

National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: February 5, 1996

TO: Victoria E. Aguayo, Regional Director, Region 21

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

SUBJECT: Val-Agri, Inc., d/b/a Young's Specialty Foods, Case 21-CA-30555

530-4090-7500, 530-8090-1000, 530-8090-2000, 530-8090-4000

This Section 8(a)(5) case was submitted for advice as to whether a collective-bargaining agreement and/or bargaining relationship survived the permanent transfer of unit employees to a new facility and a six-week period during which the employees' job responsibilities were reduced. ⁽¹⁾

FACTS

For about 25 years, Teamsters Local 495 (the Union) has represented the driver-sales employees of the Pet Division of ConAgra, Inc., in Santa Ana, California. The most recent collective-bargaining agreement was scheduled to expire on January 31, 1996. As of May 31, 1994, the unit included 19 driver-sales employees, one truck driver and one warehouse employee. The driver-sales employees delivered pet products to customers in company vans, took orders from customers and stocked the customers' shelves. ⁽²⁾

As of June 1, 1994, ConAgra, Inc. formally merged its Pet Division with a separate subsidiary called Val-Agri, Inc., d/b/a Young's Specialty Foods (the Employer). The pet products operation continued at the Employer's Santa Ana facility for a few months after the formal merger. In early August 1994, the Employer informed the Union that at the end of the month the Santa Ana facility would be closed, the unit employees terminated and the operation transferred to the Employer's facility in Cerritos, California.

On August 9, 1994, the Union and Employer met and discussed the Employer's decision to close Santa Ana. The Employer stated that it wished to eliminate the expensive van delivery operation by consolidating the Santa Ana pet product operation with the specialty food operation in Cerritos. ⁽³⁾ The Employer indicated that there were about 85 employees at Cerritos doing work similar to driver-sales employees in Santa Ana. ⁽⁴⁾ The Employer stated that driver-sales positions did not exist at Cerritos, but rather the employees there were divided up into drivers, order-writers and stockers. ⁽⁵⁾ The Union was apparently told that the drivers at Cerritos were represented by Teamsters Local 630. ⁽⁶⁾ It was agreed that the Santa Ana employees would be given an opportunity to transfer to Cerritos. According to a Union representative, however, the transfer was to be on a "trial basis" as the Employer was unsure that the workers could perform the work at Cerritos. After discussing the Employer's plan, the parties negotiated a closing agreement, signed on August 10, which included a severance package for employees choosing not to transfer. ⁽⁷⁾

On August 16, the Employer announced the move to Cerritos to the Santa Ana employees. The Employer said they would no longer each perform the three functions of driver, order-writer and stocker. Instead, the employees would be divided into three groups, each performing only one of these functions. The Employer indicated that those Santa Ana employees designated as drivers at Cerritos would be represented by Teamsters Local 630, and those designated as order-writers and stockers would be unrepresented.

The driver-sales employees turned in their vans on August 26. Beginning August 29, apparently most of the employees transferred to Cerritos.⁽⁸⁾ Initially, the former Santa Ana employees continued the pet products work, servicing the same customers, from the Cerritos facility. The employees now designated as drivers (approximately four to seven) were told they were included in the Local 630 unit and they paid dues to that Local. Those employees designated as drivers used company-owned vehicles to make deliveries, whereas order-writers and stockers had to provide their own vehicles.

Pet products customers almost immediately reacted negatively to the 3-tier system.⁽⁹⁾ One customer specifically threatened to terminate its account unless the old system was reinstated. On October 6, the Employer announced to the employees that it was going back to the 1-tier system and that the employees would "get [their] vans back." As of October 10, the Employer abandoned the 3-tier system with respect to the pet products employees.

In November, when it learned of the reversion to the 1-tier system, the Union demanded that the Employer again recognize the Union and follow the Santa Ana contract. The Employer refused. The instant Section 8(a)(5) and (1) charge was filed by the Union on February 28, 1995⁽¹⁰⁾ and was amended on June 2 to include a request for Section 10(j) injunctive relief.

ACTION

We conclude that the Employer violated Section 8(a)(5) and (1) of the Act by refusing to recognize the Union and honor the pre-existing collective-bargaining agreement when the Santa Ana employees transferred to Cerritos.

The Board has held that a collective-bargaining agreement and an employer's duty to recognize and bargain with a union continue when an employer moves a facility to a new location if: (1) the operation remains substantially the same at the new location; and (2) the transferred employees comprise a substantial percentage (40% or more) of the employees at the new location.⁽¹¹⁾ In *Harte & Co.*, the Board made it clear that the policy behind this rule takes into account the need to maintain bargaining relationships, as well as the expectations of parties. In that case, the Board weighed the newly hired employees' interest in choosing whether or not to have union representation against the transferees' interest in retaining their collective bargaining gains. The Board specifically recognized that the national labor policy favors industrial stability achieved through the collective-bargaining process.⁽¹²⁾ Factors relevant to these considerations in *Harte* included good faith on the part of the employer as to the delay in completing the transfer, reasonableness of the length of the delay, and the absence of competing unions' representational claims.⁽¹³⁾

Applying these principles, we conclude that the Santa Ana collective-bargaining agreement should have remained in effect when the employees moved to Cerritos. Regarding the first prong of the *Harte* test -- whether the operation of a relocated facility remains substantially the same -- the Board weighs several factors, including the product or service produced, the machinery or equipment used, the customers served, and whether job classifications and supervision have changed.⁽¹⁴⁾ The Board has found substantial similarity in operations when the employer continues to provide basically the same service or product, even where certain lines of work are added or deleted.⁽¹⁵⁾ In the present case, the Employer's operation remained substantially the same at the new location. The skills used by the employees remained the same; there is no indication that the employees needed any type of retraining or new skills. Rather, the employees' job duties merely narrowed during the initial six-week period. At Santa Ana, each employee acted as driver, order-writer and stocker. For the first six weeks after the transfer, each performed only one of these three functions. The nature of the Employer's business (pet products) remained the same, and the employees continued to service the same customers. Thus, even during the six-weeks of operating under the 3-tier system, the operations remained substantially the same as at the old facility.

As regards the second prong of the relocation test, we conclude that the transferred employees remained a separate and appropriate unit after the transfer and thus at all times constituted a substantial percentage (100%) of the relevant employee complement at the new location because there was no effective merger of the units. Although the Employer may have intended to divide the Santa Ana group into drivers, stockers and order-writers and, accordingly, to merge the single driver-sales unit into the separate bargaining units that existed at Cerritos, the decision to adopt this 3-tier system for the Pet Division was always tentative and, indeed, failed almost immediately.

Evidence that the arrangement was tentative includes the Employer's apparent concern from the start about the feasibility of the 3-tier approach to pet products. It indicated to the Union prior to the transfer that it was concerned about the employees' ability to perform the work required under the 3-tier system and agreed to transfer the employees to Cerritos on a "trial basis." However, it is inherently incredible that the employees would be unable to do the work under the 3-tier system as it involved only a portion of the work that they had successfully performed at Santa Ana. The Employer kept the Santa Ana company vans on hand rather than selling them, and thus as soon as the 3-tier system failed, the vans were available for return to the employees. Moreover, almost immediately after the transfer, customers expressed to the employees and the Employer their dissatisfaction with the 3-tier system. Given the tentativeness of the Employer's decision to change to the 3-tier system and the short time that elapsed before 1-tier operations resumed, the Region should contend that there was never an effective merger of operations and that the driver-sales employees retained their identity as an appropriate unit even during the six weeks after the transfer. ⁽¹⁶⁾

Additional Harte considerations support enforcement of the Santa Ana contract at Cerritos. The Employer operated under the 3-tier system for only six weeks. There are no rival unions seeking representation. ⁽¹⁷⁾ As in Harte, enforcing the collective-bargaining agreement here promotes the national labor policy favoring industrial stability by honoring the expectations formed by the parties through collective bargaining. Moreover, this result is even more compelling than in Harte, since here no other employee interests countervail those of the transferees. As discussed above, the former Santa Ana bargaining unit has remained separate and appropriate at all times, and the Union's contract is not being imposed on the specialty foods employees already working at Cerritos.

In sum, because the business remained substantially the same and a substantial percentage of the new employee complement consists of transferees from the old plant, the collective-bargaining agreement continued, and the Employer was obligated to continue to recognize and bargain with the Union, after the relocation.

Alternatively, the fact situation here could be analogized to a temporary plant closing and reopening after a six-week hiatus in operations. Under Board law, an employer must again recognize a union upon request, even after a permanent closure, if it reopens substantially the same business at the same location using a workforce consisting mostly of its pre-hiatus unit employees. ⁽¹⁸⁾ Where the employees have no reasonable expectation of reemployment, the Board treats the employer's relationship with the union as if it had terminated and later resumed; that is, any pre-existing bargaining agreement would no longer be in force. ⁽¹⁹⁾ If under all the circumstances, however, the employees had a reasonable expectation of reemployment, the Board considers the closure to have been merely temporary and the employer is bound by any pre-existing collective-bargaining agreements. ⁽²⁰⁾

In the present case, the employees had a reasonable expectation of continued employment under the 1-tier system in the event the 3-tier system failed. The Union/employees were aware all along of indications that the new arrangement was tentative, i.e., that the transfer was being attempted on a "trial basis." The Employer's overriding concern, evident to all, was to remain in the pet products business and retain its customers. The employees were also aware that customers were reacting negatively to the 3-tier system. It became apparent soon after the transfer that the 1-tier system would likely be reinstated. Therefore, from the inception of the 3-tier system or immediately thereafter, the employees' most reasonable expectation would have been continued employment under the 1-tier system.

In typical temporary closure cases, the Board has found that an Employer's obligation to apply a pre-existing contract does not begin until the plant reopens, even where some unit employees continued working during the hiatus. ⁽²¹⁾ However, we would argue in this case that the Employer should have continued to honor the contract even during the "hiatus." This is not inconsistent with the temporary closure cases cited above. Thus, in Rockwood Energy Corp., although the employer unilaterally changed terms and conditions of employment for one of the employees hired to work during the hiatus, this change occurred outside the Section 10(b) period. ⁽²²⁾ In contrast, the date the employees here commenced operations at Cerritos, August 29, is within the Section 10(b) period. Additionally, although there were several employees working during the hiatus in Morton Development Corp., the collective-bargaining agreement expired prior to the hiatus and there is no evidence that the employer made any changes to terms and conditions of employment during the hiatus. ⁽²³⁾ In the present case, all that was "closed" was the format of doing business; the employees continued to work full-time doing a portion of their previous jobs. Because these employees kept doing unit work to maintain the pet food operations, they should have enjoyed the benefits of

the contract without interruption. Therefore, the Employer's refusal to recognize the Union and apply the collective-bargaining agreement after the August 29 transfer violated Section 8(a)(5) and (1) of the Act.

Finally, even if the Board were to find that the Employer had effectively merged the units for six weeks and that the Santa Ana employees had no reasonable expectation of employment under the 1-tier system, and thus that the closing was permanent, the Employer's bargaining obligation revived upon the "reopening" under the 1-tier system. As set forth above, the Employer eventually reconstituted the former Santa Ana unit as a 1-tier operation and therefore "reopened" substantially the same operation using a workforce completely drawn from the pre-hiatus unit. Under those circumstances, although the failure to apply the collective-bargaining agreement would be lawful, the Employer nevertheless unlawfully refused to recognize and bargain with the Union upon its request. ⁽²⁴⁾

Accordingly, a Section 8(a)(5) and (1) complaint should issue, absent settlement, alleging that the Employer violated the Act by refusing to recognize the Union and honor the pre-existing collective-bargaining agreement when the Santa Ana employees transferred to Cerritos.

B.J.K.

¹ [FOIA Exemption 5].

² The Employer described this operation as a "1-tier" system, with one employee performing the three functions of driver, stocker and order-writer.

³ While each of the driver-sales employees at Santa Ana used a company van, only the drivers at Cerritos use company-owned vehicles. The stockers and order-writers at Cerritos are required to purchase or lease vehicles to perform their job duties.

⁴ The Cerritos employees apparently ordered, stocked, or delivered specialty foods, but not pet products.

⁵ The Employer describes this as a "3-tier" system.

⁶ Union president Hatfield claims that he was told these positions were non-union.

⁷ The agreement provided that the wages and benefits of employees transferring to Cerritos as drivers would be determined by the collective-bargaining agreement between the Employer and Teamsters Local 630.

⁸ It is not clear what happened to the unit truck driver and warehouse employee.

⁹ One employee testified that customers complained about long delays in getting their shelves stocked once the product was delivered.

¹⁰ An identical charge had been filed by the Union on November 17, 1994, but was withdrawn when the Union was unable to present witnesses in a timely manner.

¹¹ *Harte & Co.*, 278 NLRB 947, 948 (1986) (where the Board held that an employer and a union lawfully extended their collective-bargaining agreement to a new facility even though it took eight months for the employer to "substantially complete" the relocation). See also *Rock Bottom Stores*, 312 NLRB 400, 402 (1993).

¹² 278 NLRB at 950.

¹³ *Id.*

¹⁴ See, e.g., *Molded Acoustical Products*, 280 NLRB 1394, 1396-97 (1986) (relocated facility was basically unchanged although the new facility was larger and more modernized than the old, the work was more sophisticated, production was more efficient, new job descriptions and job titles were established, new equipment was added, and there were new customers for a new line of products).

¹⁵ See, e.g., *W.T. Grant*, 197 NLRB 955, 956 (1972) (additions to the product lines were made); *Sterling Processing Corp.*, 291 NLRB 208, 209 (1988) (one-quarter of its former operation was abandoned and a new packaging process was added).

¹⁶ The closing agreement does not affect this conclusion. Part of that agreement affected only the employees who did not choose to transfer to Cerritos. The agreement as a whole, including the portion defining the rights of the drivers who would transfer into the unit of drivers represented by Local 630, was premised on the assumption that an actual merger of the units would take place. As discussed above, it did not.

¹⁷ Once the Employer reverted to the 1-tier format, Local 630 no longer sought representation of the driver-sales employees.

¹⁸ See *Sterling Processing Corp.*, 291 NLRB 208, 210 (1988).

¹⁹ See, e.g., *Sterling*, 291 NLRB at 210.

²⁰ See *El Torito-La Fiesta Restaurants*, 295 NLRB 493, 496 (1989).

²¹ See, e.g., *Rockwood Energy Corp.*, 299 NLRB 1136 (1990); *Morton Development Corp.*, 299 NLRB 649 (1990).

²² 299 NLRB at 1137.

²³ 299 NLRB at 649. Apparently no employees worked during the hiatus in *El-Torito-La Fiesta*. 295 NLRB at 493.

²⁴ See, e.g., *Sterling Processing Corp.*, 291 NLRB at 210.