

Successor Employers and Initial Terms
Paul J. Murphy, Assistant Regional Director
Region 3, Buffalo, NY.

Forty three years ago, the Supreme Court put its stamp of approval on the Board's decades old practice of requiring successor employers to bargain with incumbent unions where there is a substantial continuity in operations and the predecessor's represented employees comprise a majority of the successor's workforce. NLRB vs. Burns International Security Services, Inc., 406 U.S. 272 (1972) Virtually every published case involving a successor employer's failure to recognize and bargain with an incumbent union since then refers to the Supreme Court's Burns decision. The Supreme Court's disposition of that issue should not have surprised anyone. The Board, with the courts of appeals' approval had consistently required successor employers to organize and bargain with incumbent unions where the continuity of operations and majority status prerequisites were satisfied since the early days of the Act NLRB vs. Colten, 105 F. 2d. 179 (1939).¹

The Supreme Court may have granted certiorari in Burns , in part, because some justices wanted to address the issues raised by the imposition of a bargaining order on a successor employer, but other issues raised by the Board's decision undoubtedly

¹ There was some disagreement amongst courts of appeals about applying the Board's successor doctrine in those cases where there were no contractual privity between the successor and its predecessor, but the Supreme Court's decision in Burns resolved that issue for good. The absence of a contractual relationship between successor and predecessor employers does not defeat a successorship claim.

grabbed the attention of all nine justices. In the underlying administrative case, the Board broke with 35 years of precedent and concluded that, absent unusual circumstances, the Act required successor employers to adopt and honor their predecessors' collective bargaining agreements. The William J. Burns International Detective Agency, Inc., 182 NLRB 348 (1970). As a result of this conclusion, the Board determined that Burns was bound to its predecessor's collective bargaining agreement as though it was a signatory, and that its failure to maintain that agreement violated section 8(d) and 8(a)(5) of the Act. The Supreme Court unanimously rejected the Board's new approach and noted that the Act favored freedom of contract and there was no statutory or judicial support for the Board to compel agreement between non-consenting parties.

Prior to Burns, the Board had never bound a successor employer to its predecessor's contract, but had consistently held that regardless of whether a successor is bound to the contract, it could not institute terms and conditions different from those of the predecessor without just bargaining with the union. NLRB vs. Burns, supra, citing Valleydale Packers, Inc., of Bristol, 162 NLRB 1486 (1967); Overnite Transportation Co., Inc., 157 NLRB 1185 (1966). The Supreme Court was almost as troubled by the Board's established position that successor employers were required to adhere to its predecessor's terms and conditions of employment until they discharged their bargaining obligation, as it was by the Board's new stance that successors were bound to their predecessor's contracts. Therefore, it unanimously overruled decades of

Board law and held that successors were free to establish initial terms and conditions of employment.

The reader might think that after Burns successor employers enjoyed the unfettered right to set initial terms and conditions of employment. Not so fast. Although the Supreme Court rejected the Board's established position that a successor employer had to abide by its predecessor's terms and conditions of employment until it bargained for something different, it set the stage for 43 years of adjudication and debate by creating an exception to successors' right to set initial terms and conditions of employment. It wrote "(a)lthough a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor, there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him consult with the employees' bargaining representative before he fixes terms."² This observation was the origins for what has been commonly referred to as the "perfectly clear" exception.

The Supreme Court established the perfectly clear exception, but the NLRB was responsible for defining and applying it. It did so in Spruce-Up Corp., 209 NRLB 194 (1972). In that case, the Board confined the exception to those instances where the perfectly clear successor failed to announce new terms of employment at the time employment was offered or misled employees about their initial terms. In Spruce-Up

² Justice White is responsible for the use of the male pronouns in this context, not the author.

the employer manifested an intent to hire the predecessor's barbers from the time it was awarded the bid to operate Ft Bragg's barber shops, but apprised the employees' union it would pay those employees differently. It followed-up with offer letters to all employees setting forth new commission rates. In determining that Spruce-Up was free to set initial terms, the Board observed that "(w)hen an employer who has not yet commenced operations announces new terms prior to or simultaneous with his invitation to the previous work force to accept employment under these terms, it will not be deemed to fall within the Burns perfectly clear exception."

Two Board members did not agree with the narrowly drawn exception. Members Fanning and Penello argued that the Supreme Court's perfectly clear standard was unambiguous and should be applied to require employers who manifest intent to hire their predecessors' employees to bargain before establishing new terms and conditions of employment. The Board has adhered to the narrow Spruce-Up perfectly clear standard for the last 43 years, although, Chairman Gould used his concurring opinion in Canteen Co., 317 NLRB 1052 (1995), to express his support of Fanning's and Penella's dissents in Spruce-Up and his belief that the existing Spruce-Up standard represented a misapplication of the Supreme Court's perfectly clear exception.

Other than Chairman Gould in Canteen, no Board member has advocated a re-examination of the Spruce-Up standard. Rather, the debate has focused on exactly when in the hiring process an employer must announce the terms if it intends to chart a new course. The Board in Spruce-Up suggested that as long as the perfectly clear

successor announces new terms simultaneous with an invitation to the predecessors' employees to accept employment, its actions would not violate the statute.

This pronouncement, however, has generated considerable and somewhat confusing litigation concerning what constitutes an invitation to accept employment. It appears, however, that if an employer does not announce new terms prior to or simultaneous with its first expression of an intent to hire the predecessor's employees, it may forfeit its right to establish initial terms and conditions of employment.

For example, in Canteen Co., supra, the Board concluded even though the employer told a majority of the predecessor employees that they would be retained at reduced wages before they actually applied for employment and a full week prior to when it assumed control of the operation, the Board deemed it a perfectly clear successor which was not entitled to implement new wage rates. The Board's conclusion was based on several conversations Canteen had with the predecessor's employees in which it expressed its desire to have all of them apply for employment as well as discussions with the union about the contours of a new collective bargaining, during which the only change it sought was a new probationary period for any employee it retained. Canteen did not reveal its plans to offer a new wage rate in any of its preliminary discussions with the employees or union.

Similarly, in Fremont Ford, 289, NLRB 1290, (1988), the Board concluded that the successor employer was obligated to bargain about its initial terms even though it announced significant changes during hiring interviews in advance of commencing

operations. The Board's finding rested exclusively on the Employer's representation, at a meeting with the union weeks earlier that it planned to retain all but three or four of the predecessor's twenty-two service department employees.

Fremont Ford's and Canteen Co's roots lie in Roman Catholic Diocese of Brooklyn 222 NLRB 1052 (1976); enforcement denied in relevant part sub nom Nazareth Regional High School vs. NLRB, 549 F. 2d 873 (2d Cir (1977)). In that case, the Board concluded that the successor employer established itself as a perfectly clear successor long before it offered employment contracts to the predecessor's employees when the chairman of the board of trustees told a union representative. "I don't understand what you are worried about though. We intend to hire all of the people. They will all be retained".

It is apparent that the Board's application of the perfectly clear exception under Space-Up fails to establish a clear bright-line test as to when on the hiring continuum a perfectly clear successor must announce intentions to establish new terms and conditions of employment. At least one Administrative Law Judge observed that the Board's application of its Spruce-Up framework to the Burn's perfectly clear exception has produced a confusing patchwork body of Board law on the issue; Nexeo Solutions, LLC, 2012 NLRB Lexis 543 at 6-8 (NLRB Div of Judges).

It is against this back drop, that the General Counsel placed the issue back before the Board and has urged it to re-visit Spruce-Up, and to adopt the test urged by Fanning and Penello in their Spruce-Up dissents and Gould's concurrence in Canteen.

Novel Service Group, Inc. serves as that vehicle. The Administrative Law Judge has issued a decision in which he concluded that Novel was obligated to bargain with the union as a successor employer but declined to weigh in on the General Counsel's argument that Spruce-Up should be overruled, noting it was not his place to make such a decision. Novel Service Group, 2015 WL 1945 20 (NLRB Division of Judges). The matter is currently pending before the Board.

Under current Board law, all successors, including those that fall within the perfectly clear definition have an opportunity to set initial terms and conditions of employment. Successor employers however, forfeit that right if they do not behave lawfully. The Board has routinely held that when a successor employer refuses to hire its predecessor's employees to avoid a bargaining obligation it relinquishes its right to establish new terms and conditions of employment; Love's Barbeque Restaurant No. 62., 245 NLRB 78 (1979); State Distributing Co., Inc., 282 NLRB 1048 (1987); and Pressroom Cleaners, Inc., 361 NLRB No. 133 (2014). The penalty for unlawfully failing to hire the predecessor's employees is steep. To start, the successor employer is liable to make the employees it refused to hire whole for lost wages and benefits at the levels paid by the predecessor. In addition, a successor employer in a case such as this will also be required to make the employees it did hire whole for the difference between their wages and benefits and those that were provided by the predecessor. Finally, a successor employer in these circumstances could be required to make any multi-employer Taft-Hartley benefit fund in which the predecessor participated whole for any contributions that were not made.

The Board has extended the Love's Barbeque refusal to hire rationale to cases where a successor employer hired the predecessor's employees, but advised them during or immediately after the hiring process that there would be no union or that employment was being offered on a non-union basis. Advanced Stretchforming International Inc., 323 NLRB 529 (1997). The Board observed that "it would be contrary to statutory policy to confer Burn's rights on an employer that has not conducted itself like a lawful Burns, successor....."; Advanced Stretchforming supra; and State Distributing Co., 282 NLRB 1048 (1987).

As noted previously, a successor who relinquishes his right to set initial terms because it engaged in unlawful conduct could face a substantial backpay inability. Historically, the backpay has been tolled only when the successor which had acted unlawfully restored the status quo and began to bargain with the union. Some courts of appeals thought this approach was unusually harsh because it did not allow for an employer to establish that it would have never agreed to those terms had it engaged in lawful bargaining. In Planned Building Services, 347 NLRB 360 (2006), the Board cracked the window for a successor employer to toll its backpay liability prior to restoring the status quo. The Board ruled that successor employers who forfeit their right to set initial terms under Love's Barbeque or Advanced Stretchforming would have the opportunity in a subsequent compliance proceeding to demonstrate that at some point it would have reached agreement on a contract with different terms or reached a good faith impasse in bargaining that would have allowed it to act unilaterally. If it

successfully met this burden, backpay would be tolled at the point the agreement or impasse would have been reached.

In 2014, the Board, however, overruled Planned Building Services, concluding that the analytical framework was unworkable and flew in the face of traditional Board doctrine that any ambiguity should be construed against the wrong doer. Pressroom Cleaners, supra. In the eight years between Planned Building Services and Pressroom Cleaners, there were no published cases in which a successor employer attempted to, let alone, succeeded in tolling backpay by meeting the Planned Building prerequisites in a compliance proceeding.

Successor employer cases can raise a variety of issues and can be relatively complex. Cases in which the successor refuses to recognize the incumbent union can turn on difficult issues about majority status, representative complement of employees, the continuing appropriateness of the unit and continuity of operations. On top of those issues, questions concerning the appropriateness of a successor bar and its application have vexed the Board for over 50 years. As this paper outlines, cases involving a successor employer's invocation of the right to establish initial terms can be equally complex with dramatically higher stakes for employers, unions and employees. Thus, all affected parties should not only be aware of the circumstances that might determine whether a successor is obligated to bargain with an incumbent union, but also the conditions under which a predecessor's terms and conditions must be maintained.