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

DATE: October 28, 2013

TO: J. Michael Lightner, Regional Director
Region 22

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

SUBJECT: Milveen Environmental Services
Case 22-CA-096873

Successorship Chron
177-1667-0100
530-4825-6700

This case was submitted for advice as to whether the Employer, a cleaning services contractor, is a *Burns*[1] successor to a predecessor Union contractor, where there was an intervening non-union employer for approximately six months. We conclude that the Employer is a *Burns* successor because a majority of its employees were bargaining unit employees of the predecessor employer and there was a substantial continuity between enterprises, notwithstanding the hiatus caused by the intervening non-union employer. Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(1) and (5) of the Act by refusing to recognize and bargain with the Union.

FACTS

Prior to April 2012,[2] Maverick Building Services ("Maverick") provided contract cleaning services for a county building in Hackensack, New Jersey. Maverick employed a supervisor and twelve bargaining unit employees to clean the county building. The bargaining unit employees were represented by SEIU Local 32BJ ("Union"), and were covered by a collective bargaining agreement effective from January 1, 2012 to December 31, 2015. In April, the county rejected Maverick's bid to continue its cleaning services work and, instead, awarded a one-year contract to Chuck's Professional Cleaning ("Chuck's"). As a result, Maverick laid off all unit employees. Chuck's is a non-union company and hired an entirely new workforce to service the county building. While Chuck's was providing cleaning services under its

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

[2] All dates hereinafter are in 2012 unless otherwise stated.

new contract, the Union and predecessor bargaining unit employees actively attempted to obtain employment with Chuck's. The employees and Union engaged in leafleting to notify the community of Chuck's refusal to hire them. The Union also urged county officials to convince Chuck's to hire the unit employees.

After approximately six months of performance, the county terminated its contract with Chuck's and awarded Milveen Environmental Services ("Employer") a one-year cleaning services contract, effective October 1, with a one-year renewal option. Upon learning of the Employer's contract award, the laid-off Maverick employees filed job applications with the Employer. The Employer hired ten former Maverick employees and three Chuck's employees. One of the ten former Maverick employees was hired as a supervisor. The contract cleaning services work performed by the Employer is essentially the same as the work performed by the predecessor employers.

Shortly after the Employer was awarded the contract, the Union contacted the supervisor to congratulate him on his new position and thank him for hiring so many former Maverick employees. The Union also sought information on the employees' terms and conditions of employment. The supervisor informed the Union that the Employer's wage rate would be $12.75 per hour, which was a small increase from the previous Union contract rate. However, employees would not receive any of their previous contractual fringe benefits. He also stated that he hired primarily predecessor employees because of their experience and because the building's tenant had reported problems with Chuck's. The supervisor then asserted that the Employer did not want the Union.

The Union repeatedly sought recognition and bargaining once the Employer began contract performance. From October to March 2013 the Employer failed to reply to the Union's requests. After the Union filed the instant charge, on March 12, 2013 the Employer sent a letter to the Region saying it had "no objection to meeting with [the Union] for bargaining." The Union then attempted to reach the Employer by email on March 26 and April 16, but received no response. The Union phoned the Employer on March 26 and was able to speak directly to the owner and, during the course of the conversation, was able to schedule an initial meeting of the parties in May.

On May 1, 2013, the Union and Employer's owner met face to face. At that meeting, the owner stated that he does not normally hire union workers, that he asked applicants on the application form whether they were with a union, and that his current employees must have lied to him. He said that he was going to follow up with employees by asking whether each had been involved with the Union and whether they misled him. He then stated that he did not want to be affiliated with any union because unions interfere with administration and business. The owner

concluded by saying, "I don't want to be involved with the Union and I'm not having anything to do with 32BJ." The Union and Employer have not met again.

ACTION

We conclude that the Employer is a *Burns* successor because a majority of its employees were bargaining unit employees of the predecessor employer and there was a substantial continuity between enterprises, notwithstanding the hiatus caused by the intervening employer. Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(1) and (5) of the Act by refusing to recognize and bargain with the Union.

An employer succeeds to the collective-bargaining obligations of a predecessor if (1) a majority of the successor's employees (once the employer has hired a "substantial and representative complement" in an appropriate bargaining unit) are former employees of the predecessor; and (2) the similarities between the two operations manifest a "substantial continuity between the enterprises."[3] The factors relevant to determining "substantial continuity" are whether the business of both employers is essentially the same, whether the employees of the new company are doing the same jobs with the same working conditions under the same supervisors, and whether the new entity produces the same products, using the same production processes, and has basically the same body of customers.[4] These factors are to be assessed primarily from the perspective of the employees involved; that is, whether the "employees who have been retained will understandably view their job situation as essentially unaltered."[5] Therefore, when examining the continuity of the employing entity, the Board will look at the objective factors and how those influence the subjective attitude of the employees.[6] The Board makes its "substantial continuity" determination based

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[3] *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27, 41-43 (1987); *CitiSteel USA*, 312 NLRB 815, 815 (1993), *enforcement denied*, 53 F.3d 350 (D.C. Cir. 1995).

[4] *Fall River Dyeing Corp.*, 482 U.S. at 43.

[5] *Id.* (citations omitted).

[6] *Straight Creek Mining, Inc.*, 323 NLRB 759, 763 (1997), *enforced*, 164 F.3d 292 (6th Cir. 1998). *Accord Nephi Rubber Products Corp.*, 303 NLRB 151, 152 (1991) (stating that the "essential inquiry" is whether operations as they impinge on union members remain essentially the same after the transfer of ownership), *enforced*, 976 F.2d 1361 (10th Cir. 1992); *Sierra Realty Corp.*, 317 NLRB 832, 835 (1995) (explaining that from the perspective of the realty company maintenance employees they would have perceived the successor employer as an entity which "simply displaced" the predecessor cleaning contractor employer and thus would have viewed their job situation as essentially unaltered), *enforcement denied*, 82 F.3d (D.C. Cir. 1996).

on the totality of the relevant circumstances.[7]

The Board treats a hiatus in operations "as only one factor in the 'substantial continuity' calculus and thus it is relevant only when there are other indicia of discontinuity."[8] For example, in *Straight Creek Mining*, the Board held that the fifty-four month hiatus in operations did not negate the employer's successorship status where there otherwise was substantial continuity between the predecessor mine operator and the successor employer.[9] The hiatus was the result of the predecessor employer ceasing operations and an ensuing employee strike, which continued for over forty-five months, notwithstanding the predecessor's ceasing operations.[10] The Board concluded that the hiatus' significance was reduced by evidence that the union and predecessor employees remained active by continuing the strike during the hiatus period and the mine remained available for re-opening.[11] The ALJ, affirmed by the Board, further explained that the union and striking employees could "certainly assume" that even though the predecessor employer was going out of business, someone would acquire the mine and maintain substantial continuity of the mining enterprise.[12]

Furthermore, in assessing the significance of a hiatus, the Board looks to whether "from the employees' perspective . . . their job situation has so changed that they would change their attitudes about being represented."[13] For example, in *Straight Creek Mining,* the employees' continued participation in a protracted strike, notwithstanding the predecessor employer's ceasing operations, demonstrated their continued support for the union.[14] Similarly, in *Nephi Rubber Products Corp.*, the

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[7] *CitiSteel USA*, 312 NLRB at 816 (citing *Fall River Dyeing*, 482 U.S. at 43).

[8] *Nephi Rubber Products Corp.*, 303 NLRB at 152 (citing *Fall River Dyeing*, 482 U.S. at 45).

[9] 323 NLRB at 759, 761.

[10] *Id.* at 761. The predecessor employer announced that it was going out of the coal business "forever" but continued to briefly employ supervisors who maintained the mines and equipment. *Id.*

[11] *Id.* The Board also relied on the fact that the employer remained nominally in existence during part of the hiatus. *Id.*

[12] *See id.*

[13] *Nephi Rubber Products Corp.*, 303 NLRB at 152 (citations omitted).

[14] 323 NLRB at 764.

Board found that a sixteen-month hiatus did not defeat successorship where, during the hiatus, the former employees, with the union's cooperation, pursued forming an Employee Stock Ownership Plan to purchase the plant following the predecessor employer's bankruptcy.[15]

Here, nine of twelve of the Employer's workforce are former Maverick employees – a clear majority. Additionally, there was substantial continuity of the business enterprise because the Employer continues to provide the same contract cleaning services for the county and cleans the same public building under a supervisor who was previously a bargaining unit employee. Thus, from the employees' perspective, they continue to perform the same job, with the same working conditions, in the same location, for the same customer.[16]

Further, based on the totality of the circumstances, we conclude that Chuck's contract was akin to a six-month hiatus that did not in itself disrupt the continuity of the operation nor call into question the employees' support for the Union. Instead, the employees continued to work with the Union throughout the hiatus to regain their positions. The Union and employees remained active throughout the hiatus period by engaging in leafleting and seeking the assistance of the county to regain their positions.[17] Given the employees' participation in Union activities during the hiatus,

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[15] 303 NLRB at 151. *Accord CitiSteel USA*, 312 NLRB at 816 (finding successorship status despite local union deactivation during two-year hiatus where representatives and lawyers from international union remained active by meeting with potential buyers, responding to former employees' inquiries, and attempting to obtain commitments from successor employer to recognize and bargain with the union).

[16] *Cf. Sierra Realty Corp.*, 317 NLRB at 835 (finding that predecessor employees of contract cleaning services employer perceived the successor as an entity which "simply displaced" the predecessor and thus would have viewed their job situation as essentially unaltered).

[17] *Cf. Straight Creek Mining, Inc.*, 323 NLRB at 761 (despite predecessor employer ceasing operations, employees continued to strike for over forty-five months); *Nephi Rubber Products Corp.*, 303 NLRB at 154 (during hiatus former employees, city, and county tried to find ways to re-open plant after employer filed for bankruptcy); *CitiSteel USA*, 312 NLRB at 816 (union retained support of employees during hiatus despite local being deactivated where international union remained active and in touch with employees).

there is no indication that the change in their employer affected their desire for Union representation.[18]

Accordingly, the Employer is a *Burns* successor because a majority of its employees worked for the predecessor and there is continuity between the two employers' enterprises from the employees' point of view despite the six-month hiatus. Thus, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(1) and(5) of the Act by refusing to recognize and bargain with the Union.[19]

/s/
B.J.K.

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[18] *Cf. Nephi Rubber Products Corp.*, 303 NLRB at 153 (stating that nothing about the predecessor employer's bankruptcy or hiatus period itself indicated that employees would no longer desire union representation once rehired).

[19] The Union has asserted that the Employer forfeited its right to set initial terms and conditions under *Advanced Stretchforming International, Inc.* because the Employer's supervisor told employees when they were hired that it would operate non-union. 323 NLRB 529, 530 (1997), *enforced in relevant part*, 233 F.3d 1176 (9th Cir. 2000), *cert. denied*, 534 U.S. 948 (2001). (b) (5)

(b) (5) [redacted]