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# New Clarity From NLRB On Successor Bargaining Duties

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Businesses seeking to grow their operations through the acquisition of other companies often approach potential target companies with unionized workforces with immense skepticism and extreme caution, assuming the acquisition of a company with a union will create a compliance nightmare. Far too often, companies fear wading into the murky waters of the often confusing — and ever-changing — laws, rules and regulations that govern an employer's interactions and obligations with a unionized workforce. However, a recent decision by the National Labor Relations Board should reduce at least some of the anxiety that may arise when a company has its eyes on a potential target company with a union.

**The Board's Decision in Ridgewood Health Care Center**

In a 3-1 decision released last month, the National Labor Relations Board reversed decades of precedent regarding a successor employer's bargaining obligations following the asset purchase of an entity with a unionized workforce. The board's Ridgewood Health Care Center decision[1] significantly reined in the application of the "perfectly clear successor" doctrine, which requires a successor employer that planned to retain all of the employees in the unit to initially consult with the employees' bargaining representative before it fixed the terms and conditions of employment. With this narrower application of the doctrine, more businesses that acquire companies with a unionized workforce will be given the much needed freedom to set their employees' wages, hours and benefits without first bargaining with a union, and without fear of violating the National Labor Relations Act.

**Successorship Following an Asset Purchase — The Burns Case**

Pursuant to the U.S. Supreme Court's decision in *NLRB v. Burns International Security Services Inc.*,[2] the National Labor Relations Board applies a two-part test when determining whether an employer is a "successor" employer under the National Labor Relations Act, and therefore has a duty to recognize and bargain with the union representing the employees of its predecessor. Whether an employer is a successor employer depends on two factors:

1. Whether there is a substantial continuity of business operations, i.e., whether the new employer conducts substantially the same business as the predecessor employer, and

2. Whether there is continuity in the workforce, i.e., whether a majority of the new employer's substantial and representative complement of employees in an appropriate unit are former employees of the predecessor employer.

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Generally, even if an employer is a successor employer under this two-part test, it is still free to set the initial terms and conditions of employment for bargaining unit employees prior to bargaining with the union, and therefore is not required to abide by the terms and conditions of employment set forth in the predecessor employer's collective bargaining agreement. The Supreme Court reasoned that the rationale for this "economic freedom was that…[s]addling such an employer with the terms and conditions of employment contained in the old collective bargaining contract may make these changes impossible and may discourage and inhibit the transfer of capital …"[3]

**The Narrow "Perfectly Clear Successor" Doctrine and its Subsequent Expansion by the NLRB**

The Supreme Court, however, carved out a narrow exception to this two-part test in Burns, whereby a successor employer is bound by the terms of the predecessor employer's collective bargaining agreement if it is determined that the successor employer is a perfectly clear successor. Under Burns, a successor employer is deemed a perfectly clear successor if the employer planned to retain, or would have retained absent a discriminatory motive, all or substantially all of its predecessor's bargaining unit employees.

Despite its indication that the perfectly clear successor doctrine should be narrowly construed, the National Labor Relations Board slowly expanded the application of the doctrine over decades of decisions. In Spruce Up Corp.,[4] the board emphasized that the perfectly clear successor exception was supposed to be narrow.

The board held that employers are required to bargain before setting the initial terms and conditions of employment only "in 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."[5]

Subsequently, in Love's Barbeque[6] which addressed the appropriate remedy following an employer's discriminatory hiring practices aimed at avoiding hiring employees of a predecessor employer, the doctrine expanded again by the board. In Love's Barbeque, the employer attempted to conceal its hiring opportunities from the predecessor's former employees.[7]

The board concluded that this concealment created an ambiguity and made it impossible to determine whether the employer would have hired all or substantially all of the predecessor's unit employees. Thus, the board held that "any uncertainty as to what [r]espondent would have done absent its unlawful purpose must be resolved against [r]espondent, since it cannot be permitted to benefit from its unlawful conduct."[8]

In the case of Galloway School Lines,[9] the board further expanded the application of the perfectly clear successor doctrine, citing the remedial doctrine in Love's Barbeque. Following the board's decision in Galloway School Lines, a successor employer was also obligated to bargain with a predecessor union before setting initial terms and conditions of employment if the successor employer discriminatorily failed to hire some, but not all, of the predecessor's employees in order to avoid a bargaining obligation.

The majority in Galloway School Lines construed the Burns perfectly clear successor exception to "mean that a duty to bargain over initial terms can arise not only in situations where the new employer's plan is to retain virtually every predecessor employee, but also in cases where, although the plan is to retain a fewer number of predecessor employees, it is still evident that the union's majority status will continue."[10]

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**Board Overrules Galloway School Lines and Returns to the Narrow Application of the Burns Perfectly Clear Successor Doctrine**

In Ridgewood Health Care Center, the board expressly overruled its subsequent interpretations of the perfectly clear successor doctrine, which it contends impermissibly expanded the scope of the narrow exception set forth in Burns. Specifically, the board overruled its 1996 decision in Galloway School Lines and subsequent precedent applying its holding, determining that the decision was an unwarranted extension of the Love's Barbeque remedial doctrine.

The board concluded that Galloway School Lines "effectively eliminate[d] the otherwise customary Burns right to set initial employment terms unilaterally even for an employer whose hiring discrimination is limited to a single predecessor employee whose hiring would have established a continuing majority in the successor unit."[11] The board further noted that Galloway School Lines undermined the "economic freedom" rationale set forth in Burns, noting that while the Galloway remedy may deter employers from engaging in unlawful hiring practices, it also may inadvertently cause financial ruin for all employees in the successor's enterprise.[12]

Returning to the application of the narrow exception set forth in Burns, the board determined that the successor employer in Ridgewood Health Care Center was not a perfectly clear successor because only 65 of the 83 bargaining unit members applied for jobs, and only 51 of them received offers.[13] Although the board found that at least four bargaining unit members did not receive offers of employment due to anti-union discriminatory motives, this refusal "created no uncertainty whether the [successor employer] planned to retain all or substantially all of the predecessor's unit employees."[14] Accordingly, the successor employer was free to set the initial terms and conditions of employment without first bargaining with the union.[15]

**What Does the Return to This Narrow Application Mean for Employers?**

The board's return to the narrow application of the perfectly clear successor doctrine will undoubtedly benefit successor employers in escaping perfectly clear successor liability, and thereby provide them much needed flexibility following an acquisition of a business with a unionized workforce. Even with this newfound flexibility, companies seeking to expand their operations through the acquisition of target companies with unionized workforces should still consider the following:

- Successors who do not intend to retain all or substantially all of its predecessors bargaining unit employees should indicate this to the bargaining representative and the bargaining unit throughout the acquisition. Under applicable law, a successor may incur perfectly clear successor liability if it wrongly indicates that it intends to retain all, or substantially all, of the bargaining unit employees, but then failed to do so.

- Those successors who do not fall within the category of a perfectly clear successor should not mislead employees to believe their terms and conditions of employment will remain unchanged. Employers who are found to have misled employees regarding the terms and conditions of employment will be required to bargain with the bargaining representatives prior to setting initial terms and conditions of employment.

- Despite the board's Ridgewood decision, it remains unlawful to discriminate against an employee because of their union affiliation. Moreover, a successor employer cannot refuse to hire a union member to avoid successor liability or perfectly clear successor liability.

**Notes**

[1] Ridgewood Health Care Center, Inc., 367 NLRB No. 110 (April 2, 2019).

[2] *NLRB v. Burns Security Services, Inc.*, 406 U.S. 272 (1972).

[3] Id. at 287-88.

[4] Spruce Up Corp., 209 NLRB 194 (1974), enfd. 529 F.2d 516 (4th Cir. 1975).

[5] Id. at 195.

[6] Love's Barbeque Rest. No. 62, 245 NLRB 78 (1979).

[7] Id. at 80.

[8] Id. at 82.

[9] Galloway School Lines, 321 NLRB 1422 (1996).

[10] Id. at 1426.

[11] 367 NLRB No. 110, slip op. at 8.

[12] Id.

[13] Id. at 2.

[14] Id. at 9.

[15] Id. at 9-10.

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