Eldorado, Inc. and its successor employer J.C. Media Group, Inc. *and* Graphic Communications International Union, Local 577–M, AFL–CIO. Cases 30–CA–13784 and 30–CA–13895

August 27, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND TRUESDALE

On January 14, 1999, Administrative Law Judge C. Richard Miserendino delivered a bench decision in this proceeding and on February 23, 1999, he issued a decision and certification, certifying the accuracy of that portion of the transcript containing his decision, as amended, and issuing a recommended remedial order. Respondent J.C. Media Group, Inc. filed exceptions and a supporting brief. The General Counsel and the Charging Party filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified[2] and to adopt the recommended Order as modified.[3]

Imposition of Initial Terms of Employment

We agree with the judge that under the standard enunciated in *NLRB v. Burns International Security Services,* 406 U.S. 272 (1972), J.C. Media is the successor employer of Eldorado, Inc. We further agree, for the reasons set forth below, that by communicating to Eldorado's employees at the outset that there would be no union at the new business, J.C. Media, as the successor employer, was not privileged to set the initial terms and conditions of employment.

In *Advanced Stretchforming International, Inc.*[4] the Board held that where a successor employer unlawfully declares to the employees of its predecessor that there would be no union for those it hired, the successor loses its right to unilaterally set initial terms and conditions of employment. The Board found that such an unlawful declaration "blatantly coerces employees in the exercise of their Section 7 right to bargain collectively through a representative of their own choosing," and like a discriminatory refusal to hire the predecessor's employees, thereby "block[s] the process by which the obligations and rights of such a successor are incurred." 323 NLRB at 530, quoting *State Distributing Co.*, 282 NLRB 1048, 1049 (1987).

Here the evidence established that John Gavin, J.C. Media's president, told Eldorado's employees, in response to

[1] Respondent J.C. Media has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Members Liebman and Truesdale agree with the judge and their colleague that J.C. Media is liable under *Golden State Bottling v. NLRB*, 414 U.S. 168 (1973), for remedying the unfair labor practices of its predecessor, Eldorado. However, in reaching this conclusion, they believe it is unnecessary to find that J.C. Media had an opportunity to indemnify itself or negotiate a reduction in the purchase price. John Gavin, J.C. Media's president, was not a disinterested party when it came to the business affairs and economic well-being of its predecessor, Eldorado. The record establishes that Gavin co-owned Eldorado for approximately 19 years before selling the business to Edward Treis. After the sale, under a collateral pledge agreement, Gavin retained the company's stock and assets, including its equipment, as collateral. He also had the right, under that agreement, to remove Treis as the chief executive officer, a right he exercised as soon as he learned that the bank intended to foreclose on its loan to Eldorado. When Gavin acted to protect his own substantial security interest in Eldorado, that action established that he was, in fact, on both sides of any transactions between the two companies. In such circumstances, they would find *Golden State* liability irrespective of whether there was an opportunity for indemnity or a reduction in purchase price. Cf. *Evans Services v. NLRB*, 810 F.2d 1089, 1093 fn. 5 (11th Cir. 1987) (indemnity or reduction in purchase price unnecessary to impose *Golden State* liability where principal was not disinterested third party but was on both sides of the transaction); *NLRB v. Hot Bagels & Donuts of Staten Island*, 622 F.2d 1113, 1116 (2d Cir. 1980) (indemnity and reduction of purchase price irrelevant to *Golden State* analysis where predecessor and successor corporations are both wholly owned by same individual "who was unlikely to profit from any indemnity or price reduction, even assuming either were possible."). Chairman Hurtgen would impose *Golden State* liability solely because it knew of Eldorado's unfair labor practices and it had an opportunity to indemnify itself.

[2] The conclusions of law have been amended to conform to the judge's finding that the Union demanded recognition and requested information by letter dated February 28, 1997.

[3] We shall modify the judge's recommended Order to reflect his finding that Eldorado, Inc. failed to make the contractually required fund payments and that under *Golden State Bottling,* supra at 186–187, it shared joint and several liability for its unremedied unfair labor practices with successor J.C. Media. Further, we will modify the judge's recommended Order in accordance with our recent decision in *Ferguson Electric Co.,* 335 NLRB 142 (Aug. 24, 2001).

[4] 323 NLRB 529 (1997), enfd. in relevant part 233 F.3d 1176 (9th Cir. 2000), petition for cert. filed June 7, 2001 (No. 00–1829). See also *Brown & Root, Inc.*, 334 NLRB 628 (2001). Our dissenting colleague's attempt to distinguish this case from *Advanced Stretchforming*, supra, and *Brown & Root,* supra, on the basis that Gavin reassured employees of their Sec. 7 rights by informing them that they could vote the Union in if they wanted, misses the point. When a new company hires a majority of its predecessor's work force, as occurred in this case, the new company inherits its predecessor's bargaining obligation and the employees do not have to vote the union in again to obtain union representation. By indicating to employees that they had to do so here—and would be nonunion unless they did so—we find that the Respondent was imposing a facially unlawful condition of employment.

a question about retaining their union, that the new business was starting out as a nonunion company and that "if you guys want a union, it's up to you. Why you would want one, I don't know." In agreement with the judge, we find that this statement violated Section 8(a)(1). As discussed in *Kessel Food Markets, Inc.*,[5] prior to making its hiring decisions, a successor employer does not know whether it will have a duty to recognize and bargain because it does not know whether it will hire a majority of the predecessor's employees. Therefore, when a successor employer "tells applicants that the company will be nonunion before it hires its employees, the employer indicates to the applicants that it intends to discriminate against [the predecessor's] employees to ensure its nonunion status." 287 NLRB at 429.[6]

We reject the contention that Gavin's response to the employee's question was a permissible statement of objective fact and therefore lawful under *P.S. Elliot Services,* 300 NLRB 1161 (1990). *P.S. Elliot* is inapposite to the instant case. In *P.S. Elliot*, the new employer employed 175 employees and thus it could not have inherited any bargaining obligation even if it had hired all 8 of the predecessor's employees. Thus, the employer's statement that the new business would be nonunion was a truthful statement of objective fact, which standing alone, was not coercive in violation of Section 8(a)(1). See id. at 1162.

Unlike the employer in *P.S. Elliot*, Gavin had no objective basis for stating that the new company would be nonunion. Indeed at trial, Gavin acknowledged that when he met at the time with the predecessor's employees he intended to draw a substantial majority of J.C. Media's work force, if not all of it, from the predecessor's work force in order to start the operation immediately. Thus, Gavin in effect knew that the predecessor's employees would be a majority of the new work force. In any event, even if he did not know for certain that they would be a majority, it is clear under *Kessel,* supra, that his statement that the new business would be nonunion was unlawful.

As in *Advanced Stretchforming,* therefore, we find that, by telling employees that the new business would start out nonunion, J.C. Media imposed a facially unlawful condition of employment, coerced the employees in the exercise of their Section 7 rights, and thus was not privileged to set initial terms and conditions of employment. Accordingly, we affirm the judge's finding that J.C. Media violated Section 8(a)(5) and (1) of the Act by modifying the initial terms and conditions of employment without bargaining with the incumbent Union.

Finally, we also adopt the judge's remedy requiring J.C. Media to restore the terms and conditions of employment under the predecessor's contract with the Union until it negotiates a new contract with the Union or negotiates to impasse. See *Advanced Stretchforming*, supra, 323 NLRB at 531. Such a remedy is consistent with our previous decisions, and with the equitable principle that any uncertainty created by the respondent's own misconduct should be resolved against it.[7] See, e.g., *State Distributing*, supra at 1048–1050. The courts have enforced this requirement in similar cases.[8]

Duty to Bargain and Provide Information

Contrary to our dissenting colleague, we agree with the judge that the Union demanded recognition and bargaining after J.C. Media commenced operation on February 17. In so concluding, the judge relied on two identical letters from the Union dated February 28. The first letter was addressed to John Gavin, president of Eldorado, Inc. and the second letter was addressed to Edward Treis, president of Eldorado Digital Imaging Solutions, Inc. Each letter sought information about what had transpired at Eldorado after February 15, the relationship between the two businesses, which employees were still working, what the employees' rates were, as well as other information about the employees' terms and conditions of employment at the new business. Additionally, each letter made numerous references to the fact that the letter constituted a grievance under the contract.

[5] 287 NLRB 426, 428–429, (1987), enfd. 868 F.2d 881, 884 (6th Cir. 1989), cert. denied 493 U.S. 820 (1989). See also *Worcester Mfg.*, 306 NLRB 218, 219 (1992); *Williams Enterprises,* 301 NLRB 167 (1991), enfd. in relevant part 956 F.2d 1226 (D.C. Cir. 1992); and *Bay Area Mack*, 293 NLRB 125 (1989).

[6] Contrary to our dissenting colleague's suggestion, this finding by the Board in *Kessel* did not turn on the fact that the respondent also expressly told applicants that it would discriminate in hiring to avoid union status.

[7] Accordingly, we reject the claim, advanced by our dissenting colleague, that requiring a respondent to "forfeit" its right to set initial terms and conditions of employment is punitive relief.

[8] See *Operating Engineers, Local 465 v. NLRB*, 221 F.3d 196 (unpublished), 2000 WL 628188 (D.C. Cir. May 2, 2000), enfg. *Daufuskie Island Club & Resort*, 328 NLRB 415h (1999); *Pace Industries, Inc. v. NLRB*, 118 F.3d 585, 593–594 (8th Cir. 1997), cert. denied 523 U.S. 1020 (1998); *New Breed Leasing Corp. v. NLRB*, 111 F.3d 1460, 1468 (9th Cir. 1997), cert. denied 522 U.S. 948 (1997); *NLRB v. Staten Island Hotel Ltd. Partnership*, 101 F.3d 858, 862 (2d Cir. 1996); *NLRB v. Horizons Hotel Corp.*, 49 F.3d 795, 806 (1st Cir. 1995); *U.S. Marine Corp. v. NLRB*, 944 F.2d 1305, 1322–1323 (7th Cir. 1991), cert. denied 503 U.S. 936 (1992); *Systems Management, Inc. v. NLRB*, 901 F.2d 297, 307 (3d Cir. 1990); *American Press, Inc. v. NLRB*, 833 F.2d 621, 627 (6th Cir. 1987). Cf. *Advanced Stretchforming*, supra, 233 F.3d at 1183–1184 (restoration of initial terms until successor negotiates new contract or to impasse is required unless successor shows through definitive evidence that it would not have agreed to the initial terms even if it had acted lawfully). But see *Capital Cleaning Contractors, Inc. v. NLRB*, 147 F.3d 999, 1010–1012 (D.C. Cir. 1998).

Under Board law, "a valid request to bargain need not be made in any particular form, or in haec verba, so long as the request clearly indicates a desire to negotiate and bargain on behalf of the employees in the appropriate unit concerning wages, hours, and other terms and conditions of employment." *Marysville Travelodge*, 233 NLRB 527, 532 (1977) (quoting *Al Landers Dump Truck, Inc.*, 192 NLRB 207, 208 (1971)), enfd. sub nom. *NLRB v. Confer*, 637 F.2d 1309 (9th Cir. 1981). The Board has also found that a request for information is tantamount to a request for bargaining. See, e.g., *Specialty Envelope Co.*, 321 NLRB 828, 830 (1996), enfd. sub nom. in relevant part *Peters v. NLRB*, 153 F.3d 289, 298–299 (6th Cir. 1998); *Grand Islander Health Care Center*, 256 NLRB 1255, 1256 (1981); *Nappe-Babcock Co.*, 245 NLRB 20, 21 fn. 4 (1979). For the reasons discussed above, we find that the Union's letter satisfied this test because it clearly indicates that the Union was seeking to fulfill its role as the exclusive bargaining representative of the former Eldorado employees.[9] See *Hydrolines, Inc.*, 305 NLRB 416, 420 (1991) (finding that, under the circumstances presented, "the Union's demand reasonably informed the Respondents that the Union considered the Respondents to be a successor . . . and that the Union sought to represent the Respondents' employees").

Moreover, the Union subsequently filed a charge against the Respondent on April 21, which further demonstrated and reaffirmed its earlier request for recognition and bargaining. *Williams Enterprises,* 312 NLRB 937, 938–939 (1993), enfd. 50 F.3d 1280, 1286 (4th Cir. 1995); *Stanford Realty Associates*, 306 NLRB 1061, 1066 (1992). Accordingly, we adopt the judge's findings that J.C. Media violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union, and by refusing to provide the requested information.

AMENDED CONCLUSIONS OF LAW

1. Substitute the following for Conclusion of Law 9.

"9. By refusing to recognize and bargain with the Union on or after February 28, 1997, or, alternatively, April 21, 1997, Respondent J.C. Media Group, Inc. violated Section 8(a)(5) and (1) of the Act."

2. Substitute the following for Conclusion of Law 12.

"12. By refusing and failing to provide the Union with information necessary and relevant to the performance of its duties as exclusive representative of the aforesaid bargaining unit employees on or after February 28, 1997, Respondent J.C. Media Group, Inc. violated Section 8(a)(5) and (1) of the Act."

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that

A. Respondent Eldorado, Inc., New Berlin, Wisconsin, its, officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to make contributions to the health & welfare, pension, and education funds of the Graphic Communications International Union, Local 577–M, AFL–CIO.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole its unit employees by making all unpaid contributions to the Union's health & welfare, pension, and education benefit funds that were due and owing from October 21, 1996, until February 17, 1997, including any additional amounts due the funds in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979). In addition, reimburse its unit employees for any expenses ensuing from its failure, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981), with interest as prescribed in *New Horizons for the Retarded, Inc.*, 283 NLRB 1173 (1987).[10] Liability for this make-whole remedy is joint and several with Respondent J.C. Media Group, Inc.

(b) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

[9] Unlike our dissenting colleague, we agree with the judge that the issue is not whether the Union got the name of the business right, but whether the right person got the letter. Gavin admits that he got one of the Union's letters and the judge did not credit his testimony that he did not get the second letter. In addition, Gavin acknowledged that he repeatedly changed the name of the new business in the first few weeks of operation.

[10] To the extent that any unit employee has made personal contributions to a fund that were accepted in lieu of the employer's unpaid contribution for the period of delinquency and/or to the extent that the Union has made contributions to a fund that were accepted by the fund in lieu of the employer's unpaid contributions during the period of delinquency, the Respondent will reimburse the employee and/or the Union by the amount of such contributions; however, the amount of such reimbursement will constitute a set-off to the amount that the Respondent otherwise owes the fund.

(c) Within 14 days after service by the Region, mail signed and dated copies of the attached notice marked "Appendix A"[11] to the Union and to all unit employees employed as of the time the Respondent ceased operations. Copies of the notice, on forms provided by the Regional Director for Region 30, after being signed by the Respondent's authorized representative, shall be mailed, at its own expense, immediately on receipt by the Respondent to the last known address of each employee.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

B. Respondent J.C. Media Group, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Telling employees that it intends to operate with no union when it is obligated to recognize and bargain with the Graphic Communications International Union, Local 577–M, AFL–CIO.

(b) Refusing to recognize and bargain with the Graphic Communications International Union, Local 577–M, AFL–CIO, as the exclusive collective-bargaining representative for the unit employees in the following appropriate unit:

> All employees who were or are covered under the collective bargaining agreement effective June 15, 1995 to June 14, 1997, including desk top specialists, general workers, photography, proofing, retouching, and stripping/layout employees, employed by the Respondent in New Berlin, Wisconsin; excluding guards and supervisors as defined in the Act.

(c) Changing the wages, terms, and conditions of employment of the employees in the above unit without notice to and bargaining with the Graphic Communications International Union, Local 577–M, AFL–CIO.

(d) Failing and refusing to make contributions to the health & welfare, pension, and education funds of the Graphic Communications International Union, Local 577–M, AFL–CIO.

(e) Refusing to provide necessary and relevant information to the Graphic Communications International Union, Local 577–M, AFL–CIO.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the polices of the Act.

(a) Notify the Graphic Communications International Union, Local 577–M, AFL–CIO, in writing, that it recognizes the Union as the exclusive representative of its employees under Section 9(a) of the Act and that it will bargain with the Union concerning the terms and conditions of employment for employees in the appropriate unit.

(b) On request, bargain collectively and in good faith with the Union as the exclusive representative of the employees in the appropriate unit, concerning wages, terms, and conditions of employment, and if an understanding is reached, embody it in a signed agreement.

(c) On request, cancel changes in wages, terms, and conditions of employment unilaterally effectuated and make employees whole by remitting all wages and benefits that would have been paid absent the Respondent's unlawful conduct, until the Respondent negotiates in good faith with the Union to agreement or to impasse. Backpay shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded,* supra.

(d) Make whole its unit employees by making all unpaid contributions to the Union's health & welfare, pension, and education benefit funds due on or after February 17, 1997, including any additional amounts due the funds in accordance with *Merryweather Optical Co.*, supra. In addition, reimburse its unit employees for any expenses ensuing from the unlawful conduct, as set forth in *Kraft Plumbing & Heating*, supra, with interest as prescribed in *New Horizons for the Retarded,* supra.[12]

(e) Make whole the unit employees by making all unpaid contributions to the Union's health & welfare, pension, and education benefit funds that were due and owing by Eldorado from October 21, 1996, until February 17, 1997, including any additional amounts due the funds in accordance with *Merryweather Optical Co.,* supra. In addition, reimburse the unit employees for any expenses ensuing from Eldorado's failure, as set forth in *Kraft Plumbing & Heating*, supra, with interest as prescribed in *New Horizons for the Retarded,* supra.[13] Liability for this make-whole remedy is joint and several with Respondent Eldorado, Inc.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel re-

[11] If this Order is enforced by the judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[12] See fn. 10, supra.

[13] See fn. 10, supra.

cords and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its facilities in New Berlin, Wisconsin, copies of a notice to be attached marked "Appendix B."[14] Copies of the notice, on forms provided by the Regional Director for Region 30, after being signed by the authorized representatives, shall be posted by the Respondent, maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that notices are not altered, defaced, or covered by any other material. In the event that during the pendency of these proceedings, Respondent J.C. Media Group, Inc., has gone out of business or closed its facilities involved in these proceedings, the Respondent shall duplicate and mail at its own expense a copy of the notice to all current employees and former employees employed by J.C. Media Group, Inc. and/or its predecessor Eldorado, Inc. at any time since October 21, 1996.

CHAIRMAN HURTGEN, dissenting in part.

I disagree with my colleagues in four respects: First, I do not agree that the Respondent J. C. Media (Media), a successor to Eldorado, Inc., violated Section 8(a)(1) by telling employees on February 15, 1997, that there was not going to be a union at the new company. Second, I find that the Respondent Media was privileged to set initial terms and conditions of employment, and did not violate Section 8(a)(5) when it did so without bargaining with the union. Third, I do not find that, in a letter it addressed to Eldorado on February 28, 1997, the Union presented the Respondent with a demand for recognition. Therefore, I find that the Respondent did not unlawfully deny recognition at that time.[1] Fourth, the Respondent did not violate Section 8(a)(5) by failing to furnish information to the Union in February. In the absence of a bargaining obligation at that time, it had no duty to furnish same.

I. FEBRUARY 15, 1997 ALLEGATIONS

Respondent Media's president, John Gavin, told former Eldorado employees on February 15, 1997, that there would be a new company and that they were free to file employment applications with it. He said that he could not tell them how much they would make, and that he was going to change wages and benefits. When asked about whether there would be a union, Gavin replied that the business would be nonunion. But, he added that: "You could try to vote it in if you want." According to the credited testimony of employee Richard Reinhard, Gavin let it be known that he did not favor having a union, at least initially, at the new company. Gavin also said: "If you guys want a union, that's up to you;" and "Why would you want one, I don't know."

The judge found, and my colleagues agree, that Gavin's telling employees that he did not favor a union at the new company is a "blatant denial of the employee's right to representation though their collective bargaining representative" I disagree. The statement is an opinion and is thus privileged by Section 8(c).

As to the statement that the company would be nonunion, I note that it was not clear at that time whether Respondent would be a *Burns*[2] successor or not. Thus, the statement was incorrect. However, the statement was unlike the one in *Kessel Food Markets,* 287 NLRB 426 (1987). That is, the Respondent did not say that it would discriminate in hiring so as to avoid union status. To the contrary, the Respondent assured employees of their Section 7 rights.

Similarly, the Respondent's conduct was markedly different from that of the employers in *Advanced Stretchforming International, Inc.*, 323 NLRB 529 (1997), and *Brown & Root, Inc.*, 334 NLRB 628 (2001), where no Section 7 reassurances were given. My colleagues say that when a new employer has hired a sufficient number of predecessor employees to constitute a majority of its work force, the union is the representative, and the employer cannot tell the employees that they have a choice of representative. Whatever the validity of this proposition, it has no application here. At the time when the Respondent made its statement, the hiring had not yet taken place.

Further, even if Gavin's comments violated Section 8(a)(1), that is not the type of conduct that warrants forfeiture of an employer's right to set initial terms and conditions of employment. To require the Respondent to forfeit its right to set initial terms and conditions of employment is punitive relief for that 8(a)(1) conduct. See my dissenting opinion in *Pacific Custom Materials, Inc.*, 327 NLRB 75 (1998).

Accordingly, I do not find that the Respondent's statements to applicants violated Section 8(a)(1) or that its setting of initial terms and conditions of employment violated Section 8(a)(5).

[14] See fn. 11, supra.

[1] However, I agree that a demand was made in April, and a duty to bargain arose at that time.

[2] *NLRB v. Burns International Security Services,* 406 U.S. 272 (1972).

II. FEBRUARY 28, 1997 ALLEGATIONS

With respect to the February 28, 1997 letter that the Union sent to Eldorado, I do not find that the Union demanded recognition. The Union sent copies of the letter to other companies, but none to the successor company (Media). One was sent to Gavin in his capacity as president of Eldorado, Inc., and the other to Ed Treis, president of "El Dorado Digital Imaging Solutions," a separate entity. Further, nowhere in the letter does the Union demand recognition; rather, it requests information relating to these two entities, as well as "El Dorado Graphics, Inc.," which the Union describes as the predecessor to "El Dorado Digital Imaging Solutions." Thus, the letter was not a request for recognition from Media. More particularly, the letters sought information about the relationship between the various companies, about the transaction between them, and about conditions of employment. In my view, the Union was thereby seeking to glean information as to what, if any, claims it would make. This is a far cry from making a claim for recognition.

Finally, the Respondent did not violate the Act by failing fully to respond to the February 28 information request. At that time, the Respondent had no bargaining obligation, and thus the Respondent had no duty to furnish this information.

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT fail and/or refuse to make contributions to the health & welfare, pension, and education funds of the Graphic Communications International Union, Local 577-M, AFL–CIO.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL jointly and severally with J.C. Media Group, Inc. make all unpaid contributions to the Union's health & welfare, pension, and education funds that were due and owing from October 21, 1996, until February 17, 1997, and WE WILL jointly and severally with J.C. Media Group, Inc. reimburse you for any expenses ensuing from our failure to make the required contributions to the Union's funds.

APPENDIX B

NOTICE TO EMPLOYEES
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The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

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To organize
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To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT tell you that a union will not represent you.

WE WILL NOT refuse to recognize and bargain with the Graphic Communications International Union, Local 577–M, AFL–CIO.

WE WILL NOT change your wages, hours, terms and conditions of employment without first notifying the Graphic Communications International Union, Local 577–M, AFL–CIO, and without bargaining with the Union.

WE WILL NOT fail and/or refuse to make contributions to the health & welfare, pension, and education funds of the Graphic Communications International Union, Local 577–M, AFL–CIO.

WE WILL NOT refuse to provide necessary and relevant information to the Graphic Communications International Union, Local 577–M, AFL–CIO.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL notify the Graphic Communications International Union, Local 577–M, AFL–CIO, in writing that we recognize it as your exclusive collective-bargaining representative.

WE WILL on request, bargain collectively and in good faith with the Union concerning your wages, hours, terms, and conditions of employment.

WE WILL on request, cancel any changes in wages, hours, terms and conditions of employment that we unilaterally effectuated and make you whole by remitting all wages and benefits that you would have received absent our unlawful conduct.

WE WILL jointly and severally with Eldorado, Inc. make all unpaid contributions to the Union's health & welfare, pension, and education funds that were due and owing by Eldorado on and after October 21, 1996 until February 17, 1997, and WE WILL jointly and severally with Eldorado, Inc. reimburse you for any expenses ensuing from Eldorado's failure to make the required contributions to the Union's funds.

WE WILL make all unpaid contributions to the Union's health & welfare, pension, and education funds that were due on or after February 17, 1997, and WE WILL reimburse you for any expenses ensuing from our failure to make the required contributions to the union's funds.

ELDORADO INC.

Paul Bosanac, Esq. for the General Counsel.
John H. Shore, Esq. of New Berlin, Wisconsin, for the Respondent.
Richard Saks, Esq. of Milwaukee, Wisconsin, for the Charging Party.

BENCH DECISION AND CERTIFICATION

STATEMENT OF THE CASE

C. RICHARD MISERENDINO, Administrative Law Judge. This case was tried in Milwaukee, Wisconsin, on March 23, 1998,[1] and January 11–14, 1999. The charge in Case 30-CA-13784 was filed on April 21, 1997. The charge in Case 30–CA-13895 was filed on July 7, 1997, and was amended on November 6, 1997. The consolidated complaint was issued on February 2, 1998. The complaint alleges that the Respondent, J.C. Media Group, Inc. (J.C. Media) is the successor employer of the Respondent, Eldorado, Inc. (Eldorado), and that on or about February 15, 1997, J.C. Media, by and through its president and principal stockholder, John Gavin, violated Section 8(a)(1) of the Act by telling employees of the successor entity that there would not be a union shop at the new employer, even though the Union had represented the employees of the predecessor employer, Eldorado, under a collective-bargaining agreement. The complaint further alleges that on February 16–17, 1997, and since that time, J.C. Media as a successor employer refused and continues to refuse to recognize and bargain with the Union in violation of Section 8(a)(5) of the Act. It also alleges that on the same dates, J.C. Media unilaterally changed wages, terms, and conditions of employment in violation of Section 8(a)(5) of the Act. In addition, the complaint alleges that on February 28, 1997, and since that time, J.C. Media refused to provide the Union with information necessary and relevant to the performance of its duties as exclusive bargaining representative. Finally, the complaint alleges that from October 21, 1996, through February 15, 1997, Respondent Eldorado failed to make payments to the Union's education fund in accordance with the applicable collective-bargaining agreement and that from November 1, 1996, through February 15, 1997, Eldorado failed to make payments to the Union's pension and health & welfare funds in violation of Section 8(a)(5) of the Act. Finally, the complaint alleges that J.C. Media took over and assumed the operations of Eldorado, with knowledge of the predecessor's failure to make payments into the various union funds and, therefore, J.C. Media is jointly and severally liable for Eldorado's unremedied unfair labor practices.

At the conclusion of the trial and following oral argument by counsel for the General Counsel, the Respondent, and the Union, I issued a bench decision pursuant to Section 102.35(a) of the Board's Rules and Regulations, setting forth findings of fact and conclusions of law. I found that for the period October 10, 1995, through February 14, 1997, the Union was the exclusive collective-bargaining representative for Eldorado's employees in an appropriate bargaining unit more specifically described in paragraph 5(a) of the complaint. I further found that the Union's representational status was recognized and embodied in a collective-bargaining agreement between Eldorado and the Union, effective June 15, 1995, through June 14, 1997.

The evidence shows, and the answer admits, that the majority of J.C. Media's employees were former employees of Eldorado. Applying the criteria established by the Board in *M.S. Management Associates, Inc.,* 325 NLRB 1154 (1998), I found that J.C. Media was a *Burns*[2] successor employer to Eldorado. I further found that by letter, dated February 28, 1997, the Union made a proper demand for recognition as required by *Burns.* Also*,* I found that by filing an unfair labor practice charge on April 21, 1997, alleging a violation of Section 8(a)(5) of the Act, the Union had made an additional demand for recognition in accordance with *Williams Enterprises,* 312 NLRB 937 (1993). I further found that J.C. Media was not privileged to unilaterally change wages, terms, and conditions of employment on February 17, and that it forfeited its *Burns* rights to set initial terms and conditions of employment because of the statements made by John Gavin to the employees on February 15, to wit: that there would not be a union shop at the new company when it commenced operation. *Advanced Stretch-forming International, Inc.,* 323 NLRB 529 (1997). I therefore found that J.C. Media violated Section 8(a)(1) and (5) of the Act by changing wages, terms and conditions of employment and by not making payments into the various union funds.

I also found that Eldorado violated Section 8(a)(5) and (1) of the Act by failing to make payments into the union's education, pension, and health & welfare funds. I then found that J.C. Media was a *Golden States*[3] successor, responsible for the fail-

[1] Pursuant to an unopposed motion of the Union, the case was postponed pending the Union's appeal of the Regional Director's refusal to issue a complaint alleging that Respondent J.C. Media Group was the *alter ego* or disguised continuance of Respondent Eldorado, Inc. The General Counsel denied the appeal by letter, dated June 28, 1998. (GC Exh. 1(f).)

[2] *NLRB v. Burns International Security Services*, 406 U.S. 272 (1972).

[3] *Golden States Bottling v. NLRB*, 414 U.S. 168 (1973).

ure of predecessor, Eldorado, to make the contractually required payments to the various union funds. Relying on *Ponn Distributing, Inc.,* 232 NLRB 312, 314–315 (1977), I found that even though J.C. Media assumed the operation of Eldorado without actually purchasing the business, it had a business relationship with Eldorado (i.e., a lease agreement to use Eldorado's equipment and leasehold space, *see* R. Exh. 12) and therefore it had the opportunity to indemnify itself for Eldorado's failure to payments in the context of negotiating the lease terms. I also found that J.C. Media failed to satisfy its burden of proving that it did not have knowledge of Eldorado unremedied unfair labor practice. *Robert G. Andrew, Inc.,* 300 NLRB 444 (1990).

Finally, I found that J.C. Media refused to provide and continues to refuse to provide the information requested in the union's letter, dated February 28, 1997, which is necessary and relevant to the exercise of its role as the exclusive collective–bargaining representative.

In accordance with Section 102.45 of the Rules and Regulations, I certify the accuracy of, and attach hereto as "Appendix B," the portion of the transcript, as corrected,[4] containing this decision. In addition, because the remedy, order, and notice to employees were delivered orally in summary fashion, those sections of the bench decision shall be set forth more fully below.

CONCLUSIONS OF LAW

1. The Respondent, Eldorado, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent, J.C. Media Group, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3. The Union is a labor organization within the meaning of Section 2(5) of the Act.

4. The following employees of the aforesaid Respondents constitute a unit appropriate for the purposed of collective bargaining within the meaning of Section 9(b) of the Act:

> All employees who were or are covered under the collective bargaining agreement, effective June 15, 1995 to June 14, 1997, including desk top specialists, general workers, photography, proofing, retouching, and stripping/layout employees, employed by the Respondents in New Berlin, Wisconsin; excluding guards and supervisors as defined in the Act.

5. By failing to make contractually obligated contributions to the union education fund since October 21, 1996, and the union health & welfare, and pension funds, since November 1, 1996, the Respondent, Eldorado, Inc., violated Section 8(a)(5) and (1) of the Act.

6. The Respondent, J.C. Media Group, Inc., is a successor employer to Respondent, Eldorado, Inc.

7. The Respondent, J.C. Media Group, Inc., had knowledge of Eldorado, Inc.'s failure to make contributions to the union funds, and is responsible for remedying of the unfair labor practices committed by its predecessor employer, Eldorado, Inc.

8. By informing the employees on February 15, 1997, that there would not be a union shop at the new employer when it commenced operation, the Respondent, J.C. Media Group, Inc., violated Section 8(a)(1) of the Act.

9. By refusing to recognize and bargain with the Union on or after February 27, 1997, or, alternatively, April 21, 1997, the Respondent, J.C. Media Group, Inc., violated Section 8(a)(5) and (1) of the Act.

10. By modifying the terms and conditions of employment of the unit employees on or about February 17, 1997, without prior notice to the Union and without affording the Union an opportunity to bargaining over these matters, the Respondent, J.C. Media Group, Inc., violated Section 8(a)(5) and (1) of the Act.

11. By failing and refusing to pay into the union's health & welfare, pension, and education funds from February 17, 1997, and continuing thereafter, the Respondent, J.C. Media Group, Inc., violated Section 8(a)(5) and (1) of the Act.

12. By refusing and failing to provide the Union with information necessary and relevant to the performance of its duties as exclusive representative of the aforesaid bargaining unit employees on and after February 27, 1997, the Respondent, J.C. Media Group, Inc., violated Section 8(a)(5) and (1) of the Act.

13. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, I find that they must be ordered to cease and desist and take certain affirmative action designed to effectuate the policies of the Act.

On request, the Respondent, J.C. Media Group, Inc., shall bargain with the Union concerning wages, health and welfare benefits, vacations, holidays, and other terms and conditions of employment. Furthermore, in order to remedy the Respondent's unlawful unilateral changes, I shall recommend that it be ordered that the Respondent, on the Union's request, shall rescind any changes in employees' wages, terms, and conditions of employment that were unilaterally effectuated and to make the employees whole by remitting all wages and benefits that would have been paid absent the Respondent's unlawful conduct, until the Respondent negotiates in good faith with the Union to agreement or to impasse. This remedial measure is "designed to prevent the Respondent from taking advantage of it's wrong-doing to the detriment of the employees," and to "return to the status quo ante so that the bargaining process can get under way." *U.S. Marine Corp. v. NLRB*, 944 F.2d 1305, 1322–1323 (7th Cir. 1991). The employees shall be made whole in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The Respondent, J.C. Media Group, Inc., shall also make whole its unit employees by making all delinquent contributions to the Union's health & welfare, pension, and education

[4] I have corrected the transcript by making physical inserts, crossouts, and other obvious devices to conform to my intended words, without regard to what I may have actually said in the passages in question.

benefit funds, including those that were due and owing by Eldorado, Inc., and including any additional amounts due the funds in accordance with *Merriweather Optical Co.*, 240 NLRB 1213, 1216, fn. 7 (1979). In addition, the Respondent, J.C. Media Group, Inc., shall reimburse unit employees for any expenses ensuing from its failure, and Eldorado, Inc.'s failure, to make the required contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940, (9th Cir. 1981); such amounts to be computed in the manner set forth in *Ogle Protection Services*, supra, with interest as prescribed in *New Horizons for the Retarded*, supra.

In addition, to the extent that any unit employee has made personal contributions to a fund that were accepted by the fund in lieu of the employer's unpaid contribution for the period of delinquency and/or to the extent that the Union has made contributions to a fund that were accepted by the fund in lieu of the employer's unpaid contributions during the period of delinquency, the Respondent will reimburse the employee and/or the Union by the amount of such contributions; however, the amount of such reimbursement will constitute a set-off to the amount that the Respondent otherwise owes the fund.

[Recommended Order omitted from publication.]