

TO BE OR NOT TO BE (A SUCCESSOR EMPLOYER) – DEFINING AN ELASTIC TERM

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No one likes surprises when they are buying a company, particularly when it comes to labor relations and union obligations. Unfortunately, surprises are all too common in the area of successorship. Much of the confusion is a result of failure to define the term, applying a single word to a variety of situations. With all due respect to Humpty Dumpty [“when I use a word, it means just what I choose it to mean, neither more nor less”],¹ it is useful to consider the various meanings the NLRB and the courts have given the term “successor” and what this may signify for prospective purchasers.

The “Stock Purchaser” Successor

Where the stock of a predecessor corporation is purchased, rather than its assets, the entirety of contract obligations, including all collective bargaining agreements, usually are passed to the purchaser. If the operation continues as an ongoing enterprise, the buyer essentially steps into the shoes of the seller and not only is required to bargain with the union but also assumes the current collective bargaining agreement between the predecessor and the incumbent union.²

In such a situation, the NLRB may rely on a “successorship” analysis, as discussed below, to decide what (if any) obligations apply to the new company. However, there can be circumstances when even a “stock” purchaser does not inherit the union contract. If the company undergoes dramatic changes at the same time as the stock transfer, resulting in a substantially different enterprise, and where the new company cannot fairly be described as a

“continuing” employer in any practical sense, due to significant operational changes, “the obligations of the employer may ... [not include] continued enforcement of an agreement.”³

The “Ordinary” Asset Purchaser [Burns] Successor

In contrast to the “stock” purchaser, who almost invariably inherits the union contract, an asset purchaser will not be bound to the predecessor’s contract with the union unless the successor specifically agrees to be bound or unless it is found to be an “alter ego” of the predecessor.⁴ However, although not bound by the contract of the predecessor, the asset purchaser will be determined to be a “successor” and bound to recognize and bargain with the “old” union if two factors are present: “Continuity of work force” and “continuity of enterprise.” If those two criteria are present, the employer is termed a “Burns Successor,” so named because of the United States Supreme Court case which first stated the principle.⁵

In determining whether an employer is a Burns Successor, the NLRB focuses on whether there is “substantial continuity” between the enterprises and whether a majority of the employees of the new employer in the appropriate unit had been employed by the predecessor.⁶ Concerning “substantial continuity,” the Board examines the totality of the circumstances including whether there is continuity of the business operation, plant, workforce, working conditions, supervision, etc.⁷ The Board views these factors from the employees’ perspective, i.e., considering whether they

would view their job situations as essentially unchanged.⁸

Even if found to be a “successor” under this analysis, the “ordinary” asset purchaser will be privileged to set the initial term and conditions of employment for the employees of the “new” company unless it runs afoul of an “exception.”

Exception One: The “Perfectly Clear” [Canteen] Successor

An asset purchaser is ordinarily entitled to set initial terms and conditions of employment prior to bargaining, including wages, benefits, work rules and all other terms and conditions of employment, until a new contract is bargained. However, this important privilege can be lost if the successor is found to be a “Perfectly Clear” successor, a term derived from a comment by the Supreme Court in the Burns case itself. The Court said that a successor employer is not privileged to set initial terms and conditions of employment for its newly hired workforce in “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.”⁹ Thus, if a successor is found to be a “Perfectly Clear” successor, it will be bound to recognize all of the existing terms and conditions of employment [including the pre-existing contract’s provisions] until a new contract is bargained with the union.

In *Canteen Co.*,¹⁰ the Board applied this “perfectly clear” exception to hold that when the purchaser (1) encouraged the seller’s employees to apply for positions and (2) expressed to the Union its desire to have the predecessor employees serve a probationary period, it had effectively and clearly communicated to the Union its plan to retain

the predecessor employees. Therefore, as it was “perfectly clear” on that date that the purchaser planned to retain the predecessor employees, and since the purchaser did not simultaneously state that it would be setting new terms and conditions, it was not entitled to unilaterally implement new wage rates later.

In applying the “perfectly clear” exception, the Board scrutinizes not only the successor’s plans regarding the hiring of the predecessor’s employees, but also the clarity of its intentions concerning existing terms and conditions of employment. In *Canteen* and other cases, a bargaining obligation has been imposed under the “perfectly clear” exception based upon the successor’s silence as to changing or continuing the existing working conditions at the time it indicated it would be hiring the predecessor’s employees. The Board has also applied the “perfectly clear” exception where the new entity retained the entire predecessor bargaining unit, but also indicated that at some time in the future it would implement certain unspecified changes in terms and conditions of employment.¹¹

The lesson for an asset purchaser is “perfectly clear.” To retain the privilege to unilaterally set initial terms and conditions of employment, the successor employer must “clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment.”¹² By contrast, an employer which promises to hire a predecessor’s employees, but announces vague, undefined changes in their employment terms starting on some future date, likely will be obliged to negotiate such changes with the statutory bargaining representative.¹³

Exception Two: The “Bad Actor” [Advanced Stretchforming] Successor

The NLRB has also developed a line of cases, following its “Advanced Stretchforming” decision,¹⁴ holding that a “Burns” successor forfeits its right to set initial terms and conditions if it engages in unfair labor practices which tend to undermine the union. In such cases, the Board orders the employer to retain the working conditions that existed under the predecessor employer, even if the purchaser is not a “perfectly clear” successor.

In *Advanced Stretchforming*, the successor told a majority of the predecessor’s employees that they would be hired, but at different terms and conditions of employment than existed under the predecessor. Unfortunately, during employment interviews, the purchaser also told the predecessor’s unionized employees that there would be no union at its facility. The purchaser went on to conduct an unlawful poll of employee sentiment and ultimately refused to recognize or bargain with the union.

Citing what it termed the “coercive effects” of the unfair labor practices, the Board revoked the successor employer’s *Burns* privilege to set initial employment terms. It compared this sort of “coercion”--coming “[a]t this unsettling time of transition when ‘a union is in a peculiarly vulnerable position’”--with a deliberate scheme to avoid a bargaining obligation by discriminatorily refusing to hire predecessor employees.

In the Board’s view, in such cases, imposing an obligation to retain the predecessors’ terms and conditions of employment is necessary to remedy the employer’s blocking of the successorship process and “chilling” of employees’ union support.¹⁵

Inheriting the Sins of the Predecessor--The “Golden State” Successor

Yet another successorship scenario involves a so-called “Golden State successor,” who is obligated to remedy the unfair labor practices of its predecessor, regardless of whether it has to recognize and bargain with the union of the predecessor employer. In the case of *Golden State Bottling*,¹⁶ the Supreme Court found enough evidence to support a finding that the successor knew of an outstanding unfair labor practice order from the NLRB when it purchased the assets of the predecessor. Such knowledge supported the successor’s duty to remedy the unfair labor practice. Since the *Golden State* decision was handed down in 1973, the duty has been expanded to cover not only instances of actual knowledge, but instances where the successor’s knowledge could be inferred from the circumstances¹⁷ and where the successor had notice of the facts and appreciation of the significance of the predecessor’s conduct.¹⁸ While the existence of a complaint or a board order against the predecessor is strong evidence of the successor’s knowledge, successor liability can exist even where no such “public document” exists.

Thus, an employer that acquires and operates a business in basically unchanged form, with knowledge of the predecessor’s unfair labor practices, can be held liable for the predecessor’s remedial obligations. However, where the predecessor did not hire a majority of the seller’s employees, its liability is limited to monetary relief, and it is not obligated to reinstate the seller’s employees or to recognize and bargain with their union.

Successor Clauses in Labor Contracts

Some collective bargaining agreements include “successors and assigns” provisions. This language typically states in grandiose terms that the contract is binding on the signatory company and all entities that succeed to its interest. If the company is sold, the “successor clause” purports to require the seller to secure the buyer’s agreement to assume the terms of the contract.

Such clauses are increasingly a top priority of unions. Although this language is not binding on the purchaser, it can create substantial confusion and delay in the purchase. In some cases, courts have enjoined transactions pending a labor arbitration between the seller and its union to determine whether the seller breached its obligations under the “successors and assigns” clause. If a buyer discovers that the seller’s labor agreement contains such a provision, it should ensure that the seller has fully resolved all issues with the union to avoid any risk that this language would create problems after the deal has closed.

Conclusion

In any “successorship” situation, early planning is essential. Even though an employer may be a “successor,” it still retains substantial flexibility. However, the opportunity to define the terms and conditions of employment can be easily lost if appropriate steps are not taken in the transition process.



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¹ Lewis Carroll, *Through the Looking Glass*.

² *TKB International Corp.*, 240 NLRB 1082 (1979).

³ *Id.* at 1083, n. 4.

⁴ Factors that suggest the existence of an alter ego include: Whether the corporation has substantially the same business purpose, operations, equipment, customers, management and supervisors as the predecessor; whether control of the corporation remains the same; and whether the transaction was motivated by a desire to evade obligations to the union.

⁵ *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272 (1977).

⁶ *Id.* at 280-81.

⁷ *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987).

⁸ *Id.* at 43.

⁹ *Burns, supra*, 406 U.S. at 294-95.

¹⁰ *Canteen Company*, 317 NLRB 1052 (1995), *enfd.* 103 F.3d 1355 (7th Cir. 1997).

¹¹ *East Belden Corporation*, 239 NLRB 776, 793 (1978), *enfd.* 634 F.2d 635 (9th Cir. 1980) (employer was not free to set initial employment terms where the employees had not been “clearly informed of the nature of the changes which Respondent intended to institute in the future, rather Respondent’s announcement was couched in generalized and speculative terms”).

¹² *Canteen Company*, *supra*, 317 NLRB at 1054.

¹³ *See East Belden Corporation*, *supra*, 239 NLRB at 793.

¹⁴ *Advanced Stretchforming International, Inc.*, 323 NLRB 529 (1997).

¹⁵ *See, e.g., Brown & Root, Inc.*, 334 NLRB 628 (2001); *Eldorado, Inc.*, 335 NLRB 952 (2001).

¹⁶ *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973).

¹⁷ *See, e.g., NLRB v. South Harlan Coal, Inc.*, 844 F.2d 380, 385 (6th Cir. 1988).

¹⁸ *See, e.g., NLRB v. St. Mary’s Foundry Co.*, 860 F.2d 679 (6th Cir. 1988).

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