

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

Advice Memorandum

DATE: April 22, 2009

TO : Martha Kinard, Regional Director
Region 16

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

SUBJECT: United Steelworkers of America (Asarco) 554-4250
Case 16-CB-7756

This case was submitted for advice as to whether United Steelworkers of America (the Union) violated Section 8(b)(3) of the Act in its negotiations with Asarco, Inc. (Grupo), the parent entity that owns, but does not control, Asarco, LLC (Asarco), the employer of the employees represented by the Union. We agree with the Region that the instant charge should be dismissed, absent withdrawal, as the Union had no bargaining obligation to Grupo enforceable under Section 8(b)(3), because Grupo was not an employer of Asarco's employees.

FACTS

As more fully explained in the Advice Memorandum in Case 16-CE-34, et al., Asarco is a debtor-in-possession in bankruptcy which, since 2005, has been operated by a board of directors not controlled by Grupo. In March 2007, over the objections of Grupo, the bankruptcy court approved a collective-bargaining agreement and several stipulations between Asarco and the Union which included several provisions that Grupo has alleged violate Section 8(e). One of these is a requirement in a "Special Successorship" provision that Asarco not execute any transaction resulting in a change of control unless the "buyer" enters into an agreement with the Union establishing the future terms and conditions of employment of Asarco's employees. This provision expressly provides that the Union agrees to negotiate in good faith with prospective buyers.¹ Grupo has appealed the bankruptcy court's approval of the collective-bargaining agreement; that appeal is still pending in district court. In Case 16-CE-34, et al., we authorized

¹ In approving Asarco's collective-bargaining agreement with the Union, the bankruptcy court expressly noted that it might, in certain circumstances, terminate the "Special Successorship" provision if the Union failed to honor the good-faith bargaining obligation created by that provision.

the Region to issue complaint alleging that one of the challenged provisions in the collective-bargaining agreement -- the "Neutrality" provision - is unlawful. We instructed the Region to dismiss the Section 8(e) allegations regarding the other provisions, including the collective-bargaining agreement requirement of the "Special Successorship" provision.

Soon after the bankruptcy court approved Asarco's collective-bargaining agreement with the Union, Asarco began looking for a purchaser that would buy its assets or operate it as a going concern. As many as 10 entities indicated interest in taking over Asarco out of bankruptcy, with four entities making formal bids -- Vedanta Resources, Glencore International, Harbinger Capital Partners, and Grupo.

After Grupo approached the Union, the parties began negotiations for an agreement to be effective if Grupo was able to regain control of Asarco. Between March 2008 and late May 2008,² the parties continued to discuss each other's proposals, including the Union's proposals that Grupo agree to the "Neutrality" provision alleged to be unlawful in 16-CE-34, et al., and several provisions that Grupo claims are permissive subjects of bargaining. While Grupo never indicated that it would agree to these provisions, it never refused to discuss any of the Union's proposals or stated that any of the proposals would preclude an agreement. Indeed, on April 30, Grupo stated to the bankruptcy court that it had begun discussions with the Union, that it was willing to accept all of the economic terms, and substantially all of the non-economic terms, of the existing collective-bargaining agreement between Asarco and the Union, and that it was "hopeful of reaching an agreement" with the Union.³

On May 31, Asarco and Vedanta announced that they had reached an agreement for the purchase of Asarco by a Vedanta subsidiary. On June 2, a Grupo representative and a Union representative had a brief telephone conversation during which they discussed the Vedanta purchase agreement,

² All dates hereinafter are in 2008, unless otherwise noted.

³ Based on these facts, the Region has tentatively concluded that, even if the Union had an 8(d) bargaining obligation, it did not unlawfully insist to impasse over unlawful or permissive subjects, or condition agreement on them, because Grupo never refused to bargain over any of the Union's proposals.

clarified the Union's proposals, and discussed whether Grupo and the Union might reach a collective-bargaining agreement, which each party indicated might still be possible.⁴ Neither Grupo nor the Union has since requested any further bargaining.

On June 12, the bankruptcy court approved Vedanta's bid to take over Asarco, pending approval of a plan of reorganization. The court also permitted Grupo to propose a competing plan of reorganization, notwithstanding its lack of an agreement with the Union. In July and August, both plans of reorganization were filed with the bankruptcy court. Since that time, due to the significant reduction in copper commodity prices, both plans of reorganization have been withdrawn.

ACTION

We agree with the Region that the instant charge should be dismissed, absent withdrawal, as the Union had no bargaining obligation to Grupo enforceable under Section 8(b)(3), because Grupo was not an employer of Asarco's employees.

Under Section 8(b)(3) of the Act, it is an unfair labor practice for a union to "refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of Section 9(a)." Thus, the express terms of the statute make it clear that, where a union is not the representative of the employer's employees, there can be no violation of 8(b)(3).

The necessity of an employer-employee relationship as the basis for a union's bargaining obligation can also be seen in the well-established principle that the union bargaining obligation enforceable by Section 8(b)(3) is reciprocal with the employer bargaining obligation enforceable by 8(a)(5); thus, any finding of a bargaining obligation under 8(b)(3) would require a similar finding of a bargaining obligation under 8(a)(5).⁵ As the Board will

⁴ Asarco's purchase agreement with Vendanta did not preclude the Union from reaching agreements with any other potential buyers.

⁵ See, e.g., Food & Commercial Workers Local 1439 (Layman's Market), 268 NLRB 780, 784 (1984) ("[a]s noted by the Supreme Court, it was the intent of Congress when enacting Section 8(b)(3) to condemn in union agents those bargaining attitudes 'that have been condemned in management' by the

not find a putative successor employer to be obligated to bargain with the union representing the predecessor's employees prior to the time when the putative successor becomes the employer of those employees,⁶ or at least when there is a "reasonable certainty" that it will become the employer of those employees,⁷ no reciprocal bargaining obligation attaches to the union prior to that time.

The Board has also made it clear that voluntarily beginning negotiations prior to successorship does not itself create a bargaining obligation enforceable under the Act. Thus, in Holly Farms, the successor employer's bargaining obligation began on the date it purchased a controlling interest in the predecessor corporation, notwithstanding that it had begun negotiations with the union almost four months earlier.⁸

In the instant case, while Grupo was the equity owner of Asarco during the relevant period, there is no contention that it was ever a single employer with Asarco, and it is not currently an employer of Asarco's employees, because it does not control their terms and conditions of employment. Moreover, imposing a bargaining obligation on Grupo and the Union based on the possibility that Grupo might become an employer of Asarco's employees in the future would arguably mean that each of the other three entities that submitted formal bids to take over Asarco might also have a bargaining obligation vis-à-vis the Union - those other entities had a possibility of becoming a future employer of Asarco's employees as well. Indeed, one of the other entities, Vedanta, appears to be at least as likely as Grupo to become a successor employer of Asarco's

previously enacted Section 8(a)(5)"), quoting NLRB v. Insurance Agents, 361 U.S. 477, 487 (1960)).

⁶ See, e.g., Holly Farms Corp., 311 NLRB 273, 276-277 (1993), enfd. 48 F.3d 1360 (4th Cir. 1995), affd. on another issue 517 U.S. 392 (1996) (successor's bargaining obligation began on the effective date of its purchase of a controlling interest in the predecessor corporation).

⁷ Golden Cross Health Care of Fresno, 314 NLRB 1201, 1206 (1994) (successor employer's bargaining obligation commenced when it began to operate the facility, even though legal ownership had not yet been transferred and a required license had not yet been granted, because the Board found that these eventualities would, in fact, occur).

⁸ 311 NLRB at 275.

employees, as it executed an agreement for the purchase of Asarco, as well as a collective-bargaining agreement with the Union. Imposing a bargaining obligation based on the possibility of a future employer-employee relationship would thus apply to multiple entities, even though only one of the entities, at most, will ultimately take control of Asarco and have the potential to become a successor employer.

Grupo argues that, even though it is not an employer of Asarco's employees, an 8(d) bargaining obligation should be imposed on the Union because: (1) Grupo should be treated as a "perfectly clear" successor with a bilateral bargaining relationship with the Union;⁹ (2) the "Special Successorship" provision made Grupo Asarco's agent for purposes of negotiations; and/or (3) the Union is estopped from claiming it had no duty to bargain in good faith with Grupo. We agree with the Region that none of these arguments establishes a basis for finding a violation of Section 8(b)(3) in the instant case, as none overcomes the statutory requirement of an employer-employee relationship. Thus, for Grupo to be a "perfectly clear" successor, it must be a successor employer in the first place; as discussed above, an employer becomes a successor only when it actually hires a workforce, a majority of which were employees of the predecessor. As for the argument that Grupo was acting as Asarco's agent in these negotiations, any negotiations between Grupo and the Union necessarily were not on behalf of Asarco, but rather were on behalf of Grupo itself in furtherance of its effort to regain control of Asarco. Finally, while equitable estoppel may preclude a party from disputing certain facts after it has obtained a benefit by causing the other party to reasonably rely on the truth of those facts,¹⁰ the "negotiate in good faith"

⁹ While a successor employer ordinarily is free to set initial terms and conditions of employment for its newly-hired work force, even if it has a bargaining obligation to the union that represented its predecessor's employees, a successor employer is required to bargain before changing its predecessor's terms if it was "perfectly clear" at the outset that the new employer planned to, and actually did, retain all of the employees in the unit. See generally, e.g., NLRB v. Burns International Security Services, Inc., 406 U.S. 272, 294-95(1972); Spruce Up Corp., 209 NLRB 194 (1974), enfd. mem. 529 F.2d 516 (4th Cir. 1975).

¹⁰ See, e.g., Manitowoc Ice, Inc., 344 NLRB 1222, 1223 (2005) (union estopped from challenging employer's unilateral change to employee profit sharing plan because union had acquiesced in employer's previous unilateral changes to the plan and did not challenge employer's

language of the "Special Successorship" provision did not acknowledge an 8(d) bargaining obligation. Rather, the Union merely promised to negotiate in good faith with prospective "buyers" of Asarco subject to the bankruptcy court's approval.

In dismissing the charge in the instant case, we recognize that the circumstances here are unique, and that an argument might be made that, given Grupo's past and current equity ownership of Asarco, the requirement that it negotiate an agreement with the Union and the possibility that it will become an employer of Asarco's employees if it does so should be sufficient to create a reciprocal bargaining obligation between the parties here. We would not make this novel argument, however, particularly as the bankruptcy court has indicated its intent to ensure that the Union bargains in "good faith" and to give Grupo the opportunity to regain control of Asarco regardless of whether it reaches a collective-bargaining agreement with the Union or not. Thus, in approving Asarco's collective-bargaining agreement with the Union, the bankruptcy court expressly noted that it might terminate the "Special Successorship" provision if the Union failed to honor the good-faith bargaining obligation created by that provision, and the court later permitted Grupo to submit a plan of reorganization despite its lack of an agreement with the Union. Given the bankruptcy court's expressed and demonstrated willingness to oversee this issue, we would not make the novel argument that there is a bargaining obligation, enforceable under the Act, between Grupo and the Union.

Accordingly, the Region should dismiss the charge in the instant case, absent withdrawal.

B.J.K.

express understanding that it retained management prerogative to make changes to the plan).