NOT INCLUDED IN
BOUND VOLUMES

PHMc
Sacramento, CA

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

ADAMS & ASSOCIATES, INC. and
McCONNELL, JONES, LANIER &
MURPHY, LLP

and

Cases 20-CA-130613
20-CA-138046

SACRAMENTO JOB CORPS
FEDERATION OF TEACHERS, AFT
LOCAL 4986, AMERICAN FEDERATION
OF TEACHERS

ORDER DENYING MOTION FOR RECONSIDERATION

On May 17, 2016, the National Labor Relations Board issued a Decision and Order in this proceeding.[1] The Board found, among other things, that Adams & Associates, Inc. (the Respondent) is a legal successor to Horizons Youth Services, LLC (Horizons) and that the Respondent violated Section 8(a)(3) and (1) of the Act by discriminatorily refusing to hire five incumbent employees in order to avoid an obligation to bargain with Sacramento Job Corps Federation of Teachers, AFT Local 4986, American Federation of Teachers (the Union). The Board additionally found that by engaging in its discriminatory hiring scheme, the Respondent lost the right to unilaterally establish initial terms and conditions of employment for the unit employees. Reversing the judge, the Board further found that the Respondent is a "perfectly clear" successor within the meaning of *Spruce Up Corp.,* 209 NLRB 194 (1974), enfd. per curiam 529 F.2d 516 (4th Cir. 1975), and that this independently made unlawful its unilateral

[1] *Adams & Associates, Inc.,* 363 NLRB No. 193 (2016).

setting of initial terms.[2] On June 8, 2016, the Respondent filed a motion for reconsideration, and, on June 17, 2016, the General Counsel filed an opposition to the Respondent's motion.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Having duly considered the matter, we find that the Respondent has not identified any material error or demonstrated extraordinary circumstances warranting reconsideration under Section 102.48(d)(1) of the Board's Rules and Regulations.

1. In its motion, the Respondent contends that the Board failed to identify the record evidence on which it relied to find that the Respondent violated Section 8(a)(3) and (1) by discriminatorily refusing to hire five incumbent employees. The Board stated in its decision that it was adopting the judge's findings and conclusions concerning the refusals to hire "essentially for the reasons she states,"[3] except that it did not rely on certain evidence that the Respondent argued was protected by attorney-client privilege.[4] Consequently, the Board made clear the evidence on which it relied, and we deny the Respondent's motion for reconsideration regarding this violation.

2. The Respondent also contends that the Board's finding that the Respondent is a "perfectly clear" successor is not supported by substantial evidence. In this regard, the Respondent primarily contends that the record establishes that Executive Director Jimmy

[2] The Board additionally found that the Respondent violated Sec. 8(a)(5), (3) and (1) of the Act in various other respects, that McConnell, Jones, Lanier & Murphy, LLP (MJLM) and the Respondent are joint employers, and that MJLM and the Respondent are jointly and severally liable for the unfair labor practices.

[3] 363 NLRB No. 193, slip op. at 1.

[4] Id., slip op. at 1 fn. 5 (The Board explained "we find it unnecessary to rely on General Counsel Exhibits 11(d), (g) and (h) or the testimony of Adams' former Executive Director for Human Resources Valerie Weldon regarding her conversation with Adams' Executive Director Jimmy Gagnon concerning whether to hire certain incumbent employees").

Gagnon stated during the Respondent's first meeting with the incumbent employees on February 13, 2014, "that employees hired by [the Respondent] would be receiving different health insurance benefits offered by [the Respondent], and not the benefits that had been provided by Horizons." (Motion, p. 6). Having reexamined the portions of the transcript that the Respondent cites, as well as the record as a whole, we find that the record *does not* establish this purported fact.

In support of its contention, the Respondent cites Gagnon's testimony that he told the incumbent employees that "they all had to apply for jobs. And they would be receiving the benefits that Adams and MJLM proposed in the contract."[5] However, the judge did not credit Gagnon's testimony; instead she credited Union President Genesther Taylor, who did not recall Gagnon making any statements regarding benefits at the February 13 meeting.[6]

Further, even had Gagnon been credited, his testimony does not establish any error, let alone a material error in the Board's decision.[7] Under *Spruce Up* and its progeny, to avoid "perfectly clear" successor status, a new employer must "clearly announce its intent to establish a new set of conditions" prior to or simultaneously with its expression of intent to retain the predecessor's employees.[8] A statement that the employees would receive the benefits that

[5] Tr. 684:17-685:3. Gagnon did not "spell out what the benefits would be." Tr. 685:4-5

[6] See Tr. 53:5-56:25. On cross-examination, Taylor was asked "[D]id you tell us everything that you can recall [Gagnon] saying" at the February 13 meeting? Taylor responded "I believe I did." Tr. 98:19-22.

[7] Similarly, we find that the testimony cited by the Respondent concerning Taylor's attempt to contact the Respondent's General Counsel Tiffany Pagni after the February 13 meeting to discuss an unidentified document that some employees had received which discussed the Respondent "possibly hiring their own people instead of" the unit employees does not establish any material error in the Board's decision. Tr. 114:11-23.

[8] 209 NLRB at 195; *Canteen Co.,* 317 NLRB 1052, 1053-1054 (1995), enfd. 103 F.3d 1355 (7th Cir. 1997).

the Respondent proposed in its contract,[9] without indicating that the proposed benefits differed from those that had been provided by Horizons, was too vague to put the unit employees on notice that they could expect material alterations in their terms and conditions of employment. This conclusion is reinforced by Gagnon's testimony that he did not know what health plan Horizons had provided, he was only aware of the plan that the Respondent offered, and he did not compare the Respondent's health plan with Horizons' plan. Gagnon plainly could not have advised the unit employees that they would be receiving different health insurance benefits because he did not know whether the benefits provided by the Respondent were different from those provided by Horizons.[10] We therefore find that the Respondent has failed to demonstrate extraordinary circumstances warranting reconsideration of the Board's finding that it was a "perfectly clear" successor to Horizons.

3. To remedy the Respondent's unlawful unilateral transfer of bargaining unit work to employees in the new non-unit Residential Coordinator position, the Board ordered the Respondent to, among other things, rescind the transfer of bargaining unit work, and recognize and bargain the Union as the exclusive representative of Residential Coordinators.[11] The Respondent asserts that the Board's Order is tantamount to a bargaining order, and that such an extraordinary remedy is not warranted here. An order to recognize and bargain with the union is

[9] Gagnon did not specify what contracts he was referring to, but we assume that he meant the Respondent's and MJLM's contracts with the Department of Labor.

[10] In its answering brief to the General Counsel's exceptions in the underlying case, the Respondent argued that "[t]here is no evidence that [Adams'] wage rates and health insurance plan are at all inferior to what had been provided by Horizons to its employees." It is undisputed, moreover, that the Respondent was subject to the Service Contract Act, 41 U.S.C. § 6707(c)(1) ("Under a contract which succeeds a contract subject to this chapter, and under which substantially the same services are furnished, a contractor or subcontractor may not pay a service employee less than the wages and fringe benefits the service employee would have received under the predecessor contract ….").

[11] 363 NLRB No. 193, slip op. at 10.

the traditional remedy for the conduct in which the Respondent engaged in this case. *Dixie Electric Membership Corp.,* 358 NLRB 1089, 1094 (2012), reaffirmed and incorporated by reference, 361 NLRB No. 107 (2014), enfd. 814 F.3d 752 (5th Cir. 2016); *Mt. Sinai Hospital*, 331 NLRB 895, 912 (2000). Accordingly, we deny the Respondent's motion.[12]

IT IS ORDERED that the Respondent's Motion for Reconsideration is denied.

Dated, Washington, D.C., July 29, 2016.

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Mark Gaston Pearce, Chairman

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Kent Y. Hirozawa, Member

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Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[12] See also *UGL-UNICCO Service Co.*, 357 NLRB 801 (2011) (holding that when a business changes hands and the new employer is a successor, the incumbent union is granted a "reasonable period of bargaining" during which its majority status may not be challenged).