Successor Employers Acquiring Unionized Workforces Benefit From NLRB Decision

by Diane Marie O'Malley & Dorothy S. Liu & Celia L. Guzman

In a recent case involving a health care facility, the NLRB issued a 3-1 decision that significantly changed a successor employer's bargaining obligations before imposing the initial terms and conditions of employment on a unionized workforce.

While seemingly favorable to employers, the decision also serves as a reminder to companies that they should act cautiously and consult with counsel before they take over a business with a unionized workforce.

About the Case

In its April 2, 2019, *Ridgewood Health Care Center* (367 NLRB No. 110) 3-1 decision, the National Labor Relations Board (the Board) overruled precedent in place since 1996 concerning a company's bargaining obligations when acquiring another company with a unionized workforce. Before the *Ridgewood* decision, if a successor employer discriminatorily failed to hire some but not "all or substantially all" of the former employees in order to avoid a bargaining obligation, Board precedent required the company to bargain with the union *prior to* setting its initial terms and conditions of employment. *Galloway School Lines*, 321 NLRB 1422 (1996).

The Board's *Ridgewood* decision overrules *Galloway* and holds that, before the Board can find that a successor employer forfeited its right to set initial terms and conditions of employment, the Board must essentially find that, "but for" that illegal reason, the employer would have hired all or substantially all of the predecessor's employees. In the *Ridgewood* case, the evidence demonstrated that the employer did not hire four employees for discriminatory reasons – not a sufficient amount to reach an "all or substantially all" number – and thus did not forfeit its right to set initial terms of conditions of employment without bargaining with the union:

"The Respondents would have hired 53 Preferred employees and 48 new employees but for the unlawful discrimination. Under these circumstances, the discriminatory failure to hire 4 Preferred employees created no uncertainty whether the Respondents planned to retain all or substantially all of the predecessor's unit

employees." Accordingly, the Respondents, as an ordinary Burns successor, remained free to set initial employment terms for the unit employees." (Op. at 9)[1]

Background

The test for determining whether a company is a successor to a predecessor employer with an obligation to bargain with an incumbent union depends on two factors: (1) whether there is substantial continuity of business operations and (2) whether there is continuity in the workforce – *i.e.*, a majority of the new employer's employees are former employees of the predecessor employer. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 at 43-52 (1987)

In *NLRB v. Burns Security Services, Inc*., 406 U.S. 272 (1972), the Supreme Court held that successor employers are generally free to set initial terms and conditions of employment. The reason behind the rule was to encourage business growth: "[a] potential employer may be willing to take over a moribund business only if he can make changes in corporate structure, composition of the labor force, work location, task assignment, and nature of supervision. Saddling 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..." (*Id.* at 287-288)

However, the Supreme Court did provide an exception: "Although 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 initially consult with the employees' bargaining representative before he fixes terms." (*Id.* at 294–295)

In *Spruce Up Corp*., 209 NLRB 194 (1974), enfd. 529F.2d 516 (4th Cir. 1975), the Board emphasized that the "perfectly clear" successor *Burns* exception was a narrow one that would require an employer to bargain prior to setting initial terms 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."

Galloway expanded the *Spruce Up* doctrine to include situations in which an employer discriminated against *some* of the existing union employees for the purpose of not recognizing the union. Galloway held that, if the union could show that the employer discriminated against *some* employees, then the employer had to bargain with the union before setting terms of employment. *Ridgewood* overrules that standard.

In *Ridgewood,* the new employer acquired a nursing home with a unionized workplace. The Board held that Ridgewood discriminated against existing union employees by not hiring them for the sole purpose of avoiding its bargaining obligations with the existing union. Because Ridgewood would have retained a majority of union employees had they not discriminated against four employees, Ridgewood was a successor company. However, the Board also concluded that unless a successor company discriminates against "all or substantially all" union employees, the company retains the right to set initial terms and conditions prior to bargaining with the recognized union. As a result, even though Ridgewood discriminated against some employees, Ridgewood had no duty to bargain with the existing union before it unilaterally implemented terms and conditions.

According to the Board, *Galloway* impermissibly extended the scope of the *Spruce Up* doctrine beyond its intended purpose. Touting that its decision will "promote the survival of foundering businesses and preserve jobs" (Op at p. 8), the Board thus reshaped and restricted the "successor employer" rules

regarding the duty to bargain with an existing union before setting initial terms and conditions of employment to instances only where it's clear that an employer's illegal activity would have impacted its hiring of "all or substantially all" of the former employees.

Key Takeaways and Impact

While seemingly favorable to employers, the Board's decision demonstrates the importance of treading carefully when a company takes over a business with a unionized work force. The Board kept in place the *Burns* "perfectly clear" employer status doctrine on a successor employer (*i.e.*, requiring it to bargain) if the employer misleads employees into believing that all the employees will be retained without a change in the terms and conditions of employment, or creates an ambiguity regarding whether they would have retained "all or substantially all" of the predecessor's workforce. Accordingly, companies should carefully script, and review with counsel, any communications to unionized predecessor employees.

[1] Predictably, the three Trump appointees constituted the majority opinion and the lone Obama appointee wrote the nine page dissenting opinion.

For more information, please contact:

Diane Marie O'Malley, Partner
415-995-5045
domalley@hansonbridgett.com

Dorothy S. Liu, Partner
415-995-5046
dliu@hansonbridgett.com

Celia L. Guzman, Associate
415-995-6330
CGuzman@hansonbridgett.com