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

Advice Memorandum

DATE: June 30, 1998

TO : Dorothy L. Moore-Duncan, Regional Director
Region 4

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

SUBJECT: Penn State Geisinger Health
System Foundation 530-4825-6700
Case 4-CA-26452 530-4850-6700

This Section 8(a)(5) case, involving a change in the entity operating a teaching hospital from a public university to a private corporation, was submitted for advice as to (1) whether the Employer is a Burns[1] successor as opposed to the continuation of the predecessor entity and/or the legal equivalent of a stock purchaser; (2) if successorship principles apply, whether the Employer is a "perfectly clear" successor without the privilege to set initial terms and conditions of employment; and (3) if the Employer was privileged to set initial employment conditions, whether certain changes after the effective date of the transfer of the hospital were violative of Section 8(a)(5). The Region also sought advice regarding the date the Employer's liability for the alleged unfair labor practices attached.

FACTS

From 1963 until July 1, 1997, Pennsylvania State University (PSU or Penn State) operated the Milton S. Hershey Medical Center (HMC or the Hospital) in Hershey, Pennsylvania. HMC was endowed and created to house the PSU College of Medicine under an agreement between PSU and the M.S. Hershey Foundation, a charitable trust. For much of this time, the approximately 930 registered nurses (RNs) working at HMC were employees of PSU and represented by the Pennsylvania Nurses Association (PNA). The last in a series of PSU-PNA collective-bargaining agreements expired March 31, 1997.

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

The Geisinger System (Geisinger), which was also created by a charitable trust, is a Pennsylvania non-profit corporation engaged in healthcare delivery, primarily in Pennsylvania. Prior to the events at issue here, its operations included a number of acute care hospitals, a health insurance program and a medical research facility.

On January 17, 1997, Penn State and Geisinger publicly announced that the two entities had that day signed a "Memorandum of Agreement" (the MOA) regarding an affiliation between PSU and Geisinger. Thus, on July 1, 1997, the Hospital's operation would be transferred to a "reconstituted" and renamed Geisinger, "Penn State Geisinger Health System" (PSGHS or the Employer). In addition, Hershey Medical Center Corporation (HMC Corp.), a new non-profit corporation of which PSGHS would be the sole member, was created to lease the Hospital premises from PSU and to purchase its inventory, equipment and other assets for use by PSGHS in the operation of the HMC clinical program. In broad outline, under the affiliation agreement, PSU retains sole control of the College of Medicine and ownership of the HMC grounds and buildings. These, in turn, are leased to PSGHS, through HMC Corp., for a renewable 5-year term.[2] PSGHS, again through HMC Corp., purchased all Hospital inventory and supplies.[3] The MOA imposes on PSGHS a fiduciary obligation to the College of Medicine and requires PSGHS to compensate Penn State for the presence of the medical school under a complex academic support formula.[4] PSGHS and/or HMC Corp. have also assumed other PSU assets and liabilities for an unspecified amount.

The MOA also provided that PSGHS would be governed by an 18-member Board of Directors, eight appointed by Geisinger and eight by PSU together with two ex officio voting members. On the initial Board, the MOA specified

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[2] The first annual payment exceeds $6.6 million.

[3] The price is unknown. However, the MOA specified that the value would be established by an independent appraisal.

[4] The initial calculation of the annual academic support payment exceeded $31.7 million and was subject to supplemental negotiation at a later date.

that one of these latter two directors was "the Senior Vice President for Health Affairs, Dean of the PSU College of Medicine and CEO of the M.S. Hershey Medical Center." Those positions were held by C. McAllister Evarts at all times relevant to the instant case. As one of the two ex officio directors, Evarts was also named to the executive committee of the PSGHS Board and designated "President and Chief Academic Officer" within the PSGHS Executive Office, the entity charged with overall management of PSGHS.

Further, under the heading "Employee Matters," the MOA specified that "not prior to July 1, 1997" non-faculty employees (including the unit RNs involved herein)

> who relate primarily to the . . . clinical enterprise, currently working at PSU, may transfer to the employment of the appropriate affiliate of [PSGHS]. The operational method for effecting such transfer will include eliminating applicable positions from PSU employment and immediate creation of positions within [PSGHS].

The MOA also includes provisions concerning the parties' conduct prior to the contemplated affiliation. Thus, while each party is to "continue to exercise exclusive authority and governance with respect to their respective operations and facilities,"[5]

> [n]o publicity release or announcement concerning this Agreement or any transaction contemplated hereby shall be made without the advance approval of the other party hereto, both as to the timing and content of such release . . . .[6]

As noted above, on January 17, Geisinger and Penn State officials, including Evarts, announced the signing of the MOA in a news conference that was broadcast by satellite to Hospital employees. A letter from Evarts to the HMC employees was published the same day in a special edition of "Vital Signs," a Penn State newsletter. In

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[5] MOA, Section 7 (Operations Prior to Affiliation).

[6] MOA, Section 8 (Publicity).

addition to presenting the reasons for merging the Geisinger and Penn State clinical enterprises, the letter stated that the affiliation "will give employees more long-term job security." Evarts also stated that "Unions at Hershey Medical Center will continue to be recognized." And, in noting that a pre-existing PSU cost saving initiative would continue along with efforts to reduce duplication of services and facilities funded by both organizations, he also stated that if future staff reductions were needed "we will attempt to accommodate them through retirements and transfers." A news story in the same "Vital Signs" issue also reported that "[t]he new organization will recognize the unions" and, regarding impact on employee jobs, specified that "no large number of job eliminations is anticipated as a direct result of this merger." These exact words were repeated in a in response to the question "What will be the impact on jobs?" in a separate "Questions & Answers" column in the same issue. Employees were also invited to attend any of four scheduled employee information meetings on "The Future of Hershey Medical Center" with Evarts and HMC CEO Bruce H. Hamory.

In contrast to the two statements regarding union recognition and three separate comments on the minimal impact of the just-announced merger on employee jobs in the January 17 "Vital Signs" issue, there is no mention there or in any other document issued to employees that day regarding terms and conditions of employment under PSGHS.[7] Indeed, it appears that many employees first heard that changes in their benefits were contemplated from an article about the creation of PSGHS that appeared in a local newspaper some time after January 17.[8]

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[7] Nor were there any oral announcements regarding changes in employee benefits or other working conditions.

[8] The exact date of publication is unknown and a copy of the article was not available for our review. In any event, as the Region points out, the fact that the then-HMC director of public relations, who now holds the same position within PSGHS, was thereafter prompted to apologize to employees that they had to hear about changes to their benefits in the press strongly supports the conclusion that the employees were not told anything about PSGHS's intentions regarding new employment terms on January 17.

The announcement of the creation of PSGHS and the newspaper article prompted hundreds of calls to a special toll-free information hotline. Additional questions were fielded during the week of January 20 during repeat showings of the videotape of the January 17 news conference for employees who had missed the live broadcast. The concerns raised in these forums were aggregated into model questions and answers that were published in a new publication, "Fast Facts."[9] Issued in conjunction with January 30-31 employee meetings with Evarts and Hamory, this "Fast Facts" issue contains the first written information about benefits under PSGHS disseminated to the HMC employees.[10]

In the midst of these developments, on January 28, the Union filed a petition for an election with the Pennsylvania Labor Relations Board (PLRB) seeking to replace the PNA as the RNs' collective-bargaining representative. On April 3, the Union won the PLRB election, securing 741 votes. Only 79 ballots were cast for PNA and 31 other ballots were challenged.

On April 10, Evarts and Hamory wrote to the employees informing them that their positions would "be transitioning to PSGHS effective July 1" and that they would "have the opportunity to come work for PSGHS at that time." On Friday, April 11, the PLRB certified the Union, pending the filing and resolution of any objections.[11]

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[9] Subtitled "News and Information about the new Penn State Geisinger Health System," "Fast Facts" was published at irregular intervals by the Penn State information office.

[10] A January 17 Geisinger newsletter advised Geisinger employees that the new system would adopt Geisinger's model of performance-based compensation and its benefits program. There is no indication that this document was ever made available to unit employees.

[11] No objections were filed.

During the following week, brochures outlining the highlights of the planned PSGHS benefits program, called "Options and Opportunities," were mailed to employees. The brochure represents the first presentation of the entire range of PSGHS benefits and makes possible a meaningful comparison to the range of benefits provided under the expired collective-bargaining agreement.[12]

On April 21, Frances Campo, the chief Union organizer, wrote to Evarts advising him of the Union's certification as the nurses' representative and demanding bargaining for a new collective-bargaining agreement. Campo stated further that the Union also demanded

> to bargain over the merger between Penn State and Geisinger Medical center [sic], the transitioning of employees from Penn State to [PSGHS] and the effects and impact of those decisions on the RNs at HMC. Further, we demand that these decisions not be implemented until full and complete bargaining has occurred between the parties. We look forward to working with you to resolve all issues related to the merger and to reach a new collective bargaining agreement.

On April 30, employees were given a time line for enrolling in the "Options and Opportunities" program, i.e., making their benefits selections, and submitting certain paperwork necessary for transferring their employment to PSGHS. The deadlines were extended several times.

Thereafter, a number of meetings took place between Union representatives and various PSU officials. On at least one occasion at a May 22 meeting with Union official Eileen Connelly, PSU director of human resources James Elliott apparently offered to "correspond with the representatives of PSGHS on the Union's behalf." The Union sought information regarding: the creation and structure of PSGHS, the Employer's willingness to recognize and bargain with the Union and which and under what conditions unit

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[12] Thus, some benefits, such as paid time off, are plainly inferior to the contractual version. Other benefits, such as paid holidays, are the same. A number of new benefits are also described.

employees would be working for PSGHS. On May 23, Connelly sent a confirming letter to Elliott which also requested information "with respect to negotiations with [PSGHS] as well as with Penn State." Connelly also sent copies of this letter to Geisinger CEO Stuart Heydt in his capacity as PSGHS CEO, to Frank Trembulak, also a Geisinger official and the PSGHS Chief Operations Officer, and to Evarts and Hamory in their capacities as the PSGHS Chief Academic Officer and Medical Director, respectively.

Connelly also exchanged a series of letters with PSGHS attorney John Langel in June, initially seeking essentially the same information requested in the May 23 letter to Elliott and then refining and explaining the requests. Langel answered some of the Union's queries, but failed to respond to the Union's requests for the personnel policies PSGHS intended to implement. Inter alia, in a June 13 letter, Connelly expressly challenged "the right of PSGHS to implement the Options and Opportunity . . . program without negotiations with the Union" and asked that the contractual status quo be maintained pending negotiation of a PSGHS-SEIU contract. Langel, in reply, reiterated PSGHS' willingness to recognize the Union and negotiate an agreement, but rejected the Union's request that the terms and conditions of the PNA-PSU agreement be honored.

PSGHS commenced operations on July 1 as planned. By letter dated July 11, Connelly complained that the Union had yet to receive any written information on the personnel policies under which the nurses were now working. In fact, neither the Union nor the RNs received the PSGHS employee handbook until July 21.[13] On July 24, Connelly reiterated the Union's position "that the implementation of these policies and the handbook must be negotiated with the Union prior to implementation" and that the Union was "therefore demanding that any implementation immediately cease until the parties are able to negotiate over these changes."

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[13] The Union and employees had previously been informed only that "Geisinger policies" would apply. The PSGHS handbook and the Geisinger Human Resources Manual establish policies and procedures that differ markedly from, e.g., PSU's seniority, tuition assistance, jury duty, paid time off and leave of absence policies.

On July 30, the Employer announced a bonus system for RNs assigned mandatory overtime and implemented a "no fault" attendance policy different from the attendance policy set forth in the employee handbook. It did not inform or bargain with the Union. In late August, again without notice to or consultation with the Union, the Employer eliminated a supplemental 401(k) contribution for certain senior employees that had been described in the final 1997 Options and Opportunities plan description. In September, PSGHS eliminated certain pay differentials based on employee certifications detailed in the 1997 Options and Opportunities materials, increased the starting wage for new hires and announced that part time work would no longer count toward the accrual of paid time off. In December, the Employer unilaterally canceled an implemented long distance telephone benefit. In addition, the paid time off and medical benefits described in the 1997 "Options and Opportunities" plan description were changed in the 1998 version, again without notice or bargaining. Finally, PSGHS has even departed from the seniority policy set forth in the implemented Geisinger policy manual by announcing it would recognize unit seniority only for scheduling purposes. The Geisinger policy manual provides that unit seniority is to be used as a "tie-breaker" in job vacancy disputes.

Conceding that there has been little turnover in the RN bargaining unit, the Employer contends that it lawfully set initial terms and conditions of employment because it made clear to PNA and the employees that it intended to implement new working conditions long before it extended offers of employment in the April 10 letters to the employees. In the alternative, the Employer argues that even assuming it was a "perfectly clear" successor, the Union failed either to timely protest or request bargaining over the planned changes, effectively "sitting on its rights" until long after the initial terms were set. In this regard, the Employer asserts that the April 21 letter to Evarts was not an effective demand on PSGHS and dismisses the May 23 letter to Elliott as a mere request for prospective bargaining over terms and conditions of employment after July 1, and not a bargaining demand. The Employer further dismisses the Union's June correspondence with Langel as mere efforts to clarify and/or acquiescence in the lawfully announced initial terms and conditions of employment. Finally, while the Employer concedes that the

July 24 letter was a valid demand for bargaining over initial terms, it dismisses that demand as "too late to undo the waiver occasioned by months of acquiescence."

ACTION

We conclude that the Employer is a successor rather than a legal continuation of the predecessor university and that it falls within the Burns "perfectly clear" exception. We therefore conclude that since January 17, 1997, the Employer violated Section 8(a)(5) by failing and refusing to bargain with the Union over the bargaining unit nurses' initial terms and conditions of employment, as well as the specific new policies and modifications of the initial terms that were unilaterally implemented after July 1.

Initially, we agree with the Region that the instant case should be analyzed under successorship rather than stock transfer principles, and that the instant transaction is distinguishable from the corporate consolidations the Board found akin to stock transfers in Children's Hospital[14] and Hartford Hospital.[15] Generally, a stock transfer "involves no break or hiatus between two legal entities, but is, rather, the continuing existence of a legal entity."[16] The distinction between a successorship and stock transfer is grounded in the basic principle of corporate law that a corporation is "an entity distinct from its individual members or stockholders, who, as natural persons, are merged in the corporate identity," and remains "unchanged and unaffected in its identity by changes in its individual membership."[17] A change in stock ownership does not absolve a continuing corporation of its

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[14] 312 NLRB 920 (1993), enfd. 87 F.3d 304 (9th Cir. 1996).

[15] 318 NLRB 183 (1995).

[16] Hendricks-Miller Typographic Co., 240 NLRB 1082, 1083, n.4 (1979). See also Towne Plaza Hotel, 258 NLRB 69, 71 (1981).

[17] Topinka's Country House, Inc., 235 NLRB 72, 74 (1978) (citing 18 Am. Jur. 2d, Corporations sec. 13).

legal responsibilities[18] and such continuing employers are therefore required to honor the collective-bargaining agreements in effect at the time of transfer.[19] While Children's Hospital and Hartford Hospital concededly involve similar factual settings to those here, the linchpin of the Board's analysis, the survival of the corporate entities and, hence, their continuing bargaining obligations,[20] is missing. Thus, Geisinger Foundation, renamed PSGHS, is the surviving corporate entity to which PSU transferred responsibility for the HMC clinical operations. PSGHS, in turn, is the sole member of the newly created HMC Corp., the entity which holds the lease to the HMC premises and purchased inventory, equipment and other assets used in the Hospital's clinical operations from PSU. In our view, this break in the identity of the corporate entity operating HMC is not offset by the continued existence of Penn State as a public institution or the continued presence at HMC of the academic operations of the College of Medicine.

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[18] See Hartford Hospital, 318 NLRB at 190; Children's Hospital, 312 NLRB at 927; Miller Trucking Service, Inc., 176 NLRB 556 (1969).

[19] See Hartford Hospital, 318 NLRB at 190; Children's Hospital, 312 NLRB at 927.

[20] Thus, Children's Hospital involved the merger of 2 previously separate hospitals, Children's and Pacific Presbyterian. The merger agreement provided that Pacific Presbyterian would merge into Children's Hospital; to preserve Children's pre-existing tax exempt status, Children's would be the surviving corporation and succeed to all of Pacific's assets and liabilities while the Pacific Presbyterian corporation would be dissolved. 312 NLRB at 927. Similarly, Hartford Hospital involved a merger of Hartford, an acute care hospital, and The Institute of Living (IOL), a previously independent private psychiatric hospital. While the merger transaction involved Hartford's acquisition of IOL as a wholly owned subsidiary, IOL at all times continued to be an ongoing corporation with ownership of its real property and improvements and control of its endowment. 318 NLRB at 185-186 and 190.

Under the Board's successorship doctrine, a successor normally has the freedom to set initial terms and conditions of employment for its newly-hired work force. However, the Supreme Court in NLRB v. Burns Security Services,[21] enunciated an exception to this rule, involving "instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms." In Canteen Company,[22] the Board applied this "perfectly clear" exception to hold that

> when the Respondent expressed to the Union its desire to have the predecessor employees serve a probationary period, the Respondent had effectively and clearly communicated to the Union its plan to retain the predecessor employees. [Footnote omitted.] Therefore, as it was "perfectly clear" on [that date] that the Respondent planned to retain the predecessor employees, the Respondent was not entitled to unilaterally implement new wage rates thereafter.

The Board relied on the fact that at the time the employer contacted both the union to say that it wanted employees to serve a probationary period and the employees to say that it wanted them to apply for employment, it "did not mention in these discussions the possibility of any other changes in its initial terms and conditions of employment."[23] Thus, in applying the "perfectly clear" exception, the Board scrutinizes not only the successor's plans regarding the hiring of the predecessor's employees but also the clarity of its intentions concerning existing terms and conditions of employment. In Canteen and other "perfectly clear" cases, a bargaining obligation has been imposed under the exception based upon the successor's silence as to changing

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[21] 406 U.S. 272, 294-295 (1972).

[22] 317 NLRB 1052, 1053 (1995), enfd. 103 F.3d 1355 (7th Cir. 1997).

[23] Id. at 1052.

or continuing the existing working conditions at the time it indicated it would be hiring the predecessor's employees.[24] The Board has also applied the "perfectly clear" exception where at the time the new entity retained the entire predecessor bargaining unit, it indicated that at some time in the future it would implement certain unspecified changes in terms and conditions of employment.[25] In other words, to unilaterally set initial terms and

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[24] See, e.g., Roman Catholic Diocese of Brooklyn, 222 NLRB 1052 (1976), enf. denied in relevant part sub. nom. Nazareth Regional High School v. NLRB, 549 F.2d 873 (2d Cir. 1977) (Board imposed an obligation to bargain about initial terms of employment prior to the new employer's extension of formal offers of employment to the predecessor's employees where the employer made an unequivocal statement to the union of an intent to hire all of the predecessor's lay teachers, but did not mention any changes in terms and conditions of employment; 8(a)(5) violation found when it later submitted an employment contract with unilaterally changed terms and conditions of employment); Fremont Ford, 289 NLRB 1290, 1296-1297 (1988) (initial bargaining obligation imposed under "perfectly clear" exception where new employer manifested intent to retain the predecessor's employees prior to the beginning of the hiring process by informing union it would retain a majority of the predecessor's employees and did not announce significant changes in initial terms and conditions of employment until it conducted hiring interviews). In Canteen (317 NLRB at 1053), the Board distinguished its dismissal of the complaint in Spruce Up Corp., 209 NLRB 194, 195 (1974), enfd. 529 F.2d 516 (4th Cir. 1975), where the employer was not a "perfectly clear" successor because representatives explicitly stated in its initial meeting with the union that initial pay rates would be different from those of the predecessor.

[25] East Belden Corporation, 239 NLRB 776, 793 (1978), enfd. 634 F.2d 635 (9th Cir. 1980) (employer was not free to set initial employment terms where the employees had not been "clearly informed of the nature of the changes which Respondent intended to institute in the future, rather Respondent's announcement was couched in generalized and speculative terms").

conditions of employment, the successor employer must "clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment."[26] Conversely, an employer which promises to hire a predecessor's employees, but announces vague, undefined changes in their employment terms starting on some future date will be obliged to negotiate such changes with the statutory bargaining representative.[27]

We conclude that the instant matters fall within the Burns "perfectly clear" exception and that the Employer's obligation to consult with the employee's representative over desired changes in their working conditions attached on January 17. Thus, the MOA provision regarding the transfer of Penn State positions to PSGHS and the assurances that large numbers of terminations were not anticipated as published in the January 17 edition of "Vital Signs" constitute compelling evidence that PSGHS and its principals planned from the very outset to hire virtually all of the HMC employees.[28] In this regard, we further conclude that at all times, based upon his appointment from the inception of the affiliation agreement as a principal officer of PSGHS and his role in conveying information to employees about PSGHS, including its commitment to recognize the employees' unions, that Evarts was cloaked at least with apparent authority to act as an agent of PSGHS.[29] In stark contrast to these clear

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[26] Canteen, 317 NLRB at 1054, quoting Fremont Ford, 289 NLRB at 1297.

[27] See East Belden Corporation, 239 NLRB at 793.

[28] In the absence of any contention to the contrary, we assume that statements made at the press conference and the information reported in "Vital Signs" and other Penn State publications were all in compliance with the MOA provision requiring approval by the other party of all statements regarding the MOA or the proposed affiliation transaction.

[29] See Lemay Caring Center, 280 NLRB 60, 65-67 (1986), enfd. mem. 815 F.2d 711 (8th Cir. 1986) (8(a)(1) statements of predecessor employer's supervisor prior to transition binding on successor where supervisor retained by successor). See generally Allegany Aggregates, 311 NLRB

statements regarding job continuity, there was not a single allusion, in either the MOA or any of the contemporaneous writings about the announced affiliation, to changing employee benefits or other terms and conditions of employment.[30] Moreover, the fact that changes in certain benefits, such as the state pension plan, would be unavoidable once the employees converted from public to private sector employment would not privilege the Employer to unilaterally establish substitute benefits.[31] Accordingly, the Employer fell within the "perfectly clear" exception on January 17 and, since no indication of an intention to set initial terms was given at that time, the Employer lost the right unilaterally to alter the existing Katz terms and conditions of employment which were set forth in the expired contract.[32]

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1165, 1165 (1993) (determination whether a person is acting as the agent of another, the Board applies the common law principles of agency; "agency may be established, inter alia, under the doctrine of apparent authority, when the principal's manifestations to a third party supply a reasonable basis for the third party to believe that the principal has authorized the alleged agent to do the acts in question"); "Creation of Apparent Authority: General Rule," Restatement of Agency, Second, Sec. 27 (1958).

[30] As noted above, we agree with the Region that the response to the newspaper article about the January 17 announcement of the affiliation agreement demonstrates that nothing was said about benefits at the time notice of the Employer's intentions to retain almost all the employees and to recognize the unions were announced.

[31] See Standard Candy Co., 147 NLRB 1070, 1073 (1964) (employer excused from its duty to bargain over that which is legally compelled only if the legal compulsion in question leaves it with no discretion as to how it is to be executed; the obligation to enter into the bargaining process in good faith is neither minimized nor obviated).

[32] Cf. Stephenson Haus, 279 NLRB 998, 1003 (1986) (where successor initially maintained predecessor's terms and conditions of employment, they became its unilaterally set terms and subsequent changes without bargaining violated 8(a)(5)); Blitz Maintenance, 297 NLRB 1005, 1008 (1990),

The absence of a PNA demand for recognition or bargaining prior to its decertification also does not affect our conclusion. Thus, no separate PNA recognition demand was required. Although a successor's failure to bargain normally becomes actionable only on its receipt of a valid Union demand for recognition,[33] no such demand was required here because the Employer had already, through, inter alia, Evarts' January 17 letter to the employees, expressly extended recognition to the incumbent unions, including the PNA. Just as PSU was not privileged to change employment terms without first offering to bargain with the collective-bargaining representative, the Employer could not do so since it had lost its privilege of setting initial terms. PNA was thereafter, like any 9(a) representative, entitled to clear notice of the Employer's desire to change employment conditions before it could be said to have waived its right to bargain by its silence.[34]

The Employer's alternative contention that the Union acquiesced in and/or waived the right to bargain over the announced PSGHS initial terms is similarly without merit. Thus, the Union's April 21 letter to Evarts, as the agent

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enfd. mem. 135 LRRM 3472 (6th Cir. 1990) (except for matters as to which a successor sets its own initial terms, terms and conditions of employment normally those established by predecessor's collective-bargaining agreement or past practice).

[33] Royal Midtown Chrysler, 296 NLRB 1039, 1040 (1989) and cases cited therein at n.8 (fact that the union represents a majority of the successor's employees in an appropriate unit does not, absent a demand for recognition, operate to invoke the bargaining obligation).

[34] See American Distributing Co. v. NLRB, 715 F.2d 446, 450 (9th Cir. 1983) (waiver by inaction occurs where union fails to demand bargaining upon actual notice of a proposed change sufficiently prior to implementation to permit bargaining). Accord: Medicenter, Mid-South Hospital, 221 NLRB 670, 679 (1975); American Buslines, Inc., 164 NLRB 1055, 1056 (1967).

of PSGHS, was both a timely[35] and valid demand for bargaining with PSGHS over contemplated changes in the prevailing terms and conditions of employment.[36] Thus, the Union insisted that the changes not be implemented until full and complete bargaining occurred and a new collective-bargaining agreement achieved.

We recognize that the foregoing analysis turns on the conduct of PSGHS and it agents during a time when the Board did not have jurisdiction over the employing entity, but the Region may still rely upon or allege as unfair labor practices conduct that occurred before the July 1, 1997 transition date. Thus, it is clear that the Board will apply its normal successorship principles and impose successor status as appropriate in cases where the predecessor is a public entity and the successor a private entity.[37] Indeed, in the cited cases, the fact that the

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[35] The Union demanded recognition and bargaining just 10 days after the August 11 certification and less than a week after learning the Employer's intention to make specific changes as of July 1.

[36] See, e.g., Spitzer-Akron, Inc., 195 NLRB 114, 118-119 (1972), enfd. 470 F. 2d 1100 (6th Cir. 1972) (whether a valid demand was made requires no special form; Board looks to the entire transaction between the union and the employer).

[37] See JMM Operational Services, 316 NLRB 6, 12-13 (1995) (private employer that contracted to operate city wastewater treatment plant found a Burns successor under Board's traditional successorship test); Lincoln Park Zoological Society, 322 NLRB 263, 265 (1996), enfd. 116 F.3d 216 (7th Cir. 1997) (successorship status imposed on private corporation that obtained contract to operate zoo that continued to be owned by city park district); Harbert International Services, 299 NLRB 472, 473 (1990) (Board rejected ALJ's successorship determination based solely on lack of supporting evidence that private contractor taking over maintenance services at U.S. Army base hired a majority of the Army's civilian maintenance employees; Board did not disturb ALJ's conclusion that public identity of predecessor was not material). Cf. The Boeing Company, 214 NLRB 541, 541, 559 (1974) (ALJ's finding replacement

Board lacked jurisdiction over the predecessor employer and its employees was not a factor in the successorship analysis. While none of these public-to-private successorship cases required scrutiny of the successor's conduct prior to the transition, we note that the Board routinely relies upon pre-transition conduct in successorship cases.[38] Additionally, the Board has asserted jurisdiction even before an employing entity formally exists, so long as the "new" employer, like PSGHS in the instant case, has taken concrete steps to begin operating in commerce.[39] In such cases, as here, the Board has reasoned that failing to exercise jurisdiction would preclude remedying unlawful prehire agreements and other unfair labor practices likely to occur in the start-up phases of an enterprise.[40]

Based upon the foregoing analysis, we conclude that complaint should issue, absent settlement, alleging that the Employer violated Section 8(a)(5) by implementing any unilateral changes to the pre-January 17 terms and conditions of employment, including the Options and Opportunities program, the PSGHS employee handbook and other "Geisinger policies" on and after July 1 without

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aerospace contractor was not required to bargain over initial employment terms affirmed solely under Spruce-Up analysis, leaving undisturbed ALJ's analysis that predecessor's employees were part of a nationwide bargaining unit subject to Railway Labor Act did not itself preclude application of Burns principles).

[38] See, e.g., Fremont Ford, 289 NLRB at 1293-1294; East Belden, 239 NLRB at 779; Lemay Caring Center, 280 NLRB at 65-67.

[39] See, e.g., Chemrock Corp., 151 NLRB 1074, 1080-1081 (1965) (8(a)(1) violation based on conduct of a company which was "acting like an employer" in dealing with the future employees of its recently-purchased business); Cowles Communications, Inc., 170 NLRB 1596, 1598 (1968) (unfair labor practice committed before company was in operation but after it had bought and set up equipment and was in the process of hiring employees).

[40] Cowles Communications, 170 NLRB at 1598.

first bargaining with the Union. The complaint should also allege, for the reasons stated by the Region, that the additional post-July 1 changes described above are also violative of Section 8(a)(5).

B.J.K.