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Who Mugged the Ordinary Successor Employer? A Reassessment of the U.S. Supreme Court's Successor Employer Doctrine and the NLRB's *Spruce Up* Decision

Clyde H. Jacob III

A very important aspect of U.S. business and industry is mergers, acquisitions, and the assumption of service contracts. This article is about a unique area of these corporate actions: When one company, a successor employer, is acquiring or assuming the contract of another company, a predecessor employer, whose employees are represented by a labor union. The focus of this article is how the agency and the courts have not followed the U.S. Supreme Court's precedent in this area for more than 40 years. Recent cases by the agency and the courts have made this discrepancy more glaring, and it is time for a return to the Court's precedent.

The U.S. Supreme Court in 1972 in *NLRB v. Burns International Security Services*[1] ("*Burns Security*" or "*Burns*") cemented what has become known under the National Labor Relations Act ("NLRA") as the "Successor Employer or Successorship Doctrine."[2] The doctrine addresses the circumstance of an employer, the successor, that acquires the business or assets, or assumes an existing contract, of another employer,

Clyde H. Jacob III is senior counsel in the New Orleans office of Fisher & Phillips LLP. Mr. Jacob's experience spans 40 years, working exclusively in the field of labor and employment relations. He has represented employers throughout the United States and Puerto Rico, and in one case represented an employer undergoing an international corporate union campaign with boycotts and lawsuits in Brazil, Norway, the United Kingdom, Singapore, Nigeria, Mexico, and Angola. Mr. Jacob may be contacted at *chjacob@fisherphillips.com*.

the predecessor, which has union represented employees. A successor employer, termed an "ordinary" successor, may establish its own initial terms and conditions of employment, different from those negotiated by the predecessor employer in its union bargaining agreement. Burns, however, as an "ordinary" successor had a duty to bargain with the union once the union requested Burns to do so from the initial terms because Burns had hired a majority of the predecessor's work force.

The Court's decision has language that the National Labor Relations Board ("NLRB" or "Board") and courts, enforcing Board orders, have subsequently interpreted to set forth a narrow exception to the "ordinary" successor rule, termed a "perfectly clear" successor. A successor employer falling under this exception, where it is "perfectly clear" it plans to retain a majority of the predecessor's employees, may not establish and set its own economic terms. While not normally obligated to adopt the actual union agreement,[3] the successor must accept as its own and operate under the substantive terms of the union agreement. It must bargain in good faith with the union over any new terms it intends to implement and any changes to the existing terms of the predecessor's collective bargaining agreement.

The Court in 1987 in *Fall River Dyeing & Finishing Corp. v. NLRB*[4] ("*Fall River Dyeing*" or "*Fall River*") clarified that a successor employer has no obligation to bargain with a predecessor employer's union until it has hired a substantial and representative complement of the predecessor's employees and there is an outstanding a union bargaining demand.

The Court's successorship doctrine has recently been an active subject of NLRB and federal appellate court cases.[5] As federal courts have routinely enforced Board orders, commonly understood tenets of the doctrine have been eroded and muddled. The "perfectly clear" successor exception is no longer an exception. It has now grown to the point where more often than not, it is the rule governing successorship cases, leaving the "ordinary" successor as the exception. Successor employers, for the most part, have much greater difficulty setting their initial terms without violating the NLRA.

Exactly why did the Supreme Court find Burns Security an "ordinary" successor and not a "perfectly clear" successor? The only way to determine this is to look at Court's usage of "perfectly clear" language in relation to the facts and the full opinion in *Burns Security*. This article will show that the NLRB and the courts enforcing NLRB orders have strayed far from the Supreme Court's rationale and holding in *Burns*, including giving legal life to the "perfectly clear" exception unintended by the Court and in violation of the NLRA.[6]

THE "PERFECTLY CLEAR" SUCCESSOR EXCEPTION

After establishing the rights and obligations of an "ordinary successor," the Court added the following sentence that has become interpreted and

recognized as an exception to the right of a successor unilaterally to set initial terms of employment:

> 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.[7]

The NLRB in *Spruce Up Corporation*,[8] ("*Spruce Up*") had it first full opportunity to analyze and apply the Court's successorship doctrine. The Board held that the "perfectly clear" language created a legal exception to a successor's right to set initial terms. The exception, applied to circumstances where the new employer "either actively or, by tacit inference misled employees" that they would be retained without change in their terms or where the new employer "failed to clearly announce its intent" to establish new terms prior to inviting the employees to accept employment.[9] Successors who fall into the exception may not set initial terms and must accept the predecessor's existing terms as their own and bargain to change them.

Purported rationales for creating this exception was to govern successor employer misconduct and negligence when communicating with the employees or union of a predecessor and to protect employees in the successorship process to ensure they had adequate time to arrange their affairs and make a decision about either remaining or seeking other employment.

BURNS SECURITY AS AN "ORDINARY" SUCCESSOR EMPLOYER

Background[10]

The Wackenhut Corporation ("Wackenhut") performed plant protection services for Lockheed Aircraft Service Company ("Lockheed") at Ontario International Airport. On February 28, 1967,[11] Wackenhut's employees, guards, in an NLRB election chose to be represented by the International Union, United Plant Guard Workers of America ("union") which was certified by an NLRB Regional Director on March 8. On April 29 Wackenhut entered into a collective bargaining agreement with the union, effective through April 28, 1970.

Lockheed decided to put the guard service contract out for bids, as provided in the service contract between it and Wackenhut. On May 15 at a pre-bid conference attended by service providers, Lockheed informed bidders, including Burns Security, that Wackenhut's guards were represented by the union with a contract, following an NLRB certification.

Lockheed decided to use Burns Security for guard services, and on May 31 it informed Wackenhut of the change that was to be effective July 1.

On June 29, Burns Security recognized another union as the representative of the unit of employees at Lockheed, the American Federation of Guards, Local 1 ("AFG"). It accepted a collective bargaining agreement with wages and terms that were less than those in the agreement between Wackenhut and the union.

On July 1, Burns Security assumed Lockheed's service contract. It hired 27 guards formerly employed by Wackenhut and 15 of its own employees who were transferred to Lockheed, and it announced the new, lower wages and terms of the AFG agreement. On July 12 the union made a bargaining demand upon Burns which declined recognition on July 24.

Burns Security's Actions After the Award of the Service Contract on May 31

During June, Burns Security began recruitment amongst the Wackenhut Guards, using the AFG in the recruitment effort. A few days after June 2, Burns operations manager and an organizer for AFG met with the principal guard of the Wackenhut employees, Elmer Reitzel, the union steward. Reitzel was told by the AFG organizer that Burns could not live with the union's contract. Reitzel asked for a copy of AFG's contract but did not get one. The organizer told Reitzel that he would like him to get the employees to sign union authorization cards for the AFG. The organizer mailed the cards to Reitzel, and in the latter part of June, Reitzel turned over about 18 AFG authorization cards executed by Wackenhut employees.

Another Wackenhut guard, Thomas Ware, went to Burns' office with a filled out application for employment with Burns. Burns' operation's manager and AFG organizer were there. Ware said he would like to know about pay, hospitalization, and other details, but neither would answer him. The AFG organizer repeatedly pushed the AFG authorization card in front of Ware and told him the union was out and that he had to sign the AFG card or not work for Burns.

Other Wackenhut guards reported similar experiences with Burns and AFG, none of whom were advised of the new terms and who were told that to receive a uniform and become a Burns employee they had to sign an AFG authorization card.

As mentioned earlier, on June 29 Burns recognized the AFG as the union to represent the Lockheed guards, and on July 1 announced for the first time the new wages and terms of the AFG agreement.

The Unfair Labor Practices and the Court's Decision

Burns Security was charged with violations of Sections 8(a)(1), 8(a)(2), and 8(a)(5) of the NLRA. The NLRB held that Sections 8(a)(1) and 8(a)(2)

were violated because Burns actively assisted the AFG in its solicitation of Wackenhut guards, signing up guards, organizing activities, and recognizing the AFG. Burns did not challenge the Section 8(a)(2) unlawful assistance in the court of appeals.

The NLRB also held that Burns violated Sections 8(a)(1) and 8(a)(5) of the NLRA by failing to recognize and bargain with the union and by refusing to honor the collective bargaining agreement that had been negotiated between Wackenhut and the union.

Affirming the NLRB and the appellate court, the Supreme Court held that where the bargaining unit remains unchanged and a majority of the employees hired by the new employer are represented by a recently certified bargaining agent, the new employer has a duty to bargain with the incumbent union when the union requests it to do so. The Court, however, agreeing with the appellate court, reversed the NLRB on the imposition of Wackenhut's agreement holding that although the successor employers may be bound to recognize and bargain with the union, they are not bound by the substantive provisions of a contract negotiated by their predecessors but not agreed to or assumed by them.

The Court found that Section 8(d) of the Act forbade the imposition of the substantive terms. The existence of a bargaining obligation "does not require either party to agree to a proposal or require the making of a concession." While the Court's decision in the case was 5 to 4, on this issue the Justices agreed 9 to 0.

RECENT DECISIONS OF THE COURTS AND NLRB

Nexeo Solutions, LLC[12]

Nexeo Solutions, LLC ("*Nexeo Solutions*" or "*Nexeo*") is the recent NLRB case that launched other recent successorship cases in which the Board stretched to find a successor was a "perfectly clear" successor, unlawfully setting its initial terms of employment. The decision by the Board was a 2 to 1 ruling, and as in the other recent successorship cases, the NLRB reversed its administrative law judge ("ALJ") to reach this conclusion.

Nexeo Solutions became a successor through a purchase and sale agreement on November 5, 2010 of the assets of Ashland, to be effective March 31, 2011 with operations commencing April 1, 2011. The agreement set forth that Nexeo planned to retain all of Ashland's employees, base salary or wages would be no less favorable than those prior to the closing date, and other benefits would be substantially comparable. Ashland announced this information to its employees on November 7 and 8, and notified the union representing its employees on the 8th.

On February 16, Nexeo's representative met with the union. Without receiving a bargaining demand, Nexeo agreed conditionally to recognize and bargain with the union prior to closing if a majority of employees accepted the offers of employment. Nexeo communicated it would not

accept the union bargaining agreements, not adopt as initial terms any of the agreement provisions, and that there would be benefit changes by Nexeo on health insurance and pension. The offer letters with the new terms were mailed to employees on February 17, and by February 23, all of the unit employees had accepted. Thereafter Nexeo had three bargaining sessions for a pre-close labor agreement, but the parties were unable to reach agreement by the April 1 commencement date Nexeo set its terms that day.

The NLRB held that Nexeo was a "perfectly clear" successor, and its obligation to bargain triggered on November 7 when Ashland notified its employees of the acquisition and their continued employment without mentioning Nexeo's changes in initial terms. Ashland was found to be an agent of Nexeo. The language that benefits would be "substantially comparable" was not specific enough to notify employees there would be any changes. While Nexeo "consulted" with the union, as set forth in the "perfectly clear" language in *Burns*, the Board held that consulting is not just meetings but full-fledged NLRA collective bargaining which requires an agreement or impasse before establishing initial terms, and not achieved by Nexeo. The announcement of the specific changes in benefits in the February 17 offer letters was too late because it induced possible adverse reliance upon the part of employees it lulled into not looking for other work and a lack of sufficient time to rearrange their affairs.

Creative Vision Resources, LLC[13]

Creative Vision Resources ("Creative Vision") provided "hoppers" to the waste management industry in New Orleans who loaded garbage trucks during their daily routes. In a 2 to 1 decision reversing its ALJ, the Board held Creative Vision was a "perfectly clear" successor that illegally set its initial terms. On appeal, the U.S. Court of Appeals for the Fifth Circuit, after vacating its original decision enforcing the Board's order following a request for re-hearing *en banc*, issued a new decision, again enforcing the Board's order. The Supreme Court denied certiorari.

In May 2011, Creative Vision began its plan to become the successor employer to a predecessor employer who had a service contract to supply hoppers who were union represented. From the middle of May until its end, Creative Vision met with almost half of the 44 hoppers, 20 hoppers, passing out applications and tax forms and explaining the new wages and terms. The predecessor had treated the hoppers as independent contractors, ignoring its union agreement. On June 1, the service contract with the predecessor was canceled. On June 2, Creative Vision met with the hoppers before work began, again explaining the operations and the new terms. The hoppers accepted the new terms and then work commenced. On June 6, the union representing the hoppers made a bargaining demand upon Creative Vision which it declined. Of the six hoppers who testified five said they knew about the terms either in May

or on the morning before operation began. One said they knew and had been talking about the new terms in May, and the union business agent testified she received calls in May from hoppers about the new terms.

The NLRB and the Fifth Circuit held that Creative Vision was a "perfectly clear" successor with no right to set initial terms, as it did, and whose bargaining obligation attached on June 1 – the day before operations commenced. There was no misleading but a failure to announce clearly its intent to establish new terms broadly enough beyond the 20 employees when inviting them to accept employment during the May recruitment. Even if the employees learned of the terms, Creative Vision fell short in its communication of the terms. The NLRB and the court held there is no requirement of a union bargaining demand to trigger a successor's bargaining obligation because this was a rapid transition successorship. The Fifth Circuit went further and held that an announcement by a successor on the day its operations begin is too late, since it does not provide employees time to get their affairs in order. Relying upon *Falls River*, it held that the composition of the work force "alone" is the only principle applicable to a "perfectly clear" successor and a union bargaining demand is not a requirement for the application of the "perfectly clear" exception.

First Student, Inc.[14]

First Student was found to be a "perfectly clear" successor by the NLRB and U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit"), wrongfully setting its initial terms when it took over a service contract to provide student busing. Both NLRB and court decisions were 2 to 1 rulings, and the NLRB reversed its ALJ finding that First Student was not a "perfectly clear" successor, as it did in *Creative Vision* and *Nexeo Solutions*.

First Student submitted a bid on February 3, 2012 for a school bus service contract for the 2012 – 2013 school year, and the school district and First Student negotiated the contract terms over the following three months. The drivers and monitors were union represented, and on March 2, 2012 First Student met with most of them. All were invited, and about 40 of the 55 employees attended. First Student announced its forthcoming operations, the application process, its typical hiring of 80 to 90 percent of the existing work force, and the employees continued union representation if 51 percent of them were hired, but with a new negotiated contract. In response to a question about what the conditions would be, First Student responded that those issues would be subject to negotiations.

First Student and the school district reached an agreement for bus services in early May, and it was approved on May 16 at a public meeting to be effective July 1, 2012. Just following the meeting, First Student met there with the union, which was present, and reported what was said

to the employees at the March 2 meeting. Additionally, it acknowledged the goal of hiring as many of the existing employees as it could, that it would recognize the union if a majority was hired, and that employee wages would remain the same.

On May 17, First Student met with the employees, described the hiring requirements, and set forth its new terms and conditions. The union made a bargaining demand the next day on May 18. The hiring process began, and, by August 17, a majority of the employees were hired, with the first day of work on August 27.

The NLRB and the court found First Student was a "perfectly clear" successor because of the March 2 meeting when it stated it expected to hire most all the employees but then failed to announce its initial terms. Alternatively, First Student became a "perfectly clear" successor at the May 16 meeting for the same reason. First Student induced employee reliance from March 2 to May 16, that terms would remain the same, and had employees known the new terms they might have sought other employment or urged First Student's contract to be rejected. Successors must be held to their initial statements of intent, even when they are made before the transfer of ownership is complete or operations commence. The court found that First Student engaged in the sort of misleading conduct the "perfectly clear" successor exception is meant to prevent.

THE CRITERIA OF A "PERFECTLY CLEAR" SUCCESSOR

Spruce Up and its progeny, including the aforementioned recent cases, have spawned substantial litigation defining the "perfectly clear" successor for over 40 years. With the more recent cases, there has been a significant rise in conflict and confusion about the definition and its criteria. The constant recent reversal by the NLRB of its ALJs, the rising number of split NLRB decisions on the issue, a vacated appellate court decision, and a divided appellate court decision all confirm the current confusion about the Supreme Court's *Burns*' successorship doctrine.

The principles that underlie the NLRB's recent "perfectly clear" successor cases show how they often conflict with one another, ignore precedent, and deviate from the Court's rulings in *Burns* and *Fall River,* especially the strong, articulated economic rationale by the Court for a successor's right to set its own economic plan. The new cases also call into serious question the continuing viability of *Spruce Up* under *Burns* and *Fall River*.

No Obligation of a Union Bargaining Demand for "Perfectly Clear" Successor Status

The Supreme Court has in its two successorship cases specifically addressed the necessity of a union bargaining demand to trigger a successor employer's duty to bargain. The Court in *Burns* held:

> Although Burns had an obligation to bargain concerning wages and other conditions of employment when the union requested it to do so. . . .[15]

In *Fall River Dyeing* the Court further emphasized the requirement of a bargaining demand to establish "perfectly clear" successor status when it held:

> Once the employer has concluded that it reached the appropriate complement, then, in order to determine whether its duty to bargain will be triggered, it has only to see whether the union already has made a demand for bargaining.[16]

The Fifth Circuit in *Creative Vision Resources* held that a union bargaining demand is not an element in establishing "perfectly clear" successor employer status. The composition of the successor's work force "alone" is the triggering fact for imposing the bargaining obligation. The Fifth Circuit aligned itself with the U.S. Court of Appeals for the Second Circuit in its 1995 decision in *Banknote Corp. of America v. NRLB*.[17] There is a conflict amongst the courts of appeal on whether a union bargaining demand is required before a successor has a bargaining obligation and the "perfectly clear" exception applied, with the Second Circuit, and now the Fifth Circuit, taking the minority position.

Standing directly contrary to the Fifth and Second Circuits, four federal courts of appeal have addressed this issue with all applying the two Supreme Court decisions to require the existence of an outstanding demand by a union for recognition or bargaining before a bargaining obligation occurs for a successor and the "perfectly clear" successor exception can be applied.[18] Even the D.C. Circuit, nine years before *Fall River,* and relying strictly upon *Burns*, held:

> But absent a bargaining demand by the union, the successor can simply institute the terms on which the employees were hired at the beginning terms of employment, as was the situation in *Burns*.[19]

Indeed, the Fifth Circuit departed from its own, often cited precedent in holding no union bargaining demand is required in the Court's successorship doctrine in "perfectly clear" exception cases. In *Houston Building Services, Inc*.,[20] the court held that when an employer immediately hires all of a predecessor's employees and the union has made a bargaining demand, the successor's obligation to bargain arises because "a majority of the successor's employees had been employed by its predecessor, assuming that the union has made a bargaining demand." In *Creative Vision*, the Fifth Circuit did not overrule *Houston Building* but simply said it only applied in the "ordinary" successor context – not the "perfectly clear" successor context,[21] which will be discussed *infra*. The NLRB likewise failed to follow, distinguish, or even discuss

its own established precedent that a bargaining obligation is a necessary element.[22]

In rejecting the requirement of a bargaining demand, the Fifth and Second Circuits' rationale distinguished between two successorship situations – one that requires a union bargaining demand for a bargaining obligation and one that does not. The demand rule only applies to circumstances analogous to *Fall River* – where there is a gradual or staggered hiring or a significant hiatus in operations because there may be considerable doubt as to whether a union that enjoyed majority support continues to do so. When, however, the successor engages in "a rapid transition" period with the immediate hiring of a full employee complement, as in *Burns*, the rationale for the demand rule dissipates since the successor will be able to easily discern its obligation to presume that the union continued to enjoy majority status.[23]

This distinction has no basis or support in the Court's *Burns* and *Fall* River cases, and it conflicts directly with *Burns*. *Burns* was a "rapid transition," immediate hiring circumstance, like *Creative Vision*. Yet Burns was held to be an "ordinary" successor, and the distinguishing element that made Burns "ordinary" was the lack of a union bargaining demand when it began operations on July 1 and first announced its terms. Burns' bargaining duty did not arise on July 1, or even on the day before, like the Board and Fifth Circuit required of Creative Vision. The Court held that Burns' duty to bargain did not occur until July 12, when the union made its bargaining demand.[24]

The artificial distinction of rapid versus gradual transactions to eliminate one of the key tenets of the Supreme Court's successorship doctrine also ignores the gradual buildup that occurred in both *Burns* and *Creative Vision* before they commenced operations. Burns built up its workforce for 30 days and Creative Vision for 17 days.

A union bargaining demand is an integral component of the Supreme Court's successorship doctrine. The hallmark ruling in *Burns* is that a successor has the right to set initial terms, and to excise the request of a bargaining demand unduly burdens the right. The Court's language could not be any clearer that without one a successor is free to set its terms. More importantly, it is a strong bright line that assists the parties in assessing their legal responsibilities and economic rights.

In "Perfectly Clear" Successor Cases the Composition of the Work Force "Alone" Is the Triggering Fact for the Bargaining Obligation

In a corollary to the union demand criterion, the Fifth Circuit in *Creative Vision* broke new ground when it held that nothing in *Fall River Dyeing* supports the rule of a bargaining demand's extension in the "perfectly clear" successor context – the demand requirement that *Fall River* established for "ordinary" successors has not been extended

to "perfectly clear" successors. The Fifth Circuit distinguished its prior decision in *Houston Building Services*, in which it held that a bargaining demand is required to trigger a bargaining obligation, as applying only in the "ordinary" successor context – not the "perfectly clear" successor context. In "perfectly clear" successor cases, the composition of the successor's work force "alone" is the triggering fact for the bargaining obligation.[25]

The Fifth Circuit's holding did not follow the precedent of *Fall River*. No court, or the NLRB, had previously held that the composition of the work force "alone" is the triggering fact for a bargaining obligation. Indeed, the word "alone" is not in the *Fall River* language quoted by the court and was added without support by the court. This conflicts with *Burns* because if the composition of the work force "alone" is the trigger, then Burns' bargaining obligation should have triggered on July 1, the day it commenced operations, or even earlier on June 30 as the NLRB and the Fifth Circuit required – not on July 12 when the union made a bargaining demand.[26] "The successor's duty to bargain at the substantial and representative complement date is triggered only when the union has made a bargaining demand."[27]

Fall River began its operation and set its initial terms on September 20, 1982. The union made its bargaining demand on October 19, 1982. The court, however, did not view or treat the case as an "ordinary" successor versus a "perfectly clear" successor case. "Perfectly clear" status was not an issue. The issue was the hiring of a "substantial and representative complement" – the first prong of the court's new, two prong successorship test. Like in *Burns*, the union bargaining demand came after Fall River set its initial terms. Fall River's right to unilaterally set its terms existed at the time it commenced operations because it had not yet hired a "substantial and representative complement" and received a union bargaining demand – the second prong of the successorship test. If the union had not made a bargaining demand, Fall River would not have had a bargaining obligation. The *Fall River* court finalized the current two prong test with its holding of the requirement of a "substantial and representative complement"; however, it reaffirmed its holding in *Burns* of the requirement of a union bargaining demand.[28]

The Fifth Circuit's ruling also contradicts itself within its opinion. Earlier in the opinion the court affirmed that Creative Vision was a "perfectly clear" successor whose bargaining obligation was triggered the day before it began operations because of a plan to retain the predecessor's work force but before the composition of its work force.[29] In rejecting the Court's requirement of a bargaining demand, however, the Fifth Circuit also held composition of the work force "alone" is the requirement.[30] Actual hiring or employment is not necessary to be a "perfectly clear" successor, but then the court holds hiring "alone" is the triggering fact.

The Fifth Circuit cited its opinion in *Houston Building*, which it chose not to follow on the requirement of a union bargaining demand, to hold

that a union bargaining demand is only necessary in the "ordinary" successor context. The union demand has not been applied or required in the "perfectly clear" successor context.[31]

Houston Building, however, was held by the court not to be an "ordinary" successor, a finding which made it a "perfectly clear" successor. Citing it for the proposition that it supports application of the union bargaining demand only in the "ordinary" successor context significantly misreads the decision. Had Houston Building been an "ordinary successor" its initial terms would have been legitimately set and not ordered rescinded by the court. The case actually supports the principle that a union bargaining demand is applicable in all successorship contexts, including the "perfectly clear" successor context. Houston Building committed an unfair labor practice after it set its terms because it had hired the predecessor's work force - the composition of its work force – on the day it began operations and had received an outstanding union bargaining demand.[32] Both preceded Houston Building's setting of terms. These are the two prong requirements of *Fall River Dyeing* and *Burns* for a successor to have a bargaining obligation before setting terms.

At the agency level, the NLRB in *Houston Building*, of course, applied the bargaining demand requirement in a "perfectly clear" successor case. The Board in *Creative* Vision declared however, that in a long line of its cases, it found a "perfectly clear" successor's obligation to bargain over initial terms commenced before the union demanded recognition and bargaining.[33]

In none of those cases, however, was the requirement of a bargaining demand in the "perfectly clear" context joined as an issue or addressed in the decisions. It was not even discussed in the cited cases whether a union must demand bargaining before the status is triggered. This is similar to what happened in *First Student* which clearly announced its terms on May 17, prior to the union demand on May 18. The requirement of a bargaining demand was not raised or addressed as an issue in the case, just as in the multiple cases the Board incorrectly cited in *Creative Vision* that it was.

The Fifth Circuit's holding that composition of the work force "alone" is the trigger for a "perfectly clear" successor excises the union bargaining demand as a recognized principle in successorship cases without an adequate rationale. A bargaining demand can apply in "ordinary" successor cases, creating an "ordinary" successor, when it occurs after a successor has set terms. It can apply in "perfectly clear" successor cases, creating a "perfectly clear" successor, when it occurs before a successor sets terms. The requirement of a union bargaining demand has never been held to be an interchangeable part of the successorship doctrine either in *Burns* or *Fall River*, applicable in some successorship cases but not others. The NLRB's and minority courts' interpretation that it is not required unduly burdens and violates a *Burn's* successor's right to set its initial terms.

Actual Hiring and Employment of a Predecessor's Employees by a Successor Is Not a Requirement of the "Perfectly Clear" Exception

There is an innate conflict between the *Spruce Up* and progeny rule establishing the "perfectly clear" successor exception and the *Falls River* and *Burns* requirement of actual employment, composition of the work force. Actual employment is required to establish the composition of any work force, but the Board imputes actual employment in the exception by concluding the employer has already hired and employed a predecessor's employees before it becomes a successor. This contradicts the holding of the Court which requires actual employment.

Under the holdings in *Nexeo Solutions* and *First Student,* a bargaining obligation triggers at the first public communication, whenever it occurs, by a successor or its agents, of its plans to retain without also announcing its new terms. The commencement of operations, when the employees, for the first time become a successor's employees, is irrelevant. In *Creative Vision* the bargaining obligation was held to trigger the day before it commenced operations and hired the predecessor's employees even though it said or made no public communication that day.

The varying trigger times of the bargaining obligation under the Board's "perfectly clear" exception, from five months in *Nexeo* before employment to one day in *Creative Vision,* contrast with the solid and clear requirement set forth in *Burns* and *Fall River*. *Burns* held that actual hiring a "majority" is the requirement and *Fall River* clarified the requirement to hiring a "substantial and representative complement."

As the Court stated in *Burns*:

> Burns purchased nothing from Wackenhut and became liable for none of its financial obligations. Burns merely hired enough of Wackenhut's employees to require it to bargain with the union as commanded by Section 8(a)(5) and Section 9(a).[34]

And as the Court stated in *Fall River Dyeing*:

> The successor's duty to bargain at the "substantial and representative complement" date is triggered only when the union has made a bargaining demand.[35]
>
> Once the employer has concluded that it reached the appropriate complement, then, in order to determine whether its duty to bargain will be triggered, it has only to see whether the union has already made a demand for bargaining.[36]

A "substantial and representative complement" in both cases refers to employment by the successor of a predecessor's employees. That

complement may be reached on the day a successor commences operations or over time after operations have begun. But it does require a successor hire and make the predecessor's employees its employees.

Nothing in either *Burns* or *Fall River Dyeing* holds that a "substantial and representative complement" of employees can also be attained by a successor either five months or one day before a predecessor's employees become its employees. Burns' plan to retain Wackenhut employees did not make them its employees. In fact, *Spruce Up* make this point – the successor planned to retain the barbers, but on the day it began operations, the barbers went on strike over Spruce Up's new terms.[37] It did not attain a "substantial and representative complement" until weeks later.

No successor who intends to implement new terms knows whether or not it will have a "substantial and representative complement" of a predecessor's employees until they choose to work under those terms, after the successor has become a successor. The current interpretation of the "perfectly clear" exception by the NLRB and the courts cannot be reconciled with *Burns* and *Fall River* on the requirement of actual hiring. If the Court truly intended to dispense with actual hiring and employment in its "perfectly clear" sentence, it would have distinguished its core holding that hiring a "majority," and later a "substantial and representative complement," is a requirement. The Court's not doing this undercuts *Spruce Up's* establishment of the exception and its tenet that employment is not required.

A Successor Employer That Does Not Announce Its New Terms Until the Day It Begins Operations Loses Its Status as an "Ordinary" Successor

In *Creative Vision*, the Fifth Circuit held that an announcement of new terms by a successor on the same day operations commence is untimely, thus relegating the successor to the "perfectly clear" exception. Relying on the Second Circuit in *Banknote*, but going further, the court held:

> In this case, the June 2 announcement was clearly untimely. The announcement occurred the same day the hoppers were formally hired and Creative's operations commenced. This same-day announcement gave hoppers insufficient time to rearrange their personal affairs.[38]

The NLRB decision held that the bargaining obligation on Creative Vision attached on June 1 – the day before it began operations on June 2. The court enforced this legal conclusion, but took it a step further.

This holding directly conflicts with *Burns Security*. Burns did not announce its initial terms to the employees during the 30 days it recruited before its operations began on July 1. Burns, in fact, deceived the employees during the period. Only on the day it commenced operations did it

reveal the new, lower terms in the AFG agreement. Burns Security's conduct contrasts with Creative Vision's which made efforts during the last two weeks of May to communicate its new terms and then announced them the morning before its operations began on June 2. The NLRB did not articulate a reason for holding the demand attached the day before operations began, but it is not unreasonable to surmise that it was done to apply the "perfectly clear" exception to foreclose Creative Vision's legal right to set its initial terms.

The rationale behind the court's holding of untimeliness of an announcement on the day operations begins cannot be squared with its acceptance and enforcement of the NLRB's ruling that the bargaining obligation attached on June 1 – one day before Creative Vision started operations. The Fifth Circuit found that a same day of operations announcement gives employees insufficient time to rearrange affairs. Yet an announcement the day before operations begin likewise provides insufficient time for employees to rearrange affairs.[39] This rationale becomes a slippery slope of what amount of time is sufficient for a predecessor's employees to rearrange affairs if they choose to quit or adjust to accommodate the new terms.

Significantly, the NLRB in prior decisions has not found this to be a legal tenet of its "perfectly clear" successor exception. In *Nexeo Solutions*, the NLRB found Nexeo to be a "perfectly clear" successor employer even where Nexeo announced its new terms on February 16, 2011 and did not begin operations until April 1, 2011. Almost two months is insufficient. In this instance the NLRB held that Nexeo's bargaining obligation attached on November 7, 2010, about five months before operations began, when the predecessor announced to employees the pending sale to Nexeo without specifically setting forth Nexeo's initial terms and conditions.

The D.C. Circuit in *First Student* likewise enforced an NLRB order and decision finding "perfectly clear" successorship where the predecessor's employees had sufficient time to rearrange their personal affairs. In the case, the city awarded the contract on May 16, 2012 to First Student which made a full, unambiguous announcement of its initial terms on May 17. Operations, however, did not commence until August 27, some three months later. First Student became a "perfectly clear" successor, unable to set its initial terms, on March 2 when it initially announced its intent to retain the predecessor's employees without specifying its terms.

In both *Nexeo* and *First Student* the predecessor's employees presumably had sufficient time to rearrange their personal affairs long before the new operations commenced. Yet this fact is not considered a requirement of or a defense to the "perfectly clear" successor exception by the NLRB in its decisions in *Nexeo, First Student,* and *Creative Vision*. The Fifth Circuit's holding not only conflicts with *Burns*, but deviates from current NLRB case law. The court has injected into the successorship doctrine a new tenet, applicable in the Fifth Circuit, that clashes with the NLRB's position that a bargaining order triggers at the earliest moment a successor announces or negotiates

to retain the existing work force without specifying terms, regardless of the amount of time the employees have to rearrange their affairs.

A Successor Employer That Bargains with the Predecessor Employee's Labor Union Prior to Implementing Its Initial Terms Becomes Subject to the Standard Rules Regarding Good Faith Bargaining and Impasse

Some successor employers who are aware of the ever-shifting sands of the successorship doctrine have chosen to negotiate with a predecessor's union before implementing their new terms. This is done with the expectation that it is a reasonable business decision and in keeping with a principle rationale of the NLRA. In most instances the parties reach an agreement without litigation. Yet where an agreement is not achieved, a successor may have harmed its *Burns*' right to set its initial terms.

The NLRB scrutinizes closely successor bargaining, applying its technical rules about good faith bargaining and impasse. While the "perfectly clear" exception uses the word "consult," the NLRB's position is that "consult" is treated as, and means, full-fledged traditional collective bargaining.[40]

Nexeo Solutions defended its right to set initial terms in part because it negotiated with the union about them. Nexeo met three times with the union before it commenced operations and even continued meeting after operations began, though implementing its new terms on that day.[41] Applying the rules governing collective bargaining, the NLRB held that no legal impasse was reached so that Nexeo, as a successor employer, wrongfully implemented or set its terms.

The same thing happened to another employer: Elf Atochem. Elf Atochem, before commencing operations, had 16 bargaining sessions with the predecessor's union over a five-month period, including a final proposal that included its new terms. It was still found to be a "perfectly clear" successor due to an earlier announcement before bargaining of an intent to hire with "equivalent" salaries and "comparable" benefits. These terms were found insufficient to inform employees of the nature of the changes.[42]

The core of *Burns* is that a successor employer has the right to set its initial terms. "Consulting" with the union before commencement of operations, however, may not contribute to its right to set initial terms if it is unable to reach an agreement.

Misleading or Negligent Conduct by a Successor Employer in Its Communications About Successorship Extinguishes Its Right to Set Initial Terms

Misleading or negligent conduct by a successor in its communications with a predecessor's employees or their union is a hallmark violation of

the NLRB's interpretation of *Burns*. Since *Spruce Up,* the NLRB and the courts enforcing NLRB orders have held that an "ordinary" successor's right to set terms is forfeited by such conduct.

The Board, however, muffed its interpretation of *Burns* in *Spruce Up*. Nowhere in *Burns* is successor misconduct or negligence in its communications discussed as a limitation on a successor's legal right to set initial terms. Holding successor misconduct or negligence as a restriction on the right to set initial terms from the "perfectly clear" language ignores the Supreme Court's treatment of successor unfair labor practices. Misconduct and unfair labor practices are irrelevant to a successor's right to set terms.

Burns Security was found by the court to be an "ordinary" successor that properly set its initial terms on the day it commenced operation. Yet Burns, for a 30-day period before it began operations, continually refused to tell Wackenhut's employees what its new terms would be. It foisted a new union upon the employees not of their choosing. It coerced the guards to sign authorization cards of the new union. This conduct by Burns had no impact on the Supreme Court's decision that Burns rightfully set its initial terms, and it emphasizes the significant strength the Court gives to successors to have the freedom to institute their own economic plans with enterprise acquisitions.

By creating successor misconduct or negligence as a limiting test, the Board in *Spruce Up* undercut the Court's holding in *Burns*. If Burns Security was an "ordinary" successor, despite its conduct, then too was Creative Vision, Nexeo Solutions, and First Student whose conduct was much less severe.

It is clear from the facts on which the Court based its decision that Burns Security planned to retain a "substantial and representative complement" of Wackenhut's guards, and indeed did so. Elmer Reitzel was tasked with soliciting Wackenhut's employees for Burns and obtained 18 cards, and during the 30 days before July 1, Burns' plan was to recruit as many Wackenhut guards as it could.

Burns also did not announce its new terms to Wackenhut employees until the day it assumed the service contract – July 1 – and hired Wackenhut guards. This was truly a surprise to the 27 former Wackenhut guards it hired that day and would be the basis for the application of the "perfectly clear" successor exception to Burns and virtually every NLRB successor case since *Spruce Up*.

Burns additionally, "either actively or by tacit inference, misled employees" that they would be retained without change in terms or "failed to clearly announce its intent" to establish new terms prior to inviting the employees to accept employment under *Spruce Up*. Burns throughout the 30-day recruiting period, working with the AFG, certainly actively misled Wackenhut's employees, and, at the very least, failed to clearly announce new terms and conditions.

There were Section 8(a)(2) unfair labor practices committed by Burns during the period after it received the contract on May 31 which

compounded its misconduct. Burns was found to have violated Sections 8(a)(1) and 8(a)(2) of the NLRA by assisting and recognizing the AFG as the bargaining representative of its work force.

The misconduct, negligent communication standard is a loose, pliable standard that can redefine conduct to suit a subjective result. By every measure of the recent NLRB and court decisions, Burns Security would not qualify as an "ordinary" successor employer. The Supreme Court, however, did not find this disqualified Burns from setting its initial terms as an "ordinary" employer or that it qualified Burns for its *dicta* sentence that later became the "perfectly clear" successor rule in *Spruce Up*.

Misconduct or negligence by a successor in communications as a legal basis to deprive a successor of its right to set terms has no support in *Burns*. Burns' conduct belies any argument that it does.

The Timing and Clarity of a Successor's, or Its Agent's, Communication or Non-Communication of New Terms Can Lead to "Perfectly Clear" Successor Status

The recent NLRB and court cases, relying upon *Spruce Up* and it progeny, hold that where a successor expresses or indicates a plan to retain a predecessor's work force, it is held to its earliest communication of intended new terms. When a successor in its earliest communication only announces broadly or generally there will be new terms, or not at all, it forfeits "ordinary" successor status. Even where a successor subsequently, and before it becomes a successor, clearly announces the new terms, it is too late, and the successor is held to its first deceptive or unclear communication. The totality of a successor's communications is not the rule.

In *Nexeo Solutions*, Nexeo's earliest communications was actually by the predecessor, found to be Nexeo's agent, that the base salary and wages would be "no less favorable" and other benefits would be "substantially comparable." The Board held this description was not specific enough to inform of the nature of the changes.[43] The description was in the purchase agreement and also in an early employee communication almost five months before Nexeo began operations. Nexeo made a full, specific announcement 1 1/2 months before taking over. The ALJ focused on the "totality" of the communications over the five-month period before operations began, and not just the earliest communication, to find clear and timely communication of terms, but was reversed by the Board.

The NLRB maintained that *Spruce Up* and its progeny established the principle that the obligation to bargain attaches when a successor expresses an intent to retain without making clear that employment is conditioned on the acceptance of new terms. *Spruce Up*, however, does not mandate that an employer announce its intent to establish new terms

in any particular form or to any specific number or percentage of the predecessor's unit employees, and neither does *Burns*. The NLRB and the courts have previously held that all that is required is a communication that "portend[s] employment under different terms and conditions."[44] The D.C. Circuit in *First Student*, which applied the "perfectly clear" exception, held:

> The employer need not specify the new terms during its initial communication with employees. Rather the employer need only convey its intent to make unilateral changes; it can determine the details later.[45]

The NLRB in *Nexeo Solutions* and other cases has demanded more clarity and details and applies it only to the earliest, single communication, something *Spruce Up* and *Burns* do not require. In fact, Burns for over 30 days failed to announce its new terms at all until the day it began operations which conflicts with the Board's interpretation in *Nexeo Solutions*.

In *Creative Vision*, the issue was not a failure to communicate new terms clearly and accurately over the two weeks in May it recruited the predecessor's employees. Creative Vision was able to communicate the terms with 20 of the 44 hoppers. All the hoppers except one learned and knew the terms before going to work for Creative Vision. Even the union business agent learned of the new terms from employees in May. On the day it began operations, June 2, Creative Vision again announced the terms. The ALJ found that there had been sufficient communication of the new terms, but was reversed by the Board.

The NLRB and the Fifth Circuit held that the communications in May were not conveyed broadly enough by Creative Vision to reach the predecessor's employees. The announcement on the day operations began to the entire employee complement was not included by the Board because it decided to set the bargaining obligation the day before operations commenced. The Fifth Circuit went a step further than the NLRB and held that an announcement by a successor on the day of operations is too late to maintain "ordinary" successor status.[46]

Creative Vision communicated with almost half of the employees, and the small employee unit learned of and knew the terms. The NLRB held previously that communications of this scope are legally effective. The Board found that an employer's communication during a meeting with approximately half of the bargaining unit was wide and legally effective dissemination – 20 to 30 employees of a 64 person unit.[47]

Moreover, setting Creative Vision's bargaining obligation on the day before it began operations has never before been applied by the Board on a successor. There was no communication or action regarding the predecessor's employees by Creative Vision that day. Had the NLRB held that the bargaining obligation triggered on the next day, the day it commenced operations, Creative Vision would have been an "ordinary"

successor like *Burns Security* which did not communicate its terms in any way until the day it began operations.

The Board's "perfectly clear" exception must serve some purpose in furtherance of our nation's labor laws within existing precedent. While preventing successors from misleading employees or negligently communicating with employees is laudable, it is not a purpose supported by or articulated by the Court in *Burns Security*, particularly given Burns' conduct.

The Fifth Circuit also maintains that the exception provides employees with an opportunity to rearrange their affairs, giving them time to decide to remain or seek other employment. Yet in the recent cases how were employees harmed in this respect? In *Nexeo* the employees knew of the terms a month and a half before they were to become Nexeo's employees. In *First Student,* the employees knew of the terms more than three months before.

While maintaining that a purpose of the exception is to give predecessor employees time, time is actually irrelevant to the NLRB's interpretation of the exception that the earliest unclear communication, whenever it occurs, triggers the bargaining obligation for a successor. If it were the purpose, there would be an analysis by the Board in these cases of the time employees were afforded between learning the initial terms and the last day they had to decide whether to accept those terms – the day a successor's operations began. *Nexeo* and *First Student* would clearly meet the purpose of adequate time.

The only true purpose of the NLRB's current interpretation, however, is to foreclose or unduly burden successor employers setting initial terms. How else can setting the bargaining obligation the day before Creative Vision commenced operations be explained? If the day of operations for an announcement is not enough time, certainly one day before is also insufficient, and of course, Burns did not announce and set its terms until the day operations began. While unarticulated, the Board's purpose is to foreclose successors from setting initial terms, and this violates the Supreme Court's holding in *Burns Security*.

THE FAILURE OF *SPRUCE UP*

The earlier sections of this article show the direct conflict of *Spruce Up* and the recent NLRB and circuit court cases with *Burns* and *Fall River* and the evolution of dictum in *Burns* into a strong, full-fledged legal principle that does not follow *Burns*. There are, however, deeper flaws which militate overturning *Spruce Up* and a return to the established principle and core holding of *Burns*.

In *Nexeo Solutions*, the AFL-CIO and the Service Employees International Union ("SEIU") filed an *amicus curiae* brief in support of overturning *Spruce Up*. The federation and union, similar to the points made earlier in this article, maintained:

- The decisions under *Spruce Up* are so fact-dependent and conflicting that the case law can fairly be recognized as irrational.[48]

- "*Spruce Up's* focus . . . has created an equally muddled body of law. . . ."[49]

- "Instead of the convoluted litigation that has arisen under *Spruce Up*. . . ."[50]

While recognizing the long history of legal confusion and conflict engendered by *Spruce Up,* calling for its reversal, the AFL-CIO and SEIU contended that the "perfectly clear" exception was impermissibly limited by *Spruce Up.* The "perfectly clear" exception requires bargaining prior to setting initial terms whenever a successor "plans to retain" the incumbent workforce.[51] This position, however, seriously misreads *Burns* and would negate the core holding of *Burns.*[52]

Spruce Up ignored the strong rule and rationale of *Burns* of a successor employer's right to set initial terms as a matter of national economic policy to ensure not discouraging potential employers from taking over challenging businesses and inhibiting the transfer of capital.[53] The NLRB created a rule that the substantive terms of a collective bargaining agreement, but not the agreement itself, can be legally imposed on a successor. The *Spruce Up* holding by the Board collides with Section 8(d) of the NLRA, and the Board failed to follow the significant language in *Burns* on the application of Section 8(d) to successor employers.

Section III of *Burns* is devoted entirely to the principle that the duty of a successor to bargain does not include being bound by and observing the "substantive" terms of a collective bargaining agreement "to which Burns had in no way agreed."[54] Section 8(d) of the NLRA expressly provides that the existence of such a bargaining obligation "does not compel either party to agree to a proposal or require the making of a concession."[55]

"Section 8(d), 29 U.S.C. § 158(d), made this policy an express statutory mandate, and was enacted in 1947 because Congress feared that the present Board has gone very far, in the guise of determining whether or not employers had bargained in good faith, in setting itself up as the judge of what concessions an employer must make and of the proposals and counter proposals that he may or may not make. . . ."[56]

The Court pointed out that it reviewed the history of Section 8(d) in detail and gave controlling effect to it in an earlier decision, *H.K. Porter Co. v. NLRB.*[57] The Court, while agreeing that the employer violated Section 8(a)(5) by refusing to agree to a dues check off, held that the Board erred in ordering the employer to agree to such a provision. "While the Board does have power . . . to require employers and employees to negotiate, it is without power to compel a company or a Union to

agree to any *substantive* contractual provision of a collective bargaining agreement."[58]

Burns found that "it would be anomalous indeed to hold that while Section 8(d) prohibits the Board from relying on a refusal to agree as the sole evidence of bad-faith bargaining, the Act permits the Board to compel agreement in that same dispute."[59] By the same token, it is anomalous to interpret *Burns* as the NLRB did in *Spruce Up* to hold that a successor, because of Section 8(d), does not have to accept a predecessor's contract, but then hold it must accept the "substantive" terms of that contract – especially when it is based upon an unprecedented standard of employer misconduct that can be redefined and stretched at the whim of the NLRB and the courts.

Burns specifically chided the NLRB for departing from its established precedent, pre-*Burns*, that consistently held that although successor employers may be bound to recognize and bargain with the union, they are not bound by the substantive provisions of a collective-bargaining contract negotiated by their predecessors but not agreed to or assumed by them.[60] In *Spruce Up*, the NLRB ignored its significant precedent choosing instead to rely only on two recent, post *Burns* decisions that lacked substantial analysis.[61] The Board's established precedent was actually set forth by the Court in *Burns*, but the Board disregarded it in *Spruce Up.*

Spruce Up launched a cavalcade of cases in which the NLRB, and the courts enforcing NLRB orders and decisions, have compelled successor employers to accept the wages, benefits, and terms and conditions that existed with the predecessor to which they did not agree and which took away their *Burns*' right to set initial terms. This cannot be reconciled with the Court's holdings in *Burns and H.K. Porter Co.* and the specific statutory mandate of Section 8(d). As *Burns* clearly held:

> We also agree with the Court of Appeals that holding either the union or the new employer bound to the *substantive* terms of an old collective-bargaining contract my result in serious inequities. 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 the nature of supervision. *Saddling such an employer with the terms and conditions of employment contained in the old collective-bargaining contract* may make these change impossible and may discourage and inhibit the transfer of capital. On the other hand, a union may have made concessions to a small or failing employer that it would be unwilling to make to a large or economically successful firm.[62]

How can one read *Burns*' "perfectly clear . . . plans to retain . . ." single sentence and interpret it to hold that it supersedes the strong statutory requirement of Section 8(d)? Section III of *Burns* devotes a considerable and substantial portion of the decision to its holding that a successor cannot be compelled to accept a term or condition to which it has not

agreed or assumed. It is the gravamen of the case. The lesser, "perfectly clear" sentence cannot be interpreted to create a substantive exception to the holding without more support in *Burns* then it has.

That leaves the question: What, if anything, did the Court in *Burns* mean or intend when it included the "perfectly clear plan to retain" sentence in the opinion? At the outset we know what it does not mean. It does not mean that a successor's misconduct or negligence about announcing its new terms can foreclose it from "ordinary" successor status. It does not mean that a union bargaining demand is irrelevant to a successor's duty to bargain with a predecessor's union, and it does not mean that a successor's setting of its terms on the day it commences operations is too late – a forfeit of its right to set terms. Lastly, it does not mean that the composition of the successor's work force "alone" is the triggering fact for a successor bargaining obligation. Unless a successor agrees, assumes, or assents to the predecessor's terms, it cannot be bound by them under Section 8(d), and the *Burns* Court was 9 to 0 on this issue.

The "perfectly clear" sentence of the Court acknowledges the common business practice in most successorship cases involving a predecessor with a union that never leads to litigation. In order to maintain an experienced work force and have a smooth transition, successor employers meet and bargain with the union and reach an agreement. They want to avoid what happened in *Spruce Up* – employees going on strike the day operations begin over the new terms. In other instances, successor employers negotiate an adjusted purchase price with the predecessor to compensate for the agreement, and then meet with the union, execute the existing agreement, and plan for future changes in collective bargaining. The Supreme Court recognized this reality of the business world with the "perfectly clear" sentence. It certainly did not, however, hold or give any signal that the "perfectly clear" sentence, in its decision was establishing a legal exception requiring successors to accept the "substantive" terms of a predecessor's union contract but not the contract itself. The Court was clear that successors cannot be "saddled" with the "substantive" terms and conditions of an old contract. Section 8(d) forbids it.

THE WAY FORWARD UNDER *BURNS* AND *FALL RIVER*

The NLRB in *Spruce Up* interpreted *Burns* to make it more complicated than it is. *Burns*, together with *Fall River*, make clear the concurrence of two events is required to trigger a bargaining obligation for a successor before it is foreclosed from unilaterally setting new, initial terms:

(1) The hiring of a substantial and representative complement of employees, a majority of whom were employed by the predecessor, and

(2) The existence of an outstanding demand by the union for recognition or bargaining.

Until these two circumstances occur, a successor is free under *Burns* and *Fall River* to set new, initial terms. Nexeo Solutions was an "ordinary" successor because before it hired a substantial and representative complement of the predecessor's employees it announced its new terms. First Student too had "ordinary" status for the same reason. Creative Vision was an "ordinary" successor not only because it announced its new terms before employing the predecessor's employees but also because it had not received a union demand for recognition or bargaining.

A successor can still be bound, however, and unable to set initial terms under the Court's successorship doctrine. This occurs when a successor commences operations, after employing a "substantial and representative complement" and receiving a union bargaining demand, and continues the predecessor's terms, but later unilaterally sets new terms. In this instance, a successor has accepted and assumed as its initial terms the predecessor's terms on the day it begins operations, employing the predecessor's employees. Since it has an outstanding bargaining demand, any subsequent, unilateral change in terms violates the Sections 8(a)(1) and (5) of the NLRA.

This is what happened in *Houston Building Services*.[63] The successor began operations, with the predecessor's work force, maintained the existing substantive terms of the union contract, but set its initial terms after receiving a union bargaining demand. The NLRB and the Fifth Circuit held that *Houston Building* illegally set its initial terms because it set them after employing the predecessor's work force and receiving a union bargaining demand.

Even though under *Burns* a successor has an almost unqualified right to set its initial terms, this conclusion does not ignore the predecessor's employees' interests. The bargaining agreement and its terms no longer apply but they do provide a framework for the good faith negotiations that will ensue. Successor employers are encouraged to actively recruit and maintain an experienced work force where they know with certainty that their economic plan will play a part in establishing the substance of the success of the new enterprise and the continuing security of the employment relationship. This stands in contrast to the successor employer's future being controlled by the predecessor – oftentimes a competitor as in *Burns.*

CONCLUSION

The Supreme Court did not create an exception in *Burns* to the right of a successor to set its initial terms with the "perfectly clear" sentence. The NLRB did in *Spruce Up,* and set in motion for over 40 years a substantive legal rule that conflicts with the NLRA, *Burns,* and *H.K. Porter,*

Co. The exception made the Court's ruling in *Burns* much more complicated than it really is, and its loose, malleable standard engenders litigation, confusion, and conflict. This will certainly continue unless the NLRB takes a fresh look at *Spruce Up* and overturns it. ALJ reversals, split NLRB decisions, split and vacated circuit court decisions, and forum shopping will continue to be the norm.

Burns Security stands for the principle that a successor employer has a unilateral right to set its initial economic terms, without bargaining with a predecessor's union. This is precisely what Burns did, even though it evinced from the outset a plan to retain Wackenhut's employees.

Burns Security and *Fall River Dyeing* hold and make clear the concurrence of two circumstances is required to attach a bargaining obligation to a successor before it is foreclosed from setting initial terms: (1) the hiring of a substantial and representative complement of employees, a majority of whom were employed by the predecessor, and (2) the existence of an outstanding demand by the union for recognition or bargaining. This is the Supreme Court's successor employer doctrine, and *Burns*' "ordinary" successor is its keystone.

NOTES

1. 426 U.S. 272 (1972).

2. In *John Wiley & Sons, Inc. v. Livingston*, 376 M.S. 543 (1964), the court dealt with a successorship case in a Section 301 suit to compel arbitration and not in the context of an unfair labor practice proceeding which the court distinguished in *Burns*.

3. In a stock purchase transaction, the employing entity typically remains the same and the collective bargaining agreement will remain in effect between the existing signatories. The successor is said "to stand in the shoes" of the seller for NLRA purposes.

4. 482 U.S. 27 (1987).

5. *Creative Vision Resources, LLC v. NLRB*, 364 NLRB No. 91 (2016), 872 F.3d 274 (5th Cir. 2017) *enf'd vacated*, *enf'd*, 882 F.3d 510 (5th Cir. 2018); *cert. den.*, ___ U.S. ___ (mem) (October 1, 2018); *First Student Inc.*, 366 NLRB No. 13 (2018) *enf'd*, 935 F.3d 604 (D.C. Cir. 2019); *Nexeo Solutions*, 364 NLRB No. 44 (2016).

6. This article does not address the circumstance of a successor employer who discriminates in hiring of a predecessor's employees in violation of Section 8(a)(3) and the application or non-application of the "perfectly clear" exception to it. *Adams & Associates, Inc.*, 363 NLRB No. 193 (2016), *enf'd*, 871 F.3d 358 (5th Cir. 2017), *but see Ridgewood Health Care Center, Inc.*, 367 NLRB No. 110 (2019) Presumably, the sections in this article on successor misconduct and Section 8(d) would have applicability.

7. *Burns*, *supra* at 294-295.

8. 209 NLRB 194 (1974), *enf'd*, 529 F.2d 516 (4th Cir. 1975).

9. *Id.,* at 195.

10. The facts of the case are at 182 NLRB 348 (1970).

11. All dates are 1967 unless otherwise noted.

12. *Supra* at fn. 5.

13. *Supra* at fn. 5.

14. *Supra* at fn. 5.

15. *Burns, supra,* at 294.

16. *Fall River Dyeing, supra*, at 52-53.

17. *Banknote Corp. of America v. NRLB*, 84 F.3d 637 (2d Cir. 1996).

18. *Nephi Rubber Prods. Corp. v. NLRB,* 976 F.23 1361, 1365 n. 6 (10th Cir. 1992) (determination of whether successor employer has duty to bargain requires analysis of whether successor has hired substantial and representative complement of employees at time of union's bargaining demand); *Williams Enters., Inc. v. NLRB*, 956 F.23 1226, 1232 (D.C. Cir. 1992) ("The presumption of majority support that creates a successor's duty to bargain arises . . . only when . . . the new employer has hired a 'substantial and representative complement' of its work force and a majority of that work force is composed of predecessor employees; and the incumbent union has, at some time, issued a valid bargaining demand to the new employer."), decision supplemented by 312 N.L.R.B. 987, 1993 WL 402910 (1993) *enf'd*, 50 F.3d 1280 (4th Cir. 1995); *Briggs Plumingware, Inc. v. NLRB*, 877 F.2d 1282, 1286-87 (6th Cir. 1989) ("The concurrence of two events is necessary to obligate the successor employer to bargain with the union: the successor's employment of a 'substantial and representative complement' of the predecessor's employees and the union's demand for recognition.") *Aircraft Magnesium, A Division of Grico Corp.,* 730 F.2d 767 (9th Cir. 1984), *enf'd*, 265 NLRB 1344, 1345 (1982) (". . . well settled that the significant time frame for determining what percentage of a purchaser's employees were former employees of a predecessor is when a demand for bargaining has been made and a representative complement of an employer's work force is on the job.").

19. *Ass'n of Machinists v. Aerospace Workers, AFL-CIO v. NLRB*, 595 F.2d 664, 675, fn. 52 (D.C. Cir. 1978).

20. *NLRB v. Houston Bldg. Service, Inc*., 936 F2d 178, 180 (5th Cir. 1991).

21. *Creative Vision, supra*, 5th Cir. at 526-527.

22. *St. Elizabeth Manor*, 329 NLRB 341, 344 n.8 (1999); *Capitol Steel & Iron Co*. 299 NLRB 484, 496 (1990); *Royal Midtown Chrysler Plymouth, Inc*., 296 NLRB 1039, 1040 (1989).

23. *Creative Vision, supra*, 5th Cir. at 526-527; *Banknote, supra*, at 645-646.

24. The minority distinction created by the Second and Fifth Circuits would lead to a different result in *Burns*. Under the distinction Burns would fall into the "perfectly clear" exception and be unable to set its initial terms. Under the Fifth Circuit and Board rulings, Burns' bargaining duty would trigger *the day before* Burns commenced operations, and its unilateral implementation of terms on the day it began operations would be an unfair labor practice.

25. *Creative Vision, supra,* 5th Cir. at 527.

26. *Burns, supra* at 295.

27. *Fall River* at 52.

28. *Id.,* at 52.

29. *Creative Vision, supra,* 5th Cir., fn. 3 at 520.

30. *Id.,* at 526.

31. *Id.,* at 526-527.

32. *Houston Bldg., supra,* at 179.

33. *Creative Vision, supra,* NLRB at 7, *Nexeo Solutions, LLC,* 364 NLRB No. 44, slip op. at 5-9 (finding that obligation to bargain over initial terms commenced before successor hired employees and before union demanded bargaining); *Adams,* 363 NLRB No. 193, slip op. at 4-5 (same); *Canteen,* 317 NLRB at 1052-1054 (same); *Level, a Div. of Worcester Mfg., Inc,* 306 NLRB 218, 218, 220 91992) (same). *See, also, Elf Arochem North America, Inc.,* 339 NLRB at 796 (finding that obligation to bargain over initial terms commenced before successor hired employees); *DuPont Dow,* 332 NLRB at 1075 (same); *Helnick Corp,* 301 NLRB at 128 fn. 1 (1991) (same); *Spitzer Akron,* 219 BKRB at 23 (finding that obligation to bargain commenced before union demanded bargaining).

34. *Burns* at 286-287.

35. *Fall River Dyeing* at 52.

36. *Fall River Dyeing* at 52-53.

37. *Spruce Up, supra,* fn. 7.

38. *Creative Vision, supra,* at 521.

39. *Creative Vision, supra,* 5th Cir., at 523 and 525-526.

40. *Nexeo Solutions, supra,* at 12.

41. *Nexeo Solutions, supra,* at 12-13.

42. *Elf Atochem*, 339 NLRB 796 (2003).

43. *See, also*, *Elf Autochem, supra* ("equivalent" salaries and "comparable" benefits.); *First Student, supra* ("subject to negotiations"); *Canteen Co.*, 317 NLRB 1052 (1995) (no mention of possibility of any other changes in initial terms beyond establishing a working manager, a probationary period, and a sample contract); *Spitzer Akron, Inc.*, 219 NLRB 20 (1975) ("I want every man to stay on the job, and we all carry on as usual").

44. *Ridgewell's, Inc.*, 334 NLRB 77 (2001), *enf'd*, 38 Fed. Appx. 29 (D.C. Cir. 2002).

45. *First Student, Inc., supra,* at fn. 3.

46. *Creative Vision, supra,* 5th Cir., at 521.

47. *Student Transportation of America, Inc.,* 362 NLRB No. 156, p.3 (2015).

48. *Nexeo Solutions, amicus curiae* brief, p. 19.

49. *Id.,* p. 21.

50. *Id.,* p. 23.

51. *Id.,* p. 14.

52. While there are exceptions, the vast majority of merger, acquisitions, and contract assumptions by employers involve plans to retain a predecessor's employees. Their argument elevates the "perfectly clear" dicta sentence to become, in application, the core holding of *Burns* that would be the law in most successorship cases, with successors seldom ever having the ability to set initial economic terms for a new business. The AFL-CIO

and SEIU forget that *Burns Security* was held to be an "ordinary" successor, but under their argument would not qualify since Burns planned to retain the incumbent workforce.

53. *Burns* at 287-288.

54. *Burns* at 281-282.

55. 29 U.S.C. § 158(d).

56. *Burns* at 293.

57. 397 U.S. 99 (1970).

58. *Burns* at 283. (Emphasis supplied.)

59. *Burns* at 283-284.

60. *Burns, supra,* at 284; *Rohlik, Inc.,* 145 NLRB 1236, 1242 n. 15 (1964); *General Extrusion Co.,* 121 NLRB 1165, 1168 (1958); *Jolly Giant Lumber Co.,* 114 NLRB 413, 414 (1955); *Slater System Maryland, Inc.,* 134 NLRB 865, 866 (1961); Matter of ILWU (Juneau Spruce), 82 NLRB 650, 658-659 (1949), *enf'd*, 189 F.2d 177, 13 Alaska 291 (CA9 1951), *aff'd on other grounds*, 342 U.S. 237 (1952).

61. *Spruce Up* at 145, fn. 7.

62. *Burns, supra* at 287-288. (Emphasis supplied.)

63. *Houston Building Services, supra.*