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

DATE: August 12, 2013

TO: Mori P. Rubin, Regional Director
Region 31

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

SUBJECT: Horizon Coach Lines 530-4825-6700
Case 31-CA-100995

The Region submitted this case for advice concerning whether the Employer, a *Burns*[1] successor, could lawfully implement changes to employee health and welfare benefits after it had hired a substantial and representative complement of the predecessor's employees but before the Union had made a demand to bargain. We agree with the Region, for the reasons discussed below, that the Employer was not obligated to bargain with the Union over those changes. The Region should therefore dismiss the charge, absent withdrawal.

Initially, we agree with the Region's conclusion that the Employer is not a "perfectly clear successor" and thus had the right to set initial terms and conditions of employment.[2] Thus, the Employer notified the Union in August 2012 that it would be acquiring the predecessor's business and provided employees with its employee handbook prior to takeover, noting that it would apply if they were hired. The handbook included terms and conditions that were different from those contained in the predecessor collective-bargaining agreement, including an employment at-will provision, the potential for split shifts, and different break and leave structures. Further, unlike the predecessor, the Employer would be under no obligation to provide the employees with a 40-hour work week guarantee. Finally, prior to their

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[1] *NLRB v. Burns Int'l Sec. Srvcs.*, 406 U.S. 272 (1972).

[2] *See Canteen Co.*, 317 NLRB 1052, 1052-53 (1995), *enfd.* 103 F.3d 1355 (7th Cir. 1997); *Spruce Up Corp.*, 209 NLRB 194, 195 (1974), *enfd. mem.* 529 F.2d 516 (4th Cir. 1975). The cases relied on by the Union are inapposite because they involved "perfectly clear" successors who were under an obligation to bargain with the incumbent unions before setting initial terms of employment. *See, e.g.*, *Saks Fifth Ave.*, 247 NLRB 1047, 1051-52 (1980), *enfd. in part* 634 F.2d 681 (2d Cir. 1980); *The Denham Co.*, 218 NLRB 30, 31-32 (1975).

hire, employees also received from, and returned to the Employer, insurance benefit enrollment forms listing the insurance policies employees could elect and that were different from those utilized by the predecessor employer. It was thus clear to the employees, prior to their hire, that they would be working under different terms if they were employed by the Employer.

With regard to the Employer's bargaining obligation as a *Burns* successor, the Employer began operations with a full complement of predecessor employees on September 14, 2012. The Union did not demand bargaining until mid-October, around the time employees began receiving specific information concerning their new insurance benefits. Although the Employer clearly was obligated to bargain with the Union over any changes in employees' terms and conditions after that time, the changes in health insurance appear to have been implemented before the Union's bargaining demand.[3] More significantly, the changes were fully consistent with the "initial terms" the Employer had lawfully set under *Spruce Up*.[4] Thus, notwithstanding that employees received more detailed, explanatory information about their benefits after they were hired, they had been provided insurance enrollment forms prior to takeover that named the specific insurance companies under which they would be insured if they so elected,[5] and the additional insurance information the Employer provided employees after their hire was consistent with

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[3] *See, e.g., MSK Corp.*, 341 NLRB 43, 44-45 (2004) (citing *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 52 (1987)) (successor's bargaining obligation attaches when it hires a substantial and representative complement of predecessor's employees and union has made an effective bargaining demand); *Harbor Cartage*, 269 NLRB 927, 928 (1984) (successor employer obligated to bargain with union "on and after" union's bargaining demand). *But see Banknote Corp. v. NLRB*, 84 F.3d 637, 644-47 (2d Cir. 1996), *enforcing* 315 NLRB 1041 (1994) (successor's bargaining obligation attached when it hired full complement of employees after takeover with no hiatus, even absent union's bargaining demand).

[4] *See Holiday Inn of Victorville*, 284 NLRB 916, 916, 916 n.2, 928 (1987) (successor employer's procurement of group insurance plan after takeover was not "new" change; successor announced intention to provide employees with its own insurance plan, thereby putting them on notice that they could not rely on continuance of old plan).

[5] *Cf. id.* at 916 n.2 ("[g]iven the nature of insurance policies, it is understandable that the Respondent might not have been able to work out all details with an insurer in advance"). *Compare East Belden Corp.*, 239 NLRB 776, 779, 793 (1978), *enfd. mem.* 634 F.2d 635 (9th Cir. 1980) (employees were not adequately apprised of successor's intended changes because they were couched only "in generalized and speculative terms," including, "at a later date [successor] would possibly be able to offer them a better [insurance] plan").

those benefit enrollment forms it had distributed prior to the takeover informing the employees of the change.[6] The Employer was therefore under no obligation to bargain with the Union concerning the health and other benefit plans it had previously announced. [7]

Accordingly, the Region should dismiss the charge, absent withdrawal.

/s/

B.J.K

Compare Banknote Corp., 315 NLRB at 1044 n.9 (successor's institution of new insurance policy four days after takeover was unlawful unilateral change because it was inconsistent with its pre-takeover announcement that predecessor's insurance policy would continue for 60 days).

[7] Since its takeover, the Employer has failed to provide the Union with notice and an opportunity to bargain over employee discipline. [FOIA Ex. 5

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