

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

DATE: November 7, 2018

TO: Nancy Wilson, Regional Director
Region 6

FROM: Jayme L. Sophir, Associate General Counsel
Division of Advice

SUBJECT: Bluestone Resources, Inc. et al.
Case 06-CA-201170

524-5012-7600

524-6710-8700

524-8347

CM Energy GP et al.

530-6067-6001-3740

Cases 06-CA-198911; -200465; -202855

530-6067-6001-3785

530-6067-6067-3100

530-6067-6067-3200

530-6067-6067-9900

530-6067-7000

These cases were submitted for advice as to: (1) whether a company that was an alleged single employer with a signatory employer violated Section 8(a)(5) by failing to follow the contractual successorship clause; (2) whether the Union was entitled to the asset purchase agreements conveying the surface mine as well as the coal preparation plant (“prep plant”) to new owners; (3) whether the subsequent operators of the prep plant and surface mine discriminated in their hiring; and, (4) whether the new owners of the surface mine and prep plant were joint employers with the subcontractors running those operations. We conclude that: (1) an alleged failure to honor a successorship clause is a contractual claim that is more properly addressed through arbitration or a Section 301 lawsuit; (2) the Union was only entitled to the asset purchase agreement covering the prep plant, not the surface mine; (3) the mechanics/welders, but not the prep plant employees, were not hired into the new operation for discriminatory reasons; and (4) it is unnecessary to decide the joint-employer questions in order to resolve or litigate the issues presented, and therefore we decline to make these determinations.

FACTS

These cases concern the sale of coal production and processing facilities at Coal Mountain, West Virginia that had been operated by subsidiaries of Bluestone

Resources, Inc., a Justice family-owned company.¹ At the time of the sale, the United Mine Workers of America (the “Union”) represented two distinct bargaining units: (1) surface miners employed by Dynamic Energy, Inc. (“Dynamic”), and (2) employees of Justice Highwall Mining, Inc. (“JHM”), including mechanics/welders (who maintained the surface mining equipment), refuse truck drivers (who hauled waste), and prep plant employees (who processed the coal, and who were added to the unit in late December 2016). Each unit had its own collective-bargaining agreement, and both agreements incorporated a successorship clause from the 2016 National Bituminous Coal Wage Agreement, which prohibited the transfer or assignment of operations to any successor without securing the successor’s agreement to assume the employer’s contractual obligations.

Initially, the sale was structured as a single asset purchase agreement (“APA”) conveying both the surface mine and prep plant to CM Energy Facilities, LP (a subsidiary of CM Energy GP, LLC) as of December 22, 2016. However, the APA was later amended to separately convey these two parts of the Coal Mountain operations. Under the amended agreements, the surface mine was sold from Dynamic to CM Energy Holdings, LP (another subsidiary of CM Energy GP), and the buyer agreed to assume the Dynamic collective-bargaining agreement. The transfer of the surface mine was relatively seamless and most, if not all, of the surface miners were hired by the subcontractor now operating the surface mine, Cornerstone Labor Services, Inc. (“Cornerstone”). The Union continues to be the recognized representative of the surface miners.

In contrast, the prep plant was sold to CM Energy Facilities without any labor obligations, ostensibly because JHM was a mere contractor and did not own the prep plant. Rather, the plant had been owned by National Resources, Inc. (“NRI”) and Frontier Coal Company (other Bluestone/Justice companies that were not signatories to the JHM collective-bargaining agreement). Accordingly, the Union is no longer recognized as the representative of any former employees of the JHM unit, and some of those employees were not rehired into the new operations. In this regard, the new subcontractor responsible for operating the prep plant, High Voltage, Inc., hired both refuse drivers but did not hire three of the seven former employees of the prep plant.²

¹ All of the predecessor entities discussed herein were majority-owned by James “Jim” Justice, II (the current governor of West Virginia), with the remainder owned by his son, James “Jay” Justice, III.

² One predecessor employee withdrew (b) (6), (b) interest in working for the new operation shortly after inquiring about employment prospects. Two others were not interested in returning to their jobs when the prep plant reopened after a few month hiatus for plant refurbishing.

The person in charge of High Voltage's hiring was (b) (6), (b) (7)(C) a former member of the JHM unit. At the surface mine, two of the four mechanics/welders who were the former (b) (6), (b) (7)(C) of the JHM unit were not hired by CM Energy Operations, LP ("CMEO," another subsidiary of CM Energy GP) to maintain the surface mine equipment, assertedly because they did not present themselves for employment at the beginning of the transition, when there was an urgent need for mechanics, and because they lacked skills, training, and experience. It is evident from emails between the Cornerstone and CM Energy presidents that the surface mine operation, and possibly the entire deal, were structured to minimize the risk of unionization spreading beyond the unit of surface miners.

After the sale, the Union requested copies of the APAs covering both the prep plant and surface mine. JHM asserted confidentiality interests in the information, and after several months of back-and-forth, the Union signed a confidentiality agreement on June 2, 2017 covering, among other things, the request for the prep plant APA.³ The Union then did not receive a response until July 27, 2017, when JHM raised, for the first time, objections as to the relevance of the prep plant APA. Thus, JHM only provided the cover page, table of contents, and signature page for the prep plant APA, notwithstanding its promise in a letter dated May 8, 2017 that the prep plant APA would be provided as soon as a confidentiality agreement was in place. Thereafter, the Union renewed its request for a complete copy of the sales agreement, but JHM never responded.

ACTION

The Region should issue complaint, absent settlement, alleging that JHM refused to provide the complete APA covering the prep plant, as well as that CMEO discriminated in its hiring with respect to the mechanics/welders who most recently served as (b) (6), (b) (7)(C) in the JHM unit. The remaining allegations lack merit and should be dismissed, absent withdrawal.

³ Although the Union never reached a confidentiality agreement with Dynamic, Dynamic did supply limited portions of the surface mine APA, including the page showing that the buyer had agreed to assume the Dynamic collective-bargaining agreement.

I. The claim that NRI failed to follow the successorship clause as a single employer with JHM is a contractual dispute more appropriately addressed in arbitration or a Section 301 action

It is well established that a mere breach of contract is not an unfair labor practice.⁴ Rather, parties must enforce their contractual rights through other avenues, namely arbitration or a Section 301 action,⁵ unless a contract breach constitutes a significant mid-term modification of employee terms and conditions of employment or constitutes a wholesale repudiation of the contract.⁶ Such actions are “situated at the threshold of matters going to the heart of the collective-bargaining relationship and to the [employer’s] duty to bargain.”⁷

Recourse for an employer’s breach of a successorship clause should not be through the Board’s processes but through arbitration and/or a Section 301 action.⁸ Our research failed to identify any Board cases finding that a failure to abide by a successor clause constituted a Section 8(a)(5) violation. To the contrary, such charges have been dismissed in the past.⁹ The fact that the breach was committed by NRI, an

⁴ See *NLRB v. C & C Plywood Corp.*, 385 U.S. 421, 427-28 (1967); *NCR Corp.*, 271 NLRB 1212, 1213 n.6 (1984).

⁵ See *Paramount Potato Chip Co.*, 252 NLRB 794, 796 (1980).

⁶ *Id.* at 797. See also *ACS, LLC*, 345 NLRB 1080, 1081-82 (2005). Compare *Cherry Hill Textiles*, 309 NLRB 268, 268 (1992) (“a refusal to arbitrate a particular grievance or class of grievances will not violate Section 8(a)(5), although it may constitute a breach of contract”), *enforced mem.*, 7 F.3d 221 (2d Cir. 1993), with *St. Marys Foundry*, 284 NLRB 221, 227, 233 (1987) (refusal to arbitrate two grievances, including one alleging noncompliance with successorship clause, amounted to unlawful repudiation of grievance-arbitration provision), *enforced*, 860 F.2d 679 (6th Cir. 1988).

⁷ *Allied Signal, Inc.*, 330 NLRB 1201, 1204 (2000), *enforcement denied sub nom. Honeywell Int’l, Inc. v. NLRB*, 253 F.3d 119 (D.C. Cir. 2001).

⁸ See generally Thomas Benjamin Huggett, *Successor Clauses: What They Are And Why Every Union Should Have One*, 46 CATH. U. L. REV. 835, 859-94 & n.125, 904-05 (1997).

⁹ See *TRT Telecomms. Corp. v. Teamsters Local 111*, 719 F. Supp. 1, 3 (D. D.C. 1989) (noting that the regional director stated in dismissing the charge that “[a]ny failure by [the seller] to require the purchaser to adopt the existing collective-bargaining agreement is a matter of contract interpretation and . . . the mere failure to abide by

alleged single employer with JHM, rather than by the signatory employer does not render Board proceedings necessary or appropriate; single employer questions can also be resolved through the arbitral process or Section 301 actions, so a union is not left without recourse in these types of circumstances.¹⁰ Thus, we conclude that the Region should dismiss, absent withdrawal, the allegation concerning NRI's failure to abide by the successorship clause covering the JHM unit.

II. JHM unlawfully withheld the prep plant APA, but there is insufficient evidence that the surface mine APA was likewise relevant

A collective-bargaining representative is entitled to information relevant and necessary to carrying out its statutory duties and responsibilities, including negotiating over mandatory bargaining subjects and policing a collective-bargaining agreement.¹¹ When the requested information deals with the terms and conditions of employment of bargaining unit employees, the Board will deem the information presumptively relevant and necessary to the union's performance of its statutory duties.¹² Where information is not presumptively relevant, the burden is on the party requesting the information to demonstrate its relevance, i.e. by showing a reasonable belief, supported by objective evidence, that the information is relevant.¹³ To meet that burden, the General Counsel must present evidence that: (1) the party requesting the information demonstrated the relevance of the non-presumptively

the contract is a matter more properly the subject of arbitration or court proceedings than an unfair labor practice charge"). *See also Compact Video Services*, 319 NLRB 131, 134 n.20 (1995) (noting that union's allegation that the employer owed a statutory duty to bind the buyer to predecessor's collective-bargaining agreement was apparently dismissed), *enforced per curiam*, 121 F.3d 478 (9th Cir. 1997).

¹⁰ *See, e.g., Lippert Tile Co. v. Bricklayers Local 5*, 724 F.3d 939, 943, 946-48 (7th Cir. 2013) (upholding enforcement of arbitration decision finding that single employer was bound by collective-bargaining agreement entered into by related company).

¹¹ *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 303 (1979) (citing *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 435-36 (1967), and *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152 (1956)).

¹² *See, e.g., Pennsylvania Power Co.*, 301 NLRB 1104, 1105 (1991) (citing *Curtiss-Wright Corp.*, 145 NLRB 152 (1963), *enforced*, 347 F.2d 61 (3d Cir. 1965)).

¹³ *See, e.g., Disneyland Park*, 350 NLRB 1256, 1257-58 (2007).

relevant information, or (2) the relevance of the information “should have been apparent” to the respondent under the circumstances.¹⁴

Requests for a sales agreement, as well as information about a possible single employer relationship, fall into the category of non-presumptively relevant information.¹⁵ With respect to single-employer information, the union must have a “reasonable belief that enough facts existed to give rise to a reasonable belief that the two companies were in legal contemplation a single employer.”¹⁶

We conclude that the Union was entitled to the prep plant APA in connection with its grievance concerning noncompliance with the successorship clause in the JHM collective-bargaining agreement.¹⁷ The Union reasonably believed that the successorship clause had not been followed, and that NRI was a single employer with JHM based on NRI’s and JHM’s common ownership, overlapping officers, and shared address.¹⁸ The relevance of the prep plant APA to the Union’s ability to pursue its

¹⁴ *Id.* at 1258. The General Counsel has recently taken the position that a party requesting information cannot simply argue that relevance should have been “apparent” under *Disneyland*, without further explanation, once relevance has been contested. Rather, the parties have an obligation to engage with each other over whether and how the information is relevant, instead of simply litigating before the Board whether the relevance of the information should have been apparent. It is the General Counsel’s view that this interactive process should apply with regard to presumptively-relevant information, where the employer has effectively disputed relevance, as well as for information that, while not presumptively relevant, was apparently relevant as asserted by the union under *Disneyland Park* prong 2, but for which the employer has effectively disputed the relevance. *See generally First Transit, Inc.*, Case 09-CA-219680, Advice Memorandum dated Oct. 19, 2018.

¹⁵ *See, e.g., Uniontown County Market*, 326 NLRB 1069, 1071 (1998), *enforced sub nom. Supervalu, Inc. v. NLRB*, 184 F.3d 949 (8th Cir. 1999).

¹⁶ *Id.* (quoting *Knappton Maritime Corp.*, 292 NLRB 236, 239 (1988)).

¹⁷ *Id.* (union entitled to sales agreement to investigate extent to which employer had complied with successorship clause); *St. Marys Foundry*, 284 NLRB at 232-33 (unlawful refusal to furnish complete copy of asset purchase agreement for purposes of enforcing successorship clause); *Washington Star Co.*, 273 NLRB 391, 392, 396-97 (1984) (unlawful refusal to provide sales agreement for purposes of administering job guarantee and successorship provisions in labor contract).

¹⁸ *See, e.g., Consolidation Coal Co.*, 305 NLRB 545, 546, 548 (1991) (unlawful refusal to provide mining contract where union sought to enforce contractual “panel” or re-

grievance alleging a breach of the successorship clause should have been apparent to JHM's officials, given that they were intimately involved in all of the Justice family's corporate entities at Coal Mountain and the Union had already raised the single employer argument in other respects during the course of the parties' extensive correspondence over the information requests. Although JHM contested the relevance of the prep plant APA, its objection was not raised in a timely manner. Thus, it waited months before raising it, and it misled the Union into thinking that the confidentiality issue was the only obstacle to receipt of the requested information by promising in May 2017 to provide documents pertaining to the sale of the prep plant once a confidentiality agreement was in place. In these circumstances, we do not fault the Union for failing to further engage in an interactive process with JHM concerning the information request. Finally, even assuming JHM had a legitimate confidentiality interest in the document, the Union alleviated those concerns by signing a non-disclosure agreement. Thus, JHM's provision of bare bones excerpts from the prep plant APA was clearly insufficient in these circumstances.¹⁹

We conclude, however, that the relevance of the surface mine APA has not been established. Shortly after the deal closed, the Union was informed that Cornerstone had assumed the Dynamic collective-bargaining agreement. Absent evidence undercutting that claim, of which there is none, there was no basis for the Union to have believed that Dynamic had failed to honor the successorship clause. Indeed, Dynamic supplied the Union with excerpts of the APA showing that the buyer had assumed the Dynamic collective-bargaining agreement. Furthermore, the Union asserts that it needed the Dynamic APA to determine whether Dynamic failed to protect the interests of JHM employees, as a single employer with JHM, in derogation of the successorship clause contained in the JHM contract. However, there can be no colorable claim that the JHM collective-bargaining agreement would apply to Dynamic given that the Union had long acquiesced to separate units.²⁰ Finally, the

employment provisions and had reasonable belief of single employer relationship), *enforced per curiam*, 979 F.2d 847 (4th Cir. 1992) (table decision).

¹⁹ See, e.g., *St. Marys Foundry*, 284 NLRB at 227, 229 & n.10, 232-33 (provision of only a portion of asset purchase agreement inadequate); cf. *Compact Video Services*, 319 NLRB at 131, 133, 134 & n.20, 139 & n.54, 143-44 & nn.81, 85 (unlawful refusal to supply parent company's sales contracts in full where union sought to enforce successorship clause and investigate alter ego status, among other reasons).

²⁰ See *Uniontown County Market*, 326 NLRB at 1071 (union failed to demonstrate need for sales agreement where underlying contention was plainly frivolous); *A-1 Fire Protection, Inc.*, 250 NLRB 217, 218-21 (1980) (alleged single employer's refusal to apply labor contract lawful where union knowingly acquiesced to excluding those

Union asserts that the surface mine APA was relevant for purposes of effects bargaining, but it has not articulated any particular information it sought from the APA in order to prepare for such bargaining. Thus, this assertion is too general and conclusory a basis to establish relevance.²¹ Accordingly, the Region should only issue complaint, absent settlement, as to the allegation that JHM unlawfully withheld the prep plant APA.

III. The discriminatory hiring allegations are meritorious as to the mechanics/welders, but not the prep plant employees

A successor employer violates Section 8(a)(3) by refusing to hire the predecessor's employees to avoid incurring a successor bargaining obligation or because of their known or suspected union sympathies.²² The following factors are among those that would establish such a violation:

- [1] substantial evidence of union animus; [2] a lack of a convincing rationale for refusal to hire the predecessor's employees; [3] inconsistent hiring practices or overt acts or conduct evidencing a

employees from the signatory's unit), *aff'd in relevant part sub nom. Road Sprinkler Fitters Local 669 v. NLRB*, 676 F.2d 826, 830 (D.C. Cir. 1982).

²¹ See *Disneyland Park*, 350 NLRB at 1258 n.5. We note that the employer in *Sierra International Trucks, Inc.*, 319 NLRB 948, 951 (1995) did not contest the relevance of the asset purchase agreement for the purpose of effects bargaining. The case *Sierra* relies on for effects-bargaining relevance, *Transcript Newspapers*, 286 NLRB 124 (1987), *enforced sub nom. NLRB v. New England Newspapers, Inc.*, 856 F.2d 409 (1st Cir. 1988), does not stand for the proposition that sales agreements are necessarily relevant for effects bargaining. Rather, there were a host of reasons the sales agreement was relevant in *Transcript Newspapers*, including the fact that the union sought to enforce a lifetime job guarantee and that there was reason to believe that the buyer sought to escape liability under the collective-bargaining agreement. *Id.* at 124 n.2, 130. Indeed, the judge's analysis does not even list effects bargaining as one of the bases supporting relevance. *Id.* at 130. Finally, *Delaware County Memorial Hospital*, 366 NLRB No. 28, slip op. at 1 n.2, 4, 8-9 (Mar. 7, 2018) is distinguishable because there, the union articulated specific reasons for its request and the employer itself considered parts of the asset purchase agreement to be relevant.

²² See, e.g., *Planned Building Services*, 347 NLRB 670, 670, 673 (2006), *overruled on other grounds by Pressroom Cleaners*, 361 NLRB 1166 (2014); *Love's Barbeque Restaurant No. 62*, 245 NLRB 78, 78-82 (1979), *enforced in relevant part sub nom. Kallmann v. NLRB*, 640 F.2d 1094 (9th Cir. 1981).

discriminatory motive; and [4] evidence supporting a reasonable inference that the new owner conducted its staffing in a manner precluding the predecessor's employees from being hired as a majority of the new owner's overall work force to avoid the Board's successorship doctrine.²³

Once the employer's anti-union motive is established, "the burden then shifts to the employer to prove that it would not have hired the predecessor's employees even in the absence of its unlawful motive."²⁴ In establishing a defense, an employer may show that "it did not hire particular employees because they were not qualified for the available jobs," or it did not have as many unit jobs as there were unit employees of the predecessor.²⁵

Here, we agree with the Region that CMEO's refusal to hire the mechanics/welders who served as (b) (6), (b) (7)(C) under JHM was discriminatorily motivated. Anti-union animus is established based on communications between CMEO and Cornerstone disclosing an intent to structure operations to minimize the risk of unionization spreading beyond the surface miners themselves. Discriminatory motive can also be inferred based on: (1) disparate treatment in terms of initiating contact with at least one predecessor employee who was less active in the Union,²⁶ thereby undercutting the claim that the (b) (6), (b) (7)(C) were not hired because they failed to present themselves for employment;²⁷ (2) CMEO's

²³ *Planned Building Services*, 347 NLRB at 673 (quoting *U.S. Marine Corp.*, 293 NLRB 669, 670 (1989), *enforced en banc*, 944 F.2d 1305 (7th Cir. 1991)).

²⁴ *Id.* at 674.

²⁵ *Id.*

²⁶ Any proof that CMEO also initiated contact with other new hires who were not predecessor employees would also support the argument that CMEO engaged in disparate treatment with respect to the (b) (6), (b) (7)(C) by failing to contact them.

²⁷ *Cf. Handy Andy, Inc.*, 313 NLRB 616, 622 (1993) (unlawful refusal to hire predecessor employees who were former strikers where, among other things, Board found that some non-strikers were called and urged to apply whereas none of the strikers were called for this purpose), *enforced in part sub nom. Sw. Merch. Corp. v. NLRB*, 53 F.3d 1334, 1343 (D.C. Cir. 1995); *Brownsville Garment Co.*, 298 NLRB 507, 516 (1990) (rejecting successor employer's defense that it did not hire influential union officer because he failed to request an interview as pretextual where employer's practice was to initiate interviews by contacting applicants), *enforced per curiam*, 937 F.2d 609 (6th Cir. 1991) (table decision). *Compare Shortway Suburban*

shifting position as to whether any CM Energy entity employed any mechanics/welders at Coal Mountain;²⁸ and (3) the unconvincing claim that the (b) (6), (b) (7)(C) were not hired due to a lack of skills, training and experience, given that both (b) (6), (b) (7)(C) had worked for JHM since (b) (6), (b) (7)(C)²⁹ CMEO did not solicit their qualifications but relied on general knowledge from industry experience, one of the discriminatees in fact held a number of training certificates, and CMEO failed to produce evidence supporting its assertion that the two predecessor employees it did hire had graduated from a certified technical school. In addition, we would infer knowledge of the discriminatees' Union activity based on the email on January 27, 2017 between Cornerstone and CMEO concerning payroll employees working at the site who were not on the list of Dynamic employees. In that email, the Cornerstone (b) (6), (b) (7)(C) asked whether these additional employees were active Union employees. Furthermore, circumstantial evidence of knowledge can be established based on CMEO's ongoing communications with predecessor managers who were aware of the discriminatees' Union status. Since CMEO's asserted reasons for not hiring these employees were pretextual, it cannot meet its defense burden under *Wright Line*.³⁰ Accordingly, CMEO³¹ violated Section 8(a)(3) by refusing to hire the (b) (6), (b) (7)(C)³²

Lines, 286 NLRB 323, 326 (1987) (refusal to hire predecessor employees unlawful where, among other things, lack of applications was not real reason for hiring decision), *enforced*, 862 F.2d 309 (3d Cir. 1988), *with ITT Federal Services Corp.*, 335 NLRB 998, 999 (2001) (no violation where successor relied exclusively on applications, which alleged discriminatees did not submit).

²⁸ See Exhibit 9 to September 8, 2017 position statement (asserting that CM Energy entities had no employees other than managers and one administrative assistant).

²⁹ See *El Mundo Corp.*, 301 NLRB 351, 364 (1991) (finding successor engaged in scheme to avoid majority status where employee-applicants were purportedly not hired because they were not qualified, yet they had worked successfully for many years).

³⁰ 251 NLRB 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981). See also *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003) ("if the evidence establishes that the reasons given for the [employer's] action are pretextual—that is, either false or not in fact relied upon—the [employer] fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct, and thus there is no need to perform the second part of the *Wright Line* analysis").

³¹ Since a violation can be established against CMEO without also including Cornerstone as a possible joint employer, and given that Cornerstone's exact role in hiring was ambiguous and limited in duration, the Region should only litigate this

As to the prep plant employees, we conclude that there is insufficient evidence demonstrating that the new subcontractor, High Voltage, conducted its hiring in a discriminatory manner. The person in charge of hiring was (b) (6), (b) (7)(C) a former member of the JHM unit and there is no evidence suggesting that (b) (6), (b) (7)(C) harbored animus toward the Union. Furthermore, we would not impute animus from CM Energy Facilities to High Voltage given the limited evidence of a joint employer relationship. Further undercutting an inference of animus is the fact that the predecessor employees would not have apparently comprised a majority of the High Voltage workforce in any event. Thus, High Voltage added a second shift of workers to the prep plant for nondiscriminatory reasons, significantly increasing the denominator in any potentially residual unit of prep plant workers bifurcated from the mechanics/welders. Furthermore, there is only one predecessor employee that High Voltage allegedly refused to hire for discriminatory reasons,³³ and hiring (b) (6), (b) (7)(C) would not have changed the successorship equation given that High Voltage had added a second shift. For these reasons, the Region should dismiss, absent withdrawal, the allegation concerning the discriminatory refusal to hire predecessor employees at the prep plant.

violation against CMEO. *See Martiki Coal Corp.*, 315 NLRB 476, 478 (1994) (joint employer relationship severed once entity's involvement became limited to providing application forms to candidates, delivering applications to sole employer entity, and recommending applicants).

³² If the Region determines that CMEO would have been a successor employer with respect to the mechanics/welders absent discrimination, and that these employees constitute their own appropriate unit, it should further allege in the complaint that CMEO violated Section 8(a)(5) by refusing to recognize and bargain with the Union and by unilaterally setting initial terms and conditions of employment. *See Planned Building Service*, 347 NLRB at 674; *Love's Barbeque*, 245 NLRB at 82. In this regard, we note that the Board has found substantial continuity of operations even where a successor has taken over a discrete portion of the predecessor's bargaining unit. *See, e.g., Dean Transportation, Inc.*, 350 NLRB 48, 48 n.2, 57-58 (2007). And we agree with the Region that the JHM unit was bifurcated as of the sale of the prep plant (or at least by March, when CM Energy Facilities contracted out the operation of the prep plant to an unrelated entity) because it was evident that the mechanics/welders would not share the same employer as the prep plant employees and refuse drivers.

³³ As noted above, this employee withdrew (b) (6), (b) (7)(C) interest in a job shortly after inquiring about employment prospects. The other two predecessor employees who were not hired were not interested in returning to the prep plant.

Accordingly, the Region should issue complaint, absent settlement, alleging that JHM violated Section 8(a)(5) by failing to provide the prep plant APA, and that CMEO violated Section 8(a)(3) by discriminating against two Union (b) (6), (b) (7)(C) in its hiring.

/s/
J.L.S.

ADV.06-CA-198911.Response.Bluestone,CMEnergy.(b) (6), (b) (7)