

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

Advice Memorandum

DATE: April 29, 2005

TO : Helen Marsh, Regional Director
Region 3

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

SUBJECT: Hancock Lumber, LLC
Case 3-CA-25058

530-4825-6700

This Section 8(a)(5) case was submitted for advice regarding (1) whether the successor Employer defaulted on a voluntary recognition agreement, and, if so, whether that default negated the Union's agreement there to waive a Burns¹ claim, and thus whether, as a Burns successor, the employer's failure to recognize the Union was unlawful; and (2) whether the Employer's failure to submit to the voluntary recognition agreement's card check procedure, in itself, was unlawful.²

We conclude that the Employer has violated Section 8(a)(5) by not recognizing, upon request, and bargaining with the Union. We further conclude that the Region should not allege that the Employer independently violated Section 8(a)(5) by defaulting on the voluntary recognition agreement. That theory implicates difficult questions, the resolution of which could not result in a remedy superior to that which could be awarded under a Burns theory.

FACTS

Background: the Union Is Certified as the Employees' Representative at Mallery Lumber; Mallery Closes

The predecessor employer, Mallery Lumber, operated a saw mill and lumber yard in Hancock, New York where it produced hardwood lumber products.³ In May 2003, following a

¹ NLRB v. Burns Int'l Security Services, Inc., 406 U.S. 272 (1972).

² The Region's request for Section 10(j) authorization will be considered in a separate memorandum.

³ Mallery Lumber is a division of Blue Triangle Hardwoods, Inc., which owned the Hancock mill. Blue Triangle Hardwoods is a wholly-owned subsidiary of Rossi American Hardwoods.

March 2002 election, and following resolution of determinative challenges, the Board certified Carpenters Local 42 ("the Union") as the representative of a unit of about 46 Mallery Lumber production and maintenance employees. Shortly after the Union was certified, in May 2003, Mallery Lumber closed.

Between the March 2002 election and the May 2003 certification, Mallery Lumber made unilateral changes and laid off employees. The Union filed Section 8(a)(1) and (5) unfair labor practice charges, which were held in abeyance pending resolution of the representation question.

The Union Agrees To Withdraw Pending Unfair Labor Practice Charges and Enters into a Voluntary Recognition Agreement with the Employer

In summer 2003, bargaining took place among the Union and Mallery's principal investor, who also is CEO and principal investor in Hancock Lumber, LLC ("the Employer" or Hancock), and an attorney who is labor counsel for both Mallery and Hancock.⁴ In mid-August, the Union agreed to withdraw its unfair labor practice charges against Mallery, and Mallery agreed to pay severance and backpay to unit employees to remedy wages lost due to Mallery's layoffs after the Board election.

At the same time, the Union and the Employer entered into a voluntary recognition agreement, the "Agreement Regarding Mallery Sawmill Facility, Hancock, New York" ("Agreement"). In Section I of the Agreement, the Union waived its right to contend that the Employer was a successor to Mallery during an eight-month grace period, and agreed not to claim successorship unless the Employer defaulted on the Agreement.⁵ The Union also waived its

⁴ When Mallery closed, its assets were sold to the George Mee Family Trust. George Mee, now deceased, owned the mill in Hancock before Mallery acquired the business. In April 2003, the Employer was formed, and the Employer leased the mill's assets from the George Mee Family Trust. In November 2003, the Employer purchased the mill's assets from the Trust.

The Region has concluded that there is insufficient evidence to establish that the Employer is an alter ego or disguised continuance of Mallery.

⁵ Section I.A. provides that the Union:

will not claim that both Hancock Lumber, LLC and any other company operating a portion of the

right to file an election petition during the eight-month grace period.⁶

In Section II.A and B, the Employer agreed to offer jobs to those former Mallery unit employees who had lost their jobs because of the facility's closing, under the "same wages and benefits" in effect at the time of their job loss.⁷ In Section II.D.2, the Employer further agreed to recognize the Union if, after the eight-month grace period had elapsed, the Union could demonstrate to a mutually selected neutral third party that the Union had obtained authorization cards from two-thirds of the unit employees.⁸

Hancock, New York facility are "successors" (under the NLRA) to Mallery Lumber . . . during the grace period set forth in paragraph D.1. below, and will only have the right to make that claim thereafter, in the event that Hancock or such other company default under the terms of this Agreement.

⁶ Section I.B. provides that the Union:

will not file a petition with the [Board] seeking a representation election during the grace period set forth in paragraph D.1. below.

⁷ Section II.A. provides that the Employer agrees:

to offer employment, for vacant positions for which hiring is being conducted at the facility to individuals who: (i) were former employees of Mallery Lumber; (ii) were members of the certified bargaining unit before their termination; (iii) were terminated for reasons associated with the closure of the facility and not terminated for disciplinary reasons; and (iv) are qualified for the position.

⁸ In Section II.D.2, the Employer agreed that

upon presentation of signed and dated authorization cards of at least 66-2/3% of the employees in an appropriate bargaining unit at the facility, the Company will consent to a card check recognition. The card check recognition must be certified by a mutually selected neutral third party. The cards must be dated no later than 30 days prior to the date on which notice is given by the union to the employer that voluntary recognition is sought, and only those individuals

Under Section II.D.1 of the Agreement, the eight-month grace period begins from the date on which the Employer begins "first daily regular production runs" at the sawmill.⁹ The Agreement's terms do not explicitly define that standard. The Union provided evidence to show that, during bargaining over the Agreement, the parties discussed the meaning of "first daily regular production," and agreed that fulfilling the Employer's first order would constitute its "first daily regular production." [FOIA Exemption 7(D) ,] at the first meeting during which the parties discussed the Agreement, the Union asked the Employer's counsel whether the grace period for getting the mill running would start when the Employer fulfilled its first order, and the Employer's counsel stated that it did. As discussed infra, the Employer's counsel insists that it intended that the grace period would begin only after the mill resumes daily production on a regular basis at the levels at which it was producing before closing.

The Employer Reopens the Mill and Hires Former Mallery Employees

By letter dated August 14, 2003, the Employer announced to former Mallery employees that it would begin hiring them in the next 30-60 days under terms similar to those under which they had worked at Mallery, that it was building a log inventory to restart production, and that it would run the mill on a regular basis once the inventory was obtained. In early fall 2003, the Employer hired about 15 former Mallery employees and began maintenance work at the mill.

Beginning in mid-November 2003, the Employer began its sawmill operation, and increased production, with some

who would be eligible shall have their cards counted.

⁹ Section II.D. provides that the Employer:

Agrees to voluntarily recognize the [Union] at the facility on the following terms and conditions:

1. Only after the expiration of a period of eight (8) months following the date on which the first daily regular production runs take place at the sawmill.

fluctuations, over the following months.¹⁰ Between about February and April 2004, after further production increases, the Employer hired about 8 more employees, bringing the total at that time to about 23 employees.

The Union Obtains Authorization Cards and Requests Recognition; the Employer Refuses to Recognize the Union, Terminates 2 Union Supporters, and Makes Antiunion Statements at Employee Meetings

During summer 2004,¹¹ the Union began soliciting authorization cards from unit employees. By letter dated July 20, the Employer told employees that it was aware that the Union was seeking employee signatures on authorization cards, advised them of its opposition to the Union, and urged them not to sign cards. The Employer reminded employees that it had hired them at comparable terms to those they had worked under at Mallery, that the mill was now running, and that the Employer was increasing production and employment. The Employer, explaining that it had agreed to recognize the Union if two-thirds of the employees signed cards, said that if the Union garnered enough cards, and if the Agreement's other conditions were met, the employees would lose the chance for a Board election.

On August 12, the Employer terminated employee union supporters Richard Mayo, a production employee, and James

¹⁰ After the Employer restarted the sawing portion of its operations, it produced 28,825 board feet of lumber for sale in November 2003. Beginning in December 2003, its first full month of production, the Employer's production fluctuated from month to month:

December 2003: 121,435 board feet
February 2004: 328,880 board feet
March 2004: 441,024 board feet
April 2004: 317,544 board feet
May 2004: 301,820 board feet
June 2004: 471,496 board feet
July 2004: 274,830 board feet

The Employer supplied a summary of Mallery's production between October 2001 to August 2002. During those months, production fluctuated between 328,697 and 853,413 board feet. The Region has concluded that the Employer produced at 1/3 to 1/2 the levels of Mallery.

¹¹ All dates hereafter are in 2004 unless otherwise indicated.

DeGroat, an employee with mixed maintenance and guard duties.¹² In mid-August, the Employer held the first in a series of mill-wide employee meetings. It informed employees about the discharge of Mayo and DeGroat and told them that they could ask the Union for the return of their authorization cards.

By letter to the Employer dated August 16, the Union requested recognition, invoking the Agreement. The Union informed the Employer that it represented a majority of employees, and that it would seek a neutral to conduct a card check. By August 16, 17 of the Employer's 25 employees, or 68 percent, including discriminatee Mayo, had signed authorization cards designating the Union as their exclusive representative.¹³

By letter dated August 19, the Employer's counsel informed the Union that the Employer refused to recognize it. For the first time, he asserted that the Union's recognition demand was premature because the facility had not been able to achieve daily production runs at levels that the predecessor had been operating at, and that, under the recognition agreement, the Union could not begin organizing until eight months after the work force was rehired and the mill was producing as it formerly did. He raised questions regarding the viability of the mill. On August 23, the Employer's counsel again asserted to the Union, by telephone and by letter, that the Union's demand for recognition was premature.

On September 3, the Employer gave the Union production data and again refused to recognize the Union. The Employer told the Union that it needed a commitment that the Union would not try to represent the employees for one to three years, and said that layoffs and liquidation might be imminent.

By letter dated September 10, the Employer's counsel informed the Union that it was in breach of the Agreement, that the Agreement's purpose was to allow mill production to return to normal, and asserted that the Agreement's requirements were not satisfied as the Employer was producing at less than one-half Mallery production levels. The letter also asserted that the Union's attempts to

¹² The Region has concluded that Mayo is a unit employee and that DeGroat is not.

¹³ If Mayo were to be properly excluded from the unit as of August 16, the Union would still have two-thirds support from the unit, or 16 of 24 employees.

organize the facility hampered production and deterred investors, and that the Employer was considering closing the mill. It suggested that the Employer would talk directly with employees about the organizing drive.

On September 17, the Union filed a petition seeking to represent the unit employees.¹⁴ That petition is blocked by the pending unfair labor practice charges.

At a September 23 employee meeting, the Employer announced that it was difficult to recruit investors because of the Union, offered to help employees to revoke authorization cards, and threatened to close the plant unless employees ceased supporting the Union. The Employer suggested that employees should pursue whatever job offers they had and told them to retrieve their cards from the Union. In October, the Union received a petition signed by 19 employees stating that they no longer wanted the Union's representation.

At a December meeting, the Employer told employees that the sums the Employer was spending each week to defend against the Union's unfair labor practice charges could be better invested in the mill. The Employer also said that the Union was a barrier to securing investors for the mill, and directed employees to let the Union know that the Union did not have their support. A supervisor offered the Employer's telephones to employees so that they could contact the Union to rescind their authorization cards.¹⁵

In January 2005 letters, the Union insisted that it represented the employees and asked for bargaining dates, and the Employer's counsel stated that the Union's demand for recognition was premature and challenged the Union to proceed to an election, an election that the counsel asserted the Union would lose for lack of employee support.¹⁶

¹⁴ Case 3-RC-11497.

¹⁵ A Section 8(b)(1)(A) charge in Case 3-CB-8342, alleging that the Union unlawfully had refused to abide by the interests of a majority of employees who did not want union representation and had refused to honor employees' wishes to have a Board election, was withdrawn on February 10, 2005, after the charging party employee failed to cooperate with the investigation.

¹⁶ The Region has decided to issue complaint on Section 8(a)(1) and (3) allegations raised in Cases 3-CA-25058, 3-CA-25187, and 3-CA-25260, and has submitted no questions about those allegations to Advice. In particular, the unfair

ACTION

We conclude, in agreement with the Region, that the Employer has violated Section 8(a)(5). The Employer defaulted on the Agreement when it refused to submit to the neutral card check, releasing the Union from its agreement not to enforce its Burns rights to recognition. As a Burns successor, the Employer must recognize and bargain with the Union. We further conclude that the Region should not allege that the Employer also violated Section 8(a)(5) by defaulting on the Agreement.

Hancock Defaults on the Agreement

As an initial matter, the question whether the Employer is a Burns successor to Mallery, with a bargaining obligation towards the Union, cannot be reached unless the Employer has defaulted on the Agreement's terms. We conclude that the Employer has defaulted. The key disputed provision is found in Section II.D.1. The Employer maintains that the Union's card check demand and request for recognition are premature because the eight-month grace period has not yet begun. The Employer contends that the "first daily regular production runs" standard set forth in Section II.D.1. is not achieved until the mill operates for a sustained period at the levels previously achieved by Mallery.¹⁷ Under the Employer's current interpretation of the Agreement, the eight-month grace period has not even

labor practice complaint will allege that the Employer violated Sections 8(a)(3) and (1) of the Act by discharging employees Richard Mayo and James DeGroat because they engaged in protected activities on behalf of the Union.

The complaint will also allege that the Employer violated Section 8(a)(1) by informing Mayo and DeGroat that it discharged them because they engaged in protected activities on behalf of the Union; by threatening plant closure unless employees ceased efforts to have the Union represent them; by threatening employees that it would not make improvements in mill unless the employees abandoned their Union support; by offering assistance to employees in revoking their authorizations designating the Union as their representative; and by attempting to coerce and coercing employees to repudiate their support for the Union.

¹⁷ The Region concluded that between November 2003 and the Union's demand for recognition, the Employer produced about one-third to one-half the number of board feet produced by Mallery.

started because the Employer's production in most months is about one-third to one-half that which Mallery produced.

We reject the Employer's current interpretation of Section II.D.1 and conclude that the "first daily regular production runs" occurred in mid-November 2003, when, as is undisputed, the Employer began sawing logs for sale. Although production output did not reach the Mallery levels, significant and regular production occurred thereafter. Therefore, the eight-month grace period expired in mid-July 2004, before the Union's August 16 recognition demand.

The Union's evidence shows that the parties in negotiating this clause intended that the "first daily regular production runs" requirement would be satisfied when the Employer fulfilled its first order. Further, if the Employer intended the language to mean what it now represents, that is, that the mill must be regularly operating at the Mallery era production levels for a significant or lengthy period before the grace period begins to run, it would have been both simple and prudent for the Employer's counsel to insist on drafting the Agreement to make that meaning clear.

Additional support for the interpretation that the clause does not require Mallery-level production is provided by the position the Employer communicated to employees before the Union demanded recognition. In the Employer's August 14, 2003 letter, the Employer stated that production on a "regular basis" would start as soon as an inventory of logs was built, suggesting that "first daily regular production runs" were imminent in mid-August of 2003. The Employer's July 20, 2004 letter in response to the union campaign, which noted to employees that the mill was in operation, that employees had jobs and benefits, and that the Employer was increasing production and employment, supports the conclusion that the Employer understood that the mill had been engaging in daily regular production runs. The Employer's entire response to the Union's campaign belies a belief that the grace period had not yet started. The Employer's July 20 statement to the employees advising them of its opposition to the Union and directing them to oppose the Union's organizing is inconsistent with its asserted belief that the Union's campaign was premature. If the Employer believed the Union's actions were premature, the Employer would have informed the employees that the Union had violated the parties' Agreement by organizing too early.

Moreover, if the Employer's current interpretation of Section II.D.1 were accepted, the Agreement would permit

the Employer to claim for years that it had not achieved production levels comparable to Mallery's, preventing the Union from invoking the voluntary recognition procedure, claiming that the Employer was a successor, or filing a representation petition. We find no basis to believe the Union acquiesced in such a draconian waiver.

In all these circumstances, therefore, we conclude the eight-month grace period began to run in November 2003 when regular daily production began, and that grace period expired in July 2004. The Union satisfied the requirements of Section II.D.1 and II.D.2 by gathering authorization cards to show that, after the grace period had expired, it had the requisite 66 and 2/3% support among unit employees. The Employer defaulted by refusing to proceed to a card check as required by the Agreement, which specifically provided that, upon the Union's "presentation of signed and dated authorization cards of at least 66-2/3% of the employees in an appropriate bargaining unit at the facility, the Company will consent to a card check recognition." Therefore, pursuant to Section I.A, because the Employer was in "default under the Agreement," the Union could claim that the Employer was a successor, and request recognition and bargaining.

With the Employer's default on the Agreement's requirements, the question whether the Employer is a Burns successor to Mallery can be reached. The evidence shows that the Employer is such a successor.

The Employer Is a Burns Successor to Mallery

A bargaining representative that has demonstrated its majority support, either in a Board-supervised election or by the employer's lawful voluntary recognition, enjoys a presumption of continuing majority status. The doctrine of successorship fosters industrial peace by ensuring that a change in employers does not itself destroy the presumption of majority status.¹⁸ When new employees who were represented by an incumbent union constitute a majority of the new work force and continue to work under essentially the same conditions as before, "a mere change of employers or of ownership in the employing industry" is not likely to change employee attitudes toward representation.¹⁹ It is

¹⁸ Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 43 (1987); NLRB v. Burns Int'l Security Services, Inc., 406 U.S. at 279; Golden State Bottling Co. v. NLRB, 414 U.S. 168, 184 (1973).

¹⁹ Burns, 406 U.S. at 278-279. See Premium Foods, Inc. v. NLRB, 709 F.2d 623, 627 (9th Cir. 1983).

well settled that a new employer that hires a majority of its employees from the predecessor is a "successor" obligated to recognize and bargain with the incumbent union if there is a "substantial continuity" between the two employing enterprises.²⁰

Here, substantial continuity exists in the enterprise; the Employer is producing the same product with the same equipment, with the same technology, for the same market as did Mallery, at the same location, and under substantially the same supervision and management. And, by August 16, when the Union demanded recognition, the Employer employed a substantial and representative complement of employees.²¹ A majority of the Employer's production and maintenance employees had worked for Mallery in the same jobs. Thus, on August 16, 15 of the Employer's 25 production and maintenance employees had been employed by Mallery in the same jobs, including discriminatee Mayo, receiving the same wages and benefits.²² Although the Employer has not achieved the Mallery levels of employment, successorship principles do not require postponing the bargaining obligation until the Employer is operating at a maximum capacity.²³ After the successor rebuilt production and increased hiring to reach a substantial and representative complement of employees, as viewed from the perspective of the unit employees,²⁴ there were no substantial changes in operations.

²⁰ Fall River, 482 U.S. at 43.

²¹ See Fall River, 482 U.S. at 46-50 (successor's bargaining obligation arises when a majority of its employees in a "substantial and representative complement" was previously employed by the predecessor). See also Premium Foods, Inc. v. NLRB, 709 F.2d at 627; Hudson River Aggregates, Inc., 246 NLRB 192, 198 (1979), enf'd, 639 F.2d 865, 870 (2d Cir. 1981).

²² The Region concluded that the appropriate bargaining unit is the same production and maintenance unit in which the Union was certified as bargaining representative for the predecessor's employees.

²³ See NLRB v. Hudson River Aggregates, Inc., 639 F.2d at 870.

²⁴ See Fall River, 482 U.S. at 43 (employees would "understandably view their job situations as essentially unaltered").

The hiatus between the predecessor's spring 2003 closing and the Employer's renewal of operations in November 2003 does not undermine the successorship finding. A hiatus in operations is not determinative where, as here, relevant factors establish the essential continuity of the employing enterprise.²⁵ We also conclude that the delay between the beginning of normal production runs in November and the Union's bargaining demand should not defeat successorship when all other factors point to a continuity. Although, in the absence of the Agreement, the Union could have made a bargaining demand in November 2003, in light of the Agreement, the Union waited the contractual grace period before making the demand. The Region has determined that the Employer did have a substantial and representative complement of employees in November. Having extracted the Union's promise in the Agreement that it would refrain from claiming successor status in return for the Employer's recognition agreement, the Employer should not be allowed to now both ignore its duty under the Agreement and argue that the Union's delay in asserting successor status precluded that claim.²⁶ In sum, there has been an essential continuation of the employing industry and any hiatus does not preclude successorship.

The October 2004 employee petition showing loss of support for the Union does not preclude finding a Section 8(a)(5) violation. The employees signed that petition after the Employer had refused unlawfully to recognize and bargain with the Union, discharged two employees for their union activities, and committed independent Section 8(a)(1) violations. Such an unlawful refusal to recognize and bargain is presumed to taint any loss of union support that follows, even without direct evidence of a causal relationship between the violation and the disaffection.²⁷

²⁵ See Fall River, 482 U.S. at 45 (hiatus of 7 months) (citing The Daneker Clock Co., 211 NLRB 719 (1974), enf'd, 516 F.2d 315, 316 (4th Cir. 1975) (hiatus of 7 months); C.G. Conn, Ltd., 197 NLRB 442 (1972), enf'd mem. 474 F.2d 1344 (5th Cir. 1973) (hiatus of 4 ½ months). Cf. Radiant Fashions, Inc., 202 NLRB 938 (1973) (no successorship where 2-and-½ month hiatus accompanied significant change in customers, products, production methods, and market).

²⁶ The Employer has not addressed the contention that it is a Burns successor.

²⁷ Lee Lumber & Building Materials Corp., 322 NLRB 175, 177 (1996), remanded on other grounds, 117 F.3d 1454, 1462 (D.C. Cir. 1997). See Franks Bros. Co. v. NLRB, 321 U.S. 702, 704 (1944) ("unlawful refusal of an employer to

Therefore, the Employer's unlawful refusal to recognize the Union tainted the petition the employees signed in October. Discharges of union supporters are a type of violation that is "exceptionally coercive" and may reasonably lead to union disaffection.²⁸ Furthermore, given the timing and the serious nature of the violations, it is reasonable to conclude that there is a causal nexus between them and the evidence that followed of employee disaffection with the Union, further tainting the employee petition.²⁹ The August discharges and the Employer's unlawful statements at the August and September meetings were followed by the circulation of the anti-union petition in early October.³⁰

Finally, we conclude that the Region should not allege that the Employer's breach of the Agreement by failing to submit to the Agreement's card check procedure in itself violated Section 8(a)(5). Such an allegation would raise difficult questions as to whether such an agreement is a mandatory subject of bargaining enforceable under Section 8(a)(5). Any resolution of those questions could not result in a remedy superior to a recognition and bargaining order, which could be achieved under a Section 8(a)(5) complaint alleging a Burns violation.

Accordingly, we conclude that the Region should issue complaint, absent settlement, alleging that the Employer, as a Burns successor, violated Section 8(a)(5) by refusing to recognize and bargain with the Union.

B.J.K.

bargain collectively with its employees' chosen representatives disrupts the employees' morale, deters their organizational activities, and discourages their membership in unions")

²⁸ Penn Tank Lines, Inc., 336 NLRB 1066, 1067-68 (2001) (even after 5 months, discharge of union activist reasonably contributed to disaffection from the union).

²⁹ Master Slack, 271 NLRB 78, 84 (1984).

³⁰ The first signatures on the petition are dated October 4 and 5.