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National Labor Relations Board

Memorandum

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TO Thomas W. Seeler, Regional Director
Region 3

FROM Harold J. Datz, Associate General Counsel
Division of Advice

SUBJECT General Electric Co./Powerex, Inc.
Case 3-CA-13046-2

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This case was submitted for advice as to (1) whether General Electric Co. (GE) and Powerex, Inc. (Powerex) are a single employer, joint employers or alter egos or whether Powerex is a successor to GE; and (2) whether Powerex violated Section 8(a)(5) and (1) by unilaterally establishing initial terms and conditions of employment when it took over the operation of a GE plant and by continuing to establish new terms and conditions for several weeks thereafter.

Facts

On August 16, 1985, 1/ GE, Westinghouse Electric Corp. (Westinghouse) and Mitsubishi Electric America, Inc. (Mitsubishi) executed a joint venture agreement to engage in the production and sale of semiconductor products. The agreement provided for the establishment of a new entity, incorporated on August 22 as Powerex, to operate GE's plant in Auburn, N.Y. and Westinghouse's facilities in Youngwood, Pa. and Puerto Rico. The ownership of Powerex is shared as follows: GE owns 45 percent, Westinghouse owns 45 percent, and Mitsubishi owns the remaining 10 percent. Pursuant to the joint-venture agreement, GE and Westinghouse each nominated two members of the board of directors, who were not formerly associated with either company. The fifth board member, who also serves as president, formerly was associated with Westinghouse but was employed by Comdial, Inc. just prior to his selection. Almost all of the other managerial employees formerly were employed by GE or Westinghouse.

Article 5 of the joint-venture agreement provided that "the initial staffing" of Powerex shall consist "principally" of GE and Westinghouse employees at the facilities involved ("Designated Employees"). The agreement also stated that:

> [T]he Corporation shall, as a successor employer, offer employment to all Designated Employees on a basis similar to

1/ Unless otherwise noted, all dates in August-December are in 1985 and those in January are in 1986.

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> the terms of their employment with General Electric or Westinghouse as of the Closing Date. . . .

Local 967, IAM (the Union) had represented GE production and maintenance employees at Auburn since 1951. The parties' most recent collective-bargaining agreement was effective from July 1, 1985 through June 26, 1988.

On October 16, GE held a meeting of the Auburn employees to announce the sale of the plant, effective January 1. In response to a request for a copy of the joint venture agreement, on November 7 GE forwarded a copy of Article 5 to the Union. On December 5, Robert Griffith, GE's Manager of Employee Relations and later Powerex's Director of Personnel for the Auburn plant, requested to meet to negotiate a new agreement for Powerex. The parties commenced negotiations on December 10.

By letter dated December 26, GE informed the Auburn employees that GE benefits would terminate as of December 31 and that Powerex would initiate appropriate insurance coverage on a contingency basis.

On December 27, Powerex sent a letter to all of the employees at the Auburn plant "to welcome [them] to POWEREX," which stated:

> POWEREX must offer employment to all those who were on the General Electric active roll as of December 31, 1985. As your new employer, however, POWEREX will be establishing the terms and conditions of your employment.

The letter noted that Powerex and the Union had been negotiating for a new contract but there had not been sufficient time to reach agreement. "In the meantime," Powerex told the employees, "you need to know some of the basics of your employment by POWEREX." There were to be no changes in the employees' base wage rate and seniority date. However, the letter set forth downward changes in other terms, such as shift differentials, vacations and overtime. In addition, future compensation packages would be tied to profitability. Powerex noted that, "[t]he IAMAW Officials continue to be your representatives. . . ." The letter concluded as follows: ""We sincerely hope you look forward to your career with POWEREX as enthusiastically as we do . . . ."

On January 1, Powerex assumed control of the Auburn facility without any interruption in operations. Powerex transferred the GE employees automatically from the GE payroll to its own payroll, without any break in service. The employees had never been interviewed for their "new" positions and had never even been asked whether they wanted to work for Powerex.

Between January 6 and 20, Powerex continued to inform the employees of additional changes in their fringe benefits, including medical, dental and life insurance benefits and notified them of the schedule for payouts from GE's savings and security program. In addition, Powerex announced a new educational assistance program.

On January 16, the Union filed the instant charge, alleging that GE and Powerex violated Section 8(a)(5) and (1) by refusing to apply the Union contract after January 1 and by making unilateral changes in terms and conditions of employment. The Region has found that at the time that Powerex implemented the alleged unilateral changes, the parties had not reached impasse on any issue. The parties recently have reached agreement on a new contract. 2/

ACTION

The instant charge should be dismissed, absent withdrawal, on the grounds that Powerex is a Burns 3/ successor to GE and, as a Burns successor, lawfully set initial terms and conditions of employment under Spruce Up Corp. 4/ upon taking over the GE operation. Although the establishment of a new educational assistance program at a later date arguably violated Section 8(a)(5), we concluded that it would not effectuate the purposes of the Act to proceed on that allegation.

Initially, we concluded that GE and Powerex are not a single employer, alter egos or joint employers. Thus, despite some common ownership, there is not the requisite common control, centralized control of labor relations and interrelation of operations for finding a single employer. 5/ Similarly, the Board has declined to find an alter ego relationship on facts similar to these, absent evidence indicating that there was "substantially identical" ownership 6/ or that the second entity was created to evade the first company's contractual or statutory obligations. 7/ GE and Powerex also do not share or co-determine matters relating to the employment relationship of the Auburn employees, as is characteristic of a joint-employer relationship. 8/

We find that Powerex is a Burns successor to GE. 9/ Powerex has

2/ When agreement on a new contract was reached, the Union requested withdrawal of a charge, not submitted for advice, that alleged additional unilateral changes by Powerex. The Union has informed the Region that it does not intend to seek withdrawal of the instant charge.

3/ NLRB v. Burns International Security Services, Inc., 406 U.S. 272 (1972).

4/ 209 NLRB 194, 195 (1974), enfd. on other grounds, 529 F.2d 516 (4th Cir. 1975).

5/ See, e.g., Western Union Corp., 224 NLRB 274 (1976), enfd. 571 F.2d 665 (D.C. Cir. 1978), cert. denied, 439 U.S. 827.

6/ See Morton's I.G.A. Foodliner, 240 NLRB 1246 (1979), enf. denied on other grounds, 663 F.2d 223 (D.C. Cir. 1980). Cf. United Constructors and Goodwin Construction Co., 233 NLRB 904 (1977).

7/ See Woodline Motor Freight, Inc., 278 NLRB No. 152, sl. op. at 8 (1986); Apex Decorating Co., 275 NLRB No. 205, sl. op. at 2, n. 3, ALJD at 9 (1985); Best Mechanical Contractors, Inc., 273 NLRB No. 19 (1984).

8/ See generally, Laerco Transportation and Warehouse, 269 NLRB 324, 325 (1984).

9/ See 406 U.S. at 280-81.

maintained GE's operational structure, the bargaining unit is unchanged and a majority of the employees hired were employed by GE and represented by the Union. The Supreme Court held in Burns that a successor employer ordinarily is free to set initial terms and conditions of employment for its employees. However, where it is "perfectly clear that the new employer plans to retain all of the employees in the unit," the successor must bargain with those employees' representative before establishing initial terms. 10/

In Spruce Up Corp., supra, the Board limited the "perfectly clear" exception to those instances in which the successor either fails to announce its intent to establish new terms before offering employment to its predecessor's employees, or misleads its predecessor's employees into thinking they will be retained without any change in their terms and conditions. 11/ The Board reasoned that the "perfectly clear" exception did not apply to a situation where the successor made it clear "from the outset" that it intended to set its own terms, because whether or not the successor actually retained all of the predecessor's employees would depend upon their willingness to accept the new terms. 12/

The Board consistently has applied its decision in Spruce Up to dismiss unilateral change allegations where the successor's offer of different terms is simultaneous with its expression of intent to retain its predecessor's employees. 13/ On the other hand, where the successor does not set different terms until after indicating an intent to hire its predecessor's employees, 14/ or misleads those employees into believing that they will be working under the same terms, 15/ the successor violates Section 8(a)(5) and (1).

In at least one case, the Board looked at "the totality of the circumstances," to determine whether the successor had an intent to retain all of the incumbent employees. 16/ In The Denham Co., the Board found such an intent, based upon the following factors: the lack of a hiatus in operations; the failure to interview the employees or other applicants; a provision in the sales agreement requiring the successor to retain the incumbent employees for 30

10/ Id. at 294-95.
11/ 209 NLRB at 195.
12/ Id.
13/ See, e.g., Harbor Cartage, Inc., 269 NLRB 927, 928 (1984); Premium Foods, Inc., 260 NLRB 708, 717 (1982), enfd. 709 F.2d 623 (9th Cir. 1983); Holiday Inn of Niles, Michigan, 241 NLRB 555, 558 (1979), enf. denied on other grounds, 652 F.2d 612 (6th Cir. 1981).
14/ E.g., Turnbull Enterprises, Inc., 259 NLRB 934, 940 (1982); L.A.X. Medical Clinic, Inc., 248 NLRB 861, 864 (1980); Starco Farmers Market, 237 NLRB 373, 373-74 (1978).
15/ E.g., Stewart Granite Enterprises, 255 NLRB 569, 575 n. 27 (1981); East Belden Corp., 239 NLRB 776, 793 (1978), enfd. mem. 634 F.2d 635 (9th Cir. 1980).
16/ The Denham Co., 218 NLRB 30, 31 (1975).

days; the retention of those employees on the payroll without any interruption; the fact that the successor's communications to the employees indicated an intent to deal with them as "already hired employees with indefinite tenure"; and the lack of evidence of a conditional offer of employment. 17/ Accordingly, the successor violated Section 8(a)(5) by announcing unilateral changes in wages and benefits several hours after it distributed a leaflet explaining its takeover of the plant and the 30-days hiring commitment.

In the instant case, we concluded that since Powerex's offer of different terms was made simultaneously with its expression of intent to retain the GE employees, Powerex was privileged to set the initial terms of employment under Spruce Up and the cases cited in note 13, supra. Although many of the factors which the Board relied upon in the The Denham Co. to find a plan to retain all were present here, there is a crucial distinguishing factor in the instant case--Powerex's offer of employment to the GE employees was made simultaneously with the announcement of different terms. Moreover, although Powerex was required under the joint-venture agreement to offer employment to the GE employees, that offer did not have to be at their existing terms of employment. Rather, it was to be "on a basis similar to the terms of their employment" with G.E. Likewise, while the agreement required Powerex to staff its operation "principally" with incumbent employees, there was no obligation to retain all of the incumbent employees. 18/

We also concluded that Powerex did not clearly waive its right to set initial terms by recognizing and bargaining with the Union prior to the takeover. Before negotiations began, the Union received a copy of Article 5 of the joint venture agreement. The Union therefore was on notice that Powerex was obligated only to offer employment to GE employees on terms "similar" to their existing terms. Certainly, by the time that the December 27 letter was distributed, the Union was aware that Powerex intended to set its own initial terms. Absent evidence that during the few negotiating sessions held in December Powerex clearly and unequivocally waived its right under Burns to set initial terms, we would not find such a waiver.

Finally, with respect to the changes in benefits which Powerex announced after the takeover, the Board law is clear that the duty to bargain under Burns arises as soon as the successor assumes control and a representative

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17/ Id. at 31.

18/ In U.S. Marine Corp. and Bayliner Marine Corp., Cases 30-CA-8206 et al., Advice Memorandum dated October 31, 1985 at 3-4, Advice concluded that a successor's intent to look to the predecessor's workforce as the principal source of employees does not in itself indicate a plan to retain all. The successor in U.S. Marine Corp. actually had clarified its intent by informing the incumbent employees in interviews that some of the conditions of employment would be changed.

complement is hired. 19/ Since Powerex assumed control of the Auburn plant on January 1 with a full workforce, a majority of whom had worked at GE, Powerex's duty to bargain with the Union matured as of that date. However, many of the alleged "changes" which Powerex made after January 1 were merely clarifications of the employees' new insurance benefits, which GE had informed the Auburn employees on December 26 that Powerex would be initiating. Moreover, in the letter regarding the savings and security program, Powerex was merely acting as GE's agent in setting forth the schedule of payments from a GE benefit program. Powerex's establishment of a new educational assistance program was a unilateral change made after its obligation to bargain with the Union arose. In view of the fact that this is a beneficial change, however, which we would not seek to have rescinded, and given that the parties apparently have now concluded a new contract, we determined that it would not effectuate the purposes and policies of the Act to issue complaint based upon this isolated unlawful conduct.

For these reasons, the instant charge should be dismissed in its entirely, absent withdrawal.

H. J. D.

19/ East Belden Corp., supra, 239 NLRB at 793 (Successor unlawfully made unilateral changes two months after succeeding to predecessor's bargaining obligation); Ranch-Way, Inc., 203 NLRB 911, 912-13 (1973) (Successor unlawfully instituted fringe benefits unilaterally two weeks after bargaining obligation accrued, although successor lawfully set initial terms unilaterally).