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Successor Employer Can Add Supervisor Duties to Jobs, NLRB General Counsel Found

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The Division of Advice of the ***National Labor Relations Board***'s Office of the General Counsel has determined that a "*Burns*" successor employer was permitted to add supervisory functions to job duties of the predecessor employer's union-represented nurses because it timely informed the nurses and the union of its intention to do so. ***Chestnut Health and Rehabilitation Group d/b/a Blue Hills Health and Rehab., LLC***, Case 01-CA-133937 (Mar. 6, 2015).

Under ***NLRB v. Burns Int'l Sec. Services, Inc.***, 406 U.S. 272 (1972), an employer is a successor if, in general, it continues the same business as its predecessor in the same manner and if a majority of its represented employees formerly worked for the predecessor. A successor employer is required to recognize and bargain with the union representing its employees, but usually may set its own initial terms and conditions of employment.

The successor employer in *Chestnut Health* assumed the operations of a nursing facility whose service employees and registered nurses were represented by separate unions. The service employees were hired, their union was recognized, and their collective bargaining agreement was adopted. The successor employer also hired the predecessor employer's nurses, but told them their job would now include supervisory duties. (Under the successor employer's business model, nurses independently disciplined and prepared performance reviews affecting pay increases and bonuses.) The successor employer told this to the union and the nurses weeks before employment was to begin, and it declined to recognize the union as the representative of the nurses because they were supervisors who are excluded from National Labor Relations Act coverage.

The nurses did not begin performing supervisory functions immediately. Answering a union inquiry, the employer said the nurses would soon participate in supervisory training. Nonetheless, the union filed an unfair labor practice charge alleging the employer unlawfully failed to recognize and bargain with the union. After conducting training, the employer instructed the nurses to commence performing

responsibilities as supervisors.

During its investigation, the NLRB's Regional Office determined the nurses were supervisors under the NLRA and submitted the case to the Division of Advice on whether to issue a complaint because the employer failed to bargain with the union as a *Burns* successor.

While the Division of Advice decided the employer was a *Burns* successor that must recognize the union as the representative of its employees, it also found that the employer may set initial employment terms for the nurses. Here, part of those initial terms included supervisory duties, which resulted in the formerly represented nurses being ineligible to be represented by a union. Thus, a potential successor employer may add supervisor duties to the work of employees of a predecessor employer it intends to hire by clearly and timely (in *Chestnut Health*, the successor did so in the first communication with the nurses and weeks before employment) informing the union and the employees that such duties will be part of the future employment terms.

Secondarily, the Division noted an exception to an employer's right to set initial terms and conditions of employment. When it is "perfectly clear" the successor will retain all of the employees and (1) it has not clearly informed employees that it will institute different terms and conditions of employment, or (2) it has mislead employees to believe that there would not be changes, it loses the right to set the initial terms and conditions of employment. *Spruce Up Corp.*, 209 NLRB 194 (1974). Here, the Division found the employer was not a "perfectly clear" successor because it provided clear notice to the employees and the union of the new conditions of employment. Consequently, the successor employer had the right to set the initial terms and conditions of employment of the nurses, including adding supervisory duties to their job.

It is uncertain how long a successor may have the opportunity to set initial terms and conditions. The Division also noted the General Counsel has opined that the Board should reconsider *Spruce Up* and return to what the General Counsel says is the plain language of the "perfectly clear" caveat in *Burns:* whenever it is "perfectly clear" that a successor plans to retain the predecessor's workforce, regardless of what it has communicated to employees, the successor must bargain with the union before setting the initial terms and conditions of employment. If a complaint had issued here, the General Counsel could have litigated that position before the Board. However, employers are forewarned that the General Counsel likely is looking for a vehicle to attack *Spruce Up* and urge its reconsideration before the Board.

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