

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

DATE: July 28, 2015

TO: Garey E. Lindsay, Regional Director
Region 9

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

SUBJECT: Data Monitor Systems, Inc.
09-CA-145040

Successorship Chron

530-4825-6700
530-4875-6700
530-6050-2500
530-6067-4044
530-8054

This case was submitted for Advice as to whether the Employer is a “perfectly clear” successor obligated to bargain with the Union before setting initial terms and conditions of employment and whether it was obligated to hire or offer employment to applicants based on their seniority with the predecessor employer. We conclude that the Employer is a “perfectly clear” successor under current Board law, including *Spruce Up*,¹ and that the Region also should urge the Board to overturn *Spruce Up* and find that the Employer is a “perfectly clear” successor based on the plain language of the Supreme Court’s “perfectly clear” language in *Burns*.² We further conclude that the Employer violated Section 8(a)(5) of the Act by making unilateral changes inconsistent with extant terms and conditions of employment regarding seniority practices.

¹ *Spruce Up Corp.*, 209 NLRB 194 (1974), *enforced*, 529 F.2d 516 (4th Cir. 1975).

² *NLRB v. Burns Int’l Security Services*, 406 U.S. 272 (1972).

FACTS

Until September 1, 2014,³ the predecessor employer, WSI All-Star, LLC (“WSI”), provided logistics support services to the Department of the Air Force at Wright-Patterson Air Force Base in Fairborn, Ohio. Since 2003, Teamsters Local 957 (the “Union”) has represented a bargaining unit consisting of all full-time and part-time logistics support employees employed at Wright-Patterson, including supply clerks, warehouse specialists, truck drivers, and maintenance employees. The Union and WSI were parties to four identical collective-bargaining agreements covering those employees, effective October 30, 2013 through September 30. The collective-bargaining agreements included multiple provisions for applying seniority based on an employee’s continuous employment in the bargaining unit. Article 1 (Recognition), Section 3, entitled “Heirs and Successors,” states that “[s]eniority of employees shall not be broken by any change of employer.” Article 11 (Seniority) states that “[w]hen the Company determines that the number of bargaining unit employees . . . shall be reduced, the Company shall lay off bargaining unit employees . . . in reverse order of their seniority.” Article 11 further states that “[t]he Company will apply [s]eniority and qualifications in its everyday operation relating to promotion, transfer, assignment of work, hours of work . . . layoff and recall from layoff, and all other terms and conditions of employment.” Furthermore, when WSI and its predecessors took over their respective logistics support contracts at Wright-Patterson, they each made their initial hiring decisions on the basis of bargaining unit seniority.

On or about July 23, the Union was informed that Data Monitor Systems, Inc. (the “Employer”) was the successful bidder for the logistics support contract at Wright-Patterson and was to assume the logistics support work on September 1. Consistent with the current Federal Acquisition Regulation, the Employer’s service contract expressly incorporates the requirements of Executive Order 13495, “Nondisplacement of Qualified Workers Under Service Contracts.” This executive order requires federal contractors to offer their predecessors’ employees a “right of first refusal” of employment in positions for which they are qualified.⁴ The executive order permits contractors to employ fewer employees than the predecessor⁵ but

³ All dates are in 2014, unless otherwise indicated.

⁴ 29 C.F.R. § 9.12(a) (2009).

⁵ 29 C.F.R. § 9.12(d)(1)(i).

encourages them to strongly consider employees' experience with the predecessor employer when determining whether they are qualified for a position.⁶

As of August, WSI employed 85 bargaining unit employees. In early August, WSI supervisors distributed employment applications and scheduled interviews on behalf of the Employer. Around the same time, the Union's business agent met with representatives of the Employer at the Union hall. The Employer claims that it told the business agent that the Employer would be hiring the most qualified employees and would not base hiring decisions on seniority. The business agent denies this, however, and states that the Employer representatives merely conveyed that they were interviewing qualified employees and made no mention of seniority.

On August 13, following brief interviews, the Employer offered employment to, and hired, approximately 66 of the 85 unit employees. Ten of the employees it did not hire had greater seniority than others who were hired. The Employer also hired at least one former supervisor for a bargaining unit position. The Employer did not hire from any source other than WSI.

Also in mid-August, the Union business agent drafted a "bridge agreement" stating that the parties would adhere to all terms and conditions of the current collective-bargaining agreements, extend those terms through March 31, 2015, and negotiate in good faith during the extension period. The Employer added a clause to the bridge agreement stating that "nothing in this letter shall be construed to retroactively bind [the Employer] to the terms and conditions of the current Collective Bargaining Agreements" The parties never discussed this additional clause. On August 29, the Union and the Employer signed the bridge agreement.

On September 3, the Union filed grievances on behalf of the ten senior employees who the Employer had not hired. The Employer refused to process the grievances, claiming that these individuals were not its employees. The Employer subsequently hired four of the senior employees, but six of the senior employees have not been offered any positions with the Employer. The Employer does not claim that any of these employees were unqualified for available positions but states that it chose other employees first for various reasons.

Other than the failure to hire the ten employees based on seniority, there are no allegations that the Employer unilaterally changed terms and conditions of employment. The parties ultimately executed new collective-bargaining agreements effective December 22 through August 31, 2018.

⁶ 29 C.F.R. § 9.12(d)(2); 29 C.F.R. § 9.12(b)(4).

ACTION

We conclude that the Employer is a “perfectly clear” successor under current Board law, including *Spruce Up*, and that the Region also should urge the Board to overturn *Spruce Up* and find that the Employer is a “perfectly clear” successor based on the plain language of the Supreme Court’s “perfectly clear” language in *Burns*. We further conclude that the Employer violated Section 8(a)(5) of the Act by making unilateral changes inconsistent with extant terms and conditions of employment regarding layoff by seniority.

Under extant Board law, the Employer became a “perfectly clear” successor, precluded from unilaterally fixing initial terms and conditions of employment, in early August when WSI distributed applications for employment to the bargaining unit employees on the Employer’s behalf. The invitations to apply for employment constituted “invit[at]ions] . . . to accept employment” under *Spruce Up*, in the context of Executive Order 13495’s requirement that federal contractors offer predecessor employees a right of first refusal of employment.⁷ At that time, the Employer had not communicated that terms and conditions of employment would change.⁸ Although the Employer asserts that it told the Union business agent that it would not be hiring by seniority when the employment applications were distributed, the Union business agent denies this and states that the Employer conveyed that it was interviewing qualified employees but made no mention of seniority. Also, there is no evidence that the Employer told the Union or the employees that it intended to make any other changes to their terms and conditions of employment when (or before) it invited employees to apply for employment. Accordingly, the Employer is a “perfectly clear” successor under *Spruce Up*.

Alternatively, we conclude that the Employer is a “perfectly clear” successor based on the General Counsel’s position that the Board should overturn *Spruce Up* and hold that “perfectly clear” successor status attaches if the successor intends to

⁷ See *Ahtna Facility Services, Inc. and G4S Government Solutions, Inc.*, Cases 7-CA-122165 and 122185, Advice Memorandum dated September 29, 2014, and cases cited therein.

⁸ Cf. *Spruce Up Corp.*, 209 NLRB at 195 (“perfectly clear” successorship restricted to circumstances in which the new employer has misled employees into believing they would all be retained “without change in their wages, hours, or conditions of employment” or has failed to “clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment”).

retain the predecessor's workforce, based on the plain language of *Burns*.⁹ This case presents an appropriate vehicle to make that argument because the Employer intended, and in fact was required by Executive Order 13495, to retain WSI's employees.¹⁰

As a "perfectly clear" successor, the Employer's unilateral decision not to hire the ten senior employees violated Section 8(a)(5) because it was inconsistent with the extant terms and conditions of employment regarding layoff by seniority. Although the Employer's conduct was technically a refusal to hire, in similar circumstances the Board has considered such conduct by a "perfectly clear" successor to be more akin to a layoff, which is a mandatory subject of bargaining.¹¹ In *Metro Toyota*, the Board adopted an ALJ's finding that a "perfectly clear" successor that planned to operate with fewer employees than the predecessor violated Section 8(a)(5) by failing to fill available positions by seniority, conduct which was inconsistent with a long-standing seniority practice encompassed in the predecessor's collective-bargaining agreement.¹² The ALJ concluded that this was properly considered a layoff and not a refusal to hire, under the circumstances, because, by the time the successor decided not to retain two senior employees, its bargaining obligation had already attached, the transition between the two entities was seamless and substantially complete, and the successor's representative had been at the premises for a few months.¹³ Moreover, the successor's principal had even used the term "layoff" when considering which of the predecessor's employees it would not retain.¹⁴

⁹ See *Novel Service Group, Inc.*, Case 02-CA-113834, et al., Advice Memorandum dated July 17, 2014, at 7-13.

¹⁰ See *Ahtna Facility Services, Inc., et al.*, Cases 7-CA-122165 and 122185, Advice Memorandum dated September 29, 2014; *Fuel Services DL Joint Venture, A Joint Venture of DAE Venture Sung and LB&B Associates*, Case 09-CA-143137, Advice Memorandum dated April 13, 2015.

¹¹ *Metro Toyota*, 318 NLRB 168, 179-80 (1995), *enforced mem. sub nom. NLRB v. N.R. Automotive, Inc.*, 104 F.3d 353 (2d Cir. 1996) (Table). See also *Lapeer Foundry & Machine*, 289 NLRB 952, 953-54 (1988) (concluding that economically-motivated layoffs are a mandatory subject of bargaining).

¹² *Id.* at 179-81.

¹³ *Id.* at 179.

¹⁴ *Id.*

Similarly, we conclude that the Employer's failure to hire the ten senior employees is properly analyzed as a layoff of employees that would otherwise be employed by the Employer. As in *Metro Toyota*, by the time the Employer decided not to retain the ten senior employees (August 13), its bargaining obligation as a "perfectly clear" successor had already attached and a seamless transition between the two entities was well underway. Although there is no evidence that the Employer described its action as a "layoff," that is in essence what it was, given that WSI and its predecessors each made their initial hiring decisions on the basis of unit seniority when first assuming their service contracts and that the WSI collective-bargaining agreements state that "[s]eniority of employees shall not be broken by any change of employer."

And, as in *Metro Toyota*, the Employer's conduct, when viewed as a layoff, is inconsistent with extant terms and conditions of employment regarding seniority. Thus, in addition to the clause in the WSI collective-bargaining agreements stating that seniority "shall not be broken by any change of employer," the seniority provision (Article 11) states that layoffs shall occur "in reverse order of seniority" and that all employment decisions, including layoff and recall, will follow bargaining unit seniority.

Although Executive Order 13495 allows a successor employer to employ fewer employees under the service contract than the predecessor and grants the successor leeway to decide which predecessor employees are qualified for a position, the Employer has not contended that any of the ten senior employees were not qualified; it simply states that it considered less senior employees to be more qualified. And nothing in the executive order even arguably precludes a successor contractor from considering seniority; if anything, it *encourages* seniority to be considered.

Finally, we reject the Employer's argument that the Union waived the Employer's obligation to maintain terms and conditions of employment regarding seniority practices when it signed the August 29 bridge agreement, which states that "[n]othing in this letter shall be construed to retroactively bind [the Employer] to the terms and conditions" of WSI's collective-bargaining agreements. Because the Employer became a "perfectly clear" successor in early August, the Employer had a statutory obligation to maintain the extant terms and conditions of employment as of that date. And its unilateral failure to adhere to extant seniority practices occurred on August 13, about two weeks before the bridge agreement was signed. Accordingly, the bridge agreement, which purports to preclude the Employer from being *retroactively* bound, went into effect too late to insulate the Employer's conduct. Moreover, the Board will not find that a union has waived bargaining rights absent evidence that the parties "fully discussed and consciously explored" the matter at issue and that the union has "consciously yielded or clearly and unmistakably waived

its interest in the matter.”¹⁵ Here, the parties never discussed this provision in the bridge agreement, let alone “consciously explored” the question of whether the Employer was thereby permitted to ignore its statutory (as opposed to contractual) obligation to bargain to a good-faith impasse before unilaterally changing existing terms and conditions of employment. Therefore, the Union clearly did not waive the Employer’s statutory obligation to maintain terms and conditions of employment, including seniority practices, when it signed the bridge agreement.

Based on the foregoing, we conclude that the Employer is a “perfectly clear” successor that violated Section 8(a)(5) by laying off ten senior employees, while continuing to employ employees with lower seniority, without first bargaining with the Union.¹⁶ Accordingly, the Region should issue a Section 8(a)(5) complaint, absent settlement.¹⁷

/s/
B.J.K

H:ADV.09-CA-145040.Response.DataMonitor (b) (6), (b) (7)

¹⁵ *Allied Signal, Inc.*, 330 NLRB 1216, 1228 (2000) (citing *Johnson-Bateman Co.*, 295 NLRB 180, 185 (1989)), *review denied sub nom. Honeywell Int’l, Inc. v. NLRB*, 253 F.3d 125 (D.C. Cir. 2001).

¹⁶ In addition, when the Employer subsequently recalled four of the senior employees, it placed three of them in part-time positions. The Region should consider whether that also violated Section 8(a)(5) because of the “hours of work” or other provisions in the WSI contracts.

¹⁷ Under Executive Order 13495, managerial and supervisory employees are not entitled to an offer of employment in lieu of regular employees. *See* 29 C.F.R. § 9.12. As the Employer hired at least one WSI supervisor for a bargaining unit position, the Region may wish to contact the DOL Wage and Hour Division if the Union has not already done so.