

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

# Advice Memorandum

DATE: October 14, 2008

TO : Celeste Mattina, Regional Director  
Region 2

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

SUBJECT: Servco Industries, Inc. 530-4825-6700  
Case 2-CA-38647 530-4850-6700

This case was submitted for Advice on whether the Employer, a Burns<sup>1</sup> successor, violated Section 8(a)(5) where it unilaterally set initial terms and conditions of employment after committing several unfair labor practices during the hiring process. We conclude that the Employer lost its right to set initial terms and conditions of employment by engaging in a scheme to undermine the incumbent Union during the hiring process, and that a complaint should issue alleging violations of Section 8(a)(1), (2) and (5).

## **FACTS**

### **Background**

In early 2008,<sup>2</sup> Servco (the Employer) was awarded a contract to provide cleaning, janitorial, and maintenance services at 123 Williams Street in Manhattan. Servco agreed to take over operations on February 1.

Previously, that building had been serviced by First Quality Maintenance, which had a collective bargaining agreement ("CBA") with Service Employees International Union Local 32BJ. The 123 Williams Street unit appears to have contained about 18 employees. Servco had no prior relationship with Local 32BJ. Rather, Servco has CBAs with United Food and Commercial Workers, Local 348S for several other buildings it services in the New York City area.

Servco president Charles Cestaro was aware that the employees of 123 Williams Street were represented by Local 32BJ but did not contact Local 32BJ or the First Quality employees before February 1. Instead, sometime before

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<sup>1</sup> NLRB v. Burns Security Services, 406 U.S. 272 (1972).

<sup>2</sup> All dates hereinafter refer to the year 2008.

February 1, Cestaro called the Local 348S president and inquired about obtaining a collective bargaining agreement with that union. Local 348S agreed to send representatives to the building.

Sometime in January, Servco representatives interviewed and hired 24 employees to clean 123 Williams Street, none of whom were prior First Maintenance employees. One quarter of the new employees were employees from other Servco buildings, and the other three quarters were new Servco employees.

On January 31, Local 32BJ representative [REDACTED] learned that First Quality had lost the contract at 123 Williams Street. [REDACTED] and another Local 32BJ representative, [REDACTED], went to 123 Williams Street as the night shift workers were arriving to begin their shifts. [REDACTED] and [REDACTED] saw around 25 people that they did not recognize (apparently, the newly hired employees). [REDACTED] approached a supervisor and asked whether he was going to hire the predecessor employees. The supervisor said that the prior employees had to sign a note pad. [REDACTED] then addressed the First Quality employees, informing them that Servco had taken over the cleaning contract; that they should continue to work that evening; and that they should sign the supervisor's pad. [REDACTED] left the building.

### **Events of February 1**

Around 7:00 a.m. on Friday, February 1, two First Quality employees reported to the locker room at 123 Williams Street, where two representatives from Local 348S were waiting.<sup>3</sup> The Local 348S representatives inquired about their current wages and healthcare plans and asked them to fill out union cards for Local 348S, which they did. At about 7:20 a.m. Servco president Cestaro entered the locker room and informed the First Quality employees that their new pay rate would be \$7.50 per hour. The two Local 348S representatives appeared shocked by the low pay rate. First Quality employees had earned around \$21 per hour under their CBA.

Ten minutes later, Local 32BJ representative [REDACTED] arrived in the locker room and informed the Local 348S representatives that she was the employee's union representative. The Local 348S representatives returned the

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<sup>3</sup> None of the First Quality employees were told that Servco was awarded the contract or that Servco had hired 24 replacement employees.

signed cards to the former First Quality employees and left the building.

Exs. 6 & 7(C) went upstairs to call Local 32BJ and tell them what was going on. Exs. 6 & 7(C) returned to the locker room and began speaking with employees when Cestaro interrupted, asking Exs. 6 & 7(C) who she was. Exs. 6 & 7(C) responded that she was the Local 32BJ representative. Cestaro told Exs. 6 & 7(C) that she was to leave and that this is not a union building anymore. One employee testified that Cestaro said, There is no union here, so you don't need to be down here, and This is not a union building anymore. Another employee testified that Cestaro said, There is no more union in the building, and The union is no longer in the building. After telling her to leave, Cestaro threatened to get the building manager to escort her out of the building and to call the police.

Cestaro disputes these accounts. He claims that he only said that at this time it was not a union shop. Cestaro claims that he asked Exs. 6 & 7(C) to leave because she would not provide identification to prove that she was a Local 32BJ representative.

Two Servco representatives then approached the former First Quality employees and told them that they needed to sign a "term sheet," an agreement accepting Servco's terms and conditions of employment or leave the building. In addition to the low wage rate, the new terms provided for elimination of medical coverage, vacation, sick leave, and pension benefits. The employees went upstairs to the lobby to ask Exs. 6 & 7(C) for advice. Exs. 6 & 7(C) advised them to sign the Servco papers so they could continue to work and told them that the Union would continue to fight for them. The employees signed the forms, filled out employment applications, and returned to work.

Exs. 6 & 7(C) returned to the Union office and sent a letter to Servco, dated February 1, stating that the First Quality employees at 123 Williams Street were seeking employment and demanding to bargain with Servco. She also informed Servco of its obligation under the New York City Displaced Building Service Workers Protection Act, NYC Admin. Code § 22-505 et. seq, to retain the predecessor employees.

#### **Events of February 4 through February 20**

On Monday, February 4, Servco wrote Exs. 6 & 7(C) stating that it was willing to bargain and requesting that she contact them to set up a bargaining date. All of the First Quality employees signed the "term sheets" accepting the new Servco terms and conditions of employment. On about February

7, 2008, all of the predecessor employees filled out employment applications. It appears that the 24 newly hired Servco employees continued to report to work for about a week and that some of them shadowed the existing employees so that they could learn the jobs.<sup>4</sup>

On February 4, a Servco supervisor told a former First Quality employee to clean the staircases and wash the doors. The employee had previously handled tenant calls and requests, responded to spills and filled in for other employees during their lunch breaks and break times. Servco confirmed that the employee's duties had been changed. On February 7, Servco also reduced this employee's shift by two hours.

Another former First Quality employee was removed from his position as the elevator operator and assigned to wash walls.

Since February 1, another former First Quality employee works the same hours but her job duties have changed. Her position with First Quality required her to restock the women's bathrooms and to fill in for the elevator operator during lunch breaks. She continues to restock the bathroom but is now required to clean the bathroom and the walls and doors in the building. She no longer fills in for the elevator operator at lunchtime. Around this time, Servco also reduced the night shift by one hour, although a week later, this hour was restored.<sup>5</sup>

By the evening of February 7, all First Quality employees had signed employment applications. On February 11, [Exs. 6 & 7(C)] returned to 123 Williams Street to deliver a petition to one of the building's tenants. [Exs. 6 & 7(C)] was

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<sup>4</sup> While the 24 newly hired employees appear to have outnumbered the predecessor unit (of around 18 employees), the Employer has not challenged its status as a Burns successor. In this regard, the Region is prepared to argue that the newly hired employees were not part of the Employer's regular complement of employees, as they did not perform work, and most stopped reporting for work once it became clear that the former First Quality employees would be offered and would accept employment with Servco.

<sup>5</sup> The Region has concluded that the Employer made these additional changes after it hired its initial complement and commenced operations, without providing Local 32BJ with notice and an opportunity to bargain, in violation of Section 8(a)(1) and (5).

approached by security guards and directed to leave the building.

### **Collective bargaining negotiations**

On February 7, Local 32BJ representative [REDACTED] Exs. 6 & 7(C) spoke to Cestaro about the need to sit down and bargain. On February 14, Local 32BJ requested information from Servco in writing, which Servco completed in March.

On March 12, the employees began a three day unfair labor practice strike. On March 17, 2008, the employees returned to work. Local 32BJ then contacted First Quality, which hired 12 predecessor employees for work at other locations (one employee retired). Bargaining is ongoing.

The Region has found merit to the complaint allegation that Servco made impermissible anti-union statements during the hiring process in violation of Section 8(a)(1) and provided unlawful assistance to Local 348S in violation of Section 8(a)(2). It recommends that in these circumstances, Servco did not have the right to unilaterally set initial terms and conditions of employment and violated section 8(a)(5) in doing so.<sup>6</sup>

Servco denies making anti-union statements and argues that applying the Advanced Stretchforming remedy in these circumstances would be punitive because it complied with its legal obligations by recognizing the Union immediately after it hired a majority of the predecessor employees.

### **ACTION**

We conclude that the Employer violated Section 8(a)(5) by setting initial terms and conditions of employment because it committed unfair labor practices demonstrating a scheme to avoid its bargaining obligation and thereby blocked the process by which Burns successorship normally occurs.

The Board has long held that where a successor engages in certain unfair labor practices in an attempt to avoid its bargaining obligation, the successor violates Section 8(a)(5) by setting initial terms and conditions of employment.<sup>7</sup> In Love's Barbeque,<sup>8</sup> for instance, the Board

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<sup>6</sup> See Advanced Stretchforming International, 323 NLRB 529 (1997) enfd. in relevant part 233 F.3d 1176 (9th Cir. 2000).

<sup>7</sup> Potter's Drug Enterprises, Inc., 233 NLRB 15, 20 (1977), enfd. 584 F.2d 980 (9th Cir. 1978) (table); Karl Kallmann

held that a successor violated Section 8(a)(5) by unilaterally setting terms and conditions of employment because it had discriminated against the predecessor employees in its hiring process in an attempt to avoid its bargaining obligation. Similarly, in Advanced Stretchforming, the Board held that a successor violated Section 8(a)(5) by unilaterally altering terms and conditions of employment where the employer clearly communicated to employees at the time of successorship that they would not retain their union.<sup>9</sup> Thus, although a successor employer is ordinarily free to establish initial terms and conditions of employment,<sup>10</sup> that rule does not apply where the employer has engaged in an unlawful scheme to avoid a bargaining obligation.<sup>11</sup>

The rationale for this rule is well-grounded in policy. The right to establish terms and conditions of employment conferred by Burns is based on the premise that the successor employer will recognize the representative of the affected unit employees and enter into good faith negotiations with the union about terms and conditions of employment.<sup>12</sup> An employer's discriminatory scheme to rid itself of a union clouds crucial indicia of whether it is a "perfectly clear" successor, making it impossible to determine whether announced changes in working conditions are for legitimate reasons or are part and parcel of its

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d/b/a Love's Barbeque Restaurant No. 62, 245 NLRB 78, 82 (1979), enfd. in relevant part 640 F.2d 1094 (9th Cir. 1981); Brown & Root, Inc., 334 NLRB 628, 632 (2001).

<sup>8</sup> 245 NLRB at 82.

<sup>9</sup> Advanced Stretchforming International, Inc., 323 NLRB at 530, See also Brown & Root, Inc., 334 NLRB at 632; Eldorado, Inc., 335 NLRB 952, 952-53 (2001).

<sup>10</sup> NLRB v. Burns Security Services, 406 U.S. at 294.

<sup>11</sup> See e.g., U.S. Marine Corp., 293 NLRB 669, 671-73 (1989), enfd. 944 F.2d 1305 (7th Cir. 1991) (en banc); Canteen Co., 317 NLRB 1052, 1054 fn.6 (1995, enfd. 103 F.3d 1355 (7th Cir. 1997)). The Board has continued to adhere to this view over the dissent of then-Member Hurtgen that it is inappropriate to treat the discriminating employer as a "perfectly clear" successor. See, e.g., Jennifer Matthew Nursing and Rehabilitation Center, 332 NLRB 300, 300 (2000) (Hurtgen, dissenting).

<sup>12</sup> Advanced Stretchforming, 323 NLRB at 530.

discriminatory scheme to avoid a bargaining obligation.<sup>13</sup> Thus, where the employer's motivation behind any newly announced employment terms are called into question, the Board has resolved the ambiguity against the wrongdoer. Any alternative policy would be contrary to statutory policy to confer Burns rights to establish initial terms only on employers that have blocked the process by which the obligations and rights of such a successor are incurred.<sup>14</sup>

We conclude that here, the Employer engaged in a scheme to avoid its bargaining obligation with the Union, thereby interfering with the process by which successorship obligations are normally incurred, and rendering it impossible to determine whether it would have been a "perfectly clear" successor. Because the Employer's unlawful actions in attempting to avoid its bargaining obligation with Local 32BJ make it impossible to determine whether announced changes in working conditions were for legitimate reasons or were part and parcel of its unlawful scheme to avoid a bargaining obligation, the Employer here violated Section 8(a)(5) by unilaterally altering terms and conditions of employment.

Specifically, the circumstances surrounding the Employer's staffing at this site demonstrate an unlawful Employer scheme to avoid its Burns obligation by inducing the First Quality employees to reject job offers. The Employer was subject to a city ordinance requiring it to retain the predecessor employees. That ordinance would ordinarily establish a Burns successorship if predecessor employees accepted employment offers. Despite the ordinance, the Employer never contacted Local 32BJ before takeover but instead, hired 24 new employees – without notice to the Union and without offering positions to the First Quality employees as required by the ordinance. The new employees largely did not work but shadowed the predecessor employees to learn the jobs.<sup>15</sup> The only plausible reason that the Employer hired the shadow workforce is that the Employer expected the First Quality employees to refuse offers.

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<sup>13</sup> See Love's Barbeque, 245 NLRB at 82.

<sup>14</sup> State Distributing Co., 282 NLRB 1048, 1049 (1987).

<sup>15</sup> It is not necessary to determine whether hiring the shadow workforce independently violated the Act, inasmuch as such a violation would not alter the remedy in this case; however, the Employer's actions in this regard further evidence its unlawful scheme to avoid its Burns obligations.

Indeed, the Employer's conduct toward employees on February 1<sup>st</sup> further evidences its unlawful scheme. While the Employer offered the First Quality employees jobs when they reported to work on that day, the Employer offered only \$7.50 per hour without benefits - substantially below the current rate and also apparently below the Local 348S rate, whose representatives were shocked when they learned of the rate.<sup>16</sup> We conclude that the Employer announced a substantially lower wage rate without any benefits to persuade employees not to accept employment.

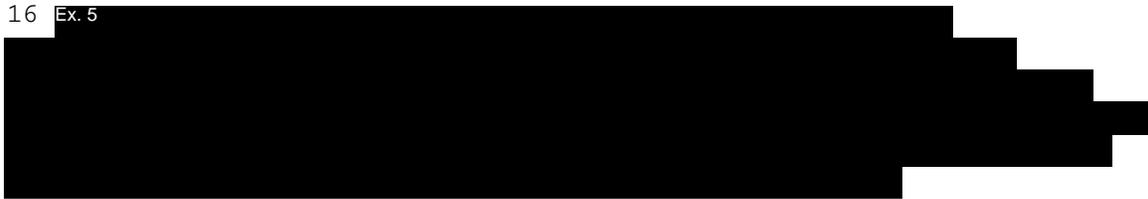
Further, without any valid basis, the Employer told employees on February 1 that they would not retain their Union and ejected their representative. While the Employer claims that it merely told employees it had no union that day, the Employer's claim is rebutted by several witness affidavits. Thus, as the Board reasoned in Advanced Stretchforming, the Employer here interfered with the process by which successorship takes place by sending a clearly unlawful message to employees that the Employer would not permit them to be represented by their union.<sup>17</sup>

Finally, despite knowing that Local 32BJ represented the First Quality employees, the Employer invited Local 348S to sign up employees on February 1. The Employer's conduct, in clear violation of Section 8(a)(2),<sup>18</sup> demonstrates its attempt to rid itself of its Burns obligation and its bargaining obligation with Local 32BJ.

The Employer's scheme to avoid the Union was thwarted by Local 32BJ's directive to employees to accept employment. Thus the Employer recognized Local 32BJ the following Monday. But the circumstances still make it impossible to determine what rate the Employer would have offered the employees absent the unlawful scheme. Because the Employer's unlawful conduct makes it impossible to determine

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<sup>16</sup> Ex. 5



<sup>17</sup> Advanced Stretchforming, 323 NLRB at 529-30.

<sup>18</sup> See Duane Reade, 338 NLRB 943, 943-44 (2003) (employer violated Section 8(a)(2) by providing union with access to stores for organizing employees before store opened while denying equal access and even concealing its intended ownership of some stores to a rival union), enfd. 99 Fed. Appx. 240 (D.C. Cir. 2004) (unpublished).

whether it is appropriate to treat the Employer as a "perfectly clear" successor, the Region should seek the equitable remedy of requiring the Employer to reinstate the terms set forth in the extant collective bargaining agreement.

While we recognize that, unlike in Advanced Stretchforming and Brown & Root, the Employer recognized and offered to bargain with Local 32BJ a few days after making the unlawful statements, we conclude that the Employer still violated Section 8(a)(5) by setting initial terms and conditions of employment. This is because its attempt to avoid its Burns obligation – by providing unlawful assistance to another union, making "no union" statements, hiring a shadow workforce, and paying a suspiciously low wage rate – renders it uncertain what the Employer would have done absent its unlawful attempt to induce the First Quality employees to reject employment offers.<sup>19</sup>

This case is distinguishable from Holiday International Security,<sup>20</sup> where the employer made somewhat ambiguous "no union" statements several months before taking over operations but immediately recognized the Union after hiring a majority of employees. The Division of Advice determined that even if the statements were unlawful, an Advanced Stretchforming remedy was not warranted because the Employer did not implement the unlawful "no union" statement; thus, the imposition of initial terms of employment on the successor was not needed to remedy the effects of the employer's unlawful conduct and would be punitive. Unlike in Holiday, the Employer not only made unlawful statements but engaged in an entire scheme to induce First Quality employees to reject job offers. The Employer engaged in this scheme – including making "no union" statements, providing unlawful assistance, hiring an unnecessary extra

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<sup>19</sup> Given the multi-faceted scheme to avoid its bargaining obligation, the fact that the Employer ultimately recognized Local 32BJ does not refute our conclusion that the Employer violated Section 8(a)(5) by setting initial terms and conditions of employment. Thus, where such broad evidence of an unlawful scheme exists, an independent Section 8(a)(5) violation is not required to find that the Employer violated Section 8(a)(5) by setting initial terms and conditions of employment. See Advanced Stretchforming, 323 NLRB at 530 ("[n]othing in Burns suggests that an employer may impose such an unlawful condition and still retain the unilateral right to determine other legitimate initial terms and conditions of employment").

<sup>20</sup> 21-CA-34394, Advice Memorandum dated November 27, 2001.

workforce, and paying employees a suspiciously low wage rate without any benefits - to avoid its Burns obligations that would have flowed from the city ordinance if the predecessor employees had accepted employment. Further, the Employer committed these unfair labor practices "*at the time of successorship*,"<sup>21</sup> when it was also setting initial terms and conditions of employment. Because the Employer has blocked the process by which successorship obligations are normally incurred, the remedy sought here is not punitive, but rather, resolves against the Employer the ambiguity as to what the Employer would have done absent its unlawful anti-union motive.<sup>22</sup>

Accordingly, absent settlement, the Region should issue complaint alleging that the Employer engaged in an unlawful scheme to avoid its bargaining obligation, by, *inter alia*, making "no union" statements during the hiring process in violation of Section 8(a)(1) and by providing unlawful assistance to Local 348 over Local 32BJ, in violation of Section 8(a)(2), and thereby violated 8(a)(5) by unilaterally altering terms and conditions of employment.

B.J.K.

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<sup>21</sup> See Advanced Stretchforming, 323 NLRB at 530 (emphasis original).

<sup>22</sup> See Love's Barbeque, 245 NLRB at 82 ("any uncertainty as to what Respondent would have done absent its unlawful purpose must be resolved against Respondent.").