Legal Update Article

A Numbers Game: Labor Board Rules on Successor Employer's Bargaining Obligation

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Related Services

Labor Relations

The National Labor Relations Board (NLRB) has held that an operator of a unionized nursing home pursuant to a lease agreement with the former owner and operator was a successor employer under the National Labor Relations Act (NLRA), despite the fact that a majority of its bargaining unit employees did not come from the bargaining unit of the former operator. *Ridgewood Health Care Center, Inc.,* 367 NLRB No. 110 (Apr. 2, 2019).

Because the successor had discriminatorily failed to hire a number of the former operator's union-represented employees to avoid hiring the requisite number to become a successor, the Board held that the new operator was a successor under the NLRA and had an obligation to recognize and bargain with the union. The Board also held that, as long as it was not perfectly clear that, absent the discrimination, the new operator would have hired all or substantially all of the seller's unionized employees, the new operator was free to set the initial terms and conditions of employment for employees.

Facts

From 2002 through September 30, 2013, Preferred Health Holdings operated a skilled nursing home pursuant to a lease with Ridgewood Health Care Center (RHCC), the owner of the facility. That lease was terminated and, on October 1, 2013, Ridgewood Health Services (RHS) assumed operation of the nursing home through a lease agreement with RHCC.

By letter dated July 29, 2013, employees were notified that they would be laid off on September 30, 2013. At all times that Preferred was the operator of the facility, the Steelworkers Union represented Preferred's licensed practical nurses, nurses' aides, and housekeeping, laundry, maintenance and dietary employees. When RHS assumed operational control of the facility on October 1, 2013, 82 bargaining unit employees reported for work, but less than 50 percent of them were former Preferred bargaining unit employees.

The union demanded recognition, and RHS refused because a majority of the employees in the new unit were not formerly in the Preferred unit. The union filed an unfair labor practice charge with the NLRB alleging, among other things, that RHS (and the facility) had unlawfully engaged in a discriminatory hiring scheme in order to avoid becoming a successor employer and refused to recognize and bargain with the union.

Applicable Precedent

Under U.S. Supreme Court precedent, whether a company is a successor to a predecessor employer with an obligation to recognize and bargain with an incumbent union depends on (1) whether there is substantial continuity of business operations from the predecessor to the purchaser, and (2) whether there is continuity in the workforce. *NLRB v. Burns Security Services, Inc.,* 406 U.S. 272 (1972); *Fall River Dyeing & Finishing Corp. v. NLRB,*482 U.S. 27 (1987). The first factor looks at whether the new employer conducts essentially the same business as the predecessor employer. The second factor determines whether a majority of the new employer's bargaining unit employees are former bargaining unit employees of the predecessor employer.

If the alleged successor does not hire the requisite number of the predecessor's employees because they had been represented by a union, the NLRB will take into account the number of employees who were discriminated against in determining whether the predecessor's unionized employees make up a majority of the alleged successor's employees in the same job classifications.

In *Burns,* the U.S. Supreme Court also held that successor employers are generally free to set initial terms and conditions of employment. However, the Court allowed a possible exception to the general rule when:

> 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.

Thereafter, in *Spruce-Up,* 209 NLRB 194 (1974), the Board emphasized that the "perfectly clear" successor exception is a narrow one that would require an employer to bargain prior to setting initial terms of employment only. The Board said that:

> 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, unlike the Respondent here, has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment.

Administrative Law Judge's Decision

A Regional Director of the NLRB decided that the union's unfair labor practice charge was meritorious and referred the charge to an NLRB administrative law judge (ALJ). After a trial, the ALJ found both factors were present and that, therefore, RHS was a successor employer to Preferred and had violated the NLRA since October 1 by refusing to recognize and bargain with the union. The ALJ also found RHS was a perfectly clear successor and, thus, unable to unilaterally establish the initial terms and conditions of employment. The employer appealed the ALJ's decision to the NLRB.

NLRB: Successorship Issue

The NLRB upheld the ALJ's finding that RHS was a successor employer to Preferred. The Board decided that, absent RHS's discrimination against some of Preferred's bargaining unit members, the former Preferred employees would have comprised a majority of the RHS bargaining unit. In making its determination on the discrimination issue, the Board relied on RHS's questioning former Preferred employees about their union membership, threatening facility closing if employees unionized, and threatening to fire an employee for encouraging coworkers to support the union. Accordingly, the NLRB upheld the successorship finding and imposed a bargaining obligation on RHS.

NLRB: Perfectly Clear Successor Issue

The NLRB reversed the ALJ's decision that the employer was a "perfectly clear" successor that was not entitled to set initial terms and conditions of employment for employees prior to bargaining with the union on a new collective bargaining agreement.

In *Love's Barbeque Restaurant No. 62,* 245 NLRB 78 (1979), the Board addressed how a successor's discriminatory hiring practices affect a perfectly clear successor finding. The

Board ruled that an ordinary successor employer engaged in hiring discrimination may forfeit its right to set initial employment terms if the discrimination created such uncertainty as to make it impossible to determine whether the "perfectly clear" situation otherwise would have resulted. Under those circumstances, the Board assumed the successor "would have retained *all* of the employees had it not decided to avoid hiring them because of their union activity" and, therefore, the successor was not entitled to set initial employment terms and conditions without first consulting the union.

However, in *Galloway School Lines,* 321 NLRB 1422 (1996), the Board held that *Love's Barbeque* should apply more broadly. In *Galloway,* the Board held the *Love's Barbeque* remedy should apply in a case in which "a successor employer discriminatorily failed to hire some, but not 'all,' predecessor employees in order to avoid a bargaining obligation, i.e., when some of the predecessor employees who applied but were *not* hired by the successor were not unlawfully denied employment" by the successor. A majority of the Board reasoned that *Love's Barbeque* was applicable even in circumstances where it is perfectly clear that, absent the successor's unlawful conduct, it *would not* have hired all or substantially all of the predecessor employees. The NLRB in *Ridgewood* overruled *Galloway* and any Board precedent applying its holding.

Implications

Ridgewood highlights the following for employers who take over a business, not by stock purchase, but by lease, asset purchase, or the like.

Right to hire new work force. The law does not require that the new employer hire any of the predecessor's employees, and it is free to hire its own workforce.

However, the new employer may not refuse employment to the predecessor's employees because of their union status. A new employer found to have unlawfully discriminated against the predecessor's employees in the hiring process will be ordered to hire them, with full back pay. If this results in a majority of the new employer's unit consisting of employees from the predecessor's unit, the new employer must recognize and bargain with the predecessor's union.

Right to set new terms of employment. The new employer is normally free to set its own initial terms and conditions of employment even if it is a successor. This is true even if the new employer plans to offer jobs to all or substantially all of the predecessor's employees, if the new employer makes clear from the start that it plans to set its own terms which successful applicants must accept in order to be employed. If, however, the new employer directly or indirectly leads the predecessor's union-represented employees to believe that it will hire all or substantially all of them without first making clear that they must accept new terms, it may not set new terms of employment. Instead, it must continue to observe the predecessor's terms until it negotiates new terms with the union. The new employer may not avoid hiring all or substantially all of the predecessor's bargaining unit employees through unlawful discrimination.

To avoid this, the new employer should consider affirmatively stating, before reaching out to hire any employees, its intention to put new terms into effect. The predecessor's employees should not be assured of employment, directly or indirectly (by, for example, statements to potential employees, the predecessor, or the union), unless it is made clear that they must accept the new terms.

Please contact the Jackson Lewis attorney with whom you work with any questions about this case or the NLRB.