

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

DATE: August 13, 2015

TO: Garey E. Lindsay, Regional Director
Region 9

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

SUBJECT: Parallel Employment Group, Inc.
Case 09-CA-148072

530-4825-6700
530-4875-6700

The Region submitted this case for advice as to whether the Employer, which was awarded a contract by a public school district to supply it with substitute teachers and refused to recognize and bargain with the incumbent union, is a *Burns*¹ successor of the school district and, if so, whether it is also a “perfectly clear” successor that forfeited the right to fix initial terms and conditions of employment.

We conclude that the Employer is a *Burns* successor with respect to the school district’s substitute teachers. We further conclude that the Employer was not a “perfectly clear” successor under *Spruce Up*,² because it clearly announced a change to the substitute teachers’ wage rates prior to inviting them to apply for employment, but that the Region should urge the Board to overturn extant Board law and find that the Employer is a “perfectly clear” successor based on the plain language of the Supreme Court’s “perfectly clear” caveat in *Burns*. In addition, we conclude that, under *Advanced Stretchforming*,³ the Employer also forfeited the right to fix initial terms and conditions of employment when it advised the substitute teachers prior to their hire that it would not recognize and bargain with the Union.⁴

¹ *NLRB v. Burns Int’l Sec. Servs., Inc.*, 406 U.S. 272 (1972).

² *Spruce Up Corp.*, 209 NLRB 194 (1974), *enforced*, 529 F.2d 516 (4th Cir. 1975).

³ *Advanced Stretchforming International, Inc.*, 323 NLRB 529, 530 (1997), *enforced in relevant part*, 233 F.3d 1176 (9th Cir. 2000).

⁴ The Region’s request to seek Section 10(j) injunctive relief will be separately addressed by the Injunction Litigation Branch.

FACTS

Prior to January 1, 2015, the Dayton Chapter of Reserve Teachers, OEA/NEA (“the Union”) had represented the “reserve” teachers employed by the Dayton Public School District (“the School District”) for almost thirty years.⁵ The parties’ most recent collective-bargaining agreement was effective from September 1, 2013 through August 31, 2014. Pursuant to that agreement, reserve teachers were paid \$14.61 per hour or \$105.92 daily.⁶ If an assignment lasted over 30 consecutive days, reserve teachers received the increased “increment pay” rate of \$15.15 per hour or \$109.84 daily. In addition to acting as the reserve teachers’ collective-bargaining representative, the Union also served as the recruiting source for the reserve teachers that the School District employed. Thus, reserve teachers referred by the Union were hired by the School District and dispatched to assignments based on requests from school principals.

In the Spring of 2014,⁷ as the Union and the School District were preparing to negotiate a successor agreement, the School District notified the Union that it intended to subcontract the work of reserve teachers to a private company and was in the process of preparing a request for proposals. The School District was concerned that the Union had not been able to provide a sufficient number of reserve teachers to meet its requirements. In response, the Union requested bargaining over the decision and, as a result, on August 5, the parties executed a Memorandum of Understanding (“MOU”). The MOU extended the collective-bargaining agreement through August 31, 2015, unless it was earlier terminated due to the Union’s failure to comply with the MOU’s terms. Pursuant to the MOU, the Union guaranteed a 95% fill rate for all vacancies through December 31.⁸ It also agreed to make available a minimum of 50 Union members for daily assignments (not including members in long-term assignments) and that its members would work at least ten days per month. In addition, the MOU provided that if the Union was unable to satisfy any of these requirements, the School System would be permitted to “subcontract the bargaining unit member’s [sic] services beginning January 1, 2015.” In early December, when it

⁵ Reserve teachers are also known as substitute teachers.

⁶ Reserve teachers hired after July 1, 2005 earned \$12.75 per hour or \$92.44 daily. Under the collective-bargaining agreement, 7.25 hours is considered the equivalent of a full work day.

⁷ All subsequent dates are in 2014 unless otherwise indicated.

⁸ The “fill-rate” is the percentage of full-time vacancies being filled by reserve teachers.

was evident that the Union would be unable to satisfy the requirements of the MOU, the School District advised the Union that it intended to subcontract the reserve teachers' work to Parallel Employment Group (the "Employer") beginning on January 1, 2015.

On December 5, the attorney and the human resources director for the School District met with the Union's labor relations consultant and its president to discuss the upcoming transition. The Employer's director of operations also attended the meeting by phone. During the meeting, the Union and the Employer discussed many terms and conditions of employment, including reserve teachers' pay. The Employer asserts that it advised the Union that the School District was establishing new rates of pay and that it anticipated paying reserve teachers \$13.00 per hour for assignments of 30 days or less and increment pay of \$16.00 per hour for assignments lasting over 30 days. The Employer also states that it advised the Union that it would provide health insurance and a 401(k) plan for the reserve teachers, and give them the option of being paid by direct deposit or with a check card. These were benefits that the School District had not provided. In addition, the parties discussed how the transition would be communicated to current reserve teachers and agreed that the School District would send a letter to the unit employees, with an attachment from the Employer, announcing the change and informing them of an informational meeting to be held on December 17.

Later that day, pursuant to the parties' discussion, the School District sent a letter to all unit members announcing that effective January 1, 2015, the Employer would become the entity that provided all reserve teachers to the School District and that questions regarding the transition would be addressed on December 17, including questions about wages, health insurance, retirement, accrued leave, and the new substitute calling system. The letter also included an attachment from the Employer for reserve teachers to review "to ensure continued employment at [the School District]." The Employer's attachment welcomed the reserve teachers to the company, invited them to complete an on-line application, directed them to click "APPLY NOW," and urged them to call or email the Employer for an interview and orientation and to bring with them appropriate identification.

Also on December 5, the Union's labor relations consultant sent an email to the Employer's operations director requesting that the Employer recognize and bargain with the Union as the collective-bargaining representative of the reserve teachers. Because it failed to receive a response, on December 10, the Union sent a follow-up email to the Employer's operations director, as well as its executive vice president, reminding them of the need to discuss the reserve teachers' terms and conditions of employment.

On December 16, the Employer formally entered into a contract with the School District to supply it with reserve teachers beginning on January 1, 2015. Pursuant to

the contract, the Employer guaranteed a 95% fill rate and agreed that it would be subject to liquidated damages if it failed to meet this requirement. As the Employer asserts it advised the Union on December 5, the contract also provided that reserve teachers working 1-30 consecutive days would be paid \$13.00 per hour and that those working 31-60 consecutive days would be paid \$16.00 per hour.

At the informational meeting conducted on December 17, approximately 60 reserve teachers were in attendance. Also in attendance were three Union representatives, including its labor consultant, two representatives of the School District, and the Employer's operations director. The Employer's representative made a power point presentation concerning its practices and procedures and distributed a program guide, which included the wage rates that were established by the Employer's contract with the School District. She also described these wage rates and stated that a 2-hour orientation and training session would be conducted. Signup sheets for these sessions were then provided. Toward the end of the meeting, one of the teachers asked when the Employer would be talking to the Union. According to the Union's labor relations consultant, in response, the Employer's representative stated that the Employer was not union, was not interested in dealing with the Union, and would not negotiate with the Union.

The following day, on December 18, the Union received an email from the Employer's executive vice president confirming its position. Specifically, the email stated, "Parallel Employment Group – Education Division has no interest in voluntarily recognizing or otherwise dealing with [the Union,] and we reserve all of Parallel's rights under any applicable federal or state law, rule, or statute to not do so."

In anticipation of being awarded the contract, the Employer had begun hiring, in early December, some reserve teachers who had not been employed by the School District. At that time, the School District employed 124 reserve teachers. On January 5, 2015 (when the students returned to school from winter break), although not yet fully staffed, the Employer employed 93 reserve teachers, 66 of whom were formerly employed by the School District. The School District's former reserve teachers who were hired by the Employer report to the same schools, work with the same principals and staff, and perform the same duties and responsibilities as they did when they were employed by the School District.

ACTION

We conclude that the Employer is a *Burns* successor with respect to the School District's reserve teachers. We further conclude that the Employer was not a

“perfectly clear” successor under *Spruce Up*,⁹ because it clearly announced a change to the reserve teachers’ wage rates prior to inviting them to apply for employment, but that the Region should urge the Board to overturn extant Board law and find that the Employer is a “perfectly clear” successor based on the plain language of the Supreme Court’s “perfectly clear” caveat in *Burns*. In addition, we conclude that, under *Advanced Stretchforming*, the Employer also forfeited the right to fix initial terms and conditions of employment when it advised the reserve teachers prior to their hire that it would not recognize and bargain with the Union. Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(5) by refusing to recognize and bargain with the Union and by unilaterally setting initial terms and conditions of employment.¹⁰

I. The Employer Is a *Burns* Successor with a Duty to Recognize and Bargain with the Union.

A new employer is a successor to a predecessor employer, and will be required to recognize and bargain with the incumbent union, when there is “substantial continuity” between the two enterprises and when a majority of the new employer’s workforce had been employed by the unionized predecessor.¹¹ In such circumstances, the mere change of the employing enterprise is not such an “unusual circumstance” as to alter presumed employee attitudes toward continued union representation.¹² This doctrine is equally applicable when the predecessor employer is a public entity outside the jurisdiction of the Act.¹³

⁹ *Spruce Up Corp.*, 209 NLRB at 194.

¹⁰ The Region has also determined that the Employer unlawfully failed to provide the Union with information, provided the Employer had a duty to bargain with the Union. Since the charge does not allege that the Employer committed any unilateral changes, the Region should solicit an amended charge that includes a unilateral change allegation.

¹¹ See, e.g., *UGL-UNICCO Service Co.*, 357 NLRB No. 76, slip op. at 2-3 (Aug. 26, 2011).

¹² See *Burns*, 406 U.S. at 278-79; *UGL-UNICCO Service Co.*, 357 NLRB No. 76, slip op. at 3; *Derby Refining Co.*, 292 NLRB 1015, 1015 (1989), *enforced sub nom. Coastal Derby Refining Co. v. NLRB*, 915 F.2d 1448 (10th Cir. 1990).

¹³ E.g., *Van Lear Equipment, Inc.*, 336 NLRB 1059, 1064 (2001) (finding successor duty to bargain for private contractor that took over school bus operations from public school district); *Lincoln Park Zoological Society*, 322 NLRB 263, 265 (1996) (“[T]he

In determining whether there is substantial continuity, the Board will consider the totality of the circumstances, including whether the business of both employers is essentially the same and whether the employees of the new company are doing the same jobs with the same working conditions under the same supervisors. The critical inquiry is whether, from the employees' perspective, "those employees who have been retained will understandably view their job situations as essentially unaltered."¹⁴

In determining whether a majority of the new employer's workforce had been employed by the unionized predecessor employer, the Board measures majority status from the date that the successor begins operating with a "substantial and representative complement" of employees.¹⁵ In general, the Board finds an existing complement to be substantial and representative when approximately 30% of the eventual employee complement is employed in 50% of the job classifications.¹⁶

Once the employer begins operating with a substantial and representative complement of employees, and the union makes a bargaining demand, the employer has an obligation to bargain.¹⁷ Under the "continuing demand" rule, a union's premature demand for bargaining continues in effect until the successor acquires a substantial and representative complement of employees.¹⁸

Here, we conclude that there was substantial continuity between the Employer and the School District. Under its contract, the Employer simply assumed the role of recruiting and dispatching reserve teachers for the School District. The School District's reserve teachers who accepted jobs with the Employer are working in the

successorship doctrine applies even though the predecessor was a public employer."), *enforced*, 116 F.3d 216 (7th Cir. 1997).

¹⁴ *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 43-44 (1987) (quoting *Golden State Bottling Co., Inc. v. NLRB*, 414 U.S. 168, 184 (1973)).

¹⁵ *Fall River Dyeing*, 482 U.S. at 52.

¹⁶ *Shares, Inc.*, 343 NLRB 455, 455 n.2 (2004), *enforced*, 433 F.3d 939 (7th Cir. 2006); *Paramus Ford*, 351 NLRB 1019, 1026 (2007).

¹⁷ *See, e.g., Royal Midtown Chrysler Plymouth*, 296 NLRB 1039, 1040-41 (1989) (finding no successor duty to bargain because union's bargaining demand came after predecessor employees no longer made up majority of successor's workforce).

¹⁸ *See Fall River Dyeing*, 482 U.S. at 52.

same schools with the same principals and staff, and they continue to perform the same duties and responsibilities. From the perspective of the employees, their jobs remain essentially unchanged. Moreover, despite the fact that the Employer recruits reserve teachers for the School District—a task previously performed by the Union—this change did not alter the essential nature of the teachers' jobs.¹⁹

We further conclude that by January 5, 2015, the date that students returned from winter break and the Employer began supplying reserve teachers to the School System, the Employer had hired a substantial and representative workforce. Thus, on that date the Employer employed 93 reserve teachers, a clear majority of whom (66) were previously employed by the School District. This constituted well over 30% of the Employer's projected workforce of approximately 200 reserve teachers, which it needed to satisfy its commitment of a 95% fill rate. And it is undisputed that there is only one job classification at issue—reserve teachers—so there is no question that the employees at issue are employed in at least 50% of the job classifications. Accordingly, on January 5, 2015, the Employer had hired a substantial and representative complement of reserve teachers and the majority of those teachers were formerly School District employees.

The Employer contends that it has no successorship bargaining obligation because, among other things, its roster of reserve teachers has not yet been substantially filled. According to the Employer, it expects the expansion of its workforce to approximately 200 reserve teachers to be complete by mid-August so that it will be in a position to satisfy its contractual guarantee by the beginning of the upcoming school year. The Employer also contends that by April 2015, well before it anticipated employing a full employee complement, it had hired 151 reserve teachers, fewer than half of whom (74) were formerly employed by the School District. We reject this argument. It is well established that majority status need not be determined at the "full complement" stage, or the three-quarters complement stage, but rather when a purchaser has hired 30% of its employees in 50% of its job classifications and the operation is in normal production.²⁰

¹⁹ *Id.* at 44.

²⁰ *Id.* at 47-48 nn.14-15. We also reject the Employer's related argument that it is not engaged in a normal level of operations because it is currently averaging a 64% fill rate, substantially below the 95% fill rate that is required to achieve its operational goals. The Employer analogizes its situation to that of the new owner in *NLRB v. Pre-Engineered Bldg. Products, Inc.*, 603 F.2d 134, 136 (10th Cir. 1979), which was required to rebuild the predecessor's manufacturing business and the composition of the workforce thereafter changed. However, unlike the predecessor's business in that case—whose production had collapsed—the predecessor in this case, the School District, was fully operational at the time the Employer assumed the role of supplying

Nor is there merit to the Employer's claim that 16 reserve teachers formerly employed by the School System should not be counted as part of its permanent workforce. The Employer explains that these employees did not provide proof of a valid teacher's license at the time they were hired and were given until August 1 to substantiate their qualifications. Because these employees are subject to termination if they fail to do so, the Employer argues that it will not know whether they can be counted as permanent employees until that time. Nevertheless, the Board has repeatedly rejected arguments that a workforce determination cannot be made until employees have completed a probationary period.²¹ In this case, although the Employer labels these teachers as "contingent," we find that they are tantamount to probationary employees. They are therefore appropriately included in the Employer's workforce.²²

The Employer's argument concerning the status of the reserve teachers under Ohio law is equally unavailing. In this regard, the Employer asserts that while the reserve teachers were employed by the School District, they were only entitled to be represented by a union if they met the definition of a "public" employee under Ohio law. The Employer further contends that the definition of public employees excludes "casual" employees who supplement the workforce, who therefore lack representation or bargaining rights with Ohio public employers. The Employer further argues that the reserve teachers were casual employees, who therefore were not entitled to union representation under Ohio law, and "thus cannot be counted as represented

it with reserve teachers; no start up time was required. Accordingly, as in *Hudson River Aggregates, Inc.*, 246 NLRB 192, 192 n.3, *enforced*, 639 F.2d 865 (2d Cir. 1981), the Employer cannot justify its refusal to bargain by relying on a planned increase in its workforce more than six months after it began operations with a substantial and representative complement of the School District's reserve teachers.

²¹ See, e.g., *Denham Co.*, 218 NLRB 30, 31-32 (1975) (rejecting employer's argument that it could not gauge the composition of its workforce until the 30-day probationary period required by its predecessor expired); *Sahara Las Vegas Corp.*, 284 NLRB 337, 337 n.4, 342-44 (1987) (workforce continuity determination is not deferred until after completion of probationary period), *enforced mem.* 886 F.2d 1320 (9th Cir. 1989) (table); *Windsor Convalescent Center of North Long Beach*, 351 NLRB 975, 978 (2007) (same), *enforcement denied sub nom. S & F Market Street Healthcare v. NLRB*, 570 F.3d 354 (D.C. Cir. 2009).

²² We note that even if these 16 reserve teachers are not included in the Employer's workforce, it would have hired well over 30% of its projected workforce (77 out of 200) and its workforce would have been comprised of a majority (50 out of 77) of the School District's reserve teachers as of January 5, 2015.

employees when [the Employer] hired them,” which insulates the Employer from *Burns* successor status. The Employer has not, however, offered any evidence or argument to substantiate its claim that reserve teachers are “casual” employees under Ohio law. In any event, prior to executing a contract with the Employer, the School System enjoyed a collective-bargaining relationship with the Union regarding the reserve teachers for more than 30 years, and there is no question that the unit of reserve teachers is an appropriate unit under the Act. The Board has long recognized that employees covered by the Act may not be denied the benefits of the successorship doctrine simply because they were previously employed by a public sector employer and did not have rights under the Act.²³ By necessary implication, therefore, Ohio’s definition of covered employees or appropriate units is immaterial to the Board’s successorship analysis.

Finally, a valid bargaining demand was in effect on January 5, 2015, the date we conclude the Employer employed a substantial and representative complement of reserve teachers, a majority of whom had been previously employed by the School District. The Union first demanded recognition and bargaining on December 5 and reiterated this demand on December 10. Under the continuing demand rule, it remained in effect until the Employer hired a substantial and representative complement of employees and commenced operations on January 5, 2015. By failing and refusing to recognize and bargain with the Union, the Employer violated Section 8(a)(1) and (5).

II. The Employer is not a “Perfectly Clear” Successor Under Extant Board Law but is a “Perfectly Clear” Successor Under the Plain Language of *Burns*.

Under *Burns*, a successor ordinarily is permitted to unilaterally fix initial terms and conditions of employment, unless it is “perfectly clear” that it plans to retain all the employees in the unit.²⁴ The Board has limited this “perfectly clear” exception to 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 such changes.²⁵ Recently, the General Counsel has taken the

²³ See *Van Lear Equipment*, 336 NLRB at 1064; *Lincoln Park Zoological Society*, 322 NLRB at 265.

²⁴ *Burns*, 406 U.S. at 294-95.

²⁵ *Spruce Up Corp.*, 209 NLRB at 195. See also *Planned Building Services*, 318 NLRB 1049, 1049 (1995) (successor that stated intent “from the outset” to hire predecessor employees under different terms and conditions of employment was not a “perfectly clear” successor).

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*.²⁶ 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 the workforce before fixing initial terms.²⁷

Here, we conclude that the Employer is not a “perfectly clear” successor under extant Board law because it communicated to the School District’s reserve teachers, through the Union, its intent to establish new terms and conditions of employment prior to inviting them to apply for employment.²⁸ Thus, it is undisputed that at the December 5 meeting scheduled by the School District, the Employer’s operations director and the Union’s labor relations consultant discussed an hourly rate of pay for teachers’ daily assignments and an hourly rate of pay for assignments over 30 days. The Employer asserts, more specifically, that it advised the Union at that time that the wage rates were going to be \$13.00 per hour for 1-30 day assignments and \$16.00 per hour for assignments lasting more than 30 days. For many of the School District’s reserve teachers, this would represent a pay cut for assignments of 1-30 days.²⁹ The Union, on the other hand, has not provided any information as to whether the wage rates discussed were different from those that the reserve teachers were receiving, and the Union has not otherwise disputed the Employer’s description of the meeting.³⁰

²⁶ See *Novel Service Group, Inc.*, Cases 02-CA-113834, et al., Advice Memorandum dated July 17, 2014, at pp. 7-14.

²⁷ *Id.*

²⁸ See *Elf Atochem North America, Inc.*, 339 NLRB 796, 796 n.3 (2003) (in “perfectly clear” successor cases, “communications with the employees’ union are regarded as ‘communications with the employees through their representative’”) (quoting *Marriott Management Services*, 318 NLRB 144 (1995)).

²⁹ This would, however, represent a pay increase for reserve teachers hired after July 1, 2005 and for all reserve teachers in assignments lasting more than 30 days. The Employer also states that it advised the Union at the December 5 meeting that it would provide health insurance and a 401(k) plan for reserve teachers, benefits the School District had not provided.

³⁰ If the Union or the School District contradicts the Employer’s contention that it communicated the above pay rates and other anticipated changes to terms and

The events that occurred soon after the December 5 meeting are consistent with and support the Employer's assertion that it clearly announced new terms and conditions of employment at that meeting. Thus, at the School District's December 17 informational meeting for reserve teachers regarding the transition, the Employer distributed a program guide that communicated that reserve teacher pay would change to \$13.00 per hour for assignments of 1-30 days and \$16.00 per hour for longer term assignments. The Employer's operations director also orally informed the teachers of the changed wage rates. Additionally, the contract executed by the School District and the Employer the previous day provided that reserve teachers would be paid \$13.00 per hour for assignments of 1-30 days and \$16.00 per hour for assignments of 30 days or more. Consequently, we conclude that the evidence supports the Employer's contention that it clearly announced its intent to implement lower wage rates for many reserve teachers when it met with the Union on December 5. Therefore, pursuant to *Spruce Up*, the Employer is not a "perfectly clear" successor even assuming that the letter sent to employees later on December 5 essentially invited all the reserve teachers in the unit to accept employment (e.g., by welcoming them to the company and discussing orientation in addition to asking them to submit applications).³¹

We further conclude, however, that the Region should use this case to urge the Board to reconsider *Spruce Up* and return to the original "perfectly clear" caveat set forth in *Burns*. Although the Employer never announced an intent to retain all of the School District's reserve teachers, the circumstances establish a strong inference that it intended to do so. After signing its contract with the School District, the Employer had less than three weeks before it was responsible for supplying reserve teachers to the School District and needed to quickly hire as many as possible to comply with the terms of the contract and avoid incurring liquidated damages. Because it had only

conditions of employment at the December 5 meeting, the Region should contact Advice.

³¹ See *MV Transportation, Inc.*, Case 02-CA-129873, Advice Memorandum dated October 20, 2014 (employer not a "perfectly clear" successor where it announced that workers would "start with a clean slate" and that it would take a year to earn sick leave, personal days, and vacation days). Cf. *Canteen Co.*, 317 NLRB 1052, 1053 (1995), *enforced*, 103 F.3d 1335 (7th Cir. 1997) (finding that employer was a "perfectly clear" successor because it did not announce new wage rates until after it had effectively announced its intent to retain the predecessor's employees); *Dupont Dow Elastomers LLC*, 332 NLRB 1071, 1075 (2000) (finding that employer was a "perfectly clear" successor because it had not announced any plans to implement "specific significant changes" until the hiring and acceptance process was well underway), *enforced*, 296 F.3d 495 (6th Cir. 2002).

hired a handful of (nonincumbent) reserve teachers before signing the contract, the Employer had a significant incentive to hire all of the School District's reserve teachers. In addition, in its attachment to the School District's December 5 letter to the reserve teachers, the Employer welcomed them to the company, invited them to complete the on-line application and "APPLY NOW," urged them to "[c]all or email our office to schedule an interview and orientation," and advised them to bring an ID and a social security card when they came. These circumstances, particularly the Employer's urging the reserve teachers to schedule an orientation and to bring with them the requisite identification to complete an I-9 form, indicate that the Employer intended to hire all that applied. Indeed, all 74 of the School District's reserve teachers who applied for employment were hired by the Employer. Accordingly, as a "perfectly clear" successor under the plain language of *Burns*, the Employer violated Section 8(a)(5) by unilaterally fixing initial terms and conditions of employment, including wage rates.

III. The Employer Also Forfeited the Right to Set Initial Terms and Conditions of Employment Under *Advanced Stretchforming*.

We further conclude, in the alternative, that the Employer forfeited its right as a successor employer to fix initial terms and conditions of employment under the rationale established in *Advanced Stretchforming*³² when it advised the reserve teachers on December 17 that there would be no union for those whom it hired.

In *Advanced Stretchforming*, the Board found that a *Burns* successor violated Section 8(a)(5) of the Act by unilaterally fixing initial terms and conditions of employment, even though it was not a "perfectly clear" successor, because it made unlawful statements to prospective employees that it would not recognize and bargain with their union, and subsequently refused to do so.³³ The Board explained that the right to establish initial terms and conditions of employment conferred by *Burns* is based on the premise that the successor employer will recognize the representative of the affected unit employees and enter into good faith negotiations with the union about terms and conditions of employment.³⁴ In contrast, the employer in *Advanced Stretchforming*, by its unlawful statements and refusal to recognize the union, sent a clearly unlawful message to employees that the employer would not permit them to be represented by a union and "blatantly coerce[d] employees in the exercise of their

³² 323 NLRB at 530.

³³ *Id.*

³⁴ *Id.*

Section 7 right to bargain collectively through a representative of their own choosing.”³⁵

In this case, the Employer similarly made an unequivocal statement indicating an intention to refuse to recognize the Union notwithstanding any legal obligation that it might have. Thus, according to a Union labor relations consultant who attended the December 17 informational meeting, the Employer’s director of operations stated that the Employer was not union, was not interested in dealing with the Union, and would not negotiate with the Union.³⁶ The Employer denies that its representative made these statements. Instead, the Employer contends, its representative merely conveyed that she did not know anything about union issues, which were not within her area of responsibility, and that the Employer does not have any unionized workforces elsewhere.³⁷ However, the Employer’s subsequent communications and actions support the Union labor relations consultant’s description. Thus, the day after the informational meeting, the Union received an email from the Employer’s executive vice president stating that the Employer had no interest in voluntarily recognizing or otherwise dealing with the Union and reserving all of its rights under any applicable federal or state law, rule, or statute to not do so.³⁸ To date, it has continued to refuse to recognize and bargain with the Union.

³⁵ *Id.*

³⁶ *See Concrete Co.*, 336 NLRB 1311, 1316 (2001) (finding employer violated Section 8(a)(1) by informing employees of its predecessor that “[t]here’s no union; the [u]nion’s gone”); *Eldorado, Inc.*, 335 NLRB 952, 953 (2001) (“[W]hen a successor employer ‘tells applicants that the company will be nonunion before it hires its employees, the employer indicates to the applicants that it intends to discriminate against [the predecessor’s] employees to ensure its nonunion status.’”) (quoting *Kessel Food Markets*, 287 NLRB 426, 429 (1987), *enforced*, 868 F.2d 881 (6th Cir. 1989)).

³⁷ In the event that this case goes to hearing, the Region should contact reserve teachers and the School District’s representatives, who also attended the December 17 meeting, in order to corroborate the Union labor relations consultant’s testimony.

³⁸ Although the statement regarding exercising its rights under applicable federal law could be interpreted to mean that the Employer would only refuse to recognize the Union if it did not represent a majority of the employees, that is not how employees hearing such a statement would reasonably interpret it. *Cf. McDonnell Douglas Corp.*, 240 NLRB 794, 802 (1979) (“[I]t can reasonably be foreseen that employees would not know what conduct is protected by the National Labor Relations Act and, rather than take the trouble to get reliable information on the subject, would elect to refrain from engaging in conduct that is in fact protected by the Act.”).

Therefore, we conclude that, under *Advanced Stretchforming*, the Employer forfeited its *Burns* right to fix initial terms and conditions of employment without first bargaining with the Union, and violated Section 8(a)(5) when it unilaterally fixed initial terms and conditions of employment, including wage rates.

Accordingly, the Region should issue a Section 8(a)(5) and (1) complaint, absent settlement, consistent with the foregoing.

/s/
B.J.K.

cc: Injunction Litigation Branch
