National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: November 7, 1995

TO: Rosemary Pye, Regional Director, Region 1

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

SUBJECT: Ludlow Savings, Division of Albany Savings Bank, Cases 1-CA-32443 and 1-CA-32665

530-4080-5084-5000, 530-4825-6700, 530-4850-6700

This case was submitted for advice as to whether the Employer, as a successor employer, was obligated to notify and bargain with the Union prior to setting initial terms and conditions of employment.

FACTS

Local 1459, United Food and Commercial Workers Union (the Union) has represented a unit of employees employed by the Ludlow Savings Bank (LSB) for about ten years at its eight locations including its main office location at Center Street, Ludlow, Massachusetts. There were approximately 90 employees represented by Local 1459 in a multi-location bargaining unit. The unit consists of tellers and variety of other clerical personnel including savings and loan clerks, mortgage personnel, and checking department personnel. The most recent collective bargaining agreement was effective from August 20, 1994 to August 20, 1995.

Because of financial difficulties, the Federal Deposit Insurance Corporation (the FDIC) under the direction of the Massachusetts Commission of Banks began evaluating the business operation of LSB in the summer of 1994. The FDIC determined that the bank was insolvent and was forced to foreclose the bank. During this period, notification was transmitted to various financial institutions by the FDIC that the bank was for sale and offered those institutions the opportunity to bid on the various services of LSB.

Among the institutions that applied during the bidding period was Albany Saving Bank of Albany, New York (the Employer or ASB). On about October 18, 1994 the FDIC informed ASB that it was a successful bidder for certain operations of LSB.

On October 21, 1994 at 3:00 p.m. the FDIC delivered a letter to Local 1459 signed by J.P. Traverson, Closing Manager/Receiver of the FDIC, stating that LSB had been found to be in unsafe financial condition to transact business and that the FDIC has taken over the operation of the bank and all its branches. The letter further stated that the FDIC has repudiated the collective-bargaining agreement in effect.[(1)]

Simultaneously, while the FDIC letter was being presented to the Union, the FDIC and representatives from the FDIC, ASB, and Key Tech Resources, Inc., a temporary employment agency,[(2)] were meeting with employees at the various LSB locations at approximately 3:05 p.m. The FDIC representative announced to the employees that LSB had failed and was now under the control of the FDIC and that ASB had purchased certain phases of the bank.

The FDIC delivered a prepared speech that it uses under such circumstances and explained to the employees certain changes that were going into effect relative to their health insurance coverage. This was a different insurance plan from that which was available to employees under the collective-bargaining agreement. The representative from Key Tech was present at this time to present itself as the employer of the LSB employees, and it presented LSB employees with "employment at will" contracts. The employees were informed by Key Tech that they would receive an hourly wage while employed by Key Tech. This hourly wage was computed by dividing the employees' former LSB weekly wage by 40 hours rather than the 33 1/2 hours which was considered full-time under LSB. Key Tech also provided free health insurance to all Key Tech employees. Key Tech had the

right to hire or terminate the services of any Key Tech employee. Key Tech, however, did not have any representative stationed at the Bank to supervise the work of Key Tech employees in the ensuing days.

The Employer asserts that the letter which was delivered to the Union by the FDIC was also read to employees at the October 21, 1994 meeting at the various bank locations. Contrary to this Employer evidence, employee witnesses state that at no time was the letter read to them or sent to them in the mail. With regard to the contractually established benefits, employees have no recollection of being told that such benefits had been eliminated or that other benefits were being offered. Certain employees, however, did assume that those benefits which they had been receiving under the collective-bargaining agreement would cease because of the takeover by the FDIC and ASB, but this was speculation on their part.[(3)]

All unit employees employed by LSB on October 21 accepted employment with Key Tech. Employees continued to work into the evening at the bank after the meeting concluded on October 21. Employees also continued to work through that weekend, under FDIC supervision, collecting and closing files and performing other clerical and administrative transition activities.

LSB paid employees for all accrued vacation time up to October 20, 1994. The final LSB pay checks were distributed to employees on October 21, 1994. LSB also received authorization from the FDIC to pay employee insurance premiums through November 30, 1994.

On October 22, 1994 the name of the bank was formally changed to Ludlow Savings Bank, a division of Albany Savings Bank. On that date ASB assumed control of the portion of the bank that it purchased: deposits, overdrafts, debit balances, service charges, safe deposit boxes, cash and receivables, federal funds, and other areas as described in the Purchase and Assumption agreement. Employees were required to complete a time sheet indicating the time worked and for whom.[(4)] Within a week after October 22, 1994, ASB began to pay Key Tech for employees who were performing work for ASB.

Between October 22, 1994 and December 1, 1994, ASB evaluated the operation of the former LSB to determine which areas would be consolidated and eliminated to avoid duplication with functions that could be performed at the main office in Albany, New York. In the meanwhile the employees at the LSB locations continued to be employed through Key Tech.[(5)] ASB continued to control personnel and had total authority to assign and direct the Key Tech employees who continued to work at the LSB locations.

In the following weeks ASB continued to evaluate the LSB operation and the employees who were still employed at LSB locations, and decisions were made by ASB as to which employees would be offered employment at the LSB locations. In the meanwhile, the FDIC continued to be present at the bank to complete the process of the bank conversion and to supervise the areas of the bank's operation which were not yet resolved.[(6)]

As of December 1, 1994 there were approximately 70 Key Tech employees, all former LSB employees, working at the former LSB operation. By December 1, 1994 ASB had decided which employees it had intended to release and which employees would be offered permanent jobs with ASB at LSB locations. ASB also decided which portions of the bank's operation would be continued on a temporary basis at the LSB locations until certain services would be discontinued or consolidated with the ASB operation in Albany, New York.

The bank continued to operate without interruption of services. On December 3, 1994, ASB held an orientation meeting for employees who were offered regular permanent jobs with ASB, and informed them of the working conditions and benefits that would be available to employees who remained employed with ASB. The employees would receive benefits which differed from those contained in the contract between LSB and the Union. ASB informed the employees that they had until December 5 to decide whether the wished to continue employment with ASB.

On December 2, 1994 an article appeared in a Springfield, Massachusetts area newspaper quoting a bank executive that all employees who are employed at ASB were former LSB employees. Approximately 58 employees who were represented by the Union accepted the terms of employment offered by ASB and as of December 5 these employees began employment as ASB employees and were no longer Key Tech employees.

On December 6, the Union sent a letter to the ASB division's executive officer Charles Jeffrey, requesting recognition and bargaining. By letter dated December 24, Jeffrey told the Union that he forwarded the Union's letter to senior management and legal counsel in Albany and that a reply would be forthcoming by the end of the month.

On December 27, 1994 the Union filed a charge in Case No. 1-CA-32443, alleging that since on and after December 6, 1994, the Employer refused to recognize and bargain with the Union. On January 3, 1995 the Region received and docketed a decertification petition filed by employee Karen Miron, a teller at the Belchertown Branch of Ludlow Savings Bank. (Case No. 1-RD-1800).

According to Miron, who has been employed by LSB for about 20 years, there had been discussions among employees since the summer of 1994 about decertification of the Union. The decertification effort at that time was not successful and the matter was discontinued. Jeffrey admits that he was aware of the decertification attempt by employees at that time; however, he did not know the details of the activity. According to Miron, about November or December 1994, employees began to sign their names, address and telephone numbers to a list being circulated so that employees could keep in contact with other employees should there be layoffs.

On or about December 28, Miron began to make telephone calls to employees on the list and also to employees whom she knew during her 20 years of employment at the bank asking them if they would be interested in decertifying the Union. On December 29 and 30, Miron met with employees outside the bank's branches at lunch time and after work; employees signed their names to a petition stating that they no longer wished to be represented by the Union. Miron states that she had taken a personal day off from work on December 29 when she solicited signatures. Miron learned of the process of decertifying the Union when she called the NLRB that past summer and obtained the Agency's formal petition form with instructions as to how to proceed regarding decertification. Miron asserts that at no time did she receive assistance from the Employer in this matter.

After obtaining 41 signatures for decertification, Miron went to see Jeffrey on December 31 at about 1 or 2 p.m. at the bank's main office in Ludlow. Miron went to Jeffrey's office and handed him a copy of the signatures she had obtained from employees stating that they no longer wished to be represented by the Union. Miron also states that she informed Jeffrey that she was mailing a decertification petition to the NLRB. Jeffrey acknowledges that he had received such a list of names from Miron. Jeffrey claims to have received that information through the interoffice mail in an envelope with Miron's name on it and that he did not meet personally with Miron. Upon receiving that information from Miron, Jeffrey contacted the Employer's main office in Albany.

On December 31, Jeffrey sent a letter to the Union stating that a majority of employees do not wish to be represented by the Union and that a decertification petition had been filed. In his letter Jeffrey declined the Union's request to recognize or bargain with the Union.

As of January 3, 1995, there were 52 employees who were members of the bargaining unit. Of the 52 employees 41 had signed the decertification petition. (Two additional signatures were illegible.) According to the Employer, the same number of employees were employed on December 31, 1994 when the Employer concluded that the Union did not have majority status. Consequently, the Employer refused to recognize the Union as the bargaining representative for the employees at the LSB division of ASB.

On February 28, 1995 the Union filed a charge in Case No. 1-CA-32665 alleging that since about December 5, 1994 the Employer has unilaterally changed working conditions without bargaining with the Union.

There are at this time approximately 8 Key Tech employees who were formerly bargaining unit employees still employed at LSB. The Employer states that these assigned jobs will soon be eliminated when the work is consolidated into the Albany operation. As of this time the FDIC is continuing its presence at the bank and is employing Key Tech employees who are former LSB employees, ostensibly in operations not taken over by ASB.

ACTION

We conclude that the charges should be dismissed, absent, withdrawal.

As a preliminary matter, we note that the FDIC, under statutory authority vested in it by 12 U.S.C. Section 1821(e), lawfully disaffirmed the collective-bargaining agreement when it took over operations of the Ludlow Savings Bank.[(7)]

This case involves two sets of unilateral changes: changes made by the FDIC and/or ASB on October 21, and changes made by ASB alone on December 3. The Union does not allege that the October 21 changes were unlawful. ASB made the second set of changes when it met with employees to whom it had decided to offer regular permanent employment, and informed them of new working conditions and benefits they would receive if they accepted the employment offer by December 5. It is these unilateral changes that the Union alleges to violate the Act. Assuming Key Tech and ASB were joint employers on October 21, these second set of unilateral changes would arguably violate the Act. However, since the Union does not allege that the October 21 changes were unlawful, we need not reach the difficult issues, which have not been fully investigated and analyzed by the Region, whether: Key Tech and the Employer were joint employers on October 21; what the appropriate unit was on that date; did the unit remain intact despite the fact that the Employer took over only part of LSB's banking operations; and whether Key Tech and/or ASB were obligated to bargain with the Union prior to making unilateral changes on October 21 and prior to the Union's bargaining demand.[(8)]

Further, as to the December 3 changes, we conclude that this is not a good vehicle to argue that under the "perfectly clear" exception to Burns, ASB was not privileged to set unilaterally initial terms and conditions of employment.

Thus, assuming ASB is a Burns successor, it was obligated to recognize and bargain with the Union in December, absent good faith doubt based on objective considerations that the Union no longer continued to command majority support, or evidence that the Union did not in fact represent a majority of unit employees.[(9)]

However, given the Union's undisputed loss of majority status, we conclude that the Employer lawfully refused the Union's request for recognition and bargaining. In this regard, we note that after receiving the Union's bargaining demand on December 6, the Employer notified the Union that it would respond by the end of the month since its main office was reviewing the situation. On January 3, the Employer received the decertification petition signed by an overwhelming majority of its employees. There is no evidence that any of the signatures are tainted. Further, the Employer has not committed any unfair labor practices that would have influenced employees into signing the petition. Thus, since the Employer had reliable evidence that a majority of its employees no longer wanted to be represented by the Union, we conclude that the Employer lawfully refused to recognize and bargain with the Union.

The fact that the Employer took three weeks to respond to the Union's request does not lead to a different result in the circumstances here since it was not unreasonable for management in Massachusetts to forward the Union's demand to its corporate headquarters in Albany. Thus, we agree with the Region that the Employer did not unduly delay in responding to the Union's request. Further, there is no evidence that the Employer's delay influenced employees into signing the decertification petition.

Accordingly, since (1) under extant Board law the Employer has acted lawfully and (2) the employees will be able to freely exercise their choice of whether to be represented by the Union in an election, it would not be appropriate to use this case as a vehicle to change existing Board law. Therefore, the charges should be dismissed, absent withdrawal.

B.J.K.

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[1] Under 12 U.S.C. Section 1821(e), the FDIC has authority to repudiate contracts and agreements. See OPEIU Local 2 v. FDIC, 813 F.Supp. 39 (D.D.C. 1993).

[2] Key Tech is a temporary employment agency often used by the FDIC in these circumstances.

[3] While there was no discussion or announcement by the FDIC as to the employees' other working conditions, there was no continuation of contractual benefits. Key Tech did pay the employees for the Veteran's Day and Thanksgiving holidays.

[4] In addition, former LSB employees in non-unit positions continued to work in areas of the bank under the supervision of the FDIC. These employees were also working at the bank as Key

Tech employees paid by the FDIC through Key Tech.

[5] During that period certain employees voluntarily left the bank's employ to accept other jobs, and there were several instances during this period when employees were laid off by ASB without subject of recall.

[6] To this date, the FDIC is still present at the bank employing Key Tech employees in other areas.

[7] See OPEIU Local 2. v. FDIC, 813 F.Supp. 39 (D.D.C. 1993).

[8] Although the Board has held that a successor employer's duty to bargain under Burns arises as soon as the successor assumes control and a representative complement is hired, see Ranch Way, Inc., 203 NLRB 911, 912-913 (1973); East Belden Corp., 239 NLRB 776, 791-793 (1978 (enfd. mem. 634 F.2d 635 (9th Cir. 1980), the Supreme Court in Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 46 (1987), has stated, in dicta, that a successor's duty to bargain upon achieving a representative complement "is triggered only when the union has made a bargaining demand."

[9] Harley-Davidson Co., 273 NLRB 1531 (1985).