that payments for deliveries made after September 24 were to be made to TNG. The letter also stated that although TNG representatives would be contacting customers in the near future to secure service contracts directly with TNG, any service inquiries should be directed to Unimag.

By letter dated October 26, the Union requested that TNG either acknowledge that it was bound by the collective-bargaining agreement between the Union and Unimag or, in

⁵ It is undisputed that Unimag's most valuable asset was its customer list.

⁶ In Michigan, TNG had existing customer accounts with Kroger supermarkets and 7-11 stores, and in Pittsburgh, TNG serviced magazine vendors at Pittsburgh International Airport.

the alternative, recognize the Union as the collective-bargaining agent of the Pittsburgh employees. The Union asserted that by virtue of the services agreement, Unimag and TNG had "acted together as an employer of [Union] members" or had become "a single employer and alter egos for employment purposes." By letter dated November 2, TNG declined to bargain with or recognize the Union, stating that TNG was not a legal successor, alter ego or joint employer with Unimag.

Prior to the expiration of the services agreement, TNG decided that it would not hire Unimag's Pittsburgh drivers, but would instead subcontract driving work. On November 29, TNG entered into a contract to lease drivers from DC Transportation Services ("DC"). TNG asserts that it made this decision for economic reasons, specifically, to achieve labor cost savings⁷ and to avoid being deemed a successor which would thus be required by ERISA to assume Unimag's multi-million dollar pension fund liability. The Region concluded that because TNG had no bargaining obligation at the time it decided to subcontract the driving work, it did not violate Section 8(a)(5) by failing to bargain with the Union about this decision. The Region's investigation revealed no independent evidence of Union animus on TNG's part.

On December 20, the services agreement expired by its terms and TNG assumed operations in Pittsburgh. As of that date, TNG employed many of Unimag's managers and supervisors, including Rob Zynosky, who had been Unimag's Pittsburgh operations manager and who held the same position with TNG. The Region has also determined that as of that date, TNG employed 13 statutory employees in general warehouse, office clerical, full-time sales and full-time service positions, nine of whom were former Unimag unit employees. In addition, TNG employed approximately 92 ISS employees, 80 of whom had worked for Unimag and 12 of whom were hired "off the street." By memorandum dated December 23, TNG announced to all Midwest employees, who included those formerly employed by Unimag in Pittsburgh, that it would observe Unimag's vacation, holiday and sick/personal day policies. Zynosky also stated that TNG hired these employees at their Unimag wage rates. The Region has determined that although TNG made minor changes to the employees' job duties, the majority of their job functions remained the same as under Unimag.

⁷ In Pittsburgh, Union drivers' contractual wages and benefits cost \$21.67 per man hour, compared with \$18.00 per man hour for drivers provided by the subcontractor, DC.

TNG operates one processing center which serves a number of depots. Customer orders are bundled at the processing center and transported to the appropriate depots. From the depots, orders are delivered to customers. Thus, TNG's Jackson, Michigan, processing center delivers orders to its Ambridge, Pennsylvania, depot,⁸ from which TNG delivers orders to its Pittsburgh customers.

The Region's investigation of the relationship between Unimag and TNG has yielded insufficient evidence to establish that Unimag and TNG were either joint employers or a single employer during the term of the services agreement. With respect to the former, the Region has found no evidence that TNG set wages or benefits, supervised Unimag employees, or otherwise actually or even potentially controlled any of their employment conditions. With respect to the latter, the Region has determined that Unimag and TNG maintained separate corporate identities throughout the term of the services agreement, and did not share any common officers, directors or supervisors. Former Unimag management officials TNG employed were required to resign their positions with Unimag.

ACTION

We conclude that TNG is a Burns successor to Unimag and that TNG's failure and refusal to recognize and bargain with the Union constitutes a violation of Section 8(a)(5) and (1). We further conclude that TNG's decision to contract out the drivers' jobs was based upon unlawful discriminatory considerations in violation of Section 8(a)(3), and complaint should issue, absent settlement.

I. Successorship and Unit Appropriateness

In determining whether an employer is a Burns successor, the focus is on whether there is "substantial continuity" between the predecessor and successor enterprises and whether a majority of the employees of new employer in an appropriate unit had been employed by the predecessor.⁹ With regard to "substantial continuity," the

⁸ When TNG commenced operations, it moved its depot from Pittsburgh to Ambridge, approximately 12 miles away. Some time thereafter, it relocated from Ambridge to McKees Rocks, Pennsylvania, approximately five miles away.

⁹ Burns, 406 U.S. at 280-281.

Board examines the totality of the circumstances, including whether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products, and basically has the same body of customers.¹⁰ The Board views these factors from the employees' perspective, i.e., whether the retained employees would view their job situations as essentially unaltered.¹¹ With regard to whether a majority of the employees of the new employer in an appropriate unit had been employed by the predecessor, the Board considers whether the new employer employs a "substantial and representative complement" of employees at the time a union makes a demand for recognition,¹² and whether the new employer's workforce comprises an appropriate unit.

Applying the above principles to the facts of the instant case, we conclude that TNG is a Burns successor to Unimag because substantial continuity exists between Unimag and TNG, and because a majority of TNG's employees in an appropriate unit were formerly employed by Unimag.¹³

¹⁰ Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 43 (1987).

¹¹ Id., quoting Golden State Bottling Co. v. NLRB, 414 U.S. 168, 184 (1973). See also NLRB v. Jeffries Lithograph Co., 752 F.2d 459, 464 (9th Cir. 1985).

¹² In Fall River Dyeing, the Court approved of the Board's "substantial and representative complement" rule in the successorship context, which fixes the moment when the determination is to be made as to whether a majority of the successor's employees are former employees of the predecessor (482 U.S. at 52), and also approved of the Board's "continuing demand" rule, whereby a union's premature demand for recognition, although rejected by the employer, remains in force until the moment when the employer attains a substantial and representative complement of employees (482 U.S. at 52-53).

¹³ TNG asserts that its purchase of Unimag's customer list was insufficient to create a successor relationship as either a stock or asset purchase. However, neither a stock nor asset purchase is necessary to establish a successor relationship. Burns was a successorship case in which the

We agree with the Region that substantial continuity exists between the employing enterprises. Therefore, we reject TNG's assertion that its operational and workforce structures are so different from Unimag's -- TNG utilizes one processing center rather than four, and uses leased drivers rather than directly employed drivers -- that insufficient continuity exists between the two enterprises. In fact, TNG is engaged in the same business as Unimag, TNG retained half of Unimag's former customers (including the single largest customer in the Pittsburgh market), and TNG employees perform essentially the same jobs they did at Unimag under the same working conditions¹⁴ and the same

new employer was the successful bidder on a service contract. See also Sierra Realty Corp., 317 NLRB 832, 836 n.16 (1995), enf. denied 82 F.3d 494 (D.C. Cir. 1996):

We find no merit in the Respondent's contention that successorship principles are inapplicable where, as here, it purchased no assets of Supreme and instead "cease[d] to purchase a service from a company and provide[d] the service through its own employees..." Burns itself was a successorship case that did not involve a purchase of assets by the new employer.

Applying this reasoning, we further reject TNG's argument that it has not succeeded to Unimag's operation because TNG's entry into the Pittsburgh market was an act of competition as opposed to a collaborative buyout of one company by another. Compare Glebe Electric, 307 NLRB 883 (1992), where the Board held that there must have been a business relationship between a predecessor and a successor in order to impose liability on the successor under Golden State Bottling Co. v. NLRB, 414 U.S. 168 (1973).

¹⁴ We reject any argument that TNG did not succeed to Unimag's bargaining obligation because it relocated its depot facility from Pittsburgh to Ambridge, and then to McKees Rocks. Here, the distances involved are not significant and do not appear to have had a discernible impact upon employees' expectations of hire by TNG. See, e.g., Mondovi Foods Corp., 235 NLRB 1080, 1082 (1978) (in determining continuity, Board considers various circumstances including change of location; significance of

supervisors and managers. Moreover TNG's production methods are the same as Unimag's inasmuch as the local depot receives bundled customer orders from a processing center, which TNG employees, as did Unimag employees, then deliver to customers. Thus, from the retained employees' perspective, their job situations are essentially unaltered. Accordingly, we conclude that substantial continuity exists between Unimag and TNG.

We further conclude that the unit to which TNG succeeded remains an appropriate unit. As an initial matter, we agree with the Region that the Union's October 26 demand for recognition, rejected by TNG on November 2, constitutes a "continuing demand" for recognition pursuant to the rule described above.

Next, applying the "substantial and representative complement" rule, we find that December 20 is the appropriate date to use in determining whether a majority of TNG's unit employees were formerly employed by Unimag. As of this date the services agreement had expired and TNG was the sole operator of the distribution business. At that time, TNG employed 13 people in unit job classifications and also employed nearly all of Unimag's managerial, supervisory and non-unit ISS employees. Nine of the 13 unit employees employed by TNG on December 20 were former Unimag unit employees. Thus, as of this date TNG employed a "substantial and representative complement" of unit employees, a majority of whom had been former Unimag unit employees.

We reject TNG's contention that it had not hired a substantial and representative complement of employees as of December 20, because it had overhired at that time and its operations and not yet stabilized. The appropriate time at which to determine whether TNG was obligated to recognize and bargain with the Union is the date on which it had hired employees in virtually all job classifications and had begun normal production. Fall River Dyeing, 482 U.S. at 52. In fact, TNG's assertion that it had overhired on its first day of operation supports a finding that it had hired a substantial and representative complement of employees as of December 20. That TNG employees resigned or were laid off in the following months because TNG lost business does not alter this conclusion.

change of location on employees' expectations of hire by purchaser may increase in proportion to distance involved).

Accordingly, the Union's premature demand for recognition became effective, and TNG's attendant obligation to recognize and bargain with the Union attached, as of December 20.¹⁵

TNG asserts that the ISS employees ought to be included in the unit, and that any unit which does not include them is inappropriate. TNG contends that if a representation petition were before the Board today, the ISS employees could be properly included in the unit because they arguably share a community of interest with unit employees. Notwithstanding that ISS employees are paid a flat-fee commission rather than an hourly wage, receive no benefits, work flexible and unusual schedules, work entirely off-site, have no occasion to visit TNG's depot, and have only minimal interaction with unit employees, TNG asserts that a community of interest exists between unit employees and the ISS employees because the latter "are an integral part of [TNG's] core operation of distributing magazines to retailers."

We reject this argument because TNG misapprehends the Board's policy regarding the appropriateness of a historical unit. The issue in a successorship situation is not whether a previously unrepresented unit is appropriate, but whether a historically recognized unit is no longer appropriate.¹⁶ The Board does not give less weight to the

¹⁵ See, e.g., Bronx Health Plan, 326 NLRB 810, 813 (1998) (Board found union's premature demand that successor bargain with it operated as a continuing demand for recognition which became effective the day after the management services agreement between predecessor and successor terminated, at which time successor employed a substantial and representative complement of employees).

¹⁶ Trident Seafoods, Inc., 318 NLRB 738, 739 (1995), enfd. in relevant part 101 F.3d 111 (D.C. Cir. 1996). Even assuming, arguendo, that TNG's assertion that ISS employees may share a community of interest with unit employees has merit, it is well-settled that the Board seeks to identify not the most appropriate or comprehensive unit but simply *an appropriate unit*. P.J. Dick Contracting, Inc., 290 NLRB 150, 151 (1988), citing Morand Bros. Beverage Co., 91 NLRB 409 (1950) (emphasis added). Once this unit is determined the requirements of the Act are satisfied. P.J. Dick Contracting, above. Thus, it is far from certain that the Board would not certify a unit which excluded the ISS employees.

bargaining history of an uncertified historical unit than it gives to the history of a certified unit.¹⁷ Thus, with respect to the appropriateness of a historical unit, the Board's longstanding policy is that "a mere change of 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."¹⁸ The party challenging a historical unit bears the burden of showing that the unit is no longer appropriate.¹⁹ The evidentiary burden is a heavy one.²⁰ In Trident Seafoods, the Board found that after the respondent's purchase, jobs and working conditions remained unchanged. Thus, with respect to the two historical units at issue, the Board concluded that the respondent had failed to demonstrate either compelling circumstances or repugnancy to Board policy sufficient to overcome the significance of bargaining history. Accordingly, the Board found that each unit continued to be appropriate.²¹

In the instant case, there is no evidence of significant changes in unit members' jobs or working conditions. Therefore, TNG cannot meet its burden of showing compelling circumstances or repugnancy to Board policy sufficient to overcome the Union's bargaining history, and we conclude that the historical unit to which TNG succeeded remains an appropriate unit.

¹⁷ Trident Seafoods, 318 NLRB at 739 n.5.

¹⁸ Id. at 738, quoting Indianapolis Mack Sales, 288 NLRB 1123, n.5 (1988).

¹⁹ Trident Seafoods, 318 NLRB at 738.

²⁰ Ibid. See, e.g., Children's Hospital, 312 NLRB 920, 929 (1993) ("compelling circumstances" are required to overcome the significance of bargaining history in a challenged unit); P.J. Dick Contracting, 290 NLRB at 151 (units with extensive bargaining history remain intact unless repugnant to Board policy).

²¹ Trident Seafoods, 318 NLRB at 739-740. Compare Irwin Industries, 304 NLRB 78, 79 (1991) (employees who had been part of a multiemployer unit did not constitute appropriate unit when employed by the successor).

TNG also asserts that the unit at Unimag contained statutory supervisors and was thus inappropriate, which accordingly relieved TNG of any obligation to recognize or bargain with the Union. However, TNG has not submitted evidence to support this assertion.²² In fact, TNG has conceded that Unimag conferred titles such as manager and supervisor upon employees who did not possess true supervisory authority as defined in Section 2(11). Moreover, although TNG identifies one former Unimag unit employee, Audrey Borsevich, as someone who may arguably be considered a statutory supervisor, TNG's contention is based on Borsevich's role as ISS Manager for TNG, not her position as a full-time service employee at Unimag. In these circumstances, the Board's policy for determining the appropriateness of a historical unit, set forth above, remains applicable.

Moreover, in assessing whether TNG was obligated to recognize and bargain with the Union as of December 20, it is of no consequence that TNG did not employ any of Unimag's drivers as of that date.²³ It is well established that the bargaining obligations attendant to a finding of successorship are not defeated by the mere fact that only a portion of a former union-represented operation is subject to a sale or transfer to a new owner, so long as the unit employees in the conveyed portion constitute a separate appropriate unit and comprise a majority of the unit under the new operation.²⁴ Thus, TNG's bargaining obligation was not defeated by its failure to hire any of Unimag's drivers, because as set forth above, the unit to which TNG

²² It is well established that the burden of proving supervisory status rests on the party asserting that such status exists. Billows Electric Supply, 311 NLRB 878, 879 (1993).

²³ But see discussion below at pp. 12-16 that TNG violated Section 8(a)(3) by subcontracting the driving work. Had TNG acted lawfully, the drivers would have remained part of the unit to which TNG succeeded, and TNG would not have been entitled to subcontract their work unilaterally. Thus, TNG's doing so violated Section 8(a)(5). See Love's Barbecue Restaurant No. 62, 245 NLRB 78, 81-82 (1979), enfd. in relevant part 640 F.2d 1094 (9th Cir. 1981).

²⁴ See, e.g., M.S. Management Associates, 325 NLRB 1154, 1155 (1998); Bronx Health Plan, 326 NLRB at 812.

succeeded remained an appropriate unit and a majority of this unit was comprised of former Unimag unit employees.

Accordingly, we find that as of December 20, TNG was a Burns successor to Unimag because substantial continuity exists between Unimag and TNG, and because a majority of TNG's employees in an appropriate unit were formerly employed by Unimag.

II. Lawfulness of the Decision to Subcontract

We conclude that TNG violated Section 8(a)(3) because its decision to subcontract the drivers' work was based upon a desire to avoid paying contractual wages and a desire to avoid successorship obligations, both of which are unlawful discriminatory considerations. We reject TNG's claim that its subcontracting decision was privileged as a lawful entrepreneurial decision.

In Delta Carbonate,²⁵ the Board found that the respondent's decision to subcontract in order to avoid a successorship bargaining obligation upon its hiring of a substantial and representative complement of employees was discriminatorily motivated in violation of Section 8(a)(3). More recently, in Sierra Realty, above, the Board held that a refusal to hire employees in order to avoid their union wage scale "is the plainest form of 8(a)(3) discrimination and is in no way lawfully distinguishable from a refusal to hire employees in order to avoid a successorship obligation." 317 NLRB at 833. The Board further stated that because it deemed the respondent's refusal to hire "its own indicia of intent," there was no need to search for independent circumstantial evidence of animus, and the Board rejected the ALJ's conclusion that the union's higher wage scale established a valid economic defense for the respondent's decision. Id. at 834.²⁶ Here, TNG chose to

²⁵ 307 NLRB 118, 121 (1992).

²⁶ In this regard, Delta Carbonate and Sierra Realty have cast doubt on the continued validity of the holding in Griffith-Hope Co., 275 NLRB 487, 488 (1985), that an employer's decision to subcontract unit work in order to avoid paying contractual wages and benefits did not violate Section 8(a)(3), because in the absence of evidence of union animus such action was not "inherently destructive." In any event, we find Griffith-Hope distinguishable from the instant case because it involved a decision to subcontract temporarily, while TNG has done so permanently.

subcontract the drivers' work in a deliberate attempt to avoid the successorship obligations which would attach upon its hiring of a substantial and representative complement of employees -- bargaining with the Union about contractual wages and assuming Unimag's accrued pension fund liability. Thus, applying the principles of Delta Carbonate and Sierra Realty to the instant case, the Region should argue that TNG violated Section 8(a)(3) because it decided to subcontract the driving work for unlawful discriminatory reasons, notwithstanding the Region's determination that no independent evidence of Union animus exists,²⁷ and despite TNG's assertion that because it hired other represented employees and encouraged DC to hire Union members, no Union animus on its part can be proven.²⁸ The fact that TNG did not violate Section 8(a)(5) by subcontracting the driving work before it became a successor does not preclude issuance of a Section 8(a)(3) complaint consistent with the theory set forth above.

We further conclude that for purposes of Section 8(a)(3) there is no distinction between seeking to avoid contractual wages and seeking to avoid assuming a predecessor's accrued pension fund liability because each flows directly from the collective-bargaining relationship.²⁹ In this regard, we find TNG's reliance on Oklahoma Fixture Co.³⁰ for the proposition that an employer

²⁷ However, the Region should contact the Division of Advice if it believes that TNG can meet its Wright Line burden by showing that its subcontracting decision would have been the same even absent these unlawful considerations.

²⁸ See, e.g., Sierra Realty, 317 NLRB at 834 (Board found irrelevant the fact that the respondent continued to maintain a contractual relationship with the union at its other buildings or that it eventually hired one of the alleged discriminatees at one of those facilities).

²⁹ Cf. Sierra Realty, 317 NLRB at 834 ("Nor can we accept the judge's conclusion that Supreme's higher union wage scale establishes a valid economic defense for the Respondent's decision not to hire Delgado and De LaRosa.... Such purported justification cannot justify conduct that is, in fact, related to the employees' union affiliation.").

³⁰ 314 NLRB 958 (1994), enf. denied on other grounds 79 F.3d 1030 (10th Cir. 1996).

may weigh the costs associated with assuming a particular business operation is misplaced.

In Oklahoma Fixture Co., the Board held that the respondent's decision to subcontract its electrical work did not violate Section 8(a)(3) and (1). The respondent's decision was based upon concerns about legal liability in the event of an electrical wiring problem causing damage to its client's property or customers; it feared that if such a mishap occurred it would lose the customer's account and be forced into bankruptcy, and its lack of knowledge about electrical wiring precluded it from properly overseeing such work being performed by unit employees. 314 NLRB at 958. The Board stated that even assuming the General Counsel had made a showing sufficient to support the inference that the employees' union activity was a motivating factor in the respondent's decision to lay them off, the respondent had satisfied its burden under Wright Line, and dismissed the allegation. 314 NLRB at 959. Oklahoma Fixture Co. is thus readily distinguishable from the instant case, because there the respondent's motive for subcontracting was unrelated to its employees' union affiliation, whereas TNG's decision to subcontract was inextricably linked to the drivers' Union status and contractual wage scale when they worked for Unimag.

Next, we reject TNG's assertion that its decision to subcontract was privileged as a lawful entrepreneurial decision. The decision to subcontract the drivers' work was not part of a plan to make significant entrepreneurial changes to its operations. Rather, the evidence reveals that TNG is engaged in the same business as Unimag and utilizes fundamentally identical production methods. The fact that TNG's operational structure differs slightly from that employed by Unimag, and that TNG chose to subcontract a portion of the predecessor's business, is wholly inadequate to establish that it has implemented fundamental entrepreneurial changes to the enterprise.³¹ Moreover, the Board has iterated that discrimination on the basis of

³¹ Cf. Pertec Computer, 284 NLRB 810, 811 (1987), enfd. as mod. sub nom. Olive Hi Office U.S.A. v. NLRB, 926 F.2d 181 (2d Cir. 1991), cert. denied 502 U.S. 856 (1991) (Board rejected respondent's contention that transferring and subcontracting bargaining unit work altered the company's basic operation, finding that "there was neither a liquidation of the enterprise, in whole or in part, nor a fundamental change in its nature," but rather that "the transfers of work resulted in the same work being done for the employer by other employees in different locations").

union animus cannot constitute a lawful entrepreneurial decision.³²

We also find that TNG's reliance on Container Transit³³ for the proposition that TNG lawfully chose not to hire Unimag's drivers is misplaced. In Container Transit, the Board's conclusion that the respondent did not unlawfully discriminate in its hiring practices was based solely upon the fact that the respondent's recruiting efforts were directed toward independent contractors, who are afforded no protection under the Act. 281 NLRB at 1039 n.4. However, TNG did not hire independent contractors to replace Unimag's drivers. Instead, TNG contracted with DC to have DC's unrepresented employees provide driving services. Therefore, Container Transit is inapposite.

Accordingly, we find that TNG violated Section 8(a)(3) because its decision to subcontract was based upon unlawful discriminatory considerations. We also reject TNG's argument that its subcontracting was a privileged entrepreneurial decision.

III. Conclusion

For the foregoing reasons we conclude that, absent settlement, the Region should issue a Section 8(a)(5) and (1) complaint with respect to TNG's failure and refusal to recognize and bargain with the Union, because TNG is a Burns successor to Unimag. We further conclude that, absent settlement, the Region should issue a Section 8(a)(3) complaint because TNG unlawfully discriminated against Unimag's former drivers by subcontracting their work in order to avoid paying contractual wages and to avoid assuming liability for Unimag's accrued pension fund liability. [FOIA Exemption 5

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B.J.K.

³² Gold Coast Produce, 319 NLRB 202, 202 n.1 (1995), citing Delta Carbonate, 307 NLRB at 122 and cases cited there.

³³ 281 NLRB 1039 (1986).