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## SUCCESSOR EMPLOYERS' OBLIGATIONS UNDER THE NLRA

by

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### Introduction

It is common under our economic system for businesses to merge or be acquired by other businesses. The manner which the changes in business ownership takes place is varied, and often indirect and complex. There may be an outright sale of a business operation, with the new employer continuing to employ the same employees at the same plant. The new employer may hire many new employees while continuing to employ some of the predecessor's employees. The new employer may acquire the assets of the plant or business, but change the operation of the business. The union representing the predecessor's employees may believe that the new owner is a "successor" employer with an obligation to bargain with the union, and may contend that the successor has other legal obligations as well. The new owner of the assets of the predecessor's business may believe that it is not a successor and that it has no legal obligations to the predecessor's union and employees. This paper deals with the rights and obligations of these parties under the National Labor Relations Act.

### Alter Ego Distinguished from Successor

An entity is an alter ego of another discontinued entity where it is "merely a disguised continuance of the old employer."<sup>1</sup> In alter ego cases the Board determines whether or not there is a continuation of ownership and control of the new enterprise by the former owner, stating it will find alter ego status ". . . where the two enterprises have 'substantially identical' management, business purpose, operations, equipment, customers and supervision, as well as ownership."<sup>2</sup> The alter ego employer is bound by the terms of the predecessor's labor agreement.

A successor employer may have certain legal obligations to the predecessor's employees, but, as will be discussed, the successor employer is not obligated to assume and is not bound by the predecessor's labor agreement.<sup>3</sup>

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## Successor's Duty to Bargain

In NLRB v Burns International Security Services, Inc.,<sup>4</sup> the Supreme Court stated that a mere change of employers or ownership in the employing industry does not affect the Boards' certification of a bargaining unit. The successor's obligation to bargain is based on the language of Sections 8(a)(5) and 9(a) of the NLRA--an employer must bargain with the "representatives designated or selected for the purposes of collectively bargaining by the by majority of the employees in a unit appropriate for such purposes."<sup>5</sup> In Burns the Supreme Court approved the rule that a mere change in ownership does not destroy the presumption of continuing employee support for a certified union.<sup>6</sup>

In determining whether a new employer must recognize and bargain with a union that has represented the predecessor's employees, the Labor Board looks to the totality of the circumstances to determine whether there have been changes that have significantly altered the employees' working conditions, expectations and needs for representation. Factors considered by the Board in determining whether a new employer is obligated to recognize a union are set forth as follows:

### A. Continuity of the Work Force

A majority of the employees must have worked for the predecessor employer for the union to succeed.<sup>7</sup> If the new owner purposefully avoids hiring union members to escape designation as a Burns successor, the majority requirement is waived, and the employer will ordinarily be subject to a bargaining order.<sup>8</sup>

### B. Continuity of Operations

The Board looks to the continuity of the functions performed by the employees, the continuation of the business at the same location, with the same or similar equipment, and the continuity of customers.<sup>9</sup>

### C. Continuity of the Appropriateness of the Unit

The bargaining unit of the new employer, must continue to be appropriate for a successorship finding.<sup>10</sup>

### D. Hiatus

A hiatus between the cessation of production of the old employer and the commencement of the new employer's operations will be considered by the Board. However, it does not preclude a successorship finding where the hiatus

period is viewed as the normal concomitants of a new management and a new approach to a failing business.<sup>11</sup>

#### E. Employer Defenses

The employer may avoid successorship obligations to recognize and bargain with a union where the "continuity" and hiatus factors, set forth previously, do not support a finding of successorship; or where it has not committed unfair labor practices and it demonstrates a bona fide doubt as to the union's lack of majority support.

#### Determining When the Bargaining Obligation Attaches

The bargaining obligation can normally be determined at the time of the transaction or when operations of the new employer begins.<sup>12</sup> However, in circumstances where a new employer is re-opening a shut down plant or is operating at a substantially reduced capacity, a delay in making the determination may be appropriate until, as the Supreme Court stated in Burns, "the successor employer has hired his full complement of employees."<sup>13</sup> This "full complement" principle, however, has not been interpreted to require that the bargaining obligation determination be postponed until the business is operating at its maximum capacity or until the employer has completed hiring all of its bargaining unit employees. The Board has applied and the courts have agreed that, in cases in which the successorship obligation cannot be determined at the very outset of the transaction, fixing the appropriate date at which the bargaining obligation arises "involves balancing the objective of insuring maximum employee participation in the selection of a bargaining agent against the goal of permitting employees to be represented as quickly as possible."<sup>14</sup> Accordingly a "substantial and representative complement" standard is applied in such situations. It is this standard which is being reviewed in the Fall River Dyeing & Finishing Corp. v NLRB<sup>15</sup> case, presently before the Supreme Court. For more than thirty years before 1982, "Sterlingwale," which was owned by the Ansin family, operated a plant at Fall River, Massachusetts, in which it engaged primarily in dyeing and finishing textiles. In early 1982, Sterlingwale ran out of cash, and as a result began to liquidate the company, laying off employees and selling its inventory. In July 1982 the firm's remaining assets were sold by a professional liquidator, and Arthur Friedman the President of Fall River Dyeing acquired Sterlingwale's equipment and real property through another Friedman company. On September 20, 1982 Fall River began hiring employees at the former Sterlingwale premises. On October 19, 1982 the union demanded recognition of the new employer; at that time 18 of the 21 individuals employed by Fall River

Dyeing were former Sterlingwale employees. By January 15, 1983, the first shift at Fall River was in full operation, with 36 of the 55 employees hired being former Sterlingwale employees. At that point, the Board held, the company employed a representative complement of employees and Fall River was a successor employer to Sterlingwale. It held that Fall River had violated Section 8(a) (5) and (1) of the NLRA by refusing to recognize and bargain with the Union once its successor obligation arose. The First Circuit Court of Appeals enforced the Board's order.

#### Duty of Successor to Remedy Unfair Labor Practices and Title VII Violations

In Golden State Bottling Co. v NLRB<sup>16</sup> the Supreme Court held that the duty to remedy the unfair labor practices of a predecessor may be imposed upon a successor who takes over a business with knowledge of the unfair labor practices or the pendency of unfair labor practice proceedings. The successor employer can protect itself against the costs of remedying known unfair labor practices of the predecessor by requiring an indemnity clause in the contract for the sale of the business or by taking into account the cost of the remedy in reaching the purchase price of the business.

A successor employer may be required to comply with remedial provisions of a Title VII consent decree.<sup>17</sup>

#### Obligation of Successor to Honor the Predecessor's Agreement

In H.K. Porter v NLRB,<sup>18</sup> the Supreme Court held that while the Board does have the power under the Act to require employers and employees to negotiate, the Board is without power to compel a company or union to agree to any specific substantive contractual provision of a collective bargaining agreement. In the Burns International Security Services case,<sup>19</sup> the Supreme Court held that in view of the Act's premise that the parties to collective bargaining cannot be compelled to make agreement (the H.K. Porter rationale) successor employers obligated to bargain with a union certified to represent employees of the prior employer are under no obligation to honor the substantive terms of collective bargaining agreements negotiated by their predecessors.

The Howard Johnson Co. v Detroit Joint Board<sup>20</sup> decision involved a franchiser (Howard Johnson Co.) that purchased assets of a restaurant and motor lodge and hired only a small fraction of the sellers' employees and none of

their supervisors. The Supreme Court held that, based on Burns, Howard Johnson Co. erroneously was ordered to arbitrate the extent of its obligations under the sellers' collective bargaining contract to the sellers' employees who were not hired. The Court held that there was no obligation to arbitrate since there plainly was no substantial continuity of the work force hired by the franchiser with that of the sellers and no express or implied assumption by the franchiser of an agreement to arbitrate.

### Conclusion

Ordinarily successor employers do not have a duty to honor predecessor's collective bargaining contracts. However, they very well may have an obligation to recognize and bargain with the bargaining representative of the predecessor employer, and the successor may be required to remedy the predecessor's unfair labor practices if it had knowledge of the unfair labor practice or the institution of unfair labor practice proceedings. A successor then should be aware of its potential legal obligations in assessing whether or not to acquire a business. And should it decide to go ahead with the transaction it should make sure its price properly reflects its potential liabilities.

### FOOTNOTES

1. Howard Johnson Co. Inc. v Detroit Local Joint Executive Board, 417 U.S. 249, 262 N.9 (1974).
2. Crawford Door Sales Co., 226 N.L.R.B. 1144, 94 L.R.R.M. 1393 (1976).
3. N.L.R.B. v Burns International Security Services Inc., 406 U.S. 272 (1972).
4. Id., at 279.
5. 29 U.S.C. section 158(a)(5) and 159(a).
6. N.L.R.B. v Burns, 406 U.S. at 277-79. See also Aircraft Magnesium, 265 N.L.R.B. 1344, 1345 (1982).
7. Id., at 281.
8. Hudson River Aggregates, Inc., 246 N.L.R.B. 192 (1979), Potter's Drug Enterprises, 233, N.L.R.B. 15 (1977).
9. N.L.R.B. v Burns, 406 U.S. at 279-80.

10. Id., at 280.
11. N.L.R.B. v Fall River Dyeing & Finishing Corp., 775 F.2d 425 (1st Cir. 1985).
12. N.L.R.B. v Hudson River Aggregates, Inc., 639 F.2d 865, 870 (2nd Cir. 1981).
13. N.L.R.B. v Burns, 406 U.S. at 295.
14. N.L.R.B. v Pre-Engineered Bldg. Products, 603 F.2d 134, 136 (10th Cir. 1979). See also Premium Foods Inc. v N.L.R.B., 709 F.2d 623.
15. 775 F.2d 425 (1st Cir. 1985); U.S. Sup. Ct. No. 85-1208, 42 DLRA A-5 (1987).
16. 406 U.S. 272 (1972); N.L.R.B. v Jarm Enterprises Inc., 785 F.2d 195 (7th Cir. 1986).
17. Bates v Pacific Maritime Assn., 744 F.2d 705 (9th Cir. 1984).
18. H.K. Porter, Inc. v N.L.R.B., 397 U.S. 99 (1970).
19. N.L.R.B. v Burns International Security Services, 406 U.S. 272 (1972).
20. 417 U.S. 249 (1974).