

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

DATE: April 22, 2015

TO: Nancy Wilson, Regional Director
Region 6

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

SUBJECT: Dominion Transmission, Inc. 177-1633-7500
Case 06-CA-143530 530-4850-3300
530-4825-6700
530-4850-6700

The Region submitted this case for advice regarding whether: (1) Blue Racer Midstream, LLC (“BRM”), a joint venture between Dominion Natrium Holdings, Inc. and Caiman Ohio Midstream, LLC, is the alter ego of Dominion Transmission, Inc., Dominion Resources, Inc., Dominion Natrium Holdings, Inc., and Dominion Resources Services, Inc., a single employer (“Dominion”) and therefore violated Section 8(a)(5) and (1) of the Act by refusing to honor and apply the collective-bargaining agreement between Dominion Transmission, Inc. and the Union; or (2) alternatively, whether BRM is a “perfectly clear” successor under the plain language of the “perfectly clear” caveat set forth in *NLRB v. Burns International Security Services, Inc*¹ and thus violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union prior to setting initial terms and conditions of employment. We conclude that BRM is not an alter ego of Dominion due to a lack of common ownership or the kind of substantial control by Dominion over BRM that the Board requires to establish an alter ego relationship. Also, because the unit employees formerly employed by Dominion do not constitute a majority of BRM’s workforce, we conclude that BRM is not a *Burns* successor and was not obligated to recognize the Union. Thus, the Region should dismiss the charge, absent withdrawal.

FACTS

Dominion Resources, Inc. (“DRI”) is the parent of various Dominion subsidiaries that together constitute one of the nation’s largest producers and transporters of energy. Dominion Natrium Holdings, Inc. (“DNH”) is a holding company that owned

¹ 406 U.S. 272 (1972); *see also*

a natural gas processing and fractionation facility in Natrium, West Virginia. DNH announced it would develop the Natrium facility in January 2011 and decided that Dominion Transmission, Inc. (“DTI”) would operate the facility. DTI’s production, maintenance, and office clerical employees are represented by United Gas Workers Union of America, Local No. 69 (“Union”). DTI and the Union have a collective-bargaining agreement that covers over 1,000 unit employees at Dominion facilities in six states where DTI supplies operating services. Dominion Resources Services, Inc. (“DRS”) provided certain administrative services, as well as legal and human resources services to DTI at the Natrium facility. The Region has determined that DRI, DNH, DTI, and DRS are a single employer (“Dominion”).

In October 2011, the Union and DTI entered into a staffing agreement for the Natrium facility, and DTI hired 30 unit employees who became subject to the collective-bargaining agreement that was in effect at other DTI-operated Dominion facilities. The collective-bargaining agreement gives unit employees the right to transfer to other facilities covered by the contract.

In December 2012, DNH entered into a joint venture agreement with Caiman Ohio Midstream, LLC (“Caiman Ohio”), a subsidiary of Caiman Energy II, to form Blue Racer Midstream, LLC (“BRM”). Caiman Ohio is a midstream energy company headquartered in Texas. BRM was formed to provide midstream services to natural gas producers in portions of Ohio and Pennsylvania.² DNH and Caiman Ohio are equal partners in the joint venture, each with a 50 percent share in the business. They have an equal number of representatives on the board of directors and each have three representatives on BRM’s executive management team that is responsible for managing BRM’s operations and assets. DNH contributed ownership of the Natrium facility to the joint venture, and Caiman Ohio contributed private equity capital.

On December 27, 2012, BRM entered into a four-year operating and management agreement with DTI, whereby DTI would continue to run the Natrium facility as an independent contractor until December 31, 2016. After signing the agreement, DTI continued to employ unit employees and to abide by the collective-bargaining agreement. By 2014, BRM and DTI began having disputes regarding the operation of the facility, including over DTI’s difficulty maintaining an adequate workforce because many DTI employees exercised their contractual right to transfer out of Natrium to other DTI-operated facilities. In September 2014, DTI and the Union agreed that DTI could use an employment agency to provide workers to perform unit

² Midstream services include the processing, storing, transporting, and marketing of oil, natural gas, and natural gas liquids.

work to fill in gaps in coverage, with the understanding that these workers were temporary and DTI would ultimately fill the positions with unit employees.³

On October 16, 2014, DTI told the Union that BRM planned to void its operating and management agreement and that Natrium would no longer be staffed with DTI employees. In October or November, BRM told the employees that it was taking over the operation of the facility and that it would make job offers to every single employee working at the Natrium facility. On October 21, BRM offered to enter into a collective-bargaining agreement with the Union, but the Union refused to discuss a separate contract because it believed BRM was bound to the DTI contract. On November 7, the Union and BRM met again, and BRM reaffirmed its intent to hire all the employees currently working at the Natrium facility and presented the Union with a proposed contract that was different from the collective-bargaining agreement the Union had with DTI. BRM's proposal did not include transfer rights or the same health insurance or other benefits provided under the DTI contract. The Union offered to discuss the attrition problem but otherwise took the position that BRM was bound by the DTI collective-bargaining agreement.

On December 16, BRM provided written employment offers to all 28 unit employees and 29 contractor employees, with different medical, paid time off, and retirement benefits than the unit employees had with DTI. The offers were for full-time, permanent employment for both the unit and contractor employees. Of the Union-represented employees, 12 accepted job offers with BRM, and 3 became supervisors. All 29 contractor employees accepted employment with BRM, and one became a supervisor. BRM also hired two other employees who were not previously employed by DTI or its labor contractor. Thus, only 9 of the 39 employees working for BRM performing unit work are former bargaining unit members.⁴ BRM also hired the DTI supervisors and managers who had been working for DTI at the Natrium facility.

BRM assumed operations of the Natrium facility on February 1, 2015. The facility is now operated totally by BRM employees, supervisors and managers. Neither DTI nor its labor contractor employs any of the employees working at the Natrium facility. BRM operates the Natrium facility with the same business purpose,

³ The collective-bargaining agreement permits DTI to subcontract unit work, provided that DTI "will not contract work which directly results in any regular employee being laid-off, demoted, or forced to work less than a normal work week without that employee having been offered a regular job . . ."

⁴ Many of the former DTI employees who did not accept employment with BRM transferred to other DTI facilities.

operations, equipment, supervision, plant managers, and customers as when DTI ran the facility.

ACTION

We conclude that BRM is not the alter ego of Dominion because the two entities do not share common ownership, nor does Dominion have the “substantial control” over BRM that the Board requires to establish alter ego status. Additionally, we conclude that BRM is not a *Burns* successor to Dominion because a majority of BRM’s workforce are not former union-represented employees. Thus, the charge should be dismissed, absent withdrawal.

Alter Ego

In determining whether two separate business entities may be regarded as alter egos, the Board examines whether the two businesses have substantially identical ownership, management, business purpose, operation, equipment, customers, and supervision.⁵ No one single factor is determinative of an alter ego finding, and not all factors must be present.⁶ The Board also considers whether the alleged alter ego was created to allow an employer to evade responsibilities under the Act,⁷ though unlawful motive is not a necessary element of an alter ego finding.⁸

The Board has found two entities were alter egos in the absence of common ownership where both companies were wholly owned by members of the same family or nearly completely owned by the same individual, or where the older business exerted “substantial control” over the new company.⁹ Substantial control requires a

⁵ *E.g., Advance Electric, Inc.*, 268 NLRB 1001, 1002 (1984).

⁶ *Summit Express, Inc.*, 350 NLRB 592, 594 (2007) (citing *Fugazy Continental Corp.*, 265 NLRB 1301 (1982), *enforced*, 725 F.2d 1416 (D.C. Cir. 1984)).

⁷ *Fugazy Continental Corp.*, 265 NLRB at 1032.

⁸ *Johnstown Corp. and/or Stardyne, Inc.*, 313 NLRB 170 (1993), *enforcement denied in part on other grounds*, 41 F.3d 141 (3d Cir. 1994), *supplemental decision* 322 NLRB 818 (1997).

⁹ *Cadillac Asphalt Paving Co.*, 349 NLRB 6, 8 (2007).

degree of control by the older entity over the newer that “obliterate[s] any separation between them.”¹⁰

In *Dupont Dow Elastomers LLC*, the Board adopted the ALJ’s finding that a joint venture between E.I. Dupont de Nemours and Company (“Dupont”) and the Dow Chemical Company (“Dow”) was not the alter ego of Dupont because the two entities lacked common ownership and control, even though Dupont owned 50 percent of the joint venture and held half the seats on the board of directors.¹¹ Dupont contributed its facilities at Louisville Works and Chambers Works to the joint venture, Dupont Dow Elastomers LLC (“DDE”).¹² Production and maintenance employees at Louisville Works were represented by the Neoprene Craftsmen Union Local 788 (“NCU”), and separate units of production and maintenance employees and clerical employees at Chambers Works were represented by the Chemical Workers Association, Inc. (“CWA”); both Unions had collective-bargaining agreements with Dupont.¹³ At Louisville Works, DDE made offers of employment to all Dupont elastomers employees.¹⁴ DDE at Louisville Works engaged in the same business operation, used the same technology and equipment, used the same processes to manufacture the product, shipped to the same customers, and employed the same plant supervisors and managers as Dupont had when it ran the plant.¹⁵ At Chambers Works, DDE assumed operations only for the viton and FMDL portions of the polymers business.¹⁶ DDE offered employment to all of Dupont’s viton and FMDL employees at Chambers Works.¹⁷ The DDE employees at Chambers Works had the same supervisors and managers, used the same equipment and technology, and produced the same products, for the same customers as they had when they were

¹⁰ *Dupont Dow Elastomers*, 332 NLRB 1071, 1083 (2000), *enforced*, 296 F.3d 495 (6th Cir. 2002).

¹¹ *Dupont Dow Elastomers LLC*, 332 NLRB at 1071 n.1., 1080.

¹² *Id.* at 1079.

¹³ *Id.*

¹⁴ *Id.* at 1081.

¹⁵ *Id.* DDE did employ a new plant manager, but only because the Dupont plant manager died before DDE assumed operations of the plant. *Id.* at n.6.

¹⁶ *Id.* at 1082.

¹⁷ *Id.*

employed by Dupont.¹⁸ Because they continued to operate in the same physical space where Dupont continued to manufacture other products, DDE and Dupont employees at Chambers Works had the same security force, used the same non-work facilities (including the tool room, medical facility, change house, laundry room, and lunch room), served together on the same emergency unit and fire brigade, had the same time-keeping system, received paychecks from the same payroll firm, used the same telephone, paging, and computer systems, and had joint training and safety meetings.¹⁹

In spite of the abundance of evidence that Dupont and DDE shared substantially identical management, business purpose, operations, equipment, customers, and supervision, the Board upheld the ALJ's finding that DDE was not Dupont's alter ego due to the lack of common ownership and control between the two businesses.²⁰ Common ownership and control were found lacking because DDE was 50 percent owned by Dow and Dow had 50 percent control over DDE's significant business decisions, including DDE's labor relations matters.²¹ In finding that Dupont did not exercise substantial control over DDE, the ALJ, upheld by the Board, also noted that Dupont and DDE had separate management, did not engage in the same business at the shared facilities, and performed arm's length transactions for one another.²² The Board also agreed with the ALJ that there was insufficient evidence that DDE was formed to aid Dupont in evading its obligations under the Act.²³ Thus, the ALJ concluded, and the Board expressly agreed, that because DDE and Dupont had separate ownership and control, DDE was not Dupont's alter ego.²⁴

¹⁸ *Id.* at 1083.

¹⁹ *Id.*

²⁰ *Id.* at 1071 n.1, 1084.

²¹ *Id.* at 1084.

²² *Id.*

²³ *Id.* at 1071 n.1.

²⁴ *Id.* at 1071 n.1, 1084. The Board did conclude that DDE was a "perfectly clear" successor to Dupont. *Id.* at 1075. *See also Cadillac Asphalt Paving Company*, 349 NLRB at 8 (finding a joint venture was not the alter ego of Cadillac Asphalt Paving Company, where Paving Company's parent company owned 50 percent of the joint venture, Cadillac Asphalt, LLC, and another entity owned the other 50 percent; although Cadillac Asphalt's first and second line supervisors, business purpose, equipment, premises, and customers remained the same, the Board concluded that

The facts in the present case are virtually indistinguishable from those in *Dupont Dow Elastomers*. Thus, although BRM has the same business purpose, operations, equipment, customers, supervision, and plant management as Dominion did when it ran the facility, there is no common ownership, and the sharing of ownership by Dominion with Caiman Ohio means there is the same lack of substantial control as in *Dupont Dow Elastomers*. BRM is owned 50 percent by Caiman Ohio and 50 percent by Dominion. And BRM's executive management committee and board of directors are made up of equal numbers of Dominion and Caiman representatives, giving Caiman Ohio 50 percent control over BRM's business decisions and ensuring that BRM cannot take action without both Caiman Ohio's and Dominion's agreement. Additionally, BRM entered into an arm's length transaction to contract for DTI's services to operate the Natrium facility. Finally, there is no evidence that BRM was created to permit Dominion to evade its obligations under the Act; in fact, BRM entered a four-year contract with DTI to run the plant knowing that DTI was subject to a collective-bargaining agreement with the Union, and BRM initially offered to bargain with the Union when it decided to take over operation of the Natrium facility. Although the evidence suggests that BRM wanted to assume operation of the facility to prevent employees from exercising their transfer rights under the collective-bargaining agreement, this evidence does not support a conclusion that BRM was created to allow Dominion to evade its obligations under the Act. Thus, we conclude that BRM is not Dominion's alter ego and accordingly was not required to abide by the terms of DTI's collective-bargaining agreement with the Union.

“Perfectly Clear” Successor

An employer succeeds to the bargaining obligations of its predecessor where the new employer continues the predecessor's business in substantially the same form and a majority of the new employer's workforce were formerly employed by the predecessor.²⁵ A successor employer is permitted to unilaterally set initial terms and conditions of employment unless it is “perfectly clear” that the new employer plans to retain all the employees in the unit.²⁶ The Board has limited this exception to

neither entity in the joint venture had complete operational control over Cadillac Asphalt, only 6 of 15 Paving managers were offered employment with Cadillac Asphalt, and it was formed for legitimate business reasons, all of which weighed against an alter ego finding).

²⁵ *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 41-43 (1987); *Burns*, 406 U.S. at 279-81.

²⁶ *Burns*, 406 U.S. at 294-95.

instances where the successor either failed to clearly announce its intent to change terms and conditions of employment or misled employees into believing they would be employed without changes.²⁷ Recently, the General Counsel has taken the position that the Board should reconsider its decision in *Spruce Up* and return to the plain language of the “perfectly clear” caveat set forth in *Burns*.²⁸ Under that plain language, whenever it is “perfectly clear” that a successor plans to retain the predecessor’s workforce, regardless of what it has communicated to employees, the successor must bargain with the union that represents that workforce before fixing initial terms.²⁹

Although it is clear in the present case that BRM planned to hire all of Dominion’s employees at the Natrium facility, a majority BRM’s workforce were not employed by the predecessor. BRM employs 39 hourly employees, 9 of whom were former DTI employees, 28 of whom worked at the Natrium facility as temporary employees performing unit work but who were not unit employees and were not employed by DTI, and 2 outside hires. Because a majority of BRM’s workforce was not employed by its predecessor, it is not a *Burns* successor, let alone a “perfectly clear” successor.³⁰ Thus, BRM did not succeed to DTI’s bargaining obligation with the Union and was not required to bargain with the Union prior to setting initial terms and conditions of employment.

Accordingly, the Region should dismiss, the charge, absent withdrawal.

/s/
B.J.K.

²⁷ *Spruce Up Corp.*, 209 NLRB at 195; *Canteen Co.*, 317 NLRB 1052, 1052-54 (1995) (finding it was “perfectly clear” that the successor employer planned to retain the predecessor’s employees where the successor failed to announce lower wage rates until after inviting employees to apply for employment), *enforced* 103 F.3d 1355 (7th Cir. 1997).

²⁸ *See Burns*, 406 U.S. at 294-95.

²⁹ *See*

³⁰ We note that even if all 28 of the unit employees had accepted employment with BRM, they would still not constitute a majority of BRM’s workforce.