



**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

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**CREATIVE VISION RESOURCES, LLC** \*  
**Respondent** \*  
\*  
**and** \*  
\* **Case No. 15-CA-020067**  
**LOCAL 100, UNITED LABOR UNIONS** \*  
**Union** \*  
\*\*\*\*\*

**COUNSEL FOR THE ACTING GENERAL COUNSEL’S EXCEPTIONS TO THE  
DECISION OF THE ADMINISTRATIVE LAW JUDGE AND BRIEF IN  
SUPPORT OF EXCEPTIONS**

COMES NOW Kevin McClue, Counsel for the Acting General Counsel (Counsel), in the above captioned case, and files these Exceptions to the Administrative Law Judge’s (ALJ) Decision and Order (ALJD) in the above-captioned case.<sup>1</sup> Counsel excepts to the following:

**Exception No. 1**

Counsel excepts to the ALJ’s finding “Respondent did not fail to communicate candidly with the hoppers who would become its employees and thus did not fall within the definition of perfectly clear successor.” (ALJD, p. 21, lines 24-28; p. 22, lines 16-17; p. 25, lines 40-41; p. 26, lines 9-11; p. 29, lines 28-31).

**Exception No. 2**

Counsel excepts to the ALJ’s finding “Respondent’s owner, Richard, III, determined the initial terms and conditions of employment before the Respondent began operations.” (ALJD, p. 21,

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<sup>1</sup> Reference to the Exhibits of the General Counsel and Respondent will be designated as “GCX” and “RX” respectively, with the appropriate number or numbers for those exhibits. The Joint Exhibits of General Counsel and Respondent will be designated as “JX”. Reference to the transcript and the ALJD in this matter will be designated as “TR” and “ALJD” respectively.

lines 4-6).

**Exception No. 3**

Counsel excepts to the ALJ's failure to find that Respondent's failure to announce the new work rules contained in Respondent's employee handbook and safety manual to its hoppers until June 4, 2011, was a violation of Section 8(a)(5) of the Act. (ALJD, p. 26, lines 20-25).

**Exception No. 4**

Counsel excepts to the ALJ's finding "Respondent did not violate the Act by setting its initial terms and conditions of employment." (ALJD, p. 22, lines 18-20; p. 25, lines 41-43; p. 26, lines 9-11; p. 26, lines 22-25; p. 29, lines 28-31).

**Exception No. 5**

Counsel excepts to the ALJ's dismissal of paragraphs 11(a) and 11(c) of the Complaint and Notice of Hearing, as amended. (ALJD, p. 29, lines 30-31).

**I. SUMMARY OF PERTINENT FACTS**

**A. The Union.**

United Labor Unions, Local 100 (Union) is an independent union.

In 2005, M&B/Berry Services (Berry III) began providing hoppers—individuals who ride on the back of garbage trucks and "hop" off to collect the garbage—to several New Orleans municipal garbage collectors, which included a contract to provide hopper services for Richard's Disposal, Inc. (Richard's Disposal). On May 18, 2007, the Union—then affiliated with the SEIU Local 100—was certified as the bargaining representative of the Berry III hoppers who worked on trucks operated by Metro Disposal, Inc. and/or Richard's Disposal. (ALJD, p.3, lines 20-35).

Thereafter, the Union and Berry III entered into a collective bargaining agreement effective September 1, 2007, through September 1, 2010. (ALJD, p. 6, lines 17-19; GCX 27).

**B. The Hiring Process.**

Respondent provided a job application and tax forms (hiring documents) to individuals interested in employment with Respondent. ALJ Locke found that the tax forms were the type of forms an employee typically completes when hired. (ALJD, p. 8, lines 11-13). ALJ Locke found that Respondent sought employees only from the hoppers who were employed by Berry III. (ALJD, p. 11, lines 15-18). Respondent's owner Alvin Richard III (Richard III), who at all material times was the Vice President of Richard's Disposal<sup>2</sup> did not interview any of the Berry III hoppers who turned in their hiring documents. (RX 8, p. 3; ALJD, p. 8, line 29). Rather, Richard III testified that simply by turning in their hiring documents, the Berry III hoppers were agreeing to work for Respondent and Respondent was agreeing to hire them. (RX 8, p. 3; ALJD, p. 8, lines 32-47). According to Richard III, when he gave hiring documents to the Berry III hoppers, he told them if they wanted the job, they needed to complete the hiring documents. (RX 8, p. 3). Thus, by distributing the hiring documents to the Berry III hoppers, Respondent made offers of employment to them. Moreover, at the time the Berry III hoppers turned in their hiring documents, Respondent officially hired them.

**C. Respondent's original planned start date was May 20, 2011.**

Respondent initially planned to begin operations on May 20, 2011; however, by May 20, 2011, Respondent had not received enough applications from the Berry III hoppers to begin

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<sup>2</sup> Richard III is the son of the owner of Richard's Disposal.

operations so it postponed taking over for Berry III until it had secured enough applications (TR, p. 437, lines 8-13). Typically, Richard's Disposal needs 40 to 44 hoppers per day to work on its trucks. (ALJD, p. 9, lines 22-24).

**D. The majority of the applicants were not informed of changes to their terms and conditions of employment.**

In May 2011, Richard III asked Berry III hopper Eldridge Flagge (Flagge) to distribute applications to the Berry III hoppers on behalf of Respondent. (TR, p. 97). Flagge was one of the first individuals to receive hiring documents from Richard III. (RX 8, p. 2). When Richard III gave Flagge the hiring documents, Richard III knew the Berry III hoppers were represented by the Union. (RX 8, p. 3). Flagge testified he was not informed of any changes to the terms and conditions of employment when Richard III asked him to distribute the hiring documents. Flagge initially distributed a stack of 15 to 20 hiring documents to the Berry III hoppers and then requested and received more hiring documents from Richard III to distribute to the Berry III hoppers. (ALJD, p. 13, lines 16-19).

Richard III testified that when he gave the hiring documents to Berry III hoppers he informed them of new terms and conditions of employment, including that hoppers would earn \$11 per hour. (ALJD, p. 13, lines 8-11). ALJ Locke also found the record does not establish how many hoppers Richard III informed of the initial terms and conditions when he provided them with the applications, but that Richard III ...” distributed applications to less than half the hoppers in the Berry III bargaining unit.” (ALJD, p. 17, lines 39-41). Therefore, it logically follows Flagge must have distributed hiring documents to more than half the hoppers in the

Berry III bargaining unit.

As stated earlier, Flagge was one of the first of the Berry III hoppers Richard III approached with Respondent's hiring documents, and Flagge testified he was not told there were going to be changes to the terms and conditions of employment when he received the hiring documents. Consequently, more than half of the Berry III hoppers who received hiring documents from Flagge were not informed of any changes to their terms and conditions of employment when they turned in their hiring documents and thus hired by Respondent. (ALJD, p. 14, lines 1-3; p. 17, lines 44-45; TR, p. 301, lines 5-20, p. 302, lines 13-23). When Richard III asked Flagge to distribute hiring documents to the hoppers on behalf of Respondent, Flagge was an agent of Respondent when he distributed the hiring documents to the Berry III hoppers. Therefore, Respondent was accountable for what Flagge said and/or did not say to the Berry III hoppers when Flagge distributed and collected the hiring documents from the Berry III hoppers. Thus, Respondent through its agent Flagge did not inform over half of Berry III hoppers of any changes to their terms and conditions of employment when he offered them employment with Respondent by giving them Respondent's hiring documents. (TR, p. 98, lines 1-13).

**E. Respondent did not inform Union of changes to terms and conditions of employment.**

Respondent did not inform the Union that it was distributing hiring documents to the Berry III hoppers nor did Respondent notify the Union of any changes to the terms and conditions of employment the Berry III hoppers could expect from Respondent. The Union only became aware that Respondent was distributing hiring documents to the Berry III hoppers in late May 2011, when it was contacted by a Berry III hopper after the hopper received hiring

documents from Respondent. (TR, p. 253, lines 16-25, p. 254, line 1). At the time the Union became aware Respondent was soliciting Berry III hoppers for employment, Respondent's owner had already asked Berry III bargaining unit employee Flagge to distribute hiring documents to the Berry III hoppers, and Flagge had already started distributing the hiring documents to over a half of Berry III's bargaining unit employees.

**F. On June 1, 2011, Respondent had hired enough Berry III hoppers to begin operations.**

By June 1, 2011, Respondent had hired at least 39 former Berry III bargaining unit employees, based on Richard III's admitted policy that by accepting the application Respondent was offering to hire the Berry III hopper and upon receipt of application Respondent agreed to hire hopper. (GCX 13A-S; GCX14A-J). On June 1, 2011, Respondent determined it had hired enough hoppers to begin operations on June 2, 2011. Therefore, on June 1, 2011, Richard III as Vice President of Richard's Disposal informed Karen Jackson (Jackson), then Berry III's bargaining unit employee supervisor, that Respondent was taking over for Berry III and asked Jackson to deliver a letter to Berry III's owner cancelling Richard's Disposal's contract with Berry III. (RX 21, p. 3; ALJD, p. 9, lines 2-3).

**G. On June 2, 2011, Respondent began operations.**

On June 2, 2011, Jackson stated at a meeting with an unknown number of hoppers present at Richard's Disposal facility that they were now working for Respondent. Jackson told the hoppers present they were going to be earning \$11 an hour, guaranteed eight hours per day, overtime, four paid holidays, and that taxes would be taken out of their pay. (ALJD, p. 20, lines 4-47). ALJ Locke found that but for Jackson, on June 2, 2011, informing the former Berry III

bargaining unit hoppers that they were now working for Respondent, they would not have known that Respondent had taken over for Berry III. (ALJD, p. 9, lines 5-7; p. 10, lines 9-12).

Notably, some of the hoppers were so unhappy about the announced changes to their terms and conditions of employment that they walked away upset from Jackson's meeting. (ALJD, p. 20, lines 35-47). It is a reasonable conclusion that the hoppers who walked away upset on June 2, 2011, were some of the hoppers who had received their hiring documents from Flagge and thus were not informed of the new terms and conditions of employment when they were given the hiring documents, nor when they submitted their hiring documents to Respondent.

On June 2, 2011, Respondent provided 44 hoppers to Richard's Disposal. All of Respondent's hoppers were previously members of Berry III's bargaining unit and constituted a representative complement of employees. (ALJD, p. 9, lines 21-27).

**H. On June 4, 2011, Respondent announced the employee handbook and safety manual to its hoppers.**

Richard III admitted that when he gave the hiring documents to Flagge to distribute to the Berry III hoppers in May 2011, Respondent's employee handbook and safety manual had not been finalized. In addition, Richard III did not recall speaking with Flagge about the employee handbook and/or safety manual when he gave Flagge the hiring documents to distribute to the Berry III hoppers. (RX 8, p. 3). Although Respondent began operations on June 2, 2011, the new terms and conditions of employment contained in the employee handbook and safety manual were not announced to Respondent's hoppers until they were distributed to the hoppers on June 4, 2011. (ALJD, p 26, lines 15-16).

## **I. The Union Demands Recognition.**

On June 6, 2011, the Union demanded Respondent recognize and bargain with it.

Respondent has refused to recognize and bargain with the Union.

## **II. ALJ DECISION**

In his January 7, 2013, decision, ALJ Locke found Respondent is a successor to Berry III. ALJ Locke found it was perfectly clear that Respondent intended to hire the employees in the Berry III bargaining unit. (ALJD, p. 12, lines 15-17; p. 12, lines 46-47; p. 13, lines 1-2; p. 21, lines 24-26). ALJ Locke determined that completing the hiring documents was a mere formality for the Berry III hoppers. (ALJD 8, lines 29-32). Additionally, ALJ Locke determined that when Richard III distributed the applications to some, but less than half, of the representative complement of bargaining unit employees, Richard III informed those employees of some of the changes to their terms and conditions of employment. Because Richard III informed some, but less than half, of the Berry III of some of the changes to their terms and conditions of employment, ALJ Locke determined Respondent "... did not fall within the definition of 'perfectly clear' successor..." as set forth by the National Labor Relations Board (Board) in *Spruce Up Corp.*, 209 NLRB 194 (1974), enf. 529 F.2d 516 (4<sup>th</sup> Cir. 1975).

Based on the finding that Respondent is not legally a perfectly clear successor, ALJ Locke determined Respondent did not violate the Act by setting its initial terms and conditions of employment. Therefore, ALJ Locke dismissed paragraphs 11(a) and 11(c) of the Compliant and Notice of Hearing (CNOH).

### III. LEGAL ANALYSIS

The ALJ erred in finding Respondent sufficiently communicated changes to terms and conditions of employment to the Berry III hoppers before it began operations and therefore did not violate Section 8(a)(5) of the Act. The basis of the ALJ's decision is that Richard III informed some, but less than half, of the Berry III hoppers about some of the changes to the Berry III hoppers' terms and conditions of employment when Richard III distributed hiring documents to the Berry III hoppers. However, Flagge, who distributed more than half of the hiring documents, did not inform any of the Berry III hoppers about changes to terms and conditions of employment. Consequently, Respondent failed to notify more than half of the prospective employees about expected changes to their terms and conditions of employment before offering and accepting their employment with Respondent. Therefore, Respondent violated Section 8(a)(5) of the Act as alleged in paragraphs 11(a) and 11(c) of the CNOH when it did not continue the terms and conditions of employment the bargaining unit employees enjoyed while working for Berry III.

#### A. **Perfectly Clear Successor Argument.**

In *NLRB v. Burns Int'l Servs.*, 406 U.S. 272 (1972), the Supreme Court held that a successor who did not adopt its predecessor's contract with the union was nevertheless precluded from unilaterally imposing new terms and conditions of employment if "it is perfectly clear that the new employer plans to retain all of the employees in the unit." *Id.* at 294.

As noted above, Richard III testified that simply by turning in their hiring documents, the Berry III hoppers were agreeing to work for Respondent, and Respondent was agreeing to hire

them. Thus, the ALJ correctly found that it was perfectly clear that Respondent intended to hire all of the hoppers in the Berry III bargaining unit. (ALJD, p. 12, lines 15-17; p. 12, lines 46-47; p. 13, lines 1-2; p. 21, lines 24-26). Although the ALJ does not specifically state when it was perfectly clear Respondent intended to retain the hoppers in the Berry III bargaining unit, the evidence indicates that on the day in early May 2011, when Respondent asked Flagge to distribute applications to the Berry III hoppers, Respondent intended to retain all the Berry III hoppers. It was evident at this point Respondent only intended to distribute applications to hoppers in the Berry III bargaining unit. A few days later, Richard III distributed the hiring documents to Flagge to give to the Berry III hoppers. For example, hopper Booker Sanders (Sanders) received his application from Flagge and turned it in on May 19, 2011, to Respondent. (GCX 13Y). Sanders did not receive any information from Flagge about Respondent changing any terms and conditions of employment. (ALJD, p. 17, lines 43-47, p. 18, lines 1-2).

Again, Richard III distributed some, but less than half, of the hiring documents to the Berry III hoppers. Whereas, Flagge distributed more than half of the hiring documents to the Berry III hoppers without notifying the bargaining unit employees of any changes to their terms and conditions of employment. Thus, Respondent, via its agent Flagge, offered employment to more than half of the Berry III bargaining unit hoppers without informing them of any changes to their initial terms and conditions of employment.

The Board in *Spruce Up Corp.*, 209 NLRB 194 (1974), enf. 529 F.2d 516 (4<sup>th</sup> Cir. 1975), established boundaries to the perfectly clear caveat established in *Burns*. In *Spruce Up Corp.*, the Board stated that:

[w]e 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. *Id.* at 195.

In the instant case, it was perfectly clear Respondent in May 2011 intended to hire all the Berry III hoppers who were given hiring documents. Therefore, Respondent effectively announced its intent to retain the predecessor hoppers when Richard III asked Flagge to distribute Respondent's hiring documents to the Berry III hoppers. Flagge was not notified of any changes to the terms and conditions of employment when Richard III asked him to distribute hiring documents on behalf of Respondent; thus, Flagge did not notify any of the Berry III hoppers of any changes to terms and conditions of employment when he distributed the hiring documents to more than half of the Berry III hoppers. (See *Arden's*, 211 NLRB 510 (1974) (successor employer is free to set new initial terms and conditions of employment up until the moment when it offers employment to the predecessor's employees, but not after).

Based on Richard III failing to notify Flagge of changes to terms and conditions of employment when he asked Flagge to distribute Respondent's applications to the hoppers, and Flagge not notifying the Berry III hoppers to whom he distributed the hiring documents of changes to their terms and conditions of employment, Respondent misled Berry III bargaining unit hoppers into believing they would be hired without any changes to their terms and conditions of employment. Thus, Respondent "failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment." *Id.* at 195. Therefore, Respondent is legally a perfectly clear successor that failed to notify the Union or

Berry III hoppers of the changes to their terms and conditions of employment when it invited, through Flagge, Berry III bargaining unit employees to become Respondent employees.

As a perfectly clear successor, Respondent violated Section 8(a)(5) of the Act when it changed the way employees were paid and instituted new work rules in its employee handbook and safety manual as alleged in paragraphs 11(a) and 11(c) of the CNOH.

**B. Respondent failed to notify its potential employees of changes announced in the employee handbook and safety manual until June 4, 2011.**

The evidence indicates that as of June 1, 2011, the Berry III hoppers who had been hired by Respondent were not aware of the employee handbook and safety manual. The employee handbook and safety manual were not given to the hoppers until June 4, 2011, two days after they had become employees of Respondent. Thus, although ALJ Locke found that the employee handbook and safety manual was promulgated on June 2, 2011, start up, (ALJD, p. 26, lines 23-25), the record shows they were not announced to the hoppers until Respondent distributed them to the hoppers on June 4, 2011.

Even assuming Respondent in May 2011 initially informed the hoppers of the \$11.00 per hour wage rate, guaranteed eight hours a day, overtime, that taxes would be taken out of their pay, and that they would only have four paid holidays, Respondent violated the Act when it failed to specifically announce until June 4, 2011, the other changes to terms and conditions of employment as described in the employee handbook and safety manual. (See *Cora Realty Co.*, 340 NLRB 366, 367 (2003) (post takeover termination of fringe benefits unlawful because successor failed to announce them prior to takeover); *Specialty Envelopes Co.*, 321 NLRB 828,

832 (1996) (although Burns successor lawfully announced certain changes prior to takeover, an unannounced change in attendance policy one month later was unlawful)).

Therefore, assuming Richard III announced some changes to the terms and conditions of employment when he distributed the hiring documents to less than half of the Berry III hoppers, the new terms and conditions of employment as set forth in the employee handbook and safety manual were not announced to Respondent's hoppers until June 4, 2011, when the hoppers received copies of the employee handbook and safety manual. Thus, Respondent violated Section 8(a)(5) of the Act when it instituted the new terms and conditions of employment via the employee handbook and safety manual as alleged in paragraph 11(c) of the CNOH.

#### IV. REMEDIES

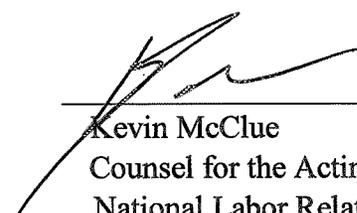
In the Remedy Section of the CNOH, the Region requested in connection with an award of backpay that the Respondent: (1) reimburse discriminatees for any amounts equal to the difference in taxes owed upon receipt of a lump-sum payment and taxes that would have been owed had there been no discrimination, and (2) submit the appropriate documentation to the Social Security Administration so that when backpay is paid, it will be allocated to the appropriate periods. Because ALJ Locke incorrectly found that Respondent had clearly announced initial terms and conditions of employment, ALJ Locke did not order a remedy requiring Respondent to perform (1) and (2) the above. Thus, it is requested that any Board Order require Respondent to perform (1) and (2) above. See *Latino Express, Inc.* 359 NLRB No. 44 (December 18, 2012) (Board issued an order requiring Respondent to: (1) submit the appropriate documentation to the Social Security Administration (SSA) so that when backpay is

paid, it will be allocated to the appropriate calendar quarters, and/or (2) reimburse a discriminatee for any additional Federal and State income taxes the discriminatee may owe as a consequence of receiving a lump-sum backpay award covering more than 1 calendar year.)

V. CONCLUSION

Counsel submits that Respondent is a legally perfectly clear successor who did not clearly announce changes to terms and conditions of employment before misleading all the Berry III bargaining unit hoppers into believing they would all be retained without changes to terms and conditions of employment. Therefore, the ALJ erred in finding Respondent is not a perfectly clear successor and dismissing allegations 11(a) and (c) of the CNOH. Thus, Counsel excepts to all portions of the ALJD where the ALJ finds Respondent is not a perfectly clear successor and to the dismissal of allegations 11(a) and (c) of the CNOH.

Dated at New Orleans, Louisiana this 11th day of February 2013.



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**CERTIFICATE OF SERVICE**

I hereby certify that on February 11, 2013, I electronically filed a copy of the foregoing Counsel for the Acting General Counsel's Exceptions to the Decision of the Administrative Law Judge and Brief in Support of Exceptions with the Executive Secretary of the National Labor Relations Board and forwarded a copy by electronic mail to the following:

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