

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

Advice Memorandum

DATE: December 17, 2007

TO : Joseph Barker, Regional Director
Region 13

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

SUBJECT: Durham School Services
Case 13-CA-44276

This case was submitted for advice as to whether a successor employer violated Section 8(a)(5) by refusing to recognize and bargain with an incumbent union during the pendency of a petition filed by a rival union.

In agreement with the Region, we conclude that Durham School Services (the Employer) is a Burns successor¹ (but not a "perfectly clear" successor obligated to apply the contract) and that it violated Section 8(a)(5) by refusing to recognize and bargain with Dundee Association of Transportation Employees (the Union or DATE) after it hired a substantial and representative complement of employees.

In RCA Del Caribe,² the Board held that the mere filing of a representation petition by an outside, challenging union does not require or permit an employer to withdraw from bargaining or refrain from executing a contract with an incumbent union. Thus, an employer will not violate Section 8(a)(2) by postpetition negotiations or execution of a contract with an incumbent, but an employer will violate Section 8(a)(5) by withdrawing from bargaining based solely on the fact that a petition has been filed by an outside union.³ The Board has applied this rule in the successor context, and required that a successor employer recognize and bargain with the incumbent union of its predecessor's employees even though a petition challenging

¹ See Lincoln Park Zoological Society, 322 NLRB 263, 264-265 (1996) (successorship doctrine applies where predecessor was public employer), *enfd.* 116 F.3d 216 (7th Cir. 1997).

² 262 NLRB 963 (1982).

³ If the challenging union wins a Board election, any contract between the employer and the incumbent union "will be null and void." *Id.* at 966.

the incumbent union's representation status is pending before the Board.⁴

Here, the Region has determined that the Employer is a Burns successor to the school district and that it hired a majority of its employees from the ranks of the represented predecessor employees. Therefore, applying RCA Del Caribe, the Employer was required to recognize and bargain with the Union, despite the pending question concerning representation raised by the Teamsters' timely filed petition.⁵ Complaint should issue alleging an unlawful refusal to bargain with the Union as of September 2007, by which time the Employer had hired a substantial and representative complement of employees.

B.J.K.

⁴ See Castaways Management, Inc., 285 NLRB 954, 959 (1987). See also Planned Building Services, Inc., 318 NLRB 1049, n. 5 (1995).

⁵ The Union's demand for recognition, prior to the hiring of a substantial and representative complemented, is appropriately treated as a continuing, timely demand. See MSK Corp., 341 NLRB 43, 44 (2004).