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

DATE: August 28, 2017

TO: Timothy Watson, Regional Director
Region 16

FROM: Jayme L. Sophir, Associate General Counsel
Division of Advice

SUBJECT: Dallas Airmotive, Inc. 775-3700
Case 16-CA-192780 775-8780

The Region submitted this case for advice on whether the Union waived its right to represent bargaining unit employees whom the Employer legally transferred to a nonunion facility. Despite the fact that the Union signed two facility closure agreements that contained limited waivers, and the fact that the parties' collective-bargaining agreement identifies the bargaining unit by a geographic location, we conclude that the Union did not waive its right to represent the transferred employees. The Region should continue processing the case consistent with this conclusion.

## FACTS

The Employer, Dallas Airmotive, Inc., is an aerospace company that tests, overhauls, and otherwise repairs aircraft engines. The Employer operates throughout the globe and, until recently, had three facilities in the Dallas-Fort Worth (DFW) area: Forest Park, Heritage Park, and Love Field. Traditionally, each of these facilities provided engine-specific overhaul services; the Forest Park facility also performed virtually all of the engine testing and component repair services. This case involves the Employer's consolidation of its DFW operations.

The International Association of Machinists and Aerospace Workers, District Lodge 776 (Union), has represented all production and maintenance employees at Forest Park since 1966. It has never represented workers at Heritage Park or Love Field. The Union filed the above-captioned charge in regards to bargaining unit work that the Employer has transferred out of Forest Park as a result of its consolidation efforts. The charge alleges, *inter alia*, that the Employer has unlawfully withdrawn recognition of the Union, repudiated its statutory obligation to bargain with the

Union, and unilaterally changed more than seventeen terms and conditions of employment.[1]

In January 2014, the Employer announced that it would be consolidating its DFW operations. At a meeting with the Union held on or around January 15, 2014, the Employer informed the Union that these consolidation efforts were in part motivated by noise pollution issues stemming from Forest Park's engine testing services. The Employer's stated plan, at this time, was to transition only some of the Forest Park work to nearby facilities. Shortly after the meeting, the Employer issued a memo to all Forest Park employees. The memo stated that the transition would occur in multiple phases, beginning with Phase 1. Phase 1, the memo stated, would be completed by June 2014 and entail the transition of several categories of bargaining unit work to the Employer's nearby facilities. The memo indicated that the Employer would continue meeting with the Union to discuss the transition process.

Over the next month, the Employer and Union engaged in Phase 1 effects bargaining. During these negotiations, the Union's business representative requested recognition of the Union as the exclusive bargaining representative of employees that were transferred from Forest Park to the Employer's other facilities. The Employer responded that it was unsure how the rest of the consolidation would transpire (*i.e.*, where, when, and what Forest Park jobs would go) and, as such, recognition would be premature. Phase 1 effects bargaining culminated on February 18, 2014 with the execution of the first Forest Park Facility Closure Agreement (2014 FCA).

The 2014 FCA contains an introduction and four sections. The introduction states that the agreement solely concerns the Phase 1 transition. The first section, People Transition Process, states that the transition process would follow normal staffing procedures, effectively stating that Forest Park employees would have to reapply for their jobs once those jobs transferred out of Forest Park. The second section, Wages/Compensation, states that compensation for employees that transferred would follow the practice at the location where the work moved but that base rates and longevity premiums would not be less than those set out by the parties' CBA. The third section, Benefits, discusses health and welfare benefits, sick pay, holidays, vacations, and retirement. The section specifies which of those benefits' policies, practices, and procedures would "remain the same" and which would "follow the practice at the location where the work will move." The Benefits section concludes with a catch-all provision: "All other policies, practices, and procedures at the location

[1] The Union has also filed a unit clarification petition in response to the transition of bargaining unit work out of Forest Park. The Region is holding this petition in abeyance until the unfair labor practice charge is resolved.

where the work will move will apply." The fourth and final section, Voluntary Separation Plan, outlines procedures for employees wanting to voluntarily separate from the Employer in exchange for compensation.

After the parties agreed to the 2014 FCA, the Employer executed its Phase 1 transition plan. When Phase 1 ended around March 2014, the Employer had transitioned approximately ninety Forest Park jobs to Heritage Park. Only ten to fifteen affected employees opted to reapply for their old jobs at Heritage Park, and they all received offers.

Between March 2014 and February 2015, the parties did not discuss further consolidation of the Employer's DFW operations. During that period, however, the Employer searched for a property that could adequately house, at a minimum, the engine testing services still being performed at Forest Park. Its search resulted in the acquisition of a new facility, the DFW Center.

In February 2015, the parties began negotiations for a successor CBA to the then-current, soon-to-expire CBA. Those negotiations resulted in a new, three-year CBA with an effective date of March 23, 2015. Relevant for our purposes, the preamble of the new CBA states the following:

> This Agreement is made and entered into by and between Dallas Airmotive, Inc. - Forest Park Facility (hereinafter referred to as the Company), and International Association of Machinists and Aerospace Workers, AFL-CIO, District 7 (hereinafter referred to as the Union) representing the unit as described and as certified by the National Labor Relations Board Case No. 16 RC-4105 dated January 13, 1966 to wit: "all production and maintenance employees employed by the Company at its facilities located at 6114 Forest Park Road, Dallas, Texas."

No evidence suggests that this preamble has changed in any meaningful way since the parties' first CBA decades ago.

Notably, during the course of CBA negotiations, the Employer informed the Union that it had acquired the DFW Center, that DFW Center would eventually house Forest Park's engine testing jobs, and, most importantly, that its consolidation plans now entailed the eventual closure of Forest Park. The Employer did not inform the Union when Forest Park would close or where the remainder of Forest Park jobs would go, but this is due to the fact that it had yet to make such determinations. Because the Employer informed the Union of its plans to close Forest Park, the parties began a second round of effects bargaining.

The exact content of the 2015 effects bargaining is contested. Specifically, the Union asserts that during the bargaining it again requested recognition as the

transferred workers' exclusive bargaining representative. According to a majority of the Union's witnesses, the Employer responded that it could not recognize the Union because the Forest Park jobs would be going to different—but yet-to-be-determined—facilities, all of which were currently nonunion. According to a majority of the Employer's witnesses, however, the Union did not request to represent transferred workers.

On August 3, 2015, the parties concluded effects bargaining by executing a second Forest Park Facility Closure Agreement (2015 FCA). Like the 2014 FCA, the 2015 version contains an introduction and four sections. The introduction states that the agreement concerns the transition of Forest Park's bargaining unit work "between now and complete facility closure." The first section, People Transition Process, states that Forest Park employees would have to reapply for their jobs but would receive priority consideration. The second section, Wages/Compensation, states that compensation would follow the practice of the location where the work transfers at the "wage rate for the position."[2] The third section, Benefits, is largely the same as its counterpart in the 2014 FCA, including the catch-all provision ("All other policies, practices, and procedures at the location where the work will move will apply"). The fourth section, Severance, lays out severance benefits for Forest Park employees who would be laid off as a result of Forest Park's closure.

Around May 2016, well after the execution of the 2015 FCA, the Employer finalized its consolidation plans. The plans, which the Employer did not immediately announce to its employees or the Union, entailed the consolidation of *all* DFW operations into DFW Center. Upon reaching this decision, the Employer began notifying Forest Park employees about the next phase of the consolidation.

In June 2016, the Union heard that the Employer would soon begin the next phase of the consolidation. Under the impression that the Employer would be dispersing the Forest Park employees amongst its three nonunion facilities, the Union began collecting authorization cards from Forest Park employees.

Around August 2016, the Employer began transferring employees from Forest Park and other facilities to DFW Center. By March 2017, DFW Center had approximately 190 hourly employees, with approximately 130 of those employees being direct transfers from Forest Park. Also as of that date, approximately thirty bargaining unit employees remained at Forest Park. The Employer predicts that all hourly employees from Forest Park, Heritage Park, and Love Field will transfer to DFW Center by the end of 2017. As a result, the Employer contends, DFW Center will

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[2] The meaning of "wage rate for the position" is unclear. It could mean the rate set by the CBA or one set by the Employer.

have approximately 350 hourly employees, with just less than half being Forest Park employees.

The Employer has continued to honor the parties' CBA in regards to the employees currently remaining at Forest Park; however, it has ceased to apply the agreement's terms to the employees that it has transferred to DFW Center, and has refused to recognize the Union there. The Employer contends that the CBA is not applicable to any employees working at DFW Center and that the Union has waived any statutory or contractual right to represent those employees.

## ACTION

We conclude that the Union did not waive its right to represent bargaining unit employees transferred from Forest Park. The 2014 and 2015 FCAs waived some Union rights for a limited period of time but, even assuming that the FCAs waived the Union's right to bargain over changes to terms and conditions of employment, they clearly did not waive the Union's *statutory* right to represent the transferred bargaining unit employees. Additionally, the CBA does not waive the Union's right to represent bargaining unit members transferred from Forest Park; its preamble, which identifies the bargaining unit by referencing Forest Park's street address, is merely a geographic description of the unit and does not limit the Union's rights.

A Union's right to recognition is "statutory, not contractual, in nature."[3] And, as the Board has long held, a union's waiver of statutory rights must be clear and unmistakable.[4] This standard requires bargaining partners to express the waiver "unequivocally and specifically."[5] Absent specific contractual language, a waiver may be found where there is evidence that "the matter sought to be waived was fully discussed and consciously explored and that the waiving party thereupon consciously yielded its interest in the matter."[6]

In multiple cases applying the above waiver standard, the Board has distinguished waivers of the right to bargain over specified terms from waivers of the right to represent bargaining unit employees. For example, in *TransMontaigne, Inc.*, the Board held that a contract provision stating that successor employers are not

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[3] *TransMontaigne, Inc.*, 337 NLRB 262, 263 (2001).

[4] *See Provena St. Joseph Med. Ctr.*, 350 NLRB 808, 810-15 (2007).

[5] *Id.* at 811.

[6] *Trojan Yacht*, 319 NLRB 741, 742 (1995).

bound by the contractual recognition clause did not waive the union's *statutory* right to recognition by the successor employer.[7] The Board emphasized that the provision only mentioned contractual rights and entirely failed to refer to the union's independent, statutory right to recognition.[8] Similarly, in *Allied-Signal, Inc.*, the Board held that a union's contractual waiver of bargaining rights so as to permit unilateral action by the employer regarding a workplace smoking policy did not preclude the Board from finding a "direct dealing" violation.[9] The Board found that "[d]irect dealing with employees goes beyond mere unilateral action," and that "nothing in the language of the collective-bargaining agreement or the record of contract administration remotely suggest[ed]" that the union waived its right to object to direct dealing.[10]

Here, the FCAs did not waive the Union's statutory right to represent transferred Forest Park employees because they contain no language to that effect. At most, the agreements contain *temporary* waivers of the right to bargain over *some* terms and conditions of employment. As for the agreements' finite nature, the 2014 FCA states that it applies during Phase 1 of the work transfer, and the 2015 FCA states that it applies "between now and complete facility closure." And, although the FCAs give the Employer the power to unilaterally set some terms and conditions of employment for transferred employees, the FCAs also state that some terms and conditions must "remain the same." Although both FCAs contain a catch-all provision stating that "[a]ll other policies, practices, and procedures at the location where the work will move will apply," that provision refers to "*other* policies, practices, and procedures" (emphasis added); therefore, it does not affect the prior language that certain terms and conditions must "remain the same." Moreover, the catch-all provision is contained *within* the Benefits section, and thus would appear to only apply to "benefits" not addressed earlier in that section.

But, even assuming that the FCAs waived the entire CBA or granted the Employer unilateral control over all terms and conditions of employment, we would still conclude that the FCAs did not waive the Union's right to represent transferred Forest Park employees. As illustrated in *TransMontaigne*, even a contractual waiver of an entire collective-bargaining agreement does not erase a union's statutory right

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[7] 337 NLRB at 263.

[8] *Id.*

[9] *Allied-Signal, Inc.*, 307 NLRB 752, 754 (1992).

[10] *Id.*

to represent bargaining unit employees. Further, as shown in *Allied-Signal, Inc.*, waiving the statutory right to bargain over changes to terms and conditions of employment does not result in the waiver of fundamental representational rights.

Beyond the FCAs' language, the negotiations that led to these agreements fail to show that the parties "fully discussed and consciously explored" a waiver of the Union's representational rights. The majority of the Employer's witnesses contend that the Union never requested representation rights over the transferred employees while the parties negotiated the FCAs. If that is the case, then it is virtually impossible to conclude that the parties fully discussed a waiver of those representational rights. The Union, on the other hand, contends that it requested recognition but that the Employer took the position that the request was premature because consolidation efforts were ongoing. Simply requesting recognition and having that request denied on account of its prematurity is not tantamount to a waiver of the future right to recognition.

We further conclude that the description of the bargaining unit contained in the CBA's preamble was not a geographic limitation on the Union's representational rights. We find, instead, that it was merely a descriptive recitation of the physical location of the Forest Park plant.

In determining whether a geographic identifier limits representational rights or merely describes the location of the unit employees' workplace, the Board considers the language of the contract as well as the relevant bargaining history. For example, in *Waymouth Farms, Inc.*, the Board found a representational limitation based on the explicit language of the parties' collective-bargaining agreement: the union represents a unit of employees at the employer's "Plymouth, Minnesota, plants, and at no other geographical locations."[11] The bargaining history showed that the union agreed to this limitation in exchange for a union security clause.[12] Similarly, in *Mohenis Services, Inc.*, the Board found that the collective-bargaining agreement contained a representational limitation because the bargaining history showed that, due to a discussion where the employer informed the union that it would be opening a second plant across town, the union consciously agreed to narrow the bargaining unit's description to "all production employees at the Company's plant at 875 East Bank

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[11] *See Waymouth Farms, Inc.*, 324 NLRB 960, 960, 963 (1997), *enforced in relevant part*, 172 F.3d 598 (8th Cir. 1999).

[12] *See id.* at 966 n.5.

Street, Petersburg, Virginia."[13] Previously, the description had not described the unit by a specific street address.[14]

In contrast to *Waymouth Farms* and *Mohenis Services*, the Board did not find a representational limitation in *King Soopers, Inc.*[15] There, the collective-bargaining agreement described the unit as those employees that were employed at "the grocery store owned or operated by the [employer] at 5150 West 120th Avenue, Broomfield, Colorado."[16] When the employer closed its West 120th Avenue store and relocated operations to a new store located less than a thousand yards away, it refused to recognize the union and argued that the union had waived its right to represent employees at any location besides the store on West 120th Avenue.[17] The Board agreed with the ALJ that the union did not waive its right to represent the relocated employees because the unit description's language was not a clear waiver, the union had not knowingly agreed to such a geographic limitation, and the union had received no consideration for such a limitation of its rights.[18]

The facts before us are more similar to *King Soopers* than *Waymouth Farms* or *Mohenis Services*. First, the unit description does not contain an explicit waiver; as in *King Soopers*, it contains a mere street address. Second, the bargaining history does not show that the parties had a mutual understanding that the language would limit the Union's rights. Indeed, unlike *Mohenis Services*, the weight of the evidence shows that the parties did not fully discuss the meaning of the CBA's unit description and agree to limit the Union's representational rights to the Forest Park address.[19]

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[13] 308 NLRB 326, 326, 332-33 (1992).

[14] *Id.* at 333.

[15] 332 NLRB 32 (2000), *enforced*, 254 F.3d 738 (8th Cir. 2001).

[16] *Id.* at 38.

[17] *Id.* at 33-34.

[18] *Id.* at 38.

[19] One of the Employer's witnesses states that a discussion about the CBA's limited applicability occurred. That witness states that the Employer informed the Union that it could not represent transferred employees because the CBA only applied to the Forest Park facility. The witness does not allege that the Union agreed to this view, and the witness's account is directly controverted by the Employer's other witnesses.

Instead, like *King Soopers*, the evidence shows that the parties agreed to the language without a mutual understanding that the language limited the Union's right "to represent the employees if the [facility] was relocated."[20] Third, like *King Soopers*, the bargaining history fails to show a bargained-for exchange. This case is thus unlike *Waymouth Farms*, where the union received the benefit of a union security provision in exchange for the limitation of its rights. For these reasons, we conclude that the CBA's preamble did not waive the Union's statutory right to represent bargaining unit employees transferred from Forest Park.

Accordingly, we conclude that the Union did not waive the right to represent bargaining unit members transferred from Forest Park. The Region should therefore continue processing this charge.

/s/
J.L.S.

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For these reasons, we conclude that there was not a full discussion regarding the CBA's limited applicability.

[20] *King Soopers*, 332 NLRB at 38.