

**Diamond Detective Agency, Inc. and International
Guards Union of America.** Case 9–CA–38569

June 30, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAMBER
AND WALSH

The principal issue in this case is whether the Respondent violated Section 8(a)(3) by refusing to hire Eddie Dunn, the president of the local union, who had been unlawfully discharged by the Respondent's predecessor.¹

The Respondent adduced evidence that it did not hire Dunn because he was not on the predecessor's payroll at the time the Respondent assumed operations and because Dunn applied for a position for which the Respondent had no opening. The judge rejected the Respondent's defense and found that the Respondent unlawfully refused to hire Dunn because of his status as union president. The Respondent contends that the judge erred in rejecting its defense. We agree.

Even assuming that the General Counsel established that Dunn's status as union president was a motivating factor in the Respondent's decision not to hire him, we find that the Respondent demonstrated that it would not have hired Dunn even in the absence of his union status. *Wright Line*, 251 NLRB 1083, enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Accordingly, we shall dismiss the 8(a)(3) allegation of the complaint.²

I. THE FACTS

The record shows that Ernie Dunn worked for the Respondent from 1993 to 1998 as a sergeant on post 9 at the U.S. Department of Commerce Census Bureau in Jeffersonville, Indiana. In 1998, Numark Security, Inc. (Numark) replaced the Respondent as the security service provider at the Census Bureau. Numark hired all of the Respondent's employees, including Dunn. On February

2, 2000, the Union was certified as the exclusive collective-bargaining representative of Numark's employees in a unit of sergeants, officers, and security center operators. Dunn was elected president of the local union in March 2000. Almost a year later, on February 2, 2001, Numark discharged Dunn. The Union filed unfair labor practice charges over Dunn's discharge and a complaint issued, alleging, inter alia, that Numark's discharge of Dunn violated Section 8(a)(3) of the Act.

On April 16, 2001, at the request of the Department of Commerce, the Respondent replaced Numark as an interim provider of security services at the Census Bureau under a 6-month contract, which was extended to October 31, 2001. The Respondent hired all Numark employees on the payroll at the time it succeeded Numark. This included Union Vice President Timothy Crawford who had been disciplined but not discharged by Numark. Crawford was also named as a discriminatee in the unfair labor practice complaint against Numark.

All former Numark employees, whether union members or not, were transferred without interruption from the payroll of Numark to that of the Respondent. Dunn, having been removed by Numark 2 months earlier, was not on Numark's payroll at the time the Respondent took over operations. He was not hired and transferred to the Respondent's payroll. Instead, he submitted an application to the Respondent dated April 11, 2001. The application stated that Dunn sought a sergeant's position on post 9, the position he held prior to his discharge from Numark. That position had higher pay and greater authority than other sergeant or guard positions.³ Dunn's application did not list any other positions for which he wished to be considered.

Vice President for Operations David Howell interviewed Dunn on the day after Dunn submitted his application. Dunn told Howell that Numark had fired him because of his union activity. Howell told Dunn he would hear from the Respondent about whether he would be hired or not. Dunn contacted the Respondent again when he did not hear anything about his hiring. He was directed to Geoffrey White in the human resources department. White told Dunn that the Respondent was still

¹ In a prior case, the predecessor, Numark Security, Inc., was found to have violated Sec. 8(a)(3) of the Act by discharging Dunn. *Numark Security Inc. and International Guards Union of America*, JD–86–01, adopted pro forma by the Board on August 18, 2001.

In the instant case, on March 5, 2002, Administrative Law Judge Martin J. Linsky issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has adopted the judge's rulings, finding, and conclusions only to the extent consistent with this Decision and Order.

² We affirm the judge's rulings, findings, and conclusions concerning the Respondent's refusal to bargain with the Union in violation of Sec. 8(a)(5) of the Act.

³ Dunn testified without contradiction that a post 9 sergeant had more authority and was paid more than other sergeants. Further, in sec. C-6-D of the contract between the Respondent and the Commerce Department at the Census Bureau, the post 9 position is described as follows: "The Post 9 guard shall serve as the Post supervisor and shall meet all the requirements of Sec. C-9-F [Special Requirements for Supervisors]. The Post 9 guard shall be capable of, and fully qualified, in an emergency, of relieving the Control Center Operator and will be responsible for seeing that all Post stations are manned correctly and that all Post Orders are carried out in a manner consistent with the contract and government regulations." [R. Exh. 1.]

reviewing his application. White said that he needed copies of Dunn's certifications at the Respondent's local office. Dunn later took the requested copies to the local office and left a message at White's office that he had done so. Dunn called White one or two times and left messages for him, but did not hear from him again.

The Union's attorney, Irwin H. Cutler Jr., inquired about Dunn's job status on numerous occasions when Cutler was trying to schedule negotiations with the Respondent. He informed the Respondent that Region 9 of the Board had issued a complaint alleging that Numark unlawfully discharged Dunn.

Cutler spoke with the Respondent's president, Richard Taylor, about Dunn's status on June 12, 2001. Taylor told Cutler that the Respondent was waiting to see the outcome of the Board's unfair labor practice case. In a letter to Taylor dated June 13, Cutler wrote:

I have mentioned to you and Mr. Howell several times that the Union believes that Ernie Dunn, who is President of the local union and who was fired by Numark Security because of his union activity, should have been hired by Diamond Detective Agency the same as other Numark employees. In the meantime, Mr. Dunn has applied to Diamond and, even though Diamond has hired numerous other guards to work at the Census Bureau, Mr. Dunn has not been hired. [GC Exh. 14.]

On June 22, 2001, Administrative Law Judge Amchan issued a decision finding, *inter alia*, that Numark terminated Dunn in violation of Section 8(a)(3) of the Act and that Dunn should have been listed on Numark's payroll at the time Numark's contract was terminated. No exceptions were filed to Judge Amchan's decision. It was adopted by the Board and became final on August 18, 2001. The Respondent did not hire Dunn.

II. THE JUDGE'S DECISION

The judge focused on the Respondent's defenses in finding that the Respondent unlawfully refused to hire Dunn. He rejected the Respondent's defense that it did not hire Dunn because there was no opening in the post 9 position. He found that when Dunn applied for the position from which Numark unlawfully discharged him, it was incumbent on the Respondent to consider Dunn for some other position if the particular position he applied for was not available. The judge observed that after Dunn applied, the Respondent hired guards and also promoted a person to a sergeant's position, but did not hire Dunn. Instead, the Respondent said it wanted to see the outcome of the unfair labor practice case involving Dunn's discharge from Numark, but then did not hire Dunn after learning that Dunn prevailed in the case.

In these circumstances, the judge found that the only rational explanation for the Respondent's failure to hire Dunn was his status as union president. In this regard, he found that Dunn was in a different position from the other union members and officers hired by the Respondent because Numark discharged Dunn for union activity. Finally, the judge found that the Respondent's failure to bargain in good faith with the Union in violation of Section 8(a)(5) is evidence of the Respondent's union animus.

III. THE RESPONDENT'S EXCEPTIONS

The Respondent argues that the judge erred in rejecting its defense. The Respondent asserts that it hired all employees on the Numark payroll on April 16, 2001, including Union Vice President Crawford whose discipline, along with Dunn's discharge, was the subject of the unfair labor practice complaint against Numark. The Respondent further asserts that when Dunn applied for the post 9 sergeant position, the position was not open. The Respondent only had openings for positions for which Dunn had indicated no interest—positions with lower pay and less authority than the post 9 position. The Respondent contends that the judge improperly expanded an employer's hiring obligations by finding that the Respondent was required to consider Dunn for other lower paid positions with less authority for which Dunn did not apply or otherwise indicate he would accept.

IV. ANALYSIS

In all cases alleging violations of Section 8(a)(3) turning on employer motivation, the General Counsel must, under *Wright Line*, 251 NLRB at 1089, establish that union activity was a motivating factor in the employer's decision. The burden then shifts to the employer to demonstrate that it would have taken the same action even in the absence of the union activity.

The judge did not expressly apply the *Wright Line* shifting burdens analysis. Instead, he appears to have used a pretext analysis, which falls within the *Wright Line* framework.⁴ Finding that the Respondent's defenses were invalid, he essentially concluded that the Respondent used them as a pretext for the only remaining rational explanation of its refusal to hire Dunn: his status as union president. The judge supported this con-

⁴ See, e.g., *USF Dugan, Inc.*, 332 NLRB 409, 413 (2000), referring to the *Wright Line* test: "The test applies regardless of whether the case involves pretextual reasons or dual motivation. *Frank Black Mechanical Services*, 271 NLRB 1302 fn. 2 (1984). 'A finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel.' *Limestone Apparel Corp.*, 255 NLRB 722 (1981), *enfd.* 705 F.2d 799 (6th Cir. 1982)."

clusion with a finding that the Respondent's violation of 8(a)(5) evinced its union animus.

Applying *Wright Line*, we reject the judge's analysis. We find that even assuming that the General Counsel had established that union activity was a motivating factor in the Respondent's decision not to hire Dunn, the Respondent met its burden of showing that it would not have hired Dunn even in the absence of his union activity.

A. The Respondent failed to Hire Dunn Because he was not on Numark's Payroll at the Time it Took Over Operations

The Respondent asserts that it did not hire Dunn because he was not on Numark's payroll at the time the Respondent took over operations. The record supports this assertion. The record shows that the Respondent offered jobs to all employees on the Numark payroll on April 16, 2001. Dunn, however, was not on Numark's payroll when the Respondent took over operations because Numark had discharged him some 2 months earlier.

B. The Respondent did not Hire Dunn Because There was no Opening in the Position for Which he Applied

Dunn's application for work with the Respondent stated that he sought a sergeant's position on post 9, the position he formerly held with Numark. As stated earlier, the post 9 position was higher paid and vested with more authority than other sergeant or guard positions. It is undisputed that the position was filled at the time the Respondent took over operations from Numark. It is further undisputed that there was no opening in the post 9 position during the time the Respondent was the security provider at the Census Bureau.

Beyond question then, the Respondent had no opening in the specific position for which Dunn applied. Nor was the Respondent required to consider Dunn for other positions in which it had openings, but for which Dunn had not applied. Numark unlawfully discharged Dunn. The Respondent had no involvement in Numark's action and incurred no reinstatement obligation as a result of it. Contrary to the judge, we find that when Dunn applied for the post 9 position, the Respondent's legal obligation was limited to considering him for that position.

Further, we find that there is no convincing evidence that Dunn sought any other position with the Respondent. Dunn's application for employment with the Respondent refers solely to the post 9 position. Dunn himself did not assert that he expressed to the Respondent an interest in other positions. Instead, he testified that he could not remember whether he discussed during his interview with Howell a willingness to accept any other position with the Respondent.

The only possible evidence concerning Dunn's interest in a different position with the Respondent is Cutler's June 13 letter to the Respondent. The letter is ambiguous at best. Irving told the Respondent:

the Union believes that Ernie Dunn . . . should have been hired by Diamond Detective Agency the same as other Numark employees. In the meantime, Mr. Dunn has applied to Diamond, and even though Diamond has hired numerous other guards to work at the Census Bureau, Mr. Dunn has not been hired.

This letter does not clearly state that Dunn would have accepted positions other than the one for which he applied. In fact, it is most reasonably read simply as a complaint that Dunn was not hired in the position for which he applied, even though other hiring had taken place. After all, the post 9 position was higher paid and had more authority than other guard positions. And if Dunn had been willing to drop to a lower paying position with less authority, either he or the Union could easily have expressly said so. In these circumstances, the Union's letter is not reliable evidence that Dunn indicated to the Respondent that he would accept one of the other guard positions which were open at the time he applied.

V. CONCLUSIONS

Even assuming that the General Counsel established that Dunn's union status was a motivating factor in the Respondent's decision not to hire Dunn, we find that the Respondent demonstrated that it would not have hired Dunn even in the absence of his union status because he was not on Numark's payroll at the time the Respondent took over operations and because there was no opening in the post 9 position for which he applied. We shall, therefore, dismiss the allegation of the complaint that the Respondent refused to hire Dunn in violation of Section 8(a)(3) and (1) of the Act.⁵

ORDER

The National Labor Relations Board orders that the Respondent, Diamond Detective Agency, Inc., Jeffersonville, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unlawfully refusing to bargain in good faith with International Guards Union of America as the exclusive

⁵ The judge alternatively found that under *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973), the Respondent was lawfully bound to remedy Numark Security, Inc.'s unlawful discharge of Dunn when it became the successor to Numark. We do not adopt this finding, as the complaint does not allege that the Respondent is a *Golden State* successor, and there is no indication that the General Counsel ever advanced that theory of liability.

collective-bargaining representative of the employees in the following appropriate unit:

All guards, including sergeants, officers, and security center operators employed by Respondent at the Department of Commerce Census Bureau National Processing Center at Jeffersonville, Indiana, excluding all professional employees and supervisors as defined in the Act.

(b) 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) Within 14 days after service by the Region, mail a copy of the attached notice marked "Appendix"⁶ to all employees who were employed by the Respondent between June 13, 2001, and October 31, 2001, at the Department of Commerce Census Bureau National Processing Center in Jeffersonville, Indiana. The notice shall be mailed to the last known address of each of the employees after being signed by the Respondent's authorized representative.

(b) Within 21 days after service by the Region, file with the Regional director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

(c) Notify its successor at the Census Bureau of this decision.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations not found.

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 Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

⁶ If this Order is enforced by a judgment of the United States court of Appeals, the words in the notice reading "Mailed by Order of the National Labor Relations Board" shall read "Mailed Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain in good faith with International Guards Union of America as the collective-bargaining representative of our employees in the following appropriate unit:

All guards, including sergeants, officers, and security center operators employed by Respondent at the Department of Commerce Census Bureau National Processing Center at Jeffersonville, Indiana, excluding all professional employees and supervisors as defined in the Act.

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

DIAMOND DETECTIVE AGENCY, INC.

Eric J. Gill, Esq., for the General Counsel.

John D. Meyer and Rayford T. Blankenship, Esqs., of Greenwood, Indiana, for the Respondent.

Irwin H. Cutler Jr., of Louisville, Kentucky, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARTIN J. LINSKY, Administrative Law Judge. On June 21, 2001, the International Guards Union of America (the Charging Party or the Union) filed a charge with Region 9 of the National Labor Relations Board (the Board) alleging that Diamond Detective Agency, Inc. (Respondent) violated the National Labor Relations Act (the Act).

On August 6, 2001, the Board, by the Regional Director for Region 9, issued a complaint alleging that Respondent violated Section 8(a)(1), (3), and (5) of the Act when it refused to hire Ernie Dunn and when it failed and refused to recognize and bargain with the Union as the collective-bargaining representative of a unit of its employees.

Respondent filed an answer in which it denied that it violated the Act in any way.

A hearing was held before me in Louisville, Kentucky, on December 11, 2001.¹

Upon the entire record in the case, to include posthearing briefs submitted by the General Counsel and Respondent, and upon my observation of the demeanor of the witnesses, I make the following

¹ Respondent's unopposed motion to correct transcript is granted.

FINDINGS OF FACT

I. JURISDICTION

At all material times, Respondent has been engaged in providing guard services, including services for the U.S. Census Bureau in Jeffersonville, Indiana.

Respondent admits, and I find, that at all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits, and I find that, at all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Overview

Respondent is an Illinois corporation engaged in the business of providing security services for private and public customers. It operates nationwide and employs between 500 and 700 employees operating under approximately 120 contracts.

From 1993 until 1998 Respondent provided security services for the U.S. Census Bureau in Jeffersonville, Indiana, through a contract with the U.S. Department of Commerce. Ernie Dunn was employed by Respondent at the Census Bureau during that 1993 to 1998 period of time.

In 1998, Respondent was replaced as the security service provider by Numark Security, Inc. Numark hired all of the Respondent's employees at the Census Bureau when it took over the site to include Ernie Dunn. Numark operated as the security service provider until April 16, 2001, at which time and at the request of the Department of Commerce Respondent replaced Numark as an interim provider of security services under a 6-month contract which was to run until October 15, 2001, but which was later extended to October 31, 2001.

During the time that Numark had the contract the employees selected the Union to be their collective-bargaining representative. On February 2, 2000, the Union was certified as the exclusive collective-bargaining representative of the following unit of Numark employees:

All guards, including sergeants, officers and security center operators employed by Respondent at the Department of Commerce Census Bureau National Processing Center at Jeffersonville, Indiana, excluding all professional employees and supervisors as defined in the Act.

The Union and Numark management engaged in some negotiations for a collective-bargaining agreement but did not reach agreement on a contract by the time Numark was replaced by Respondent as the security provider at the Census Bureau in Jeffersonville, Indiana.

On February 2, 2001, Numark fired Ernie Dunn, who had been elected president of Local 143 of the International Guards Union of America in March 2000.

Again, Respondent took over on an interim basis the security provider duties at the Census Bureau on April 16, 2001.

On April 11, 2001, Ernie Dunn, the president of the Union, who had been fired by Numark on February 2, 2001, applied

for work with Respondent for whom he had worked from 1993 to 1998. Respondent did not hire him.

Some days prior to Respondent taking over from Numark the Union requested Respondent to recognize it as the exclusive collective-bargaining representative of its employees in the certified union and to bargain with it.

The two allegations of unfair labor practices, which I will address separately, are that Respondent violated Section 8(a)(1) and (3) of the Act when it refused to hire Ernie Dunn and that Respondent violated Section 8(a)(1) and (5) of the Act when it failed and refused to recognize and bargain with the Union.

B. Failure and Refusal to Hire Ernie Dunn

Ernie Dunn worked for Respondent from 1993 to 1998. During the course of his employment he was disciplined with a reprimand and a 4-day suspension. He also received a commendation and testified without contradiction that he had been offered a promotion. When Respondent lost the security contract at the Census Bureau to Numark Ernie Dunn was a sergeant on post 9, which all parties to this litigation agreed was an important post and as a Sergeant Ernie Dunn had a higher rank than officer.

When Numark took over, it hired all the employees of Respondent to include Dunn.

Numark fired Dunn on February 2, 2001, approximately 1 year after the Union had been certified as the exclusive collective-bargaining representative of Numark's employees and approximately 11 months after Dunn had been elected president of the Local.

The Union filed unfair labor practice charges over Ernie Dunn's discharge and other matters and a complaint issued.

Shortly after Respondent took over from Numark on April 16, 2001, the Union informed Respondent that it was litigating the discharge of Ernie Dunn as an unfair labor practice.

Respondent hired all the Numark employees by Numark as of April 15, 2001, to include union offices, such as Local Vice President Timothy Crawford, whether union members or not. The Numark employees were not required to present any certifications or take physical exams, etc. They were simply transferred without interruption from the payroll of Numark to that of Respondent.

Ernie Dunn submitted an application to Respondent, which is dated April 11, 2001. He was interviewed the very next day by David Howell, Respondent's vice president for operations. In the interview Howell, the third highest ranking official of Respondent from 1993 to 1998 and that Dunn claimed that he had been fired by Numark because of his union activity. Howell told Dunn he would hear in due course if he were hired or not.

Dunn didn't hear anything so he called Jim Adams, a supervisor for Respondent who had previously been a supervisor for Numark. Adams directed Dunn to contact the corporate human resources department and talk to a Geoffrey White. After several attempts Dunn eventually spoke with White. White told Dunn that Respondent was still reviewing his application and needed copies of Dunn's various certifications, e.g., gun qualifications, and White also mentioned that Dunn may need to submit a physical exam. Dunn told White that all his records

were current and were on file at the Census Bureau facility where he had worked. Dunn was told Respondent still needed a copy of his certifications and Dunn said he had copies and was told to take those copies to Respondent's local office. Dunn did so and then left a message at White's office that he had done so.

When Dunn heard nothing further he called White one or two times and left messages on White's voice mail. Dunn never heard back from White or anyone else on behalf of Respondent.

The Union's attorney, Irwin H. Cutler Jr., on numerous occasions while trying to schedule negotiating sessions with Respondent for a collective-bargaining agreement, would inquire about the job status of Ernie Dunn and informed Respondent that Ernie Dunn's discharge by Numark was the subject of an unfair labor practice complaint issued by Region 9 of the Board.

The case against Numark, i.e., Numark Security, Inc., Case 9-CA-37419, et al., was tried on April 23 and 24, 2001, before Administrative Law Judge Arthur J. Amchan. The case involved a number of alleged unfair labor practices to include the allegation that Numark unlawfully discharged Ernie Dunn.

On June 22, 2001, Judge Amchan issued his decision, which, among other things, found that Numark violated the Act when it discharged Ernie Dunn on February 2, 2001. In his recommended Order Judge Amchan ordered that Numark should "Notify its successor at the Census Bureau that . . . [Numark] disciplined and terminated Ernie Dunn in violation of the Act, that Ernie Dunn should have been listed on its payroll at the time . . . [Numark's] contract with the Census Bureau was terminated and that all references to the disciplining of Ernie Dunn . . . that it maintained at the Census Bureau facility should be expunged."

Judge Amchan prepared a notice to employees to be mailed by Numark to the Union as well as all Numark's employees at the Census Bureau, which contained the following provision

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge and discipline of Ernie Dunn and unlawful discipline of Timothy Crawford, and will notify our successor that any records maintained at Jeffersonville, Indiana, should also be expunged and WE WILL, within 3 days thereafter, notify Ernie Dunn and Timothy Crawford in writing that this had been done.

No exceptions were filed to Judge Amchan's decision and it was adopted by the Board and became final agency action on August 18, 2001. Timothy Crawford, the union vice president had received discipline short of discharge from Numark. He was still on Numark's payroll when Respondent took over on April 16, 2000, and was hired by Respondent.

Union Attorney Cutler testified that he communicated with senior representatives of Respondent about Ernie Dunn. On June 12, 2001, Cutler spoke with Richard Taylor, Respondent's president, about a number of issues to include Ernie Dunn. Taylor told Cutler, according to Cutler's testimony, which I credit and which he memorialized in writing that in connection

with Ernie Dunn, Respondent was waiting to see the outcome of the Board case.

The outcome of the Board case was that Ernie Dunn has been unlawfully discharged and Judge Amchan specifically found that Dunn should have been listed among Numark's current employees on April 16, 2001, when Respondent took over the security duties at the Census Bureau.

When Respondent took over from Numark it offered employment to all of Numark's employees and the overwhelming majority of 30 to 35 employees accepted and became employees of Respondent.

According to the record, to include the uncontradicted testimony of security guard Dana Moore, the new employees of Respondent who had previously been employed by Numark were not required to take a physical exam or provide any certifications to Respondent. Respondent simply received their files maintained at the Census Bureau from Numark, which contained all the necessary paperwork. Respondent had the exact same access to all the necessary paperwork on Ernie Dunn.

Ernie Dunn told Geoffrey White, vice president for human resources, that his file with the necessary paperwork was maintained at the Census Bureau like those of all the other Numark employees hired by Respondent. In any event Dunn furnished copies of his certifications to Respondent after he applied and called to inquire about what else he needed to do. Respondent never got back to him.

Respondent claims it did not hire Ernie Dunn because Dunn didn't complete the application process and because he applied for a sergeant's position on post 9 a position for which there was no opening.

Respondent's defenses fail. As discussed above, Dunn did tell Respondent's representative where the necessary information was, i.e., at the Census Bureau, and he even supplied copies of certifications. Ernie Dunn applied for the position from which he was unlawfully fired by Numark. It would be incumbent upon Respondent to consider Dunn for some other position if the *particular* position he applied for was not available but a sergeant's position was available. As the uncontradicted evidence at trial reflects Respondent, after hiring most of Numark's employees, found it necessary after Dunn applied and was not hired to run ads in the newspaper seeking people to apply for positions as guards and Respondent, after Dunn applied, hired as guards, individuals who had never worked at the Census Bureau for either Respondent or Numark and also promoted a person who had worked for Numark as a guard to a sergeant's position.

The only rational explanation for Respondent's failure to hire Ernie Dunn was his union status as president of Local 143. And, I find as fact that that was the reason. Respondent did hire employees of Numark who were officers or members of the Union and only failed and refused to hire Ernie Dunn. But Dunn was in a different position from those other people, i.e., he had been fired by Numark for his union activity. Respondent was informed by Irwin Cutler that Ernie Dunn had been unlawfully fired for union activity and Respondent gives Ernie Dunn the run around and eventually, on June 12, 2001, Richard Taylor, the president of Respondent, tells the Union they want to wait and see the outcome of the Board case before they de-

cide whether to hire Ernie Dunn or not. The outcome of the Board case on June 22, 2001, is that Ernie Dunn was indeed unlawfully discharged on February 1, 2001, because of his union activity, and lo and behold, Respondent still does not hire him.

The above coupled with my finding that Respondent, at the same time it refused to hire Ernie Dunn, violates Section 8(a)(1) and (5) of the Act by failing to bargain in good faith with the Union showing union animus on Respondent's part leads me to conclude that Respondent violated Section 8(a)(1) and (3) of the Act when it failed and refused to hire Ernie Dunn.

An alternate theory of liability is that Respondent was a *Golden State*² successor to Numark Security, Inc., i.e., before it took over from Numark Respondent was aware of the pending unfair labor practice allegation that Numark had unlawfully discharged Ernie Dunn and Respondent was therefore lawfully bound to remedy that unfair labor practice when it became the successor. Respondent was clearly a successor to Numark as shown in section III,C, below. Respondent signed a contract with the Department of Commerce of April 16, 2001 (R. Exh. 1), but was aware of the unfair labor practice charges involving Ernie Dunn when Union Attorney Cutler notified them of it by fax on April 10, 2001 (GC Exh. 4).

C. Failure to Recognize and Bargain in Good Faith with the Union

The Supreme Court, in *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), held that a new employer has a duty to recognize and bargain with the incumbent union when two general factors, which can be summarized as (1) continuity of the work force and (2) continuity of the enterprise, are present.

In order to establish a "continuity of the work force," the former employees of the predecessor who were employed in the predecessor's bargaining unit must comprise a majority of the new employer's complement within that same bargaining unit.

After establishing the continuity of the work force, the analysis proceeds to the second factor; the continuity of the enterprise. In evaluating the continuity of the enterprise, the Board looks to the following elements: (1) whether there was been substantial continuity of the same business operations; (2) whether the new employer uses the same facilities; (3) whether the same jobs exist under the same working conditions; (4) whether the new company employs the same supervisors; (5) whether the same equipment, machinery or processes are used; (6) whether the same products or services are offered; and (7) whether the new employer had basically the same body of customers. *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27 (1987); see also *Sierra Realty Corp.*, 317 NLRB 832 (1995); *Nephi Rubber Products Corp.*, 303 NLRB 151 (1991), *enfd.* 976 F.2d 1361 (10th Cir. 1992). The totality of the circumstances frames the analysis and the Board does not give controlling weight to any single factor. *Premium Foods, Inc.*, 260 NLRB 708, 714 (1982), *enfd.* 709 F.2d 623 (9th Cir. 1983).

The Board and the courts have emphasized that the question of whether or not there is substantial continuity between the old

and new business is to be examined from the perspective of the employees affected. The pertinent inquiry is whether there has been enough of a change in operations to defeat the employees' expectation of continued Union representation. *Fall River Dyeing*, *supra*; *Premier Products, Inc.*, 303 NLRB 161 (1991); *Capitol Steel & Iron Co.*, 299 NLRB 484 (1990).

Generally, another consideration is evaluating a *Burns* successor is whether there has been a hiatus between the cessation of the old operation and the commencement of the new business. *Fall River Dyeing*, *supra*. As a rule, the longer the hiatus, the less likely an entity will be deemed a successor.

A successor employer's obligation to recognize and bargain is triggered by the incumbent Union's request for recognition and/or bargaining. It has long been held that a valid request for recognition and/or bargaining need not be made in any particular form so long as the request clearly indicates a desire to bargain and negotiate on behalf of the unit employees.

It is obvious that Respondent is a *Burns* successor to Numark Security and had a duty to recognize the union and bargain with it in good faith. Respondent had the same employees and supervisors as Numark did and performs the same services, i.e., security services, at the same location for the same client, i.e., the Census Bureau facility in Jeffersonville, Indiana.

By letter dated April 10, 2001, the Union by its attorney, Irwin Cutler, informed Respondent that it represented a unit of employees at the Census Bureau and by letter dated April 16, 2001, made a request to Respondent to bargain. The letters were also faxed to Respondent. The first letter was directed to Respondent by corporate name only. The second letter was directed to David Howell, Respondent's vice president for operations.

There was a delay on Respondent's part in meeting with the Union caused by the fact that John Jordan, Respondent's owner, who wanted to be involved in the negotiations, was recovering from organ transplant surgery. Suffice it to say, the parties agreed to meet on June 11, 2001, almost 2 months after Respondent took over from Numark. Respondent was to call the Union on May 21 to confirm the June 11 date but never called until June 7, 2001, when it left a voice mail message that they could not meet on June 11, 2001.

The Union by Cutler on May 23, 2001, wrote again to David Howell and wanted to know when the parties would be meeting and also requested certain information from Respondent, namely, a copy of Respondent's contract with the Department of Commerce and a list of the names, addresses, telephone numbers, job classifications, and rates of pay for all employees in the bargaining unit.

On May 30, 2001, the Union again wrote to Respondent and advised that it wanted to meet on June 11, 2001, as planned but it interpreted Respondent's letter of May 24, 2001, signed by David Howell as a refusal to bargain since Respondent wrote that it did not consider itself to be a "successor contractor" to Numark.

On June 4, 2001, Cutler spoke with Howell and said again that the Union wanted to meet with Respondent and begin the bargaining process.

On June 7, 2001, Cutler wrote to David Howell and Respondent's president, Richard Taylor, and asked for certain addi-

² *Golden State Bottling Co. v. NLRB*, 414 US 168 (1973).

tional information regarding the benefits of the employees in the bargaining unit and noted that Respondent was to get back to the Union regarding a date the parties could meet but hadn't done so. Cutler also forwarded a copy of the Decision and Direction of Election of the Acting Regional Director for Region 9, which describes the bargaining unit in question.

Earlier on June 7, 2001, Cutler received a voice mail message from Respondent's president, Richard Taylor, calling on behalf of Respondent's vice president for operations, David Howell. Taylor informed the Union that Respondent would not be able to meet with the Union on June 11, 2001, as previously agreed upon.

On June 12, 2001, Cutler spoke with Taylor and Taylor acknowledged, almost 2 months after taking over from Numark, that it had a duty to bargain with the Union. The parties tried to agree to some ground rules for negotiations. It is in this conversation that Taylor says that with respect to Ernie Dunn that Respondent will wait to see the outcome of the Board case against Numark in deciding whether to hire Ernie Dunn or not.

On June 13, 2001, Cutler sent to Taylor an update of where negotiations stood for a collective-bargaining agreement between the Union and Numark as of the time Respondent replaced Numark. Cutler, in his letter, wrote, "Please call me as soon as possible and advise when you are available to meet for negotiations."

The Union never heard back from Respondent and on June 21, 2001, filed its unfair labor practice charges with Region 9.

Respondent had an interim contract to provide security services until October 15, 2001, which was later extended to October 31, 2001. Respondent bid to get a 5-year contract but by letter dated July 15, 2001, Respondent was advised by the Department of Commerce that the security service contract at the Census Bureau in Jeffersonville, Indiana, would be a 100-percent small business set aside contract and since Respondent was a large business it could not continue at the Census Bureau beyond October 31, 2001.

Respondent claims that the initial delay in Respondent and the union meeting to negotiate was the result of the Respondent's owner's health problems and from mid-July 2001 forward the failure to meet was the result of Respondent not being permitted to secure a 5-year contract and it made no sense for the parties to agree to a contract which would bind Respondent's successor at the Census Bureau.

I find that Respondent, albeit not in record time, recognized the Union as the collective-bargaining representative of its employees but from June 13, 2001, forward Respondent failed to bargain in good faith with the Union in violation of Section

8(a)(1) and (5) of the Act. Needless to say there was much that the parties could bargain about even though Respondent would not be the employer after October 31, 2001, e.g., wages, hours, and the myriad remainder of *other* terms and conditions of employment such as a grievance procedure, etc. Respondent would not meet at all from June 13, 2001, forward.

A security firm named Deco replaced Respondent as the security service provider at the Census Bureau on November 1, 2001.

REMEDY

Since Respondent is no longer the security provider at the Census Bureau the remedy for the failure and refusal to hire Ernie Dunn should include back pay to Dunn at a sergeant's rate of pay from April 16, 2001, when Respondent took over the security services at the Census Bureau until November 1, 2001, when Deco replaced Respondent. This, of course, would be in addition to a cease and desist order and the mailing of an appropriate notice to employees. Backpay to be computed as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Respondent should also notify its successor about the outcome of this case.

The remedy for the refusal to bargain in good-faith finding should be a cease and desist order and mailing of a notice to employees.

CONCLUSIONS OF LAW

1. Respondent, Diamond Detective Agency, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

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

3. Respondent violated Section 8(a)(1) and (3) of the Act when it failed and refused since April 16, 2001, to hire Ernie Dunn.

4. Respondent violated Section 8(a)(1) and (5) of the Act since June 13, 2001, when it refused to bargain in good faith with the Union as the collective-bargaining representative of its employees.

5. The above violations of the Act are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommended Order omitted from publication.]