

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

Advice Memorandum

DATE: March 28, 1997

TO : Rochelle Kentov, Regional Director
Region 12

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

SUBJECT: Lockheed Space Operations Company
Lockheed Martin Space Operations
Case 12-CA-17468

530-4080-5066-3700
530-4825-6700
530-6050-0140
530-8018-2525
530-8081

This case was submitted for advice as to whether the employer is a "perfectly clear" Burns¹ successor where it took previously subcontracted work in-house and hired the subcontractor's work force, and if so, whether the employer violated Section 8(a)(5) and (1) by unilaterally removing a portion of the former subcontractor's employees from their established bargaining unit.

FACTS

Lockheed (Employer) is a defense contractor at the John F. Kennedy Space Center. Since 1983, subcontractor Grumman Technical Services (GTSI) had performed shuttle processing work for Lockheed. On June 23, 1995,² Lockheed announced that it would be taking all shuttle processing work in-house effective October 1 and that all GTSI employees would be offered employment with Lockheed.

The IBEW and the IAM both represent bargaining units at Lockheed. On July 12, Lockheed requested the input of the IBEW and the IAM in determining the appropriate collective bargaining representative of 16 GTSI logistics employees. These employees were part of a larger unit at GTSI who were represented by the IBEW. The IAM did not represent any employees at GTSI. In response to the employer's request, the IBEW contended that it should continue to represent the logistics employees. The IAM contended that the logistics employees should be placed in the IAM unit due to their

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

² All dates herein are 1995 unless otherwise indicated.

functional similarity to the IAM's storekeeper/expediter classification. On September 7, the parties met but were unable to resolve the issue. On September 12, Lockheed stated that it had decided to offer jobs to the GTSI logistics employees and to recognize the IAM as their collective bargaining representative. On October 1, the logistics employees became Lockheed storekeepers/expeditors and were placed in the IAM unit.³ At that point, there were 567 employees, including the former GTSI logistics employees, in the IAM unit, which included 140 storekeepers/expeditors. There were 468 employees, including 165 former GTSI employees, but not the logistics employees, in the IBEW unit. The IBEW contends that the former GTSI employees have no interchange with the IAM-represented storekeepers/expeditors and instead continue to perform the same duties in the same location under the same immediate supervision as when they were employed by GTSI.

ACTION

The Region should issue complaint, absent settlement.

Initially, we conclude, in agreement with the Region, that the Employer is a "perfectly clear" Burns successor⁴ and thus could not unilaterally set initial terms and conditions of employment for the former GTSI employees.

We also conclude that the Employer violated Section 8(a)(5) and (1) by altering the scope of the IBEW bargaining unit without the IBEW's consent. Once established, the scope of the bargaining unit, a permissive subject of bargaining,⁵ cannot be changed unilaterally⁶ except where

³ The change resulted in modifications in paid sick leave and severance pay. The remainder of the GTSI IBEW unit merged into the Lockheed IBEW unit.

⁴ See Canteen Co., 317 NLRB 1052, 1052-54 (1995), enfd. 154 LRRM 2065 (7th Cir. 1997); Cablevision Systems Development Co., 251 NLRB 1319, 1325 (1980) (successorship analysis applies where the employer terminates a subcontract and takes the work in-house).

⁵ Since unit scope is a permissive subject, the failure of negotiations the Employer held with the IAM and the IBEW concerning placement of the logistics coordinators did not privilege the Employer unilaterally to place these employees in the IAM unit. See United Technologies Corp., 292 NLRB 248, 249 nn.8-9 (1989), enfd. 884 F.2d 1569 (2d Cir. 1989).

the removed group is sufficiently dissimilar from the remainder of the unit so as to warrant removal.⁷ Where an employer transfers employees out of the unit to do the same work they had been doing as unit employees, without the union's consent, it has unlawfully altered the scope of the unit.⁸ On the other hand, an employer's assignment of unit work to non-unit employees, without moving employees out of the unit to do the work, is a mandatory subject of bargaining as to which the employer need only bargain to impasse.⁹

The distinction between an assignment of unit work and a change in unit scope can be subtle. However, in this case the Employer clearly changed the scope of the IBEW

⁶ See, e.g., Boise Cascade Corp., 283 NLRB 462, 467 (1987), enfd. 860 F.2d 471 (D.C. Cir. 1988); Serramonte Oldsmobile, Inc. v. NLRB, 86 F.3d 227, 234 (D.C. Cir. 1996).

⁷ McDonnell Douglas, 312 NLRB 373, 375, 377 (1993), reconsideration denied 313 NLRB 868 (1994), reversed on other grounds, 59 F.3d 230 (D.C. Cir. 1995).

⁸ See Id. (employer unlawfully removed employees from the unit when it changed their assignment from one to another of employer's component companies); Illinois-American Water Co., 296 NLRB 715, 719-21 (1989), enfd. 933 F.2d 1368 (7th Cir. 1991) (employer unlawfully moved employees out of unit when it created a new high-tech computer center and moved clericals there to do same basic function with advanced technology).

⁹ See Storer Communications, 295 NLRB 72 (1989), enfd. 904 F.2d 47 (D.C. Cir. 1990) (employer altered jurisdictional clause, after bargaining to impasse, to remove certain work from news cameramen's exclusive jurisdiction; no change in unit because all of the news cameramen remained in the bargaining unit); A.M.F. Bowling Co., Inc., 303 NLRB 167, 171 (1991), enfd. in rel. part 977 F.2d 141 (4th Cir. 1992) (proposal giving an employer the discretion to remove work from the unit, without changing the job classifications or functions of unit employees, did not change scope of the unit and was not a permissive subject); Batavia Newspapers Corp., 311 NLRB 477, 480 (1993) (proposal was a mandatory bargaining subject since it "gave the Respondent the right to assign unit work to 'persons not in the composing room,'" but did not "preclude the union from contending in unit clarification or other Board proceedings that the individuals who perform the transferred unit work assignments are to be included in the unit." (emphasis added)).

bargaining unit when it unilaterally removed the logistics employees from the unit.

The Employer violated Section 8(a)(5) by removing the logistics employees from the IBEW represented unit because the Employer failed to establish that there was sufficient change in the logistics employees' job functions and terms and conditions of employment to warrant removal from the IBEW unit. In McDonnell Douglas,¹⁰ the Board found that unilateral removal of unit employees violated Section 8(a)(5) since the reassigned employees continued to perform the same duties in the same locations as they had prior to the transfer. In this case, the job responsibilities, location, wages, hours and immediate supervisors of the former GTSI logistic coordinators remained the same after their transition to Lockheed. Thus, here, as in McDonnell Douglas, there was insufficient change in the employees' job functions or terms and conditions of employment to warrant their removal from the IBEW-represented bargaining unit.¹¹

We reject the Employer's defense that the logistics coordinators could be accreted into the IAM unit because that unit includes employees who perform arguably similar functions.¹² The Board takes a restrictive view of accretion since it forecloses the employees' right to select their bargaining representative.¹³ If the new group may appropriately belong to some unit other than the one into which accretion is sought, the Board will not find accretion.¹⁴ In this case, as noted above, the former GTSI logistic coordinators appropriately belonged in the IBEW unit. Thus, the Employer violated the Act when it

¹⁰ 312 NLRB at 377.

¹¹ See also Bay Shipbuilding Corp., 263 NLRB 1133, 1140 (1982), enfd. 721 F.2d 187 (7th Cir. 1983); Seven-Up/Canada Dry Bottling Co., 281 NLRB 943, 947-949 (1986).

¹² There is no Section 8(a)(2) charge attacking the Employer's accretion of the 16 employees in question.

¹³ Silver Court Nursing Center, 313 NLRB 1141, 1143 (1994).

¹⁴ Save Mart of Modesto, 293 NLRB 1190, 1191 (1989). See also Borden, Inc., 308 NLRB 113 n.4 (1992), enfd. 145 LRRM 2833 (10th Cir. 1994).

unilaterally removed the logistics coordinators from the
IBEW unit.¹⁵

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¹⁵ [FOIA EXEMPTIONS 2 and 5] We also agree that
the IAM should be named as a party in interest.