Canteen Company *and* Hotel Employees and Restaurant Employees Local No. 122, AFL–CIO. Case 30–CA–11826

June 30, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS, BROWNING, COHEN, AND TRUESDALE

On December 7, 1993, Administrative Law Judge Joel A. Harmatz issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed a brief in response to the Respondent's exceptions and filed cross-exceptions with a supporting brief.

The National Labor Relations Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified.[3]

The primary issue in this case is whether the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally setting initial wage rates that were different from those paid by the predecessor under its collective-bargaining agreement with the Union. We agree with the judge that the Respondent was precluded from unilaterally changing the wage rates without first consulting with the Union pursuant to the ''perfectly clear'' caveat of *NLRB v. Burns Security Services*, 406 U.S. 272, 294–295 (1972). That proposition was stated by the Supreme Court as follows:

> Although a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor, there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms. In other situations, however, it may not be clear until the successor employer has hired his full complement of employees that he has a duty to bargain with a union, since it will not be evident until then that the bargaining representative represents a majority of the employees in the unit as required by § 9(a) of the Act, 29 U.S.C. § 159(a).

As discussed by the judge, the Board in *Spruce Up Corp*., 209 NLRB 194, 195 (1974), held that the *Burns* ''perfectly clear'' caveat should

> be restricted to circumstances in which the new employer has either actively or, by tacit inference, misled employees into believing they would all be retained without change in their wages, hours, or conditions of employment, or at least to circumstances where the new employer . . . has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment. [Footnote omitted.]

In this case, the Respondent, prior to assuming control of operations on July 1, 1992,[4] personally contacted the predecessor employees to say that the Respondent wanted them to apply for employment with the Respondent. Additionally, the Respondent had several discussions with the Union in June. These discussions initially concerned the Respondent's desire to establish a working manager position. The parties also discussed which sample contract they would use when negotiating a new collective-bargaining agreement. On June 22, the Respondent informed the Union that it wanted the predecessor employees to serve a probationary period with the Respondent. The Union agreed to this request. Also on June 22, the parties agreed to meet on June 30 to negotiate a collective-bargaining agreement. The Respondent did not mention in these discussions the possibility of any other changes in its initial terms and conditions of employment.

We agree with the judge that the Respondent violated Section 8(a)(5) of the Act when, on or after June 23, the Respondent told three of the four predecessor employees that they could continue working in the

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the judge's findings.

The Respondent also suggests that remarks made by the judge at the hearing exhibited bias and that the judge's bias affected his rulings and decision. After a careful examination of the entire record, we are satisfied that this allegation is without merit.

The General Counsel requests correction of two factual errors in the judge's decision. We make the following corrections: (1) contrary to the judge's finding in fn. 9, p. 6, a copy of the letter expressing Gallo's assent to proposed language regarding work performed by supervisors was received into evidence as G.C. Exh. 4; and (2) on L. 23, p. 8, the judge refers to the General Counsel's reliance on the testimony of ''Piquette and Anderson,'' but as the judge discusses in the next two paragraphs, he should have referred to ''Piquette and Cook.'' These minor errors do not affect our decision in this case, and the errors are corrected.

[2] We adopt the judge's successorship analysis and find it unnecessary to rely on the voluntary recognition theory set forth in fn. 36 of the judge's decision.

[3] We find merit in the General Counsel's exception to the administrative law judge's failure to provide in the remedy and in the notice to employees that the Respondent restore the conditions that existed under the Service America contract, that the Respondent maintain these conditions pending good-faith bargaining, and that the Respondent make the affected employees whole for the losses they incurred as a result of the Respondent's unilateral changes to their wages or other benefits implemented on July 1, 1992. We shall modify the Order and the notice to employees accordingly.

[4] All dates are in 1992, unless stated otherwise.

food services operation, but at significantly reduced wages. Specifically, we find that by June 22, when the Respondent expressed to the Union its desire to have the predecessor employees serve a probationary period, the Respondent had effectively and clearly communicated to the Union its plan to retain the predecessor employees.[5] Therefore, as it was ''perfectly clear'' on June 22 that the Respondent planned to retain the predecessor employees, the Respondent was not entitled to unilaterally implement new wage rates thereafter.

Our colleagues in dissent contend that the ''perfectly clear'' caveat in *Burns*, as interpreted in *Spruce Up*, should apply only when the new employer has failed to announce initial employment terms prior to, or simultaneously with, the extension of *unconditional offers of hire* to the predecessor employees. None of the cases cited in the dissent, including *Burns* and *Spruce Up*, expressly limit the caveat to such a late point in the transition from one employer to another. To the contrary, the judge correctly cited *Roman Catholic Diocese of Brooklyn*, 222 NLRB 1052 (1976), enf. denied in relevant part sub nom. *Nazareth Regional High School v. NLRB*, 549 F.2d 873 (2d Cir. 1977), as a controlling example of the imposition of an obligation to bargain about initial terms of employment prior to the new employer's extension of formal offers of employment to the predecessor's employees.

The respondent in *Roman Catholic* made an unequivocal statement to the union in March 1974 of an intent to hire all of the predecessor's lay teachers for the academic year beginning in September. It did not mention any changes in terms and conditions of employment. Subsequently, however, it transmitted employment contracts to the predecessor teachers which disclaimed any intention of being bound by the predecessor's terms. It then hired the predecessor teachers on the basis of unilaterally imposed terms. The Board found that the March 1974 statement made ''perfectly clear'' the respondent's intent to hire all of the predecessor's employees and bound it to bargain about initial terms.

[5] We disagree with our dissenting colleagues' contention that the Respondent did not have a plan on June 22 to retain the predecessor employees. It is not disputed that the Respondent intended from the outset to hire all of the predecessor employees; that in early to mid-June the Respondent personally urged each predecessor employee to fill out an application and schedule an interview; and that the Respondent took no action to attract or consider outside applicants until a few days before its scheduled opening, after it learned that the predecessor employees would not accept employment based on the unilaterally imposed wage rates. In addition, by its contacts to the employees to urge them to apply, and by its discussions with the Union, including the agreement it reached with the Union that the predecessor employees would serve a probationary period, the Respondent had made it ''perfectly clear'' by June 22 to both the Union and the employees, that it intended to hire all the predecessor employees.

The dissent's reliance on the Second Circuit's denial of enforcement in *Roman Catholic* is unavailing. The court's opinion was based on a view of *Burns* which is more restrictive than *Spruce Up* and its progeny. According to the Second Circuit, a new employer remains free to fix initial terms unless it expressly promises continued employment to each of the predecessor's employees on the basis of the existing terms. In the Second Circuit's view, silence about wages and benefits throughout the hiring process, even after the act of hiring, would not bind the employer to initial bargaining. On the other hand, if the respondent in *Roman Catholic* had expressly declared to the predecessor employees in March 1974 that they would be retained on the basis of existing terms, the Second Circuit would presumably have agreed with the Board that the subsequent offer to hire those employees on different terms was unlawful.

This view of the *Burns* ''perfectly clear'' caveat is too restrictive when viewed in light of the reasoning which the Board enunciated in *Spruce Up*. In that case, the respondent made it clear in its initial meeting with the union that initial pay rates would be different from those of the predecessor. Thus, the Board held that the new employer was not a ''perfectly clear'' successor because it had stated from the outset that it would be hiring the predecessor employees pursuant to the new terms. *Spruce Up*, supra at 195.

The court's reasoning in *Roman Catholic*, on the other hand, turns this rule on its head, and would require the new employer to make unequivocal offers of hire to the existing employees on the basis of the predecessor's terms and conditions of employment before concluding it was a ''perfectly clear'' successor. This requirement is inconsistent with the express language of the ''perfectly clear'' caveat in *Burns*. Moreover, it does not take into account the very real possibility that existing employees could be misled into believing ''they would all be retained without change in their terms and conditions of employment.'' Id. To deal with this possibility, the Board in *Spruce Up* held that an employer who was silent about its intent with regard to the existing terms and conditions of employment would be found to be a ''perfectly clear'' successor if it stated or clearly indicated it would be hiring the predecessor's employees.

The *Roman Catholic* opinion did not refer to *Spruce Up*, but the Board's holding in the later case is entirely consistent with *Spruce Up*'s interpretation of the ''perfectly clear'' caveat. Any doubt about the consistency between the two cases should have been laid to rest in *Fremont Ford*, 289 NLRB 1290, 1296–1297 (1988). In that case, the Board again imposed an initial bargaining obligation under the ''perfectly clear'' exception on a respondent employer which manifested the intent

to retain the predecessor's employees prior to the beginning of the hiring process.

There, the respondent new employer informed the union on May 6, 1982, that only 3 or 4 of the 22 predecessor employees might not be retained. The respondent did not, however, announce significant changes in initial terms and conditions of employment until it conducted hiring interviews the following May 17. The Board found that the respondent's statement to the union made it a ''perfectly clear'' successor, and that the respondent had not made a lawful *Spruce Up* announcement because ''[i]t was not until after the hiring process had begun that the [r]espondent first informed the Fremont employees that there would be significantly different employment conditions.'' 289 NLRB at 1297. In addition, although the respondent in *Fremont Ford*, like the Respondent here, first informed the predecessor's employees about significantly different employment conditions during hiring interviews, the Board expressly referred to *Spruce Up* in holding that the respondent had ''failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment.'' Id.[6]

We fail to see how our dissenting colleagues can apply a more restrictive reading of *Spruce Up* without overruling *Roman Catholic* and *Fremont Ford*.[7] We would adhere to that precedent and to its proper application in this case.

Accordingly, because the Respondent did not announce the new wage rates until June 23, *after* it had effectively announced its intent to retain the predecessor employees, we agree with the judge that the Respondent violated the Act by unilaterally changing the terms and conditions of employment. Thus, we also agree with the judge that the Respondent violated Section 8(a)(3) and (1) of the Act by constructively denying employment to the predecessor employees (i.e., making them choose between employment on its unlawfully unilateral terms and declining the employment offer), and that it violated Section 8(a)(5) of the Act by refusing to recognize and bargain with the Union.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Canteen Company, Milwaukee, Wisconsin, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for subparagraph 2(a).

''(a) On request of the Union, rescind the above unilateral changes until such time as the Respondent negotiates in good faith with the Union to agreement or to impasse.''

2. Insert the following subparagraph 2(b) and reletter the subsequent subparagraphs.

''(b) Offer Susan Anderson, Kelly Piquette, and Irene Cook immediate employment in their former positions, or if nonexistent, to substantially equivalent jobs, and make them whole for losses sustained by reason of the discrimination against them and by reason of the Respondent's unilateral changes in the unit employees' wages or other benefits commencing July 1, 1992, in the manner set forth in *Ogle Protection Services*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).''

3. Substitute the attached notice for that of the administrative law judge.

CHAIRMAN GOULD, concurring.

I join Members Browning and Truesdale in finding that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally setting initial terms and conditions of unit employees' jobs without affording the Union a chance to bargain. As stated in their opinion, the finding of a violation is warranted under the standard set forth in *Spruce Up Corp*., 209 NLRB 194 (1974), enfd. on other grounds 529 F.2d 516 (4th Cir. 1975). I write separately, however, to express my opinion that the *Spruce Up* standard represents an unduly restrictive reading of the Supreme Court's definition of circumstances in which a successor employer must bargain about initial terms and conditions of employment.

In *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), the Supreme Court held that ''[a]lthough a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor, there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms.'' 406 U.S. at 294–295. In *Spruce Up*, a Board majority interpreted this language and, after factoring in the perceived desire and willingness of employees to work under different conditions, held that ''[w]hen an employer who has not yet commenced operations announces new terms prior to or simultaneously with his invitation to the previous work force to accept employment under those terms, we do not think it can fairly be said that the new employer 'plans to retain all of the employees in the unit,' as that phrase was intended by the Supreme Court.'' 209 NLRB at 195. The Board majority

[6] In a subsequent case, the Board held that a new employer cannot make a lawful *Spruce Up* announcement if it engages in discriminatory hiring practices. *U.S. Marine Corp*., 293 NLRB 669, 672–673 (1989), enfd. en banc 944 F.2d 1305 (7th Cir. 1991), cert. denied 503 U.S. 936 (1992). Although the respondent in *Fremont Ford* was also found to have engaged in discriminatory hiring, the Board's interpretation of *Spruce Up* in that case, as it relates to the timing of the announcement of new terms, is controlling.

[7] We note that Member Stephens, who dissents here, participated on the panel which decided *Fremont Ford*.

then stated that the perfectly clear ''caveat in *Burns* . . . should be restricted to circumstances in which the new employer has either actively or, by tacit inference, misled employees into believing they would all be retained without change in their wages, hours, or conditions of employment, or at least to circumstances where the new employer . . . has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment.'' Id. (Footnote omitted.)

I question the validity of *Spruce Up* and believe that it grafts on an additional requirement for finding a ''perfectly clear'' successor which is neither warranted nor intended by the Supreme Court in *Burns*. The Supreme Court stated that the test was only whether ''the new employer plans to retain all of the employees in the unit'' for the new employer to be a ''perfectly clear'' successor. *Burns*, 406 U.S. at 294–295. Contrary to the majority's opinion in *Spruce Up*, 209 NLRB at 195, the Supreme Court in no way even suggested, much less stated, that the ''desire'' of the employees or their ''willingness'' to accept the new employer's offer was to be considered in determining whether the employer planned to retain all of the employees in the unit. I agree with the dissents of Members Fanning and Penello on this point. See *Spruce Up*, 209 NLRB at 205–206 (Member Fanning dissenting) and 207–208 (Member Penello dissenting).

Indeed, as the Court noted in *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27, 41 (1987):

> [I]n *Burns* we acknowledged the interest of the successor in its freedom to structure its business and the interest of the employees in continued representation by the union.

The fact is that in many, if not most, business rearrangements, the successor employer perceives a need for change or greater flexibility in the employment relationship. This is the essential dynamic involved in the instant case as well as countless others. To eliminate instances where employers express an intent to provide changed employment conditions from the obligation to negotiate under the ''perfectly clear'' standard announced in *Burns* would both render the holding on this point meaningless and also disregard the careful balance between competing interests articulated by the Court in both *Burns* and *Fall River Dyeing*.

This point is made graphically when one takes into account the employer's right to institute unilaterally its own position at the time that the new operation is established. Under *Burns*, the employees and unions are protected by the right to negotiate subsequent to the employer's communication of an intent to retain the incumbent work force. The language of *Burns* makes this point clear. The employer's obligation is *not* to adhere to terms which it views as unsuitable. This was the proposition rejected by the Court in *Burns*.

All that is required by *Burns* is negotiation prior to the commencement of the operation. As Member Fanning correctly noted in his *Spruce Up* dissent,[1] this is the only circumstance in which negotiations could be possibly contemplated under the ''perfectly clear'' test in *Burns*. For where the employer announces its intent to adhere to the predecessor's collective-bargaining agreement there is little or nothing about which to bargain.

It is said that a rule such as the one that I have propounded—the approach initially articulated by Members Fanning and Penello—creates a disincentive to hire the old work force. See, e.g., *Spruce Up*, 209 NLRB at 195. Aside from the fact that there are disincentives to hire aplenty already contained in Federal labor law,[2] I rather doubt the proposition that the obligation to bargain alongside of the ability to institute unilaterally the employer's own position when its operation commences will induce employers appreciably to be less forthcoming with employment offers.

Again, my judgment is that *Spruce Up* represents a misreading of *Burns*. The characterization of *Burns* that the Court subsequently provided in *Fall River Dyeing* represents the better view of the issue at hand. Thus, in the present case, the dispositive fact establishing the Respondent's status as a ''perfectly clear'' successor is undisputed: the Respondent intended to attempt to hire its initial work force from the employees currently working at the predecessor's facility. The Respondent was therefore obligated to bargain with the Union before it ''fix[ed] terms'' (*Burns*, 406 U.S. at 295) and violated Section 8(a)(5) and (1) by unilaterally making changes in existing terms and conditions of employment prior to commencing operations on July 1, 1992.

MEMBER STEPHENS and MEMBER COHEN, dissenting.

We would reverse the judge's findings that the Respondent violated Section 8(a)(1), (3), and (5) of the Act and would dismiss the complaint in its entirety. As discussed below, we would find that the Respondent was free to set initial employment terms, that the Respondent was not a *Burns* successor because it lawfully did not employ any of the predecessor's employees, and that the Respondent was, thus, not obligated to recognize and bargain with the Union.

A determination of the Respondent's bargaining obligations, if any, begins with a discussion of the Supreme Court's decision in *NLRB v. Burns Security Services*, 406 U.S. 272 (1972). In *Burns*, the Supreme

[1] 209 NLRB at 206.

[2] See W.B. Gould, *Agenda for Reform* (MIT Press 1993), 173–174; *John Wiley & Sons v. Livingston*, 376 U.S. 548 (1964); *Howard Johnson Co. v. Detroit Local Joint Executive Board*, 417 U.S. 249 (1974); *Burns*, 406 U.S. at 285–288.

Court held that, although a successor employer may be obligated to bargain with the union that represented the predecessor's employees, the successor is ordinarily *not* bound by the substantive terms of the collective-bargaining agreement between the union and the predecessor and is, instead, free to set initial terms and conditions of employment. One of the concerns expressed by the Court in reaching these holdings was that a new employer may be reluctant to take over a moribund business unless the employer can make changes in the structure of the business, in the labor force, and in the terms and conditions of employment. 406 U.S. at 287–288. As to its second holding—that a new employer may set its own initial terms and conditions of employment—the Court noted that it ''is difficult to understand how [the new employer] could be said to have *changed* unilaterally any pre-existing term or condition of employment without bargaining when it had no previous relationship whatsoever to the bargaining unit and, prior to . . . [the hire date], no outstanding terms and conditions of employment from which a change could be inferred.'' 406 U.S. at 294 (emphasis in the original). The Court, however, went on to state that:

> Although a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor, there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms. [406 U.S. at 294–295.]

This exception has become known as the ''perfectly clear'' caveat.

The Board, in *Spruce Up Corp*., 209 NLRB 194, 195 (1974), enfd. on other grounds 529 F.2d 516 (4th Cir. 1975), interpreted the ''perfectly clear'' caveat of *Burns*, holding as follows (emphasis added):

> When an employer *who has not yet commenced operations* announces new terms prior to or simultaneously with his invitation to the previous work force to accept employment under those terms, we do not think it can be fairly said that the new employer ''plans to retain all of the employees in the unit,'' as that phrase was intended by the Supreme Court. . . . We believe the caveat in *Burns*, therefore, should be restricted to circumstances in which the new employer has either actively, or, by tacit inference, misled employees into believing they would all be retained without change in their wages, hours, or conditions of employment, or at least to circumstances where the new employer . . . has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment.

The Board restricted application of the ''perfectly clear'' caveat because (1) the Board did not want to discourage new employers from commenting favorably on the employment prospects of the predecessor employees; (2) the Board recognized that when a new employer announces new terms prior to extending an offer to hire the predecessor employees, there is a real possibility that the employees may not accept employment with the new employer; and (3) absent the announcement of new terms, the Board was concerned that employees would be misled into believing that they would be retained without change in their employment conditions. Id.

The judge, in this case, focused on the issue of whether the employees were misled into believing they would be retained without changes in their working conditions. We believe this misconstrues *Spruce Up* by failing to consider its link to *Burns*. In our view, the Board in *Spruce Up* was interested in protecting employees from being misled into *accepting employment* with the belief that they would be retained under the predecessor's terms and conditions. This view is supported not only by the language and rationale of *Spruce Up* and the rationale of *Burns*, but also by the fact that the very language relied on by the judge includes a footnote citing *Howard Johnson Co*., 198 NLRB 763 (1972), and *Good Foods Mfg. & Processing*, 200 NLRB 623 (1972). In both those cases, the employees were misled into *accepting employment* with the new employer with the belief that they were being retained without a change in the terms and conditions of employment, only to have the successor employer unilaterally change the terms and conditions *after* having already hired almost all of the predecessor's employees. The Board found violations in each case.

This case confronts the Board with a choice of whether to follow an interpretation of the *Spruce Up* doctrine that was embraced (apparently by implication) in *Roman Catholic Diocese of Brooklyn*, 222 NLRB 1052 (1976), or to accept the Second Circuit's contrary interpretation when it reviewed *Roman Catholic Diocese* on appeal. *Nazareth Regional High School v. NLRB*, 549 F.2d 873, 881–882 (2d Cir. 1977). Unlike our colleagues, we opt for the Second Circuit's analysis, which in our view is a more faithful application of *Spruce Up* and the policies of *Burns* and which, in our view, requires a dismissal of the complaint here.[1] As we also show below, the Board's analysis in

[1] The case currently at issue is distinguishable from *Roman Catholic Diocese* because in that case the respondent made a direct announcement of an intent to retain the predecessor's employees. The majority in this case has to infer the Respondent's announcement of an intent to retain the employees from the Respondent's actions.

Roman Catholic Diocese was something of an aberration when compared with other Board decisions issued both before and after it.

In *Roman Catholic Diocese*, the respondent told the union on March 25 that ''we intend to rehire all of the people back. They will be retained next year.'' A month later, the respondent disavowed any promise to rehire the predecessor's teachers. The respondent commenced operations in September with a faculty consisting almost entirely of the predecessor's teachers (49 of 55). The teachers were rehired at different terms and conditions of employment than those that existed under the predecessor. The Board found (without citing or discussing *Spruce Up*) that the respondent became obligated on March 25 to consult with the union before imposing initial terms because that was the point at which the respondent expressed its intent to rehire all of the predecessor's teachers.

The Second Circuit denied enforcement of this portion of the Board's decision because, in the court's view

> [t]he important consideration in determining whether it is perfectly clear that a successor intends to retain all of the employees is whether they have all been promised re-employment on the existing terms. . . . A successor-employer's right to set initial terms of employment may not be rendered nugatory solely on the basis of an expression of intention to rehire its predecessor's employees—particularly when the successor's other actions are completely inconsistent with such a statement.

549 F.2d 873 at 881–882. We agree with this reasoning, and believe that the perfectly clear exception should be limited to situations in which the employees have been tendered unconditional offers of hire, with no indication that the predecessor's terms will be changed. The ''perfectly clear'' exception will not apply if the employer indicates a change ''prior to or simultaneously with its offer to employ the predecessor's work force.'' Id. at 881, quoting *Brotherhood of Railway Clerks v. REA Express*, 523 F.2d 164, 171 (2d Cir. 1975), cert. denied 423 U.S. 1017 (1975).[2]

A survey of Board cases that apply *Spruce Up* also supports the view that the Board has intended to limit the ''perfectly clear'' caveat to instances in which the new employer fails to announce new terms prior to, or simultaneous with, extending unconditional offers of hire to the predecessor's employees. In *Jerry's Finer Foods*, 210 NLRB 52 (1974), the Board held that a new employer who, 2 weeks prior to taking over operations, announced his desire to hire the predecessor's employees, but at lower wages, did not violate the Act because it did no more than give preference to experienced employees contingent on their acceptance of the terms offered by the new employer. 210 NLRB at 53. The Board similarly found that the new employer in *Henry M. Hald High School Assn.*, 213 NLRB 415 (1974), did not violate the Act by announcing changes simultaneously with its employment offers after assuring the teachers months earlier that they could apply for jobs but informing them that the new terms and conditions had not yet been set. Finally, in *Boeing Co.*, 214 NLRB 541 (1974), affd. sub nom. *Machinists v. NLRB*, 595 F.2d 664 (D.C. Cir. 1978), the Board found no violation where, even though it could be said that the respondent intended to hire all or substantially all of the predecessor's employees (and that this intent was made known to the union and the predecessor's employees), the ''[r]espondent's 'intentions' were from the outset tied to the lower wages and benefits of [a different contract].'' In that case, the fact that the respondent's hiring intentions were based on lower wages and benefits was communicated clearly and early to the union. Id. at 552. Thus, the Board found that there was a possibility that the predecessor employees would not accept employment and it could not be said that the respondent planned to retain all of the employees in the unit, as that phrase was intended by the Supreme Court.

The facts in *Arden's*, 211 NLRB 501 (1974), presented a more difficult case for the Board because neither the union nor the employees received notice of the new employer's intent to offer the predecessor's employees employment, nor did they receive notice of the new wages and terms, until the very day that the new employer took over operation of the store. The Board found that there could be no argument that the employees were misled into believing that they would be retained without changes in their employment conditions because, although there was no advance notice of the new terms, there also was no advance commitment as to the employees' employment. Id. Admitting that it was drawing a fine line, the Board held that the new employer was entitled to set its initial terms and conditions. In reaching this decision, the Board took into consideration the facts that the new employer expressed its willingness to bargain with the union, there was no evidence of union animus, and no attempt by the employer to rid itself of the union. 211 NLRB at 502.[3]

[2] Contrary to the implication of our colleagues, we do not believe that the Second Circuit has limited the ''perfectly clear'' exception to situations where the new employer promises employment under the predecessor's terms. The exception would also apply to situations where the new employer promises employment and is *silent* as to whether the predecessor's terms will continue. In both instances, the employees can reasonably believe that these terms will not change.

[3] See also *United Maintenance & Mfg. Co.*, 214 NLRB 529, 535–536 (1974) (no violation of the Act where there was *no* indication that the new employer intended to change the terms and conditions,

Continued

On the other hand, the Board has found a new employer to have violated the Act by announcing new terms and conditions *after* hiring the predecessor's employees, without bargaining with their union. For example, in *Blitz Maintenance*, 297 NLRB 1005 (1990), the new employer took over operations on June 15; on the same day, the new employer gave the predecessor's employees job applications to fill out and told them that wages would remain the same and as few changes as possible would be made, although he did indicate a possibility that he would change scheduling. Within a couple of weeks, however, the new employer unilaterally implemented changes affecting wages and benefits and other terms and conditions of employment. The Board adopted the judge's finding that the employer violated the Act because he did not specify to prospective employees the initial terms and conditions. The Board found, however, that the employer was *not* required to rescind changes made to the employees' schedules because those changes were announced at the time that the employees were hired. 297 NLRB at fn. 2. See also *Starco Farmers Market*, 237 NLRB 373 (1978) (Board found violation where the new employer changed benefits after expressing its intent of keeping all of the predecessor's employees without indicating that the offers of employment were conditional on acceptance of new terms and conditions); and *Spitzer Akron, Inc*., 219 NLRB 20 (1975) (Board found a violation where the new employer stated before taking over operations that ''I want every man to stay on the job, and we will carry on as usual,'' but on taking over the operation, he actually changed a number of the terms and conditions of employment).

Contrary to the majority's assertion, our interpretation of *Spruce Up*, and its application in this case, is entirely consistent with the Board's decision in *Fremont Ford*, 289 NLRB 1290 (1988). In that case, the respondent conducted a misinformation campaign designed to mislead employees about their retention under the predecessor's terms and conditions of employment. For example, prior to making employment offers: the respondent's owner indicated to the union representative that he had doubts about retaining only a few of the predecessor's employees (thereby indicating that he intended to hire most of the employees); a supervisor directly informed two employees that they would be retained and assured another employee that nothing was going to change when the respondent took over operations, including having union representation; and the respondent instructed supervisors to conceal or make misleading statements to employees who inquired about new working conditions or terms of employment. Thus, in those circumstances, the Board found that the respondent's actions fell within the ''perfectly clear'' caveat to *Burns*, as interpreted in *Spruce Up*, because the respondent actively misled employees into believing that they would be retained without change in their conditions of employment and the ''[r]espondent failed to clearly announce its intent to establish a new set of conditions *prior to inviting* former employees to accept employment.'' 289 NLRB at 1297 (emphasis added).

Fremont Ford is also distinguishable from the present case because of the presence of 8(a)(3) violations. The Board found that the respondent in *Fremont Ford* violated Section 8(a)(3) and (5) under a *Love's Barbeque Restaurant No. 62*[4] analysis because the respondent did not hire some of the predecessor employees based on unlawful considerations: the interviews were tainted because the respondent conditioned the hiring of the predecessor employees on a willingness to abandon union representation and to cross the union's picket lines.[5] The Board found that, but for the respondent's unlawful conduct, it would have hired the predecessor employees and the union's status as the exclusive bargaining representative would have survived the successor's takeover of the business. 289 NLRB at 1295. Unlike the respondent in *Fremont Ford*, the judge specifically found in this case that there is no evidence that the Respondent harbored union animus nor is there evidence that the Respondent made an attempt to get rid of the Union. Further, there is no evidence in this case that the Respondent ran a ''misinformation campaign.'' In our view, the Board's findings in *Fremont Ford* support our position rather than that of the majority.

Thus, a survey of Board cases and our reading of the decisions in *Spruce Up* and *Burns*, lead us to conclude that the Board should reaffirm *Spruce Up* and clarify that a new employer need only consult with the predecessor employees' bargaining representative prior to setting initial terms and conditions if (a) the new employer plans to retain a sufficient number of predecessor employees to make it evident that the bargaining representative's majority status will continue and (b) the new employer fails to announce to the prede-

but it was clear that the predecessor employees would not have accepted employment even under the original terms and conditions, as shown by the fact that the employees were on strike for over 4 months prior to the new employer taking over); and *Holiday Inn of Victorville*, 284 NLRB 916 fn. 2 (1987) (no violation of the Act when the new employer ''did not mislead employees into believing that their retention would be without change in their wages, hours or conditions of employment, but expressly put them on notice that their future employment would be under new conditions, giving them the option of refusing employment if that arrangement was not to their satisfaction'').

[4] 245 NLRB 78 (1979), enfd. in pertinent part 640 F.2d 1094 (9th Cir. 1981).

[5] Member Cohen does not agree that the ''perfectly clear'' principle would apply where, but for 8(a)(3) discrimination, *some of* the predecessor's employees would have been hired.

cessor employees, prior to, or simultaneously with, extending an unconditional offer to hire, that its initial terms will be different from the predecessor's terms.[6]

In this case, the Respondent never announced that it would hire the Service America employees, but did announce its intent to establish new terms and conditions of employment before it invited Anderson, Piquette, and Cook to accept employment. In fact, the Respondent posted the job vacancies at the site instructing prospective employees that they were required to fill out applications in order to be considered for employment. The employees were also required to participate in interviews with the Respondent before they were offered jobs. It was during the individual interviews that the Respondent announced its wage rates and then made job offers to Anderson, Piquette, and Cook.

We disagree with the majority that the ''plan to retain all'' came into existence on June 22. The evidence shows that, on June 22, the Respondent had not yet decided whom to hire. Indeed, the interviewing of applicants was not scheduled to begin until the next day. As discussed above, the Respondent had decided on June 22 only to *consider* the hiring of the employees of the predecessor. In these circumstances, it was not ''perfectly clear'' that Respondent had decided, on June 22, to hire the employees of the predecessor. If anything, it is ''perfectly clear'' that no hiring decision had been made as of June 22.

Further, assuming arguendo that the Respondent had decided, by June 22, to offer employment at the interview to be held on the next day, that offer would be at the new terms and conditions of employment. As set forth above, the new employer is privileged to set forth new terms at the time of the offer.

In our view, the circumstances of this case are similar to *Spruce Up*, because the Respondent must have realistically anticipated the possibility that the predecessor's employees would not desire to be employed under the new wages and, thus, it can not be said that it was ''perfectly clear'' to the Respondent that he would retain all of the employees.[7] Finally, as the Board did in the close case of *Arden's*, supra, we would take into consideration that the judge in this case specifically found no evidence of union animus, that the Respondent indicated its willingness to bargain with the Union, and that there is no evidence that the Respondent made an attempt to rid itself of the Union.

Our position is not altered by the facts relied on by the judge to find that the Respondent misled the employees. In his view, the employees were misled because: (1) the Respondent initiated discussions with the Union regarding a ''working manager''; (2) the Respondent kept the wage rates ''secret,'' even when two of the employees inquired about wages; and (3) the Respondent admits that it assumed that it would be retaining the Service America employees. The fact that the Respondent contacted the Union regarding the creation of a ''working manager'' and the fact that the Respondent refused to discuss wage rates until the time of the interviews shows that it was anything but ''perfectly clear'' that the Respondent planned to retain the predecessor's employees without any change in their wages, hours, and conditions of employment. In our view, the following facts make it even less clear that the Respondent planned to retain the predecessor's employees: the Respondent posted the job vacancies and required job applications and interviews; the Respondent indicated to the Union that any employees hired would be subject to a probationary period; and the Respondent expressed a preference for working from another Canteen collective-bargaining agreement rather than the Service America (the predecessor's) agreement, if and when it began negotiations with the Union.

We are concerned that the majority's decision today will result in a rule whereby a new employer will become obligated to retain the predecessor's employees under their former terms and conditions of employment merely by indicating that it is *considering* hiring the predecessor's employees. This is exactly one of the scenarios that the Board was concerned about when it decided in *Spruce Up* to limit the ''perfectly clear'' caveat to certain circumstances. For instance, new employers may be discouraged from talking to the predecessor employees' bargaining representative or perhaps from even reviewing the predecessor's collective-bargaining agreement, until after the new employer has announced all of its changes in terms and conditions of employment and has hired its work force; otherwise the new employer may be found to have misled the predecessor employees into believing that they would be retained at their former terms and conditions. We are also concerned that the majority's decision is tantamount to announcing a requirement that a new employer must announce the changes it intends to make to terms and conditions of employment all at once, even if the new employer has not yet extended job offers to the predecessor employees.

[6] Member Cohen does not agree with part (a) of this test. In his view, it is inconsistent with the Supreme Court's language: ''plans to retain *all*'' (emphasis supplied). However, inasmuch as he agrees with part (b) of the test, he joins Member Stephens in finding that the Respondent was free to set initial terms and conditions of employment.

[7] Our view on this point is not changed by the judge's finding that after Anderson, Piquette, and Cook rejected the job offers, the Respondent ''[I]n a panicked reaction . . . [was] compelled to seek personnel from a variety of sources.'' The judge infers that the Respondent's ''panicked reaction'' is evidence of the Respondent's intent to hire all of the predecessor employees. We do not believe that the Respondent's *unannounced* intent is a factor that logically bears on whether it was ''perfectly clear'' that the Respondent intended to retain the predecessor employees without change in their terms and conditions of employment.

For all of these reasons, we would reverse the judge's decision and find that the Respondent did not violate Section 8(a)(5) of the Act by unilaterally changing the wage rates. Because we would find that the Respondent was free to set initial terms and conditions of employment, we would also reverse the judge's finding that the Respondent constructively denied employment to Anderson, Piquette, and Cook, thereby violating Section 8(a)(3). Finally, because we would find that the Respondent lawfully failed to employ a majority of the Service America unit employees, we would also reverse the judge's finding that the Respondent violated the Act by refusing to recognize and bargain with the Union. The Respondent did not hire *any* of the Service America employees. Thus the Service America employees were not a majority of the Respondent's work force, and the Respondent is not a *Burns* successor and is not obligated to recognize or bargain with the Union, which does not represent any of the Respondent's current employees at the Medical College.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain in good faith by withdrawing recognition or otherwise refusing to recognize and bargain with Hotel Employees and Restaurant Employees Local No. 122, AFL–CIO as the exclusive representative of employees in the following appropriate unit:

> All commissary food processing employees employed by the Employer at the Medical College of Wisconsin, excluding guards, professional employees and supervisors as defined in the Act.

WE WILL NOT refuse to bargain in good faith by unilaterally setting initial terms of employment for the employees described above, without consulting the Union.

WE WILL NOT discourage membership in a labor organization by constructively denying employment to, or in any other manner discriminating with respect to our employees' wages, hours, or other terms and conditions of employment.

WE WILL NOT in any like or related manner interfere with, coerce, or restrain employees in the exercise of their rights guaranteed by Section 7 of the Act.

WE WILL, on request of the Union, rescind the unilateral changes in our unit employees' wages or other benefits that were implemented on July 1, 1992, and WE WILL make affected employees whole for losses they incurred by virtue of our unilateral changes to their wages or other benefits.

WE WILL offer Susan Anderson, Kelly Piquette, and Irene Cook immediate employment in their former positions or, if nonexistent, to substantially equivalent jobs, and make them whole for losses sustained by reason of the discrimination against them, with interest.

WE WILL, on request, bargain collectively and in good faith concerning wages, hours, and other terms and conditions of employment with the Union as the exclusive representative of employees in the above-described unit, and embody any understanding reached in a signed agreement.

CANTEEN COMPANY

Benjamin Mandelman, Esq., for the General Counsel.
Steven H. Adelman, Esq. (Lord, Bissel & Brook), of Chicago, Illinois, for the Respondent.

DECISION

STATEMENT OF THE CASE

JOEL A. HARMATZ, Administrative Law Judge. This case was tried in Milwaukee, Wisconsin, on June 28 and 29, 1993, on an original unfair labor practice charge filed on July 22, 1992, and a complaint issued on November 29, 1992, alleging that the Respondent violated Section 8(a)(1), (3), and (5) of the Act by first bargaining, then withdrawing recognition from the Union as exclusive bargaining representative of a unit of employees in its newly acquired business, while constructively denying employment to Susan Anderson, Kelly Piquette, Irene Cook, and Sandra Wilson, the previously represented employees, by offering predictably unacceptable terms, thereby causing them to reject job offers. In its duly filed answer, the Respondent denied that any unfair labor practices were committed. Following the close of the hearing, briefs were filed on behalf of the General Counsel, the Charging Party, and the Respondent.

On the entire record,[1] including my opportunity directly to observe the witnesses and their demeanor, and after considering the posthearing briefs,[2] I make the following

[1] Errors in the transcript have been noted and corrected.

[2] On November 9, 1993, I issued an Order to show cause as to why the record should not be reopened for receipt of G.C. Exhs. 11(a) through (g) on a posthearing basis. By letter dated November 16, 1993, the Respondent advised that it had no objection thereto,

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, from facilities in Milwaukee, Wisconsin, operates as a contractor of food catering services. In the course thereof, the Respondent, during the 12-month period prior to issuance of the complaint, purchased and received at the facilities goods valued in excess of $50,000 directly from points outside the State of Wisconsin. The complaint alleges, the answer admits, and I find, that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the answer admits, and I find that Hotel Employees and Restaurant Employees Local No. 122, AFL–CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Factual Overview*

Prior to the events in issue here, Service America, a competitor of the Respondent, held the food service contract at the Medical College of Wisconsin. It had four employees at that location, namely, Susan Anderson, Kelly Piquette, Irene Cook, and Sandra Wilson. They were represented by the Union in a more comprehensive bargaining unit that also included some 150 other workers employed at a number of other locations where Service America provides food services. Recognition in that multilocation unit was memorialized in a collective-bargaining agreement between the Union and Service America having a term of October 1, 1990, through September 30, 1993.

In 1992,[3] the Medical College of Wisconsin reopened bidding on its food service operation. In late May or early June 1992, the Respondent—a food service contractor that operates in 15 States and has more than 300 collective-bargaining agreements—was informed that it was the successful bidder. Under the terms of the takeover, Service America would be replaced by the Respondent on July 1. Anderson, Piquette, and Cook applied and were offered jobs by the Respondent, but at significantly lower rates of pay. Because of the cut each rejected their job offer. On June 30, the Union was informed that because it did not represent any of the Respondent's employees it would not be recognized at the Medical College.

B. *Positions of the Parties*

The ultimate question in this case is whether the Respondent, having successfully bid the food service operation, was obligated to continue the bargaining relationship either by virtue of its own voluntary action or as a statutory successor. Remedially, perhaps even more significant is a prefatory allegation that the Respondent violated Section 8(a)(3) and (1) of the Act by offering former employees at the site predictably unacceptable rates of pay, causing them to reject the employment offers, thus, constituting a constructive and proscribed refusal to hire. In addition, the General Counsel contends that these rates were set at a time when the Respondent, under *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), and related cases, could not do so legitimately, without consulting the Union.

By way of defense, the Respondent defends against the 8(a)(3) and (1) allegations with the observation that the former employees were offered jobs at legitimately established, competitive wages. It claims that the new wage levels were substantially above those paid elsewhere to ''new'' employees hired into the Respondent's locations, and that it had every reason to assume that the job offers would be accepted. It contends that it legitimately acted alone in fixing the initial terms under aegis of *Burns*, and, further, that the new wage rates were not shown to have been grounded on antiunion motivation. As for the 8(a)(5) recognition issue, the Respondent asserts that it did not actually employ any of the former employees, and that while it did engage in preliminary discussions with the Union concerning an issue of importance to it, this was not tantamount to recognition or bargaining, and it at no time intended to grant recognition, nor did it have any obligation to do so. Finally, the Respondent argues that any successorship finding would rest on a material change in the scope of the unit, because the Service America employees were in a multilocation unit while, under the instant complaint, bargaining could be compelled only at a single location.

C. *Preliminary Exchanges Between the Parties*

There is no question that the Respondent, well prior to its July 1 startup, initiated contact with the Union, and, as shall be seen, actually negotiated a discrete term of employment. These exchanges are a major ''building block'' for the 8(a)(5) theory specified in the complaint, in which it is asserted that the Respondent actually agreed to recognize the Union, and violated Section 8(a)(5) when on June 30 it admittedly refused to negotiate.[4] Even if not tantamount to recognition, the General Counsel contends, in the alternative, that these discussions, coupled with the Respondent's intention to retain the Service America employees, precluded the Respondent from lawfully setting new wage rates without first consulting with the Union. See *Burns*, above, 406 U.S. at 294, 295.

In this connection, the facts show that in early 1992, prior to preparing its bid, and ostensibly to assist in the competitive process, the Respondent requested that the Union forward a copy of its collective-bargaining agreement that covered Service America's employees at the Wisconsin College of Medicine. (G.C. Exh. 2.) The Union obliged.

Thereafter, the Respondent was named as the successful bidder. In late May, Robert Kovacs, the Respondent's director of labor relations and its chief regional spokesperson for contract negotiation in Wisconsin and 15 other States, was informed of the acquisition by Dennis Hillgartner, the Respondent's district manager for food services, whose authority includes its Milwaukee sites. About a week later, Hillgartner again telephoned Kovacs advising that under the

and, accordingly, the record is hereby reopened for the limited purpose of granting the General Counsel's request that G.C. Exhs. 11(a)–(g) be, and they hereby are, received in evidence.

[3] Unless otherwise indicated all dates refer to 1992.

[4] See, e.g., *Snow & Sons*, 134 NLRB 709, (1961), enfd. 308 F.2d 687 (9th Cir. 1962).

Union's collective agreement with Service America there was no provision for a ''working manager.'' Hillgartner declared that, while this position would entail performance of bargaining unit work, it was essential to the Respondent's performance at the Medical College.[5]

On June 8, he again met with Kovacs, expressing concern as to how this requirement would impact on any ''labor contract.'' It was agreed that samples be collected of favorable contract language and then transmitted by Hillgartner to the Union.

According to Kovacs, he met with Hillgartner on June 8, showing him language in another labor contract with a different union that authorized a supervisor to perform unit work. Kovacs then telephoned Vince Gallo, the business manager of Local 122. Kovacs offered the following account of their conversation:

> I basically just explained to him that we were awarded the contract at the Medical College and that we were interested in working out an arrangement wherein we could have language concerning a working manager.

Gallo, according to Kovacs, replied that he did not think this would present a problem unless someone would get hurt by it, but requested something in writing. Kovacs stated, ''I'll send it to you.''[6]

Gallo differs slightly with Kovacs in this regard, testifying that he expressed disenchantment with the idea of yielding a position normally held by members, but that he agreed to review language in other contracts extending this privilege. Gallo also testified that their discussion had ramifications far broader than the working manager issue. He claims that he suggested to Kovacs that as a guide to overall negotiations, he wanted to ''work off of the Service America contract,'' but that Kovacs resisted, indicating that the Respondent preferred that one its own comparable contracts be used as a basis for negotiation. Gallo was led to understand that Kovacs had the Miller Brewing agreement in mind.[7]

Gallo testified that Hillgartner, on or about June 11, hand delivered to his office written contract language that would accommodate the Respondent's needs on the working manager issue. The source was a collective-bargaining agreement between the Respondent and a sister local of the Union. (G.C. Exh. 3.) In addition to Hillgartner's contact, by letter of June 15, 1992, Kovacs informed Gallo as follows:

> As you are aware, Canteen will be opening a new account, Medical College of Milwaukee on July 1, 1992.
>
> It is imperative to our successful operation of this facility that it be staffed by a working manager. To that end, I would propose that we either add language to any collective bargaining agreement or sign a letter of understanding that clearly spells out this position.
>
> Therefore, I would propose the following language that is contained in other H.E.R.E. contracts:
>
> *Bargaining Unit Work*
>
> [It is] agreed that supervisory employees shall be allowed to perform work normally done by bargaining unit employees as long as they do not displace said employees.
>
> If you agree, please sign one copy of the two enclosed originals and return same to my office.[8]

Having failed to receive a signed copy from the Union, on or about June 22, Kovacs testified that he initiated another conversation with Gallo, because ''we were within a couple of weeks of opening the account and we wanted to make sure that we were in agreement on it.'' Although Kovacs testified that Gallo ultimately agreed to this language, he could not recall whether Gallo indicated that he would do so during this phone conversation. It appears that Gallo subsequently signified his assent by mail.[9]

Gallo also testified that it was his recollection that, during this second conversation, he arranged with Kovacs to meet in conjunction with impending negotiations covering the Respondent's employees at Miller Brewing. Kovacs suggested that they exchange proposals in that regard on June 30, using the morning for that purpose, and then in the afternoon, that they proceed to negotiate an agreement for the Medical College. Kovacs agreed that an arrangement had been made whereby at noon on June 30, ''we would discuss the Service America contract.''[10] Specifically, it does not appear that the Respondent's prior agreement to meet for that purpose was subject to any express conditions or limitations.[11]

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[5] Hillgartner testified that food service arrangements at the College called for ''executive style catering'' for ''special events.'' He added that the Medical College had expressed dissatisfaction with Service America's performance in this area. It was felt that a qualified individual (Terry Mouller) was available within the Respondent's organization that could effectively perform that responsibility. She was a management trainee, however, who had already been promised a position as ''assistant manager.'' He informed Kovacs of this need, declaring that it was ''imperative'' that the working manager position be secured to deliver on the promises in the proposal. He added that ''if we're going to in fact recognize the union, I needed . . . the understanding that we will have a flexible working assistant manager.''

[6] Kovacs testified that he is not involved in day-to-day labor activity at a particular site, but that he will ''negotiate a contract over whatever period of time, and then . . . leave, rarely to go back for another three years.'' It is therefore fair to assume that, at a minimum, his involvement at the Medical College was in anticipation of collective bargaining.

[7] During a series of leading questions, propounded by the Respondent's counsel, Kovacs denied that other Canteen contracts were mentioned during these deliberations. Although counsel might have been entitled to adduce evidence in this fashion, it was an option that failed to produce reliable testimony. I believed that more comprehensive negotiations were a high-level priority for Gallo and it is entirely likely that he raised that issue. His account was consistent with the fact that at the June 30 meeting, as Kovacs himself testified, Gallo presented a comparative study of terms contained in the Respondent's Miller Brewing and the Union's Service America labor agreements. (R. Exhs. 1 and 2.) Gallo was believed over any denial by Kovacs that this step was taken by the former pursuant to their earlier discussion.

[8] G.C. Exh. 4.

[9] The letter was not offered in evidence.

[10] Gallo's affidavit places this exchange as having taken place around the end of June. In light of Kovacs' admission, any discrepancy in this regard is viewed as immaterial.

[11] Gallo also testified, without contradiction, that he discussed with Kovacs a request by the latter that, once employed, the incumbent employees be required to serve ''a relatively short probationary pe-

D. *The Offers of Employment to Service America Employees*

1. The Respondent's intentions with respect to the Service America employees

During and before this interaction with the Union, according to a consistent segment of the Respondent's evidence, it held the intention, albeit unannounced, to retain the Service America employees at the Medical College. It is also asserted on behalf of the Respondent that it was expected that they would accept its offers of employment. Thus, Hillgartner testified that the Respondent, as a matter of practice, on displacing another contractor, would post the vacancies at the site, and, as he put it: ''. . . we obviously give the first choice of jobs to current employees that are there.'' Matthew Fitzgerald, a ''manager of food services,'' who reported to Hillgartner, agreed that the Respondent ''anticipated hiring those people.'' Similarly, Kovacs testified that he assumed that the Union would be recognized at the Medical College because, as he explained, it was the Respondent's practice to ''offer the existing employees positions, and in most cases the employees seem to accept those jobs and come on board.''

As events unfolded, hiring responsibility was delegated to Steven Srok, the Respondent's onsite manager at the Medical College. In the presence of the assistant manager, Terry Moulller, he conducted the formal interviews. Srok testified that his superiors had instructed him to accord a preference to those already employed at that location. He added that this was in accord with his own desire to retain the Service America employees because he ''wanted their experience.''[12]

As shall be seen, the Respondent's intention to retain the Service America employees was backed by an expectation so strong that it neglected to take serious steps to recruit from other sources until it was informed that they had rejected job offers.

2. The invitations to apply

Consistent with the foregoing, on or about June 11, Matthew Fitzgerald posted the following announcement in the Medical College cafeteria:

> Canteen Corporation is accepting application's [sic] for all positions at the Medical College of Wisconsin facility. Blank applications can be obtained at our office located at 4500 West Wisconsin. Office hours are 7:30 a.m. to 4:30 p.m. You cannot be considered for a position if you do not fill out an application.
>
> Any questions concerning employment should be directed to myself at (414) 774–1111.
>
> Thank you.[13]

Kelly Piquette, Susan Anderson, and Sandra Wilson testified that before they elected to respond, they were solicited personally by the Respondent's officials.[14] In this respect, Anderson testified that Fitzgerald contacted her in early June, requesting a meeting, prompting her to go to his office in which she participated in a brief discussion of the Respondent's objectives at the Medical College.[15] Piquette testified that she was telephoned at work by Terry Moulller, the designated assistant manager at the Medical College. Moulller urged Piquette to schedule an interview and to complete an application. In addition, Sandra Wilson, also a Service America employee, testified that shortly after the posting, Fitzgerald told her that ''he would like me to contact him and set up an interview because he was interested in talking to me about staying on as an employee.'' Wilson, who never filed an application, testified that towards the end of June, after the others actually had their employment interviews, she again was told by Fitzgerald that he was still interested in interviewing her.[16]

3. Fitzgerald's alleged antiunion remarks

The General Counsel asserts that Fitzgerald, during these preliminary discussions, made comments concerning the Union that not only disclosed an antiunion intent, but, though unalleged, constituted independent 8(a)(1) violations. In this respect the General Counsel relies on the testimony of Piquette and Anderson. Each testified that in their meetings with Fitzgerald, he adverted to unionization in negative terms.

Piquette testified that when she met with Fitzgerald, she asked if there would be a union. Fitzgerald replied, ''No,'' advising that she could seek work at Miller Brewing[17] if ''you feel the need . . . to . . . have a union representative . . . if you feel you can't come to us personally.''[18] Beyond that, Piquette asserts that when she inquired about rates of pay, Fitzgerald stated that he was not interested in discussing wages or benefits at that juncture.[19]

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riod.'' Kovacs was told that the Union would have no problem with such a requirement.

[12] Srok admits that he discussed the Service America employees with Moulller, who previously worked with them at the Medical College, and who advised that ''everyone worked well.'' In fact, the Respondent concedes that Srok took no steps to solicit other applicants until after he was informed, in late June, that Piquette, Anderson, and Cook had rejected job offers.

[13] G.C. Exh. 5.

[14] Irene Cook, the fourth Service America employee, testified that she too participated in a conversation with Fitzgerald. The record does not clearly establish just who initiated this contact.

[15] Anderson could not recall if her application had been filed at the time. I find that her application dated June 15 actually was filed subsequently. G.C. Exh. 8.

[16] Fitzgerald testified that he was approached, after the posting, by two Service America employees whom he did not identify. He claims that they inquired as to how ''they could go about filling out this applications.'' This testimony does not squarely contradict the General Counsel's witnesses, and even were I to construe it as presenting inconsistent testimony, the more precise testimony offered by the latter would be credited.

[17] Miller Brewing is one of the Respondent's three organized operations in the Milwaukee region.

[18] Piquette's prehearing affidavit was not quite so direct. There she indicates that when she asked about the Union, he simply replied that if the employees had a problem, they could seek assistance of union representatives at Miller Brewing.

[19] Fitzgerald claims that when asked if the operation would be union, he indicated ''that it was up to the employees to make that decision.'' He acknowledges that he identified Miller Brewing and Briggs & Stratton, as the Respondent's union operations, but denies that he made any suggestion that Piquette go to either facility. Fitzgerald admits that, previously, he had been informed by superiors

Continued

As indicated, Irene Cook also met with Fitzgerald. She testified then when she inquired about rates of pay, Fitzgerald would only state that they would exceed ''minimum wages.'' Cook testified that when she inquired if the job would be union, Fitzgerald replied, ''absolutely not,'' and added that the Respondent did not want to keep all the girls because ''they want a change.'' After she indicated that she wanted to remain union, Fitzgerald allegedly commented that Cook might be interested in seeking work at one the Respondent's sites that were union.

I believed Piquette and Cook only insofar as they testified that when inquiries were made about wage rates, Fitzgerald declined to offer precise guidance. Although Fitzgerald was an unimpressive witness, in this instance, Piquette and Cook were even less believable. The antiunion remarks they attribute him simply did not ring true.[20] It is my distinct impression that the Respondent at the time was on a course pointing to recognition of the Union and retention of the Service America employees. The Respondent's commitment to this eventuality was so strong that its recruitment efforts did not include any significant exploration of alternative sources for manning the job. Mid-June would have been a totally inopportune time and context for a subordinate to strike out against the Union. Considering the probabilities evident from the entire record, together with my strong suspicions, garnered initially during the testimony of Piquette and Cook, it is concluded that the Respondent is entitled to benefit of the doubt on this issue. I reject the assertions that Fitzgerald exhibited union animus during these preliminary conversations.

4. The interviews, job offers, and reduced hourly rates

''[D]uring the last full week of June,'' presumably commencing on June 23,[21] all Service America employees that applied were interviewed and offered jobs. The Respondent during those interviews for the first time disclosed publicly that it would not adhere to each and every existing condition of employment.

At the time, the Service America bargaining unit employees were compensated at the hourly rates set forth below:

Kelly Piquette	$6.79
Susan Anderson	7.49
Irene Cook	6.79
Sandra Wilson	7.49

As of June 23, only Piquette, Anderson, and Cook had filed applications. Srok, during their separate interviews, offered each a job,[22] but stated that they merely would earn $5.70 per hour, a reduction of 16 percent in the cases of Piquette[23] and Cook,[24] and 24 percent in the case of Anderson.[25] At the time of the interviews, Srok was fully aware of of the drastic reductions in earnings that the employees would sustain[26] if they accepted employment with the Respondent.[27] All three applicants expressed strong disenchantment with the wage offering, but were noncommittal on acceptance, advising that they would think it over.

The experience of Sandra Wilson, Service America's catering coordinator at the Medical College, presents a special case. She testified that she had two brief conversations with Fitzgerald. The first was about the time that the Respondent

that they anticipated that the job would be union, however, he denies having mentioned this to the applicants.

[20] It made no sense that Fitzgerald would have suggested that either seek work elsewhere in the Respondent's operation. Considering the Respondent's approach to manning the job it is inconceivable that Fitzgerald would have made any statements calculated to steer Service America applicants away from the Medical College.

[21] This is based on the credited testimony of Srok, who presumably would have the best information about the particular time frame. Accordingly, it is concluded that the interviews were held on and after June 23.

[22] Srok acknowledged the suitability of all three, when he described his efforts during the interviews to persuade them to accept employment with the Respondent as follows:

> I tried to explain extensively how we care about our people. I explained that I treat people fairly and when someone does a good job I let them know it. I tried to explain the benefits of working for our company. I wanted them to work for me.

[23] On June 22, perhaps, after the interview, Piquette completed her employment application, which indicated that she had started at Service America at $5.97, and almost 4 years later, was then earning $6.79 per hour. G.C. Exh. 6.

[24] Cook filed her application on June 16. G.C. Exh. 9. It disclosed a starting rate of $6.11 at Service America, which had increased to $6.79 by June 1992.

[25] Anderson filed her application on June 15. G.C. Exh. 8. It reflected that her Service America starting rate in July 1988 was $6.97, and that almost 4 years later she was earning $7.49.

[26] It is of interest that Srok testified that during both the Piquette and Anderson interviews he approached the wage issue as follows:

> . . . I tried to stress knowing that they had higher salaries, that we at Canteen treat our employees with respect, that we like to foster a team attitude, that . . . we're trying to be the best food service company in the world. I tried to instill that we give credit where credit is due and we consider our employees our biggest asset.

[27] Later, Hillgartner informed Srok that the rate offered, though apparently contemplated since March, was actually in error, and should have been $5.72. Hillgartner testified that he took this step after discovering that the ''utility'' rate set forth in Service America's collective-bargaining agreement at the time was $5.72 per hour. Srok subsequently informed the three applicants that the rate would be increased by 2 cents. If Hillgartner is to be believed, this was not the only discrepancy between his wage projections set forth in R. Exh. 3, and the Service America labor contract. In that document, the rate of $6.50 was set forth forth for the cook. This classification was to receive the starting rate of $7.29 hourly under Service America's agreement with the Union. This enforces my doubt that there was any correlation between the Service America contract and the rates contained in R. Exh. 3. To make matters worse, I did not believe Hillgartner's intimation that the Company did not intend to hire Anderson as a ''cook.'' Obviously, the $5.72 rate would be difficult to explain were there an intention to retain Anderson in that capacity. Yet, would Anderson be expected to do anything else? Also unacceptable is Hillgartner's explanation that the Respondent preferred utilization of a cook who would be ''experienced'' with the Respondent's ''recipes and procedures.'' In contrast, Fitzgerald testified that the individual designated for this position, Bonnie Lebiecki, was an unknown quantity. She had worked under him in a ''smaller'' operation in the past. According to Fitzgerald, he did not feel that she ''had the level of experience to step right into that and needed to prove herself to me.'' When transferred Lebiecki was making only $5.50 per hour, and according to Fitzgerald, at the Medical College, she was given $5.70 as a probationary rate until she could demonstrate her ability to handle the job. R. Exh. 9. It is considered more likely that Lebiecki's transfer was an emergency measure in reaction to Respondent's notification that Anderson would not be available to serve as the ''cook.''

posted the June 11 notification inviting the incumbent employees to file job applications. According to Wilson, at the time, Fitzgerald advised that he wanted her to arrange an interview because ''he was interested in talking to me about staying on as an employee.'' Wilson indicated that she would contact him. She did not do so, however. Later, toward the end of June, after the others had been interviewed, she again had a chance meeting with Fitzgerald at the College. He reiterated his interest in interviewing her. Wilson advised that she would think about it. She never applied, explaining that based on the wage offers described to her by coworkers, she could not afford to work for the Respondent.

Ultimately, a few days prior to the July 1 starting date, Piquette, Anderson, and Cook informed the Respondent that they would reject the job offers. Hillgartner asserts that he first learned that the Service America employees had rejected employment on either Thursday, June 25, or Friday, June 26. In a ''panicked'' reaction, this compelled the Respondent to seek out personnel from a variety of sources, including newspaper advertisements, and utilization of temporary agencies and a ''job service.'' See G.C. Exhs. 11(a), (b), and (c).

It is the Respondent's testimony that this development led it to recast its position with respect to the Union. According to Kovacs, on or about June 27, Hillgartner reported that the Service America employees had rejected the job offers, and hence the new operation would be manned by persons hired ''off the street.'' Because uncertain about what this meant in terms of union recognition, Kovacs contacted Harold Taegel, the Respondent's corporate vice president and director of labor/employee relations. Taegel advised that recognition of the Union in these circumstances would be illegal, and he instructed Kovacs to refuse to negotiate.[28]

E. *The Events of June 30*

On June 30, the day before the Respondent was to begin operations at the Medical College, Kovacs, and Hillgartner appeared at union headquarters to meet with Gallo, and his brothers, Mike and Sam, pursuant to their earlier agreement made sometime in mid-June. Prior thereto, there had been neither direct, nor indirect disclosure to the Union either that new wage rates had been fixed for the Medical College job, or that any nonnegotiated change in existing terms was intended.

As agreed, the first order of business on June 30 involved an exchange of proposals on the soon to expire contract at Miller Brewing, to be followed by discussion of possible extension of that agreement. Previously, it also had been agreed that, at noon, the parties would ''discuss what we were going to do at the Medical College . . . to get the place open July 1st.'' Consistent therewith, Gallo opened the Medical College discussions by presenting Kovacs an outline that highlighted differences between the Miller Brewing and Service America bargaining agreements in the area of holidays, vacation, money, etc.[29] At that point, Kovacs admittedly stated:

> I have been advised by my boss that I will not recognize 122 since we feel that they legally do not represent the employees at the Medical College.[30]

Gallo admittedly lost his temper and walked out. Having received no prior information that the Service America employees had ''quit,'' or under what circumstances, he telephoned at the Medical College. In the process, he learned for the first time of the wage cuts. Thus, when he inquired about why the job offers were rejected, while complaining that he was with Respondent's officials for the purpose of negotiating a contract that very afternoon, he was informed by the employees that they had no choice in light of the substantial cuts in pay. Gallo, after learning that they would work for the Respondent if current conditions were maintained, requested that they prepare a letter to that effect. He then returned to the still-present company representatives, yelling at Kovacs, without sparing profanities, that:

> [T]he company stabbed me in the back, that we had an agreement that we were going to negotiate a contract, and they orchestrated the discharge of those employees by offering them reduced wages and no benefits.

The company representatives then left, stating there was nothing further to discuss.

Later that day, Vince Gallo sent Mike Gallo to the Medical College. In the latter's presence, a letter was prepared and signed by all four of the Service America employees, stating:

> We, the undersigned, would agree to continue our employment at the Medical College of Wisconsin at our present rate of pay according to union scale, and would like to continue our union affiliation.[31]

The letter was given returned to Vince Gallo, who forwarded it the Respondent. There was no response. The Union filed the instant unfair labor practice charge on July 21.

F. *Concluding Analysis*

Under the successorship doctrine, an employer is impelled to accept the collective-bargaining relationship of another employer if (1) a majority of its employees had been employed by the predecessor, and if (2) similarities between the two operations manifest a ''substantial continuity'' between those enterprises. *Citisteel USA*, 312 NLRB 815 (1993); *NLRB v. Burns Security Services*, above, 406 U.S. at 280–281. Satisfaction of this latter requirement is amply demonstrated in this case by the Respondent's replacement of a food service contractor under conditions obligating itself to provide those services in the same capacity, with neither hia-

[28] Hillgartner testified that on Monday, June 29, Kovacs told him that ''the ruling Mr. Taegel gave me was the fact that there was no union representation left at the Medical College . . . it was against the law . . . to in fact recognize and bargain with Local 122.''

[29] R. Exhs. 1 and 2.

[30] According to Hillgartner, when the Union raised the Medical College issue, Kovacs replied,''Sorry, but we have nothing to talk about, there are no employees left that are members of local 12 and I have been told it is against the law for me to recognize and bargain with you.''

[31] G.C. Exh. 7. Vince Gallo testified that, on learning that very day that the employees had declined employment offers, he requested that this letter be prepared and that new authorizations be executed. Anderson confirmed that all employees signed union authorization cards at that time.

tus, nor significant change, while continuing to serve the identical market. In short, apart from personnel issues, the ''substantial continuity'' between the two enterprises remained undisturbed. Thus, the majority question is determinative. In this regard, the evidence shows that the Respondent, at the Medical College, did not employ a single Service America employee in a nonmanagerial capacity. Accordingly, the Respondent argues strenuously that since none of its employees at the Medical College were ever represented by the Union, the 8(a)(5) allegations in the complaint must be dismissed.

The General Counsel counters with precedent establishing that the failure to retain a majority of the predecessor's employees, if based on illegal discrimination, will not alone excuse a successor's duty to bargain. See, e.g., *Fremont Ford*, 289 NLRB 1290 (1988); *Fall River Dyeing & Finishing v. NLRB*, 482 U.S. 27 (1987). This contention springs from the fact that three of the four Service America employees applied for bargaining unit jobs with the Respondent, and, after interview, each was offered employment. Later, these offers were declined solely because contingent on acceptance of drastically reduced rates of pay. Against this background, the General Counsel argues that the wage offers were ''predictably unacceptable'' and involved a change in existing terms of employment at a time when the Respondent, as a matter of law, could not so without consulting the Union. Accordingly, by virtue of the allegedly unlawful revision on wage rates, it is contended that the Respondent constructively denied employment to the Service America employees in violation of Section 8(a)(3) and (1) of the Act.

The General Counsel observes, and I agree that, under successorship criteria, the pivotal issue is whether the Respondent acted lawfully when Service America applicants were offered jobs at less than existing wage levels. If so, and if specific evidence of discriminatory motivation were lacking, the General Counsel would have no cause to complain. Under those conditions, rejection of the job offers would have been an exercise of personal preference beyond statutory remedy, and the failure of the Respondent to retain a majority would foreclose a finding that the Respondent succeeded to Service America's bargaining obligation.

Regarding this inquiry, the Respondent is favored initially by the Supreme Court's declaration in *Burns*, above, that ''a successor is ordinarily free to set initial terms on which it will hire the employees of a predecessor.'' 406 U.S. at 294, 295. However, this principle is not without limits. For the Court went on to state:

> [T]here will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms. In other situations in may not be clear until the successor employer has hired his full complement of employees that he has a duty to bargain with a union, since it will not be evident until then that the bargaining represents a majority of the employees in the unit as required by [Section] 9(a) of the Act.

The General Counsel argues that the exception controls when, as here, the ''successor'' not only intended at all times to hire the ''employees of a predecessor,'' but also voluntarily sought and participated in negotiations to obtain relief from a contractual working condition that it wished to change. Obviously, these deliberations furnish an atypical quality to this case. It permits the General Counsel to contest the Respondent's prerogatives regarding initial terms on the basis of distinct legal theories. The first transcends traditional successorship principles. In this latter connection, the General Counsel argues that the Respondent's willful participation in negotiations with the Union was tantamount to a voluntary grant of recognition, and hence precluded the subsequent unilateral June 23 announcement of new wage rates.[32]

Alternatively, the General Counsel relies on *Burns*, but contends that the Respondent's conduct was the analogue of a situation ''in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms.'' 406 U.S. at 294–295. Legal writers would subsequently refer to this standard variously as the *Burns* ''caveat'' or the ''perfectly clear'' doctrine.

In the years since the 1972 decision in *Burns*, the Board and circuit courts have not always been in harmony regarding the scope and meaning of the ''perfectly clear'' exception. There is evidence that the Board has declined to interpret that standard literally. In 1974, the Board determined that the right to unilaterally fix initial terms was not vitiated merely by an employer's declared intent to hire a predecessor's employees. Thus, in *Spruce Up Corp.*, 209 NLRB 194 (1974), it was held that the new operator was free to do so when he had ''made it clear from the outset that he intended to set his own initial terms, and that whether or not he would in fact retain the incumbent[s] . . . would depend upon their willingness to accept those terms.'' Accordingly, the 8(a)(5) and (1) allegation based on the employer's subsequent unilateral establishment of new commission rates was dismissed on reasoning that:

> When an employer who has not yet commenced operations announces new terms prior to or simultaneously with his invitation to the previous work force to accept employment under those terms, we do not think it can be fairly said that that the new employer ''plans to retain all of the employees in the unit,'' as that phrase was intended by the Supreme Court.[33]

At the same time, the Board made clear the possibility that a duty to consult might arise before it can be determined with precision that the successor actually has hired a major-

[32] The *Burns* successorship doctrine delimits circumstances when an unwitting employer might be compelled to confer initial recognition. Other precedent comes into play when recognition is conferred voluntarily, and later the employer seeks to repudiate the relationship. See, e.g., *Snow & Sons*, 134 NLRB 709 (1961), enfd. 308 F.2d 687 (9th Cir. 1962), agreement made by the employer to voluntarily recognize; *Terrell Machine Co.*, 173 NLRB 1480 (1969), enfd. 427 F.2d 1088 (4th Cir. 1970), presumption of continuing majority; *Harley-Davidson Transportation Co.*, 273 NLRB 1531 (1985), rebuttal of presumption. If substantiated, voluntary recognition, alone, would preclude the unilateral setting of wage rates; it also would invalidate the June 30 withdrawal of recognition.

[33] 209 NLRB at 195.

ity. Thus, *Spruce Up* conceded that the unilateral setting of initial rates would be illegal when:

> [T]he new employer has either actively or, by tacit inference, misled employees into believing that they would all be retained without change in their wages, hours, or conditions of employment, or at least to circumstances where the new employer, unlike the [r]espondent here, has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment.[34]

The General Counsel argues that this is just such a case. The Respondent takes issue with that view of the facts, arguing, by way of posthearing brief, as follows:

> Here, Canteen never announced that it planned to retain all of the Service America employees and that they would be employed pursuant to the terms and conditions called for by the collective bargaining agreement between Service America and the Union. To the contrary, Canteen's conduct shows a consistent and unwavering intent to hire only those employees who applied and who would accept the terms and conditions of employment being unilaterally set by Canteen for its Medical College employees.

Consistent with these observations, it is true that the Respondent, at least prior to the interviews during the last full week of June, had never ''announced'' that it would hire the Service America employees. Yet, all times, to the point of dependency, it held to an unflagging plan and desire to do so. Moreover, if Hillgartner is to be believed, the new wage policy had been forged months before the formal interviews, yet held in secrecy until then, even in the face of a specific inquiries by Piquette and Cook. Thus, unlike the employer in *Spruce Up*, above, here, the Respondent withheld, and thereby ''failed to clearly announce its intent to establish a new set of conditions prior to inviting the former employees to accept employment.'' 194 NLRB at 195.

In fact, the Respondent's prior conduct offered not a clue to either the disappointed applicants or their bargaining representative that Service America employees would be recruited at anything less than existing terms. Instead, it created the opposite impression. During this entire period, it openly manifested an intention to commence operations under conditions that avoided collision with demands of the subsisting labor contract. This was the admitted purpose behind its initiation of talks with the Union concerning a ''working foreman,'' a classification that it feared could not be countenanced under the Union's Service America contract. In that instance, it sought change through negotiation. Yet neither this record, nor any sense of reason, offers explanation as to just why the Respondent would have solicited union involvement in resolving a relatively mundane matter, contemporaneous with a longstanding plan to ''throw caution to the wind'' in the critical area of wages. Its failure to communicate both ends of this erratic formula left a single understanding, namely, that the Respondent's avowed respect for contractual guarantees in the area of unit work would be mirrored in other areas, particularly one with obvious explosive potential. Intended or not, the deception effectively denied the employees the protective services of their representative. Whatever the ultimate goal, the natural and foreseeable consequences of the Respondent's overall pattern of conduct left the Union every reason to assume that, until alternative terms were established through negotiations, then scheduled for June 30, the Respondent would maintain all employment conditions other than the concession it had sought and successfully exacted in the case of the ''assistant manager.''[35]

Whether the Respondent, in these circumstances, be estopped on the basis of its misleading behavior from asserting a right to set new terms unilaterally, or it be deemed to have made it ''perfectly clear'' that no such changes would be made, the facts impel the conclusion that the Respondent violated Section 8(a)(5) and (1) of the Act, by during employment interviews commencing on June 23, announcing unilaterally that job offers were contingent on acceptance of an hourly rate less than the job applicants previously enjoyed.[36]

My conclusion in that regard is not altered by the fact that the new terms were announced prior to actual employment of a majority of the Service America employees.[37] Under, the governing principles, employers are not free, in any absolute sense, to effect unilateral changes at all times prior to actual employment of a majority. Any such policy would be simply applied and thus would eliminate future controversy in an area where predictability would have special utility. The Supreme Court opted for a more complex formulation, however, by suggesting in Burns that the so-called ''caveat'' might outlaw the unilateral fixing of initial terms even before ''the successor employer has hired his full complement of employees.'' 406 U.S. at 295. The overall formula announced by the Court reflects a sensitivity to the possibility that the ''perfectly clear'' standard, once manifested, might be deemed to be so frail that, later, it might be vitiated simply because the successor employer has had a change in sentiment and elected to minimize job acceptance by announcing significant if not drastic cuts in benefits.[38] This construc-

[34] Ibid.

[35] Vince Gallo testified that unit employees at the Medical College contacted the Union in late May or early June, after learning that the Respondent had been awarded the food service operation at the Medical College. He testified that he assured them that they would be working under a union contract when the Respondent takes over, noting that he already had a letter from the Respondent, a reference to G.C. Exh. 4. In fact, he probably had not received, but was expecting that document at the time. This discrepancy did not dissuade me from belief of his testimony, however, that employees contacted him and made the inquiries in question, provoking the assurances he described.

[36] That result is also warranted by the evidence demonstrating that the Respondent effectively recognized the Union by initiating negotiation, making proposals, and enticing the Union to relinquish its contractual right to insist that unit work be performed by represented employees. See *Bellingham Frozen Foods*, 237 NLRB 1450, 1465 (1978). Contrary to the Respondent, in light of the presumption of continuing majority, no illegality would inure in consequence of such a voluntary act. See, e.g., *Fall River Dyeing Corp. v. NLRB*, above, 482 U.S. at 27.

[37] Cf. *Blitz Maintenance*, 297 NLRB 1005 (1990).

[38] Concern would be expressed later in *Fall River*, above, that successors, during the ''transition between employers'' might use their inherent economic power to further ends inimical to the statutory

Continued

tion accords with established Board policy. Thus, in *CME, Inc.*, 225 NLRB 514 (1976); and *Roman Catholic Diocese of Brooklyn*, 222 NLRB 1052 (1976), enf. denied in relevant part sub nom. *Nazarath Regional High School v. NLRB*, 549 F.2d 873 (2d Cir. 1977), the Board found that successor employers violated Section 8(a)(5) by setting initial terms before employees were actually hired.

From the foregoing it follows that the Respondent violated Section 8(a)(3) and (1) of the Act by unilaterally imposing an unacceptable condition of employment, which understandably was rejected by Piquette, Anderson, and Cook. Established precedent warrants a finding that these circumstances alone establish that the applicants were constructively denied employment for reasons proscribed by Section 8(a)(3) and (1) of the Act. Thus, the 8(a)(3) allegations are controlled by the principle that ''employees who quit rather than work under conditions established in derogation of the statutory right to bargain . . . [are] . . . constructively discharged in violation of Section 8(a)(3) and (1) of the Act.''[39] Accordingly, on this basis, it is concluded that the Respondent violated Section 8(a)(3) and (1) of the Act by denying employment, on a constructive basis to Piquette, Anderson, and Cook.[40]

It follows that the Respondent, but for the unlawful discrimination, would have retained a majority of the Service America employees. Accordingly, the Respondent also violated Section 8(a)(5) and (1) on and after June 30 by refusing to recognize and bargain with the exclusive representative of the food service employees at that location, who themselves constitute a separate appropriate collective-bargaining unit.[41]

CONCLUSIONS OF LAW

1. The Respondent, Canteen Company, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

> All food service employees employed by the Respondent at the Medical College of Wisconsin, excluding guards, professional employees and supervisors as defined in the Act.

4. The Respondent violated Section 8(a)(5) and (1) of the Act by since on or about June 23, 1992, unilaterally announcing new wage rates for the above employees without consulting the Union.

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policy encouraging ''industrial peace.'' Thus, at 482 U.S. at 40, the Court stated:

> [W]ith the wide variety of corporate transformations possible, an employer could use a successor enterprise as a way of getting rid of a labor contract and of exploiting the employees' hesitant attitude towards the union to eliminate its continuing presence.

[39] See, e.g., *Control Services*, 303 NLRB 481, 485 (1991), enfd. 975 F.2d 1551 (3d Cir. 1992); *RCR Sportswear*, 312 NLRB 513 (1993). The Respondent defends against the 8(a)(3) allegations by arguing that the record does not contain specific evidence of antiunion motivation. In this regard, the General Counsel depicts the drastic cut in wages appended to the job offers as ''predictably unacceptable'' and part of a deceptive, deliberate scheme to avoid collective bargaining. At best, the evidence raises a suspicion that this might have been the case. I conclude that no such inference is warranted. This is despite my disbelief of the Respondent's testimony as to the origin of the pay cuts. I also reject the contention that it is, or ever has been, the practice of this major corporation to recruit experienced personnel, whose services are desired, at drastically reduced earnings. At the same time, while it is my own view that the hourly rates proffered by the Respondent are appropriately characterized as ''predictably unacceptable,'' I am convinced that the Respondent believed otherwise. I am persuaded that the Respondent placed itself in a position of vulnerability with respect to manning the job. I do not believe that it would have taken this approach unless it were confident that the Service America applicants would accept employment on its terms. In any event, since the Respondent, under *Burns* and its progeny, was not free to set terms without consulting with the Union, Board precedent does not require specific evidence of an antiunion intent to substantiate an 8(a)(3) violation.

[40] The complaint identifies Sandra Wilson as among those victimized by discrimination. Wilson filed no application, as specifically required by the June 11 posting. She did not comply with this requirement even though urged to do so by Fitzgerald almost 2 weeks before any indication that the Respondent would dishonor existing terms. Wilson offered no explanation for her failure, during this period, to act with diligence. Her inaction raised question about whether she held a genuine interest in seeking work at a time when their was no reason to do anything other than pursue this employment opportunity. In failing to meet the application requirement on a timely basis, she created an ambiguity, if not suspicion, as to the legitimacy of her placement within the discriminatory class. In the end, Wilson testified that she refused to apply because she could not afford to work at the wages levels that the Respondent reportedly was offering. I am aware of the formidable support the General Counsel receives from the ''futility'' concept in a case such as this. I am also aware of the burden imposed on the wrongdoer when an unlawful pattern of conduct is punctuated by ambiguity. ''Futility'' is often employed as a self-serving tool, however, which is difficult to refute even when invoked inappropriately. In my opinion, more was required of Wilson before she could excuse her delay in pursuing employment under conditions that effectively denied the Respondent the opportunity to interview her and to possibly identify some other nondiscriminatory condition that either the Employer or even Wilson would deem unacceptable. Simply put, she is not entitled to the benefit of every doubt, particularly when, as here, she has failed to allay suspicion by affording some explanation for her failure to apply between June 11 and June 23. Her involvement and signing of G.C. Exh. 7 on June 30, signifying that she would have accepted employment at existing levels of pay was a gesture of ''solidarity'' that did not overcome her unpersuasive testimony that she did not file an application solely because of what she learned on or after June 23. In the circumstances, I am unwilling to find that Wilson was genuinely interested in employment even at her existing rate, or to assume that she would not have been rejected on lawful grounds if interviewed. Accordingly, the 8(a)(3) allegation in her case has not been substantiated and shall be dismissed.

[41] The Respondent contends that the Board could not require it to bargain in a unit limited to those employees at the Medical College. Its position is grounded in the fact that the incumbent employees at the Medical College were represented by the Union in a single unit that also included about 150 workers employed by Service America at other locations. Under this argument, the Respondent could have splintered off any one of the locations within that unit while escaping any bargaining obligation irrespective of other underlying facts. Successorship determinations, however, do not require that the scope of the former and acquired bargaining units be coextensive. Under settled Board authority, the test is whether the successor unit is appropriate. See, e.g., *Au Chu Co.*, 259 NLRB 177, 182 (1981); *School Bus Services*, 312 NLRB 1 fn. 1 (1993). That is the case here.

5. The Respondent, as a successor to Service America at the Medical College of Wisconsin, violated Section 8(a)(3) and (1) of the Act by since on or about July 1, 1992, constructively denying employment to Susan Anderson, Kelly Piquette, and Irene Cook.

6. The Respondent, as a successor to Service America at the Medical College of Wisconsin, violated Section 8(a)(5) and (1) of the Act by since on or about June 30, 1992, refusing to recognize and bargain with the Union as the exclusive representative of employees in the above-described collective-bargaining unit.

7. The Respondent, at least since June 8, 1992, having voluntarily recognized the Union as exclusive representative of employees in the afore-described unit, violated Section 8(a)(5) and (1) of the Act by, on June 30, 1992, withdrawing recognition and refusing to bargain with the Union.

8. The above unfair labor practice are unfair labor practices having an effect on commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, it shall be recommended that it be ordered to cease and desist therefrom, and to take certain affirmative action deemed necessary to effectuate the policies of the Act.

The Respondent, having constructively denied employment to Susan Anderson, Kelly Piquette, and Irene Cook, shall be ordered to hire them to their former positions, and make them whole for loss of wages and benefits by reason of the discrimination against them. Backpay shall be computed on a quarterly basis in accord with *F. W. Woolworth*, 90 NLRB 289 (1950), with interest as authorized in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[42]

ORDER

The Respondent, Canteen Company, Milwaukee, Wisconsin, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain in good faith with the Union concerning the rates of pay, wages, hours, and working conditions of employees in the following appropriate unit:

> All commissary food processing employees employed by the Respondent at the Medical College of Wisconsin, excluding guards, professional employees and supervisors as defined in the Act.

(b) Refusing to bargain in good faith by announcing new terms of employment in the above unit without consulting the Union.

(c) Refusing to bargain in good faith by withdrawing recognition or otherwise refusing to recognize and bargain with the Union as the exclusive representative of employees in the above-described unit.

(d) Discouraging membership in a labor organization by constructively denying employment, or in any other manner discriminating against employees with respect to wages, hours, or other terms and conditions of employment.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Susan Anderson, Kelly Piquette, and Irene Cook immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) On request, bargain collectively and in good faith concerning wages, hours, and other terms and conditions of employment with the Union as the exclusive representative of employees in the above-described unit, and embody any understanding reached in a signed agreement.

(d) Post at its operation at the Medical College of Wisconsin in Milwaukee, Wisconsin, copies of the attached notice marked ''Appendix.''[43] Copies of the notice, on forms provided by the Regional Director for Region 30, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notice is not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[42] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the above findings, conclusions, and recommended Order shall, as provided in Sec. l02.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[43] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''