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Buyer Beware—Continuing Its Controversial Changes, NLRB Increases the Price Tag of a Successor's Unlawful Failure to Hire Its Predecessor's Employees

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On September 30, 2014, the National Labor Relations Board overruled established precedent once again. The Board's decision enhanced the liability to which a successor employer is exposed when it fails to hire employees of its predecessor to avoid recognizing their union representative. In *Pressroom Cleaners Inc.*, Decision and Order, Case No. 34-CA-071823 (Sept. 30, 2014), the Board held a successor found guilty of such a scheme, in addition to being required to recognize and bargain with the union, had to: (1) restore the "status quo" by putting in place the employment terms of its predecessor, i.e., those spelled out in their old labor agreement, until it bargained to an agreement or impasse with the union; and (2) pay the employees it unlawfully failed to hire back pay and benefits under the monetary terms under which they worked for the predecessor.

Saying it was simply returning to the Board's "traditional approach" to remedying unfair labor practices of this kind, the majority, made up of the three Democrat appointees, overruled the Board's 2006 decision in *Planned Building Services*, 347 NLRB 670 (2006), a case giving a successor found to have unlawfully avoided successorship status a way to reduce its liability. The way *Planned Building Services* held a successor could reduce its liability was by proving in a compliance proceeding that, had it not unlawfully avoided becoming a successor, it would have bargained to an agreement or impasse with the union on less generous monetary terms.

While it may not seem surprising the Obama Board overruled a case decided by the Bush Board, *Planned Building Services* is not a Bush Board decision practitioners expected this Board to have in its crosshairs. *Planned Building Services* was a rarity in this age of partisanship and polarization at the Board—it was a unanimous decision in which then Democrat Members Liebman and Walsh, without so much as a whisper of disagreement, joined with the Republican majority.

The Board's Decision

In *Pressroom Cleaners*, all five members of the Board found, as had the administrative law judge (ALJ), that the new employer had "discriminatorily refused to hire six [of its predecessor's] employees because of their union affiliation," and that the predecessor's employees "would have constituted the majority of [the] unit employees absent [the employer's] discriminatory refusals to hire." *Decision and Order*, Case No. 34-CA-071823 (Sept. 30, 2014) at *1. Based upon those

findings, all five members, in agreement again with the ALJ, found that the employer was a statutory successor with an obligation to recognize and bargain with the union, and that, in refusing to honor that obligation, the employer had unlawfully implemented new employment terms different from those of its predecessor.

It was on the issue of the appropriate remedy where the Board's decision took a controversial turn. The ALJ applied the rule adopted by the Board in *Planned Building Services*, finding that the employer's liability "for both its unlawful discrimination in hiring and its unlawful unilateral changes" was subject to its "demonstrating in a compliance proceeding that, had it lawfully bargained with the Union, it would have, at some identifiable time, lawfully imposed or reached agreement on" terms less favorable than those of the predecessor.

The rule the Board adopted in *Planned Building Services* was designed to align the remedy in a successorship-based refusal to hire case against three basic legal principles:

- The Board does not have authority to issue punitive remedies;
- The Board may not impose substantive contract terms on parties; and
- The Board may not require a successor employer to adopt the contract terms set forth in its predecessor's collective bargaining agreement.

In the eight years since it was decided, *Planned Building Services* has been deemed by the Board (until now), as well as federal courts of appeal, to properly balance these legal principles. Indeed, four separate courts of appeal have followed *Planned Building Services*, and no courts have refused to do so. *See W & M Properties of Conn., Inc. v. NLRB*, 514 F.3d 1341, 1346-48 (2008); *NLRB v. JLL Rest., Inc.*, 325 F. App'x 577, 579 (9th Cir. 2009); *Muffley ex rel. NLRB v. Voith Indus. Servs., Inc.*, 551 F. App'x 825, 831 (6th Cir. 2014); *TCB Sys., Inc. v. NLRB*, 448 F. App'x 993, 997 (11th Cir. 2011) Despite the support the rule in *Planned Building Services* has received over the years, the Board in *Pressroom Cleaners* concluded the rule was "based upon a misunderstanding of the Board's traditional remedy in successorship-avoidance cases, inconsistent with other Board precedent, and flawed as a matter of policy."

The majority justified its finding, in part, on a non-controversial principle that begs the question—that in exercising its "broad discretionary power to devise remedies that effectuate the Act's policies," the Board is guided by the principle that remedial orders should place those harmed by an unfair labor practice in, as nearly as possible, the same position they would have been but for the unfair labor practice. Relying upon *State Distributing*, 282 NLRB 1048 (1987), the majority noted that, in fashioning a make-whole remedy in successorship-based failure to hire cases, allowing the successor to prove it would not have accepted the predecessor's monetary terms and would have reached impasse ignores the possibility the parties may have reached a compromise.

As such, so the majority said, the rule in *Planned Building Services* was flawed because a determination whether impasse or a compromise would have been reached would amount to conjecture. Ironically, the rule requiring the predecessor's employment terms to be used to measure the successor's liability, which the Board reaffirmed, is itself based upon conjecture—the fiction that, but for its discriminatory mindset, the successor would have hired the predecessor's employees under the predecessor's employment terms and, like a perfectly clear successor, been required to bargain to an agreement or impasse before changing the terms.

The majority also found the *Planned Building Services* rule to be unfair because it gave a wrongdoing employer an opportunity to prove bargaining would have resulted in less favorable terms than the predecessor had in place but did not give the union an equal opportunity to prove bargaining would have resulted in more favorable terms. In expressing that conclusion, however, the majority did not explain how, as a practical matter, that distinction made the rule unfair. In point of fact, the rule in *Planned Building Services* only came into play in cases in which the successor adopted less favorable terms than the predecessor. Those terms tethered to reality a successor's proof it would have negotiated something less than the predecessor had in place if the successor had met its bargaining obligation from the outset. The same could not be said for a claim by a union that it would have negotiated more favorable terms.

Lastly, the majority justified throwing out the *Planned Building Services* rule because, in its view, the rule "prolongs litigation by greatly complicating the compliance phase and discouraging meaningful bargaining." The majority, however, offered no empirical data to support its conclusion. Imagining the effect the rule might have, the majority speculated that, if compliance proceedings were litigated while parties were bargaining, an employer would have "an incentive to push hard for a quick impasse, and then use that as evidence in the compliance proceeding to prove that it would have reached impasse quickly had it bargained lawfully from the beginning." Of course, any such incentive might be quelled by the risk that a quick impasse might just trigger a strike, as well as a bad faith bargaining charge.

The net effect of *Pressroom Cleaners* is that a wrongdoing successor will no longer be able to escape the full brunt of a back pay remedy under the predecessor's monetary terms over the period from the date it takes over a business until it bargains to an agreement or impasse with the union. Given that Board litigation can take years, the back pay owed by a successor could be substantial—in *Pressroom*, the successor's liability dates back to December 2011, almost three years, and assuming neither has occurred, it will run until an agreement or impasse is reached.

As Members Miscimarra and Johnson explained in their dissent, *Pressroom Cleaners* permits the Board to order exactly the type of remedy the Act does not allow: a punitive one derived from contract terms of a predecessor that the law prohibits the Board from imposing upon a successor. This change allows remedies that go well beyond making employees whole by requiring a successor to pay back pay over a period far longer than it would have taken to negotiate a first contract, under employment terms it did not, and would not, accept.

The Decision's Implications

The employer in *Pressroom Cleaners*, if it seeks review of the Board's decision, would likely find a receptive court in the District of Columbia Court of Appeals. Previously, in *Capital Cleaning Contractors v. NLRB*, 147 F.3d 999 (D.C. Cir. 1998), a case on which the Board relied in *Planned Building Services*, that court rejected the Board's so-called traditional approach, finding it to be both punitive and to unlawfully impose a predecessor's contract terms on a successor. Meanwhile, the Board and its ALJs will continue to follow *Pressroom Cleaners* in all proceedings before the Board. That may not seem very significant, at first blush, because most successors do not get into this type of trouble—successorship-based refusal to hire cases, while often highly publicized by the Board, are not all that common. All future successor employers, however, need to take heed of the decision because, although the Board did not mention it, the decision necessarily will also be applied in so-called "perfectly clear successor" cases.

Under current Board law, as articulated long ago in *Spruce Up Corp.*, 209 NLRB 194, 195 (1974), enfd. 529 F.2d 516 (4th Cir. 1975), a perfectly clear successor is one that either actively or, by tacit inference, misleads its predecessor's employees to believe they will all be retained without change to their employment terms, or that fails "to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment." A perfectly clear successor forfeits its right to set initial employment terms, and must keep in place the employment terms of its predecessor (i.e., those set forth in its labor agreement) until it bargains to an agreement or impasse with the union.

Unless they are careful in any messaging to a predecessor's employees, all successors are at risk of being alleged to be a perfectly clear successor and to have unlawfully implemented initial employment terms different from those of the predecessor. And that risk may soon become heightened, as the Board's General Counsel has made it known he intends in the near future to ask the Board to overrule *Spruce Up* and adopt a new perfectly clear successor test capturing any successor that commits, as many do, to offer positions to its predecessor's workforce.

Why is this significant? Many successors will only agree to purchase a business or assume a contract if they can lower labor costs. Take for instance, a successor that decides to acquire the assets of an employer whose employees participate in an underfunded multi-employer defined benefit pension plan. It may only go forward with the deal if it can get out of the plan and require the seller to be responsible for any withdrawal liability. But it may also need the experienced workforce of the seller, exposing it to the risk of becoming a perfectly clear successor, if it is not careful. Under *Pressroom Cleaners*, if the successor moved the employees out of the plan and were proven to be a perfectly clear successor, it would be required to restore the status quo by moving the employees back into the plan, retroactive to the day it hired them. And it would have no escape from keeping them in the plan until it negotiated to an agreement or impasse after the Board ruled. That would be true notwithstanding the successor's recognition of its duty to recognize and bargain with the union—any bargaining that preceded the Board's decision could potentially be for naught.

As this example illustrates, denying a perfectly clear successor the opportunity to prove it would not have agreed to its predecessor's employment terms, had it not unilaterally set its own, could result in a serious injustice, and the prospect of that occurring may be a deal-changer. In particular, a rule imposing an immediate bargaining obligation upon a successor that extends offers of employment to its predecessor's employees would likely nix deals that would otherwise go forward or have an adverse effect on the continuity of employment, outcomes that are not in the interest of employers, unions or employees alike.

Pressroom Cleaners may, on its face, appear to be "only" a remedies case, but it is much more than that. It is further evidence of the activist agenda of the current Board and reflects this activism is likely to continue. Stay tuned.

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