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

DATE: June 14, 2013

TO: Cornele A. Overstreet, Regional Director
Region 28

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

SUBJECT: River Ranch Fresh Foods, LLC
Case 28-CA-097965

596-0420-5000
596-0420-5050
596-0420-5500
530-6050-4500

This case presents the issue of whether the Union's charge, as amended, alleging that the Employer violated Section 8(a)(5) by failing to bargain over its decision to relocate unit work to a new facility and to recognize and bargain with the Union at the new facility, was time-barred under Section 10(b). We conclude that the initial charge was timely filed as to the allegation that the Employer failed to recognize and bargain with the Union at the new facility, because it was filed about three months after the new facility began operating and the Employer denied the Union's bargaining request. The allegation that the Employer unlawfully refused to bargain over its decision to relocate unit work, however, is time-barred unless the Region determines that (1) it is "closely related" to the generalized refusal-to-bargain/unilateral change allegations contained in the Union's initial charge, which was filed within six months of the date the Union first learned of the decision to relocate the work, or (2) the Union's letter, which was attached to the timely-filed initial charge and arguably states the work-relocation allegation, sufficiently notified the Employer of the work-relocation allegation for purposes of Section 10(b). Finally, the Region should determine whether the Union otherwise waived its right to bargain over the decision to transfer unit work by failing to timely request bargaining over that decision.

## FACTS

River Ranch Fresh Foods, LLC ("Employer") is a shipper and processor of vegetables. Until recently, the Employer maintained facilities at two locations: El Centro, California and Salinas, California. Each location had both a shipping/cooling facility and a processing facility. Due to weather constraints affecting the growing season, Salinas operated from April through November, while El Centro operated from November through March. The processing facility employees at both locations were represented by the Teamsters, while the shipping and cooling facility employees at both locations were represented by the United Food and Commercial Workers

("Union" or "UFCW"), the charging party. The UFCW-represented employees at both El Centro and Salinas comprised a single bargaining unit, and the collective-bargaining agreement covering the unit is effective from December 2011 to December 2013.

Beginning in January of 2010, the bacteria *listeria* was discovered in the Employer's El Centro and Salinas facilities and in products produced in and shipped from those facilities. After several recalls of its products, and after spending $200,000 in an effort to upgrade its El Centro facilities and $500,000 in an effort to upgrade its Salinas facilities, the Employer decided to close its Salinas processing facility in June 2012.[1] As a result, 370 Teamsters-represented employees lost their jobs. However, the UFCW-represented employees at the Salinas shipping and cooling facility are still working under the aforementioned collective-bargaining agreement.

On July 5, the Employer's president sent a letter to both the UFCW and the Teamsters stating that both the shipping and cooling and processing facilities at the El Centro location would be closed permanently. The letter further stated that a WARN letter would be forthcoming and that "there may be some employment opportunities from a future dock location in Yuma, Arizona." On July 9, a UFCW agent emailed the Employer to request effects bargaining over the El Centro facility's closure. On July 19, the Union agent met with Employer representatives to engage in effects bargaining, and they told him that jobs may become available in the future at a new facility in Yuma, that nothing had been finalized, and that he would be apprised of any updates. In late July or early August, the Employer made the decision to open a new facility in Yuma, according to the Employer's Director of Shipping, but the decision was not communicated to the Union at that time. On August 30, at another effects bargaining session, the Union agent asked about the possibility of a new facility, and was told for the first time by an Employer representative that a new facility would definitely be opening in Yuma. The Employer representative stated that the new facility would cool and process vegetables and would be a combination loading dock and processing facility. The Employer representative also stated that the Employer hoped the facility would begin operating in November with about 100 employees, and that it would accept applications from El Centro facility employees and hire qualified applicants.

On October 4, the Employer sent employment applications to the former El Centro employees for work at the new Yuma facility and also sent a sample application to the Union.

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[1] All remaining dates are in 2012, unless otherwise noted.

On October 23, the Union requested recognition at the new Yuma facility pursuant to the "recognition" clause of the collective-bargaining agreement and initiated a grievance concerning this matter on October 26. On October 30, the Employer refused to recognize and bargain with the Union with respect to the Yuma facility. The Employer also denied the grievance, and on December 11 the Union formally requested arbitration. On December 14, counsel for the Union wrote to the Employer demanding recognition at the new Yuma facility and requesting bargaining. The letter also stated that "[t]his is plainly a relocation and/or successorship situation" where the Employer had "transferred a majority of the [unit] employees" to the new Yuma plant. On January 3, 2013, the Employer informed the Union that it would be willing to submit the matter to arbitration, and maintains that the parties are still in the process of selecting arbitrators.

On February 8, 2013, the Union filed an unfair labor practice charge alleging that the Employer had violated Sections 8(a)(1) and 8(a)(5) by refusing to recognize and bargain with the Union at its Yuma facility and by making unilateral changes. Attached to the charge that was filed with the Region was a letter which stated that the Employer had unlawfully relocated its facility from El Centro to Yuma and transferred El Centro unit employees there; it is unknown whether this letter was also attached to the copy of the charge that was served on the Employer. On March 8, 2013, the Union filed an amended charge which additionally alleged that the Employer had refused to bargain over the "decision…of moving its facility to Yuma."

The Yuma facility began operating in early November 2012. The Employer states that of the 76 employees working at the new facility, 31 are former El Centro employees represented by the Teamsters, 16 are former El Centro employees represented by the UFCW, and 26 are new hires.

## ACTION

We conclude that the initial February 8 charge was timely filed as to the allegation that the Employer has unlawfully refused to recognize and bargain with the Union at the Yuma facility because the 10(b) period for that allegation began in late October or early November, when the facility began operating and the Employer denied the Union's bargaining request. The 10(b) period for the allegation that the Employer unlawfully refused to bargain over the decision to relocate unit work to Yuma, however, began on August 30, when the Union first received definitive notice of the Employer's intent to open a new facility in Yuma and perform El Centro unit work there with at least some of the former El Centro employees. That allegation is time-barred unless the Region determines that (1) it is "closely related" to the generalized refusal to bargain/unilateral change allegations set forth in the initial charge that was filed less than six months later on February 8, 2013, or (2) the Union's letter arguably alleging the work-relocation violation, which was attached to the February 8 charge, sufficiently notified the Employer of the work-relocation

allegation for purposes of Section 10(b). Finally, the Region should determine whether the Union otherwise waived its right to bargain over the decision to transfer unit work to Yuma by failing to timely request bargaining over that decision.[2]

Section 10(b) of the Act precludes the issuance of a complaint based upon any unfair labor practice occurring more than six months prior to filing the charge.[3] This limitation period begins to run when a charging party has "clear and unequivocal notice of a violation."[4] In the context of an 8(a)(5) violation, mere notice of an *intent* to commit an unfair labor practice is not sufficient to trigger the 10(b) period.[5] Instead, the 10(b) period is triggered when the union has clear and unequivocal notice that an actionable unfair labor practice has occurred.[6] Moreover, in the context of 8(a)(5) charges for a refusal to recognize and bargain with a union at a new facility under an existing collective-bargaining agreement after an alleged relocation of unit work has

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[2] Assuming the work-relocation allegation is not time-barred and the Union did not waive its right to bargain over the decision to relocate the work, the Region has indicated that further investigation may be required to determine whether the Employer relocated unit work in violation of Section 8(a)(5).

[3] *See generally Machinists Local 1424 v. NLRB (Bryan Mfg. Co.)*, 362 U.S. 411 (1960).

[4] *E.g., Leach Corp.*, 312 NLRB 990, 991 (1993), enforced 54 F.3d 802 (D.C. Cir. 1995).

[5] *See Howard Electric & Mechanical*, 293 NLRB 472, 475 (1989) (notice of an intent to commit an unlawful unilateral implementation does not trigger 10(b) as to the unlawful act itself), enforced mem. 931 F.2d 63 (10th Cir. 1991); *Leach Corp.*, 312 NLRB at 991 (it is well-established that "statement of intent or threat to commit an unfair labor practice does not start the statutory six months running") (internal citations and quotations omitted). *Cf. A & L Underground*, 302 NLRB 467, 469 n.9 (1991) (distinguishing notice of contract repudiation, where the act of repudiation constituted the unfair labor practice, from a declaration of intent to implement a proposal at a later specified date, where the unilateral implementation constituted the unfair labor practice).

[6] *Howard Electric & Mechanical*, 293 NLRB at 475. *Cf. Postal Service Marina Center*, 271 NLRB 397 (1984). In *Postal Service* the Board held that in 8(a)(3) discrimination cases, the 10(b) period begins to run on the date the employee receives notice of the adverse employment action rather than the date on which the action became effective. *Id.* at 399-400. However, the Board declined to consider "what, if any, implications" its holding had in other contexts. *Id.* at 401.

taken place, the Board has held that the 10(b) period does not begin until the new enterprise begins operating.[7]

Here, the 10(b) period for the allegation that the Employer unlawfully failed to recognize and bargain with the Union at the Yuma facility began either on October 30, when the Employer rejected the Union's request for recognition and bargaining, or in early November, when the new facility started operating.[8] We need not decide which of those dates started the 10(b) period, however, because the charge was filed on February 8, 2013, well within six months of either of them.

As for the allegation that the Employer unlawfully failed to bargain about the decision to relocate unit work to its new facility in Yuma, we conclude that the 10(b) period began on August 30, when the Union first received "clear and unequivocal" notice that the Employer planned to open a new facility and was willing to employ former El Centro employees there to perform unit work. The Employer's July communications to the Union, on the other hand, stated only that the El Centro location was closing and that there "may be some" jobs at a "future dock location" in Yuma. Those communications were "equivocal and vague"; they did not indicate that a key aspect of the violation at issue—the decision to transfer unit work to another facility—had occurred.[9] Indeed, the evidence indicates that the Employer did not even

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[7] *Leach Corp.*, 312 NLRB at 991-992 (10(b) period did not begin until the employer's relocation of its employees from the old facility to the new facility was complete; union would not have known whether the Act had been violated until the relocation was complete because duty to bargain only existed if transferees from the old plant comprised approximately 40% of the new plant's workforce); *Fire Tech Systems*, 319 NLRB 302, 305 (1995) (branch manager's announcement that company would be dissolved, that he intended to start a new non-union company, and that he hoped employees would come work for him, did not start 10(b) period, as the announcement did not detail "how or when this entity would commence operations" and was thus not a "clear and unequivocal notice of a violation of the Act"; rather, the 10(b) period began when the new entity began operating) (internal quotations and citations omitted).

[8] As in *Leach* and *Fire Tech*, the Union arguably could not have known the precise details of the operation of the new facility and whether it would be entitled to recognition there until the new facility actually began running.

[9] *Fire Tech Systems*, 319 NLRB at 305. *Compare Transit Union Local 1433 (Phoenix Transit System)*, 335 NLRB 1263, 1263 n.2 (2001) (10(b) period began when the charging party was on notice of facts that "reasonably engendered suspicion" that an unfair labor practice had already occurred). Moreover, the Employer's parent company, Taylor Fresh Foods, also has facilities in Yuma. The Union might have been

make the decision to open a facility in Yuma until late July or early August. As this decision was only communicated to the Union on August 30, that date is the earliest that the Union can be charged with "clear and unequivocal" knowledge of a possible "work relocation" unfair labor practice.[10]

We would reject an argument that the Union would have learned of the work transfer decision when it was made—in late July or early August—but for a failure to exercise "due diligence."[11] A party will be found to have exercised due diligence if it makes "reasonable" efforts to ascertain the facts surrounding a violation.[12] Here, the Union representative was first notified on July 5 that "there may be some employment opportunities" for El Centro unit employees at a facility in Yuma. He followed up by discussing that possibility with Employer representatives at a July 19 meeting, and they told him that he would be apprised of any new developments. The Union representative inquired again about the possibility of jobs at a new facility on August 30. It was only at that point that he learned that a final decision had been reached to open a new facility in Yuma. Therefore, the Union representative made reasonable efforts to discern whether the Employer had decided to open a new facility and satisfied any "due diligence" obligation.

Because the 10(b) period for the allegation that the Employer failed to bargain about the decision to transfer unit work began to run on August 30, the initial charge filed on February 8, 2013 falls within the 10(b) period but the amended charge filed on March 8, 2013 does not. The Region should therefore determine whether that

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understandably confused about whether the July communications were referencing jobs in a new Employer operation or at an existing Taylor Fresh Foods facility.

[10] A determination of whether an employer has unlawfully failed to bargain over a decision to relocate unit work is governed by *Dubuque Packing Co.*, 303 NLRB 386 (1991), enforced in part 1 F.3d 24 (D.C. Cir. 1993), certiorari denied 511 U.S. 1138 (1994).

[11] *Broadway Volkswagen*, 342 NLRB 1244, 1246 (2004) (actual or constructive knowledge that an unfair labor practice has been committed "may be imputed where the filing party would have discovered the conduct in question had it exercised reasonable or due diligence"), enforced 483 F.3d 628 (9th Cir. 2007).

[12] *R. G. Burns Electric*, 326 NLRB 440, 441 (1998) (10(b) period did not start running when union agent "strongly suspected" that an employer had discriminatorily refused to hire union applicants; the agent had exercised "reasonable diligence" by keeping the employer's property under surveillance and using inside sources in an effort to determine whether the employer had, in fact, violated the Act).

work-relocation allegation was "closely related" to the February 8 charge, which included only generalized refusal-to-bargain and unilateral change language.[13] Alternatively, the Region should determine whether the attachment to the February 8, 2013 charge, which states that the Employer relocated its facility to Yuma and transferred El Centro unit employees there, was served on the Employer. If so, the Region should determine whether the attachment adequately presents the allegation that the Employer failed to bargain over the decision and effects of relocating unit work to the new facility for purposes of Section 10(b).[14]

Finally, the Region should also determine whether the Union waived its right to bargain over the decision to relocate unit work, inasmuch as the Union did not even arguably demand bargaining over the decision until December 14. That was more than a month after the new facility opened and more than three months after the Employer communicated its intention to open the facility and its willingness to employ former El Centro unit employees there to perform unit work.[15]

/s/
B.J.K.

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*Redd-I, Inc.*, 290 NLRB 1115, 1118 (1988) (an untimely allegation may be "closely related" to a timely filed charge and therefore considered timely if the untimely allegation involves the same legal theory as the violations alleged in the timely charge, if the untimely allegations arise from the same factual situation as the allegations in the timely charge, and if the respondent would raise the same or similar defenses to both allegations).

[14] *See Detroit Newspapers*, 330 NLRB 524, 526 (2000) (Board rejects respondents' contention that certain alleged unlawful discharges were barred by 10(b) because they were not mentioned in any charge, where a charge referenced an attachment containing the discriminatees' names).

[15] *Compare Kaumagraph Corp.*, 316 NLRB 793, 802 (1995) (finding no *Dubuque* violation where union was given "full opportunity to bargain" on the relocation decision but "offered little help in resolving" the employer's financial difficulties), *with Roll & Hold Warehouse & Distribution Corp.*, 325 NLRB 41, 42-43 & n.7 (1997) (finding that union request to bargain would be futile where employer's witness testified at hearing that he believed employer had no obligation to bargain over changes), enforced 162 F.3d 513 (7th Cir. 1998) *and S&I Transportation, Inc.*, 311 NLRB 1388, 1388 n.1, 1389-90 (1993) (finding fait accompli where employer's testimony at hearing revealed employer's "fixed position to implement the changes as announced" because of its "grave financial condition").