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

DATE: June 22, 2016

TO: Daniel L. Hubbel, Regional Director
Region 14

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

SUBJECT: Walden Security, Inc.
Cases 14-CA-170110, 18-CA-170129,
16-CA-170337, and 15-CA-176496

Successorship Chron
530-4825-6700
530-4850-6700

The Region requested advice as to whether the Employer unlawfully failed to bargain before setting initial terms and conditions of employment when it was awarded a federal contract to provide security services and hired virtually all of its predecessor's employees.[1] We conclude that the Employer is a perfectly clear successor under *Spruce Up*[2] and therefore violated Section 8(a)(5) and (1) by failing to bargain with the Union before setting initial terms.[3]

FACTS

In mid-2015, the Employer, Walden Security, Inc., was awarded a contract to provide security services effective December 1, 2015, in court facilities in the First, Fifth, and Eighth Circuits. Under Executive Order 13495, the Employer was obligated to offer employment to the existing contractor's employees. The existing contractor, Akal Security, Inc., had a collective-bargaining agreement with the Charging Party Union, the United Government Security Officers of America, and a

[1] This Memorandum supersedes Advice's prior case-closing email in Case 14-CA-170110 dated April 29, 2016, in light of new evidence from the Regions' additional investigations and the Board's decisions in *Adams & Associates, Inc.*, 363 NLRB No. 193 (May 17, 2016) and *Data Monitor Systems, Inc.*, 364 NLRB No. 4 (May 31, 2016).

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

[3] (b) (5)
(b) (5)

number of its Locals, covering ten bargaining units comprised of employees working at 29 different locations.

In September, the Employer contacted Akal managers in the three Circuits and asked them to post in the courthouses a "Transition Notification Letter" dated September 15, which stated in relevant part:

> Greetings from Walden Security!
>
> It is our honor and privilege to inform you that Walden Security has been chosen by the United States Marshals Service (USMS) to administer the court security officer services contract for your judicial circuit beginning December 1, 2015. …
>
> We understand that successful support of the USMS begins and ends with you, the court security officer (CSO) workforce. To that end, we pledge our support to each of our new security officers.
>
> It is our belief that you will come to realize very quickly that you have joined the premier security services provider in the industry …
>
> As we progress through the transition of the court security officer contract in your circuit, we ask for your patience and assistance in meeting all of the associated administrative requirements. It is our intent for the administrative management and support of the CSO workforce to be seamless and remain constant.
>
> We will be providing you much more information about Walden Security in the weeks ahead, to include orientation materials, benefit package details, contact information, policies, etc. We look [forward] to a long and lasting professional relationship.
>
> On behalf of everyone at Walden Security, we would like to welcome you to our company.

The letter was signed by the Employer's President and Chairman/CEO.

Soon thereafter, the Employer asked the Akal managers to post "Town Hall Flyers" announcing the dates, times, and locations of meetings and asking that the managers encourage all the CSOs to attend one of the meetings "as we will be completing all of the necessary administrative documents required of all incumbents to make the transition to Walden Security." The flyers announcing the meetings, which were scheduled over the course of a month, from September 19 through October 19, had a large banner heading stating: "Join Our Team!" The

flyers further explained that at the meetings, employees would "meet the Walden Security team, learn about our company, training, and benefits, complete an employment application, ask questions and more." Employees were instructed to bring various documents with them, including a valid driver's license or passport, their social security card, a copy of their high school or college diploma, a copy of their military discharge form if applicable, a copy of their certification from a law enforcement academy, a voided check for direct deposit, and their primary group health insurance card.

At the meetings, employees were given an "Orientation Packet," which included "the minimum documentation required to process your employment application." Along with an application, employees were required to fill out various forms, including most notably a Federal W-4 Form, a State Tax Form, and an Employee Direct Deposit Enrollment Form. The Employer announced at the meetings that it was repudiating the predecessor's collective-bargaining agreement and would be setting its own terms and conditions. It distributed copies of an "Employee Benefits Guide," which detailed its medical, dental, and vision insurance plans, but did not announce any other changes to the employees' existing terms and conditions of employment.

By letter dated October 23, the Employer offered employment to each of the predecessors' employees. Enclosed with the offer letter was a copy of its "Policies and Procedures," so that employees could "make an informed choice as to whether or not you wish to accept Walden Security's offer of employment[.]" That handbook modified several terms and conditions of employment, including replacing the predecessor's just-cause termination standard with an at-will standard and eliminating the grievance-arbitration policy.

The Employer commenced operations on December 1, and hired all but one of the predecessor's 406 employees.[4] Shortly thereafter, it recognized and offered to bargain with the Union. The Union is refusing to bargain, taking the position that bargaining should start from the predecessor's terms and conditions rather than from those set forth in the Employer's handbook.

ACTION

We conclude that the Region should issue complaint, absent settlement, alleging that the Employer is a perfectly clear successor and violated Section 8(a)(5) and (1) by failing to bargain over initial terms and conditions.

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[4] One employee failed to provide required documentation that he had graduated from a certified law enforcement training academy or program.

While a *Burns* successor employer is normally free to set initial terms and conditions of employment for its newly hired work force, a successor must "initially consult with the employees' bargaining representative before [it] fixes terms" if it is "perfectly clear that the new employer plans to retain all of the employees in the unit."[5] The Board has limited the "perfectly clear" exception to situations where the new employer actively or tacitly misleads employees or their union into believing that the employees will be retained by the successor under the same terms and conditions, or at least fails to "clearly announce" its intent to establish new terms and conditions prior to or simultaneous with its invitation to accept employment.[6] Thus, under current Board law, an employer becomes a "perfectly clear" successor only if it is silent as to changing or continuing the existing working conditions at the time it indicates to employees or their union that it will be hiring the predecessor's employees,[7] or if its announcement of new terms and conditions is too "generalized" or "speculative."[8] Most recently in *Adams & Associates, Inc.*, the

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[5] *NLRB v. Burns Int'l Security Services, Inc.*, 406 U.S. 272, 294-95 (1972).

[6] *Spruce Up*, 209 NLRB at 195 (employer that indicated intent to retain predecessor's employees while simultaneously announcing new wage rate was not a "perfectly clear" successor); *Canteen Co.*, 317 NLRB 1052, 1052-54 (1995) (employer became "perfectly clear" successor when it informed the union of its plan to retain predecessor employees without announcing changes in working conditions), *enforced,* 103 F.3d 1335 (7th Cir. 1997).

[7] *See, e.g., Canteen*, 317 NLRB at 1052-54; *Roman Catholic Diocese of Brooklyn*, 222 NLRB 1052 (1976) (obligation to bargain about initial terms of employment arose prior to the new employer's extension of formal offers of employment to the predecessor's employees where it made an unequivocal statement to the union of an intent to hire all of the predecessor's lay teachers, but did not mention any changes in terms and conditions of employment, which only became known later when it submitted an employment contract), *enforcement denied in relevant part sub. nom. Nazareth Regional High School v. NLRB*, 549 F.2d 873 (2d Cir. 1977); *Fremont Ford*, 289 NLRB 1290, 1296-1297 (1988) (successor forfeited right to set initial terms under "perfectly clear" exception where new employer manifested intent to retain the predecessor's employees prior to the beginning of the hiring process by informing union it had doubts about retaining only a few employees and did not announce significant changes in initial terms until it later conducted hiring interviews).

[8] *See e.g., Windsor Convalescent Center of North Long Beach*, 351 NLRB 975, 982 (2007) ("A general statement that new terms will subsequently be set is not sufficient to fulfill the [Employer's] *Spruce Up* obligation to announce new terms prior to or simultaneous with the takeover."), *enforcement denied in pertinent part*, 570 F.3d 354 (D.C. Cir. 2009); *East Belden Corporation*, 239 NLRB 776, 793 (1978) (finding employer to be perfectly clear successor where it announced "in generalized and

Board reiterated that in the case of a perfectly clear successor, "the bargaining obligation attaches when a successor express an intent to retain the predecessor's employees without making it clear that employment will be conditioned on acceptance of new terms."[9]

In *Adams & Associates, Inc.*, the Board found that an employer became a perfectly clear successor when it met with incumbent employees to announce the transition and inform them about the hiring process.[10] At that time, the successor clearly manifested an intent to retain the incumbent employees when its executive director told the incumbent employees that they had been "doing a really god job," that the successor "didn't want to rock the boat" and "wanted a smooth transition," and that "aside from disciplinary issues, he was 99 percent sure that [they] would all have a job."[11] Since the employer did not inform the employees that employment would be on new terms until it distributed formal offer letters between two to four weeks later, the employer violated Section 8(a)(5) and (1) by failing to continue the predecessor's terms and conditions.[12]

Here, the Employer became a perfectly clear successor when it posted the September 15 "Transition Notification Letter" and made even clearer statements manifesting an intent to retain all the incumbent employees. Thus, the Employer "pledge[d]" its support to each of its "new security officers," told them that they would come to realize that they had "joined the premier security services provider," expressed the intent that "the administrative management and support of the CSO workforce … be seamless and remain constant," and stated that the Employer looked forward "to a long and lasting professional relationship." In closing, the

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speculative terms" only that unspecified changes would occur in the future), *enforced mem.* 634 F.2d 635 (9th Cir. 1980).

[9] 363 NLRB No. 193, slip op. at 3.

[10] *Id.*, slip op. at 2, 4.

[11] *Id.*, slip op. at 4.

[12] *Id.*, slip op. at 4-5. *Cf. Data Monitor Systems, Inc.*, 364 NLRB No. 4, slip op. at 3 & n.11 (federal contractor subject to Executive Order 13495 did not become a perfectly clear successor when it distributed applications to the predecessor's employees, where neither application packets nor "associated conduct" suggested that completing the applications was "simply an administrative formality"), distinguishing *Cadillac Asphalt Paving Co.*, 349 NLRB 6, 11 (2007) (successor expressed intent to hire predecessor's employees when it asked employees to complete W-4 forms with their applications, indicating that successor had already decided which applicants to hire).

Employer "welcome[d]" them to the company. While the Employer indicated in that letter that it would be providing more information in the coming weeks, including "benefit package details" and "policies," these vague statements were insufficient to fulfill the Employer's *Spruce Up* obligation to clearly announce its intent to establish a new set of conditions prior to or simultaneously with indicating it intent to retain the predecessor's employees.[13]

Accordingly, absent settlement, the Region should issue complaint in these cases consistent with the analysis herein.

/s/
B.J.K.

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[13] *See, e.g., Windsor Convalescent Center*, 351 NLRB at 982; *East Belden Corporation*, 239 NLRB at 793.