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

Advice Memorandum

DATE: April 23, 2001

TO : F. Rozier Sharp, Regional Director
Region 17

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

SUBJECT: Waste Connections of Nebraska 420-2310
Case 17-CA-20894 530-4825-6700

This Section 8(a)(5) case was submitted for advice on whether the Employer's consolidation of its current operation with a newly purchased operation rendered the historical bargaining units inappropriate.

FACTS

Waste Connections of Nebraska (the Employer) is engaged in the business of commercial and residential trash hauling. In 1998, the Employer purchased Papillion Sanitation Services, Inc. (Papillion) in Papillion, Nebraska. The employees from the Papillion facility drove routes in Bellevue, Nebraska. As of the payroll period ending September 30, 2000,[1] there were 57 non-supervisory, non-administrative Papillion employees in various driver, loader, shop, recycling, helper, merf, and mechanic classifications.

On September 29, the Employer purchased another waste hauling business called Allied Waste Operations of Omaha, d/b/a Browning Ferris Industries (BFI), and hired virtually all of the former nonsupervisory employees. The BFI employees were covered by two collective bargaining agreements with Teamsters Local 443 (the Union). One agreement covered employees who hauled commercial routes in Omaha. The job classifications in this unit included various types of mechanics, utility employees, drivers, helpers, and loaders. As of September 6, this unit contained 29 employees.

The second BFI unit included employees performing mainly residential work in Council Bluffs, Nebraska. The jobs covered by this contract included various

[1] All remaining dates are in 2000 unless otherwise noted.

classifications of drivers and helpers. As of September 6, this unit contained 9 employees.

The BFI units have been in existence for 35 years and maintain separate seniority lists. According to the Union, there was some interchange of employees between the two units before the Employer's purchase of the facility. Moreover, Kim Luick had served as operations manager at BFI, directly supervising the Omaha commercial employees and overseeing Chris Burke, the former Council Bluffs residential supervisor. BFI also employed a shop manager.

On September 7, before its purchase of BFI, the Employer held a meeting with the BFI employees at a hotel and told them that they were going to be retained. On October 3, the Employer integrated the operations of its Papillion facility and the newly acquired BFI facility by moving Papillion's administrative and maintenance functions, maintenance employees, drivers, driver routes, and all other support services to the BFI facility in Omaha. The Employer maintained the Papillion facility as a recycling center only. Of the 57 nonadministrative, nonsupervisory employees, it appears that nine were recycling employees. Thus, approximately 48 nonadministrative, nonsupervisory Papillion employees transferred to the BFI facility.

After the merger, administrative functions, including pay classifications, were consolidated. The Employer also standardized health and pension benefits and paperwork, such as time cards and logs. All employees are subject to the same written policies covering job postings, vacations, leave, breaks, drug and alcohol testing, appraisals, discipline, and the procedure for making employment related complaints. In addition, all employees -- both former BFI employee units and the unrepresented former Papillion employees -- share common parking, staging areas, bathrooms, break rooms, offices, dispatch, and a time clock. As of November 20, all employees also wear a common uniform. Finally, the Employer merged the seniority lists of the former BFI and Papillion employees, no longer maintaining the separate seniority lists of the historical units.

The former BFI employees continue to operate the routes that they operated before the merger. They also drive the same trucks with the same equipment, although the Employer is in the process of changing the BFI logos to Papillion logos.

The three groups of drivers continue to have separate direct supervisors. Kim Luick, the operations manager,

retained his position but no longer directly supervises the Omaha employees. Rather, Troy Davis, a former Papillion supervisor, now serves as residential manager; he directly supervises the Omaha unit employees and oversees the supervisors of the Council Bluff and Bellevue employees. Newly hired Dean Hill supervises the Council Bluff unit employees, and Brian Hodge remains the supervisor of the Bellevue employees.

The former BFI and Papillion shop and maintenance functions have been consolidated at the Omaha facility. Jim Patton, former shop manager at the Papillion facility, now serves as shop manager at the consolidated operation.

The Employer has presented the following evidence of employee interchange since the merger: On one occasion, a backup "swing" driver and an Omaha unit employee temporarily replaced a Bellevue driver who was on light duty. In two other instances, swing drivers assisted on unit routes, one for Council Bluff and one for Omaha. Bellevue drivers twice assisted Omaha unit employees. Finally, two former Papillion facility helpers were reassigned from their Bellevue routes to Council Bluff routes, and two Council Bluff unit helpers were moved to Bellevue assignments.

On October 4, the Employer notified the Union that it would not honor the existing collective bargaining agreements and that it would no longer negotiate with or recognize the Union.

ACTION

We conclude that the Employer is a Burns[2] successor to BFI and that the BFI bargaining units remain appropriate. Thus, a Section 8(a)(1) and (5) complaint should issue, absent settlement.

In determining whether a purchasing employer is obligated to bargain with the exclusive representative of its predecessor's employees, the Board examines the continuity of the employing enterprise.[3] In doing so, the Board looks at the totality of the circumstances surrounding the transfer, including continuity in the business operation, the plant, work force, jobs, working conditions, supervision, machines, equipment, methods of

[2] NLRB v. Burns International Security Service, 406 U.S. 272 (1972).

[3] Id. at 280-81.

production, and product or service.[4] "In conducting the analysis, the Board keeps in mind whether those employees who have been retained will understandably view their job situations as essentially unaltered."[5]

Where a new employer has integrated the operations of an old and new business, a finding of successorship also depends on the continued appropriateness of the preexisting bargaining units.[6] In determining whether the bargaining units remain appropriate, the Board considers traditional community of interest factors,[7] focusing particularly on whether, from the employees' perspective, their jobs remain the same,[8] and also considering the collective bargaining history.[9]

In Pioneer Concrete of Arkansas,[10] for instance, the Employer purchased three companies, two of which had unionized employees, from a single owner and argued that only a unit including employees of all three companies would be appropriate. The Board disagreed, finding that the two existing units remained appropriate because "unit employees have continued to perform the same work on the

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[4] Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 43 (1987).

[5] Id.

[6] Border Steel Rolling Mills, Inc., 204 NLRB 814, 821 (1973).

[7] See Kelly Business Furniture, 288 NLRB 474, 477 (1988).

[8] See Banknote Corp. of America, 315 NLRB 1041, 1043-44 (1994) (historical units were appropriate when same employees produced same products in same jobs by same methods, despite evidence of some employee interchange), enfd. 84 F.3d 637 (2d Cir. 1996), cert. denied 519 U.S. 1109 (1997).

[9] See Fisher Broadcasting, 324 NLRB 256, 263 (1997) (in finding continued appropriateness of historical units, most significant fact was 50-year history of collective bargaining).

[10] 327 NLRB 333, 335 (1998), enfd. 194 F.3d 1309 (5th Cir. 1999).

same product using the same equipment out of the same locations for the same customers."[11] The Board further noted that immediate supervision remained the same and that, while there was some intermingling of duties between units, "those matters are similar to the way they were handled by [the companies] before the sale."[12] For instance, while mechanics in the two units sometimes worked on vehicles for each other's companies, they had done so before the sale as well. The Board reasoned that "[a]s to representation or no representation of future employees especially mechanics that are not clearly within one distinct unit, those matters may be governed by law or by agreement of the parties."[13] Although the employees at the three companies worked out of at different facilities, they often worked together at common sites.[14]

We conclude that the Employer is a Burns successor and that the BFI units remain appropriate. The BFI unit employees continue to do the same jobs, driving the same routes using the same trucks for the same customers. Thus, the operations of BFI, from the former BFI employees' perspective, remain largely unchanged.[15] Further, the two historical BFI units have existed for 35 years with the only meaningful distinction being the routes to which employees were assigned. These assignments and routes

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[11] Id. at 335-36.

[12] Id. at 336.

[13] Id.

[14] Moreover, the Board has found that historical units remain appropriate where a successor consolidates an operation at one facility but fails to sufficiently integrate groups of employees. See Fisher Broadcasting, Inc., 324 NLRB 256, 259 (1997) (consolidation of three radio stations at one facility did not destroy appropriateness of historical units).

[15] While the identity of the front-line supervisors has changed, this change alone is not sufficient to destroy successorship. See Burns International Security, 406 U.S. at 281 n.4 (despite Burns' use of its own supervisors, successorship found when "their functions and responsibilities were similar to those performed by their predecessors").

remain intact; the Employer has merely added a third group of employees working a separate route out of the Omaha facility, and has failed to show any meaningful functional integration between the three groups.

While the Employer has presented some evidence of employee interchange, some interchange apparently occurred before the merger of the facilities as well. In any event, a limited amount of employee interchange is insufficient to render historical units inappropriate.[16] Furthermore, although maintenance and mechanical employees of the former Papillion and BFI facilities are now working together in one maintenance department, this consolidation is insufficient to render the historical units inappropriate. Before the purchase, all mechanics and maintenance employees at the former BFI facility were in the Omaha unit, despite the fact that these employees probably worked on equipment used by Council Bluff unit employees as well. Accordingly, the addition of the former Papillion employees and trucks to the maintenance group is not a significant change, and any future dispute as to their representation "may be governed by law or by agreement of the parties."[17] In this regard, the Union did not seek recognition of the former Papillion employees when the Employer withdrew recognition.

While the Employer merged the seniority lists and implemented other changes in terms and conditions of employment, these changes were announced after the Employer had told the bargaining unit employees that they would be retained. "Where the new employer's offer of different terms was simultaneous with the expression of intent to retain the predecessor's employees, the Board has found no duty to bargain over initial employment terms."[18] An employer must, however, make it clear "from the outset" that continued employment depends on the employees' willingness to accept the new terms and conditions of employment.[19] That is not the case here: the Employer told

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[16] See Banknote Corp., 315 NLRB at 1042.

[17] See Pioneer Concrete, 327 NLRB at 336 (even though the bargaining unit placement of future-hired mechanics may have been unclear after consolidation, historical units were still found to be appropriate).

[18] L.A.X. Medical Clinic Inc., 248 NLRB 861, 964 (1980).

the former BFI employees at a meeting in early September that they would all be retained and mentioned no changes in working conditions. The Employer's duty to bargain with the Union thus attached before the changes were instituted, and the Employer violated Section 8(a)(5) and (1) by enacting them. Therefore, the Employer cannot rely on these changes to demonstrate that the historical units were no longer appropriate.

The Employer argues that this case is like Kelly Business Furniture,[20] where the Board held that a historical unit was no longer appropriate when the employer consolidated several operations that included one group of union-represented employees. The Board found that the employer had integrated the formerly separate operations, and that the only remaining distinguishing feature between the represented employees and the unrepresented employees was that they tended to work primarily on different product lines. The Board reasoned that it "has [never] carved up a single-facility warehousing and delivery operation . . . so as to create a unit in which only some of the inside warehousing personnel are included and only some of the outside delivery/installation personnel are included."[21] Unlike here, the bargaining unit employees in Kelly interacted with the other employees in ways that they had not interacted before the sale, performed tasked that they had not performed before, and engaged in crosstraining calculated to enable true employee interchange.[22]

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[19] Spruce Up Corp., 209 NLRB 194, 195 (1974), enfd. 529 F.2d 516 (4th Cir. 1975).

[20] 288 NLRB 474 (1988).

[21] Id. at 478.

[22] The Employer also cites Geo. v. Hamilton, 289 NLRB 1335 (1988) and Renaissance Center Partnership, 239 NLRB 1247 (1979). In Renaissance, the Board found that a historical bargaining unit was no longer appropriate when two groups of security forces were consolidated such that they were no longer separately identifiable: employees were randomly assigned to different sections and had common supervision, regular interaction, and identical duties and uniforms. 239 NLRB at 1248. In Geo v. Hamilton, the Board found that two groups of warehouse employees, one that was historically represented, had fully integrated because employees worked together without any regard to space boundaries. 289 NLRB at 1340.

We conclude that the historical bargaining units remain appropriate and, accordingly, a Section 8(a)(1) and (5) complaint should issue, absent settlement, alleging that the Employer is a Burns successor to BFI and that it unlawfully refused to recognize and bargain with the Union.

B.J.K.