Nos. 10-2801, 10-2978

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD

Petitioner/Cross-Respondent

v.

LEIFERMAN ENTERPRISES, LLC d/b/a HARMAN AUTO GLASS AND ITS SUCCESSOR, AUTO GLASS REPAIR AND WINDSHIELD REPLACEMENT SERVICE, INC.

Respondent/Cross-Petitioner

ON APPLICATION FOR ENFORCEMENT AND PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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SUMMARY OF THE CASE

The Board seeks enforcement of its Supplemental Order against Auto Glass Repair and Windshield Replacement Service, Inc. ("WRS"), as the successor to Leiferman Enterprises, LLC d/b/a Harmon Auto Glass ("Leiferman").

The only issue the Court needs to resolve is whether substantial evidence supports the Board's finding that WRS was a successor to Leiferman such that WRS is obligated to remedy Leiferman's unfair labor practices. On this stipulated record, there are no factual disputes and the Board's successorship finding is well supported.

WRS raises numerous issues relating to the interests of a third party — Leiferman's secured creditor, HAIP. The Court, however, need not reach those issues because the Board's Order does not run against HAIP, which has never been a party or sought to intervene in this case. In any event, HAIP agreed to indemnify WRS and pay the Board remedy. There is no indication that HAIP will refuse to honor its indemnification agreement.

Given the single relevant issue before the Court and stipulated record, the Board submits that oral argument is not necessary. If argument is scheduled, however, the Board requests that it be allowed to participate and submits that 10 minutes per side is sufficient.

TABLE OF CONTENTS

Headings **Page**

TABLE OF CONTENTS

Headings – Cont'd **Page**

TABLE OF CONTENTS

Headings – Cont'd **Page**

TABLE OF AUTHORITIES

Cases **Page(s)**

TABLE OF AUTHORITIES

Cases – Cont'd **Page(s)**

TABLE OF AUTHORITIES

Cases – Cont'd **Page(s)**

TABLE OF AUTHORITIES

Statutes: **Page(s)**

Other Statutes:

United States Constitution

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STATEMENT OF JURISDICTION

This case is before the Court on the application of the National Labor Relations Board ("the Board") to enforce, and the petition of Auto Glass Repair and Windshield Replacement Service, Inc. ("WRS") to review, the Board's Order

issued against WRS, as the successor to Leiferman Enterprises, LLC d/b/a Harmon Auto Glass ("Leiferman") .

The Board had jurisdiction over the unfair-labor-practice proceedings below under Section 10(a) of the National Labor Relations Act, as amended ("the Act").[1] The Supplemental Decision and Order, issued on August 6, 2010, and reported at 355 NLRB No. 66 (JA 1A),[2] is a final order with respect to all parties under Section 10(e) and (f) of the Act.[3] The Supplemental Decision and Order adopts and incorporates by reference the Board's previous decision (JA 1-5), issued on October 30, 2009, and reported at 354 NLRB No. 98.

That prior decision was issued by a two-member quorum of the Board. WRS petitioned this Court for review of that Order and the Board cross-applied for enforcement. The parties fully briefed the case. The Supreme Court, on June 17, 2010, issued its decision in *New Process Steel, L.P. v. NLRB*,[4] holding that Chairman Liebman and Member Schaumber, acting as a two-member quorum of a three-member group delegated all the Board's powers in December 2007, did not

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[1] 29 U.S.C. §§ 151, 160(a).

[2] "JA" references are to the Joint Appendix. "Br." refers to WRS' opening brief. Where applicable, references preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

[3] 29 U.S.C. § 160(e) and (f).

[4] 130 S. Ct. 2635 (2010).

have authority to issue decisions when there were no other sitting Board members, as they did in the prior decision here. The Court granted the Board's motion for remand based on *New Process*. The Board then issued its August 6, 2010 Supplemental Decision and Order that adopted and incorporated by reference the October 30, 2009, decision. (JA 1A, 1-5.)

On August 11, the Board filed an application for enforcement of its Order. WRS filed its petition for review on September 7. Both were timely filed, as the Act imposes no time limit for such filings. The Court has jurisdiction over the application and petition pursuant to Section 10(e) and (f) of the Act[5] because the unfair labor practices occurred in Minneapolis, Minnesota.

STATEMENT OF THE ISSUE

On this stipulated record, the only issue is whether the Board acted within its broad remedial discretion in ordering WRS to remedy Leiferman's unfair labor practices as the successor to Leiferman, where it is undisputed that WRS purchased Leiferman's business and assets (i) with prior knowledge of the potential liability to the Board, and (ii) with full indemnification, as part of the sale, for any such liability.

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

[5] 29 U.S.C. § 160(e) and (f).

STATEMENT OF THE CASE

I. The Underlying Unfair Labor Practice Proceeding

On February 21, 2008, the Board found that Leiferman — which sold and installed automotive glass at various facilities in the Minneapolis area — violated Section 8(a)(5) and (1) of the Act[6] by implementing unilateral changes to employees' terms and conditions of employment without reaching a good-faith bargaining impasse with the International Union of Painters and Allied Trades District Council 82 ("the Union"). (JA 87-96.) The Board's Order required Leiferman and "its officers, agents, successors, and assigns" to make the employees whole for the unlawful unilateral changes, among other things. (JA 90.)

II. The Instant Compliance Proceeding

Following the Board's Order concerning the merits of the unfair labor practices, the Board's Regional Director in Minneapolis issued a compliance specification detailing the amounts owed under the merits-case Order. Those amounts included 401(k) payments that were discontinued and increases in health insurance premiums that were not paid in contravention of the collective-bargaining agreement and extant terms and conditions of employment. The

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[6] 29 U.S.C. § 158(a)(5) and (1). Section 8(a)(5) makes it an unfair labor practice for an employer to refuse to bargain in good faith with the representative of its employees. Section 8(a)(1) makes it an unfair labor practice "to interfere with, restrain, or coerce employees in the exercise" of their rights under the Act.

backpay period ran from August 11, 2006 (the date of the unilateral changes) until February 2, 2007 (the date WRS began operating the business). WRS conceded the amounts owed, but contended that it was not liable for them because it had purchased the Leiferman assets as part of a state receivership proceeding, and that in addition to the indemnification guarantee it had obtained as part of the sale agreement, a Minnesota state court had ordered that the asset sale was "free and clear of any liens and encumbrances." The Board's General Counsel and WRS submitted the case on a stipulated record. (JA 2.)

The administrative law judge issued a supplemental decision based on the stipulated facts. He rejected WRS' defenses and found that WRS was a successor to Leiferman and was liable for the amounts owed. (JA 3-5.) As described below, the Board agreed.

STATEMENT OF THE FACTS

I. The Board's Findings of Fact

A. Leiferman's Financing Arrangement with HAIP; In Response to Leiferman's Financial Difficulties, HAIP Sought the Appointment of a Receiver in State Court

Leiferman sold and installed automotive glass at various facilities in the Minneapolis area. The Union represented 15 of its employees. The last collective-bargaining agreement was in effect from July 1, 2003 through June 30, 2006. (JA 2; 7 ¶ 4.)

Leiferman financed the purchase of its business through various agreements with a secured creditor, Harmon Auto Glass Intellectual Property ("HAIP"), the most recent of which was entered into in September 2005. Shortly thereafter, Leiferman defaulted on its obligations to HAIP. Leiferman and HAIP entered into a "forbearance agreement" on April 30, 2006. That agreement provided that Leiferman would make certain payments to HAIP and would complete the sale of its business to a third party before September 15, 2006. HAIP's security interest was perfected by filing a UCC-1 with Minnesota's Secretary of State. (JA 2; 7 ¶ 5.)

Leiferman, however, defaulted on the terms of the forbearance agreement. HAIP demanded that Leiferman return possession of and grant access to its collateral to HAIP. Leiferman refused. (JA 2; 7 ¶ 5.)

Given Leiferman's failure to grant possession of and access to the collateral, as well as evidence that Leiferman was engaging in erratic economic behavior, HAIP filed a complaint in the District Court for the State of Minnesota, County of Hennepin, for appointment of a receiver to manage Leiferman's assets. On September 20, 2006, the state court issued an order appointing a receiver, Lighthouse Management Group ("Lighthouse"). (JA 2; 7-8 ¶ 6.) The court's order authorized Lighthouse to operate the business in a manner designed to preserve

and maximize the value of the business and its assets, and to pursue a sale of the business or its assets. (JA 2; 8 ¶ 6.)

After seizing control of Leiferman, HAIP invested over $300,000 to continue Leiferman's operations and continue paying its employees. Leiferman had ceased operations and could not pay the employees because it had a negative cash flow of $100,000 per month. (JA 2; 8 ¶ 6.)

B. Leiferman's Unlawful Unilateral Changes

During this time, Leiferman and the Union were negotiating for a new collective-bargaining agreement to succeed the one expiring on June 30, 2006. On August 13, after about 2 months of negotiations, Leiferman implemented its final offer and unilaterally changed employees' terms and conditions of employment. The Union filed unfair-labor-practice charges with the Board. On November 1, the Board's General Counsel issued a complaint alleging that, by implementing unilateral changes without reaching a bona fide impasse, Leiferman violated Section 8(a)(5) and (1) of the Act.[7] (JA 2; 8 ¶ 7.) As described above (p. 4), the Board found that Leiferman violated the Act as alleged.

[7] 29 U.S.C. §158(a)(5) and (1).

C. WRS Purchased Leiferman's Assets with Advance Notice of the Potential Liability to the Board and with an Agreement that HAIP Would Indemnify WRS from Any Such Liability

In October 2006, Lighthouse sent bid instruction letters to nine potential purchasers of Leiferman's assets, along with due diligence data. That data included a notice of the potential liability arising from the Board's pending unfair-labor-practice case. WRS acknowledges (Br. 12, 40) that, prior to the purchase, it was aware of the potential backpay liability to the Board. As a condition of their bids, all prospective purchasers, including WRS, required that HAIP agree to indemnify them from any pending claims against Leiferman from the NLRB case, as well as an EEOC case. HAIP agreed to do so. (JA 2; 9 ¶ 8.)

On January 31, 2007, the state court approved the sale of Leiferman's assets to WRS. The state court order found that the "manner and terms of the proposed sale … are fair and commercially reasonable" and stated that WRS' purchase of Leiferman was "free and clear of any liens and encumbrances." (JA 2; 9 ¶ 9, 67 ¶¶ 3, 4.) The Board did not file a claim with the state court or otherwise submit to the jurisdiction of that court. (JA 2; 9 ¶ 9.)

On August 20, 2007, a state court judgment was entered against Leiferman awarding HAIP approximately $3.7 million. After the sale of Leiferman's assets to WRS a deficiency of over $3 million remains unpaid. (JA 3; 9 ¶ 10.)

D. WRS Continued Leiferman's Operations Without Substantial Change

Since purchasing Leiferman's assets, WRS has continued, without interruption, Leiferman's business of selling and installing automotive glass to retail customers. WRS assumed leases at the locations that had been leased by Leiferman. WRS licensed the same trade name from HAIP as Leiferman. Of WRS' seven glass installers, five came from Leiferman and two were new hires. WRS also employed Leiferman's nine store managers who also installed glass as they had for Leiferman. WRS employed four of the five customer representatives and the lone salesperson from Leiferman. (JA 3; 9-10 ¶ 11, 68-69.)

WRS made a few changes to the operation. WRS had different upper corporate management and a different headquarters than Leiferman. The glass installers who came from Leiferman were paid different benefits by WRS and had some different terms and conditions of employment, including increased job responsibilities. They used different equipment for glass installation. (JA 3; 10 ¶ 11.) WRS, however, operated at a loss in 2007 and 2008. (JA 3; 10 ¶ 11.)

II. THE BOARD'S CONCLUSIONS AND ORDER

After considering WRS' exceptions to the administrative law judge's decision, the Board (Chairman Liebman and Members Schaumber and Pearce) issued a Supplemental Decision and Order on August 6, 2010, adopting and incorporating by reference the Board's October 30, 2009, decision (see above, pp.

2-3). Based on the foregoing facts, the Board found (JA 1), in agreement with the administrative law judge, that WRS was a successor to Leiferman that purchased with knowledge of the potential liability to the Board. Therefore, it found that WRS was responsible for remedying the unfair labor practices. (JA 1.)

The Board ordered WRS to make the employees whole in the amounts listed below. As WRS states (Br. 16 n.40), there is no dispute about the figures or their accuracy.

Employee	Amount Owed
Timothy Rannow	$ 4,468.48
Harold Hegg	4,747.93
Robert Leyde	4,699.79
Steven Nyberg	4,766.87
Roger Wegleitner	3,945.92
James Schmidt	4,709.01
Richard Friedland	4,514.35
Daniel Hyland	2,537.16
Joseph Kacures	4,763.80
Timothy Rettner	97.62
Kenneth Salmela	98.57
Michael Leyde	5,142.75
Daniel Walters	4,796.50
Michael Ketter	4,808.30
Mark Krugerud	421.20
TOTAL	$ 54,518.25

(JA 1.)

SUMMARY OF ARGUMENT

1. The Board acted within its broad remedial authority in ordering WRS to remedy the unfair labor practices of Leiferman. Substantial evidence supports the Board's finding that WRS was a *Golden State* successor to Leiferman when it purchased the assets with knowledge of the potential unfair-labor-practice liability and continued Leiferman's operations without substantial change. WRS continued Leiferman's business of selling and installing automotive glass under the same trade name at the same locations and with the same supervision as Leiferman. Of the seven glass installers that WRS employed, five came from the Leiferman operation. For the employees — the victims of the unfair labor practices — the operation and their jobs with WRS were substantially the same as with Leiferman.

2. Because WRS demanded and Leiferman's secured creditor, HAIP, agreed to indemnify WRS for any potential successorship liability to the Board, WRS' defenses fail.

a. The state court order approving the sale of Leiferman to WRS "free and clear of any liens and encumbrances" does not extinguish the Board's remedy against WRS. The state court order explicitly approved the terms of the sale. It is undisputed that one of the conditions of the sale was HAIP's indemnification guarantee: that HAIP and not WRS would be financially responsible for any liability under the Act that, because of the sale, might flow from Leiferman to

WRS. Moreover, the state court order cannot trump the Board's remedy under federal labor law.

b. Leiferman's inability to remedy its own unfair labor practices does not negate the Board remedy. The point of successorship liability is to provide a "second chance" at a remedy for the employees. Moreover, WRS expected and planned for Leiferman's inability to pay the Board remedy by insisting that HAIP agree to indemnify it.

c. In order to enforce the Board's Order, this Court need not reach WRS' arguments asserting that HAIP's position as Leiferman's secured creditor eliminates the Board's remedy. The Board is not in competition with HAIP to collect from Leiferman's assets. It has ordered WRS to pay. The Board has not ordered HAIP to do anything.

Even if the Court were to consider HAIP's interests relevant to this case, HAIP agreed to take on WRS' successor liability to the Board. By so doing, HAIP agreed to effectively subordinate any priority of its claim as a secured creditor. There is no indication that HAIP will refuse to honor its indemnification agreement.

d. The indemnification agreement supports the Board's conclusion that *Golden State* can fairly be applied to WRS. WRS and HAIP made informed business decisions and it is not inequitable to hold them to those decisions and

their foreseeable consequences. It would be inequitable, however, to eliminate the remedy to the employees — the victims of the unfair labor practices — and allow WRS to escape the successor liability of which it was aware before the purchase of Leiferman and for which it planned by insisting on HAIP's agreement to indemnify.

STANDARD OF REVIEW

The Board's remedial power is a "broad, discretionary one, subject to limited judicial review."[8] This authority, as the Supreme Court has made clear, "is for the Board to wield, not for the courts."[9] The Board's order "will not be disturbed 'unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.'"[10]

The Board's underlying factual findings are "conclusive" if they are supported by substantial evidence on the record as a whole.[11] A reviewing court may not displace the Board's choice between conflicting views, even if it could justifiably have made a different choice de novo.[12]

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[8] *Fibreboard Corp. v. NLRB*, 379 U.S. 203, 216 (1964); *United Food & Commercial Workers Union v. NLRB*, 772 F.2d 421, 426-27 (8th Cir. 1985).

[9] *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953).

[10] *Fibreboard*, 379 U.S. at 216 (citation omitted).

[11] *See* 29 U.S.C. § 160(e).

[12] *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

The determination of whether an employer is a successor is "primarily factual in nature."[13] As such, the Court will affirm the Board's successorship determination if it is supported by "substantial evidence on the record taken as a whole."[14]

ARGUMENT

The Board Acted Within its Broad Remedial Discretion in Ordering WRS To Remedy the Unfair Labor Practices as the Successor to Leiferman Where It Is Undisputed that WRS Purchased Leiferman's Business and Assets with Knowledge of the Potential Liability to the Board and with Full Indemnification for Any Such Liability

A. Applicable Principles

The Board's remedial power under Section 10(c) of the Act[15] is not limited to issuing orders against the actual perpetrator of an unfair labor practice.[16] It is well settled under *Golden State Bottling Co. v. NLRB* that liability may also be imposed "in appropriate circumstances … against those to whom the business may have been transferred, whether as a means of evading the judgment or for other

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[13] *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 43 (1987); *accord NLRB v. Winco Petroleum Co.*, 668 F.2d 973, 975 (8th Cir. 1982) ("successorship cases are fact-intensive").

[14] *Winco Petroleum*, 668 F.2d at 978.

[15] 29 U.S.C. § 160(c).

[16] *See Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 176 (1973) ("*Golden State*").

reasons."[17] In such circumstances, where the new employer has "'continued, without interruption or substantial change, the predecessor's business operations, [the] employees who have been retained will understandably view their job situations as essentially unaltered … [and] may well perceive the successor's failure to remedy the predecessor's unfair labor practices … as a continuation of the predecessor's labor policies.'"[18] This Court recognized that, in balancing the interests of the employer, the public, and the employees, the Board may properly place an "emphasis upon protection for the victimized employee, who is 'now without meaningful remedy when title to the employing business changes hands.'"[19] The function of striking that balance is a "'difficult and delicate responsibility, which Congress committed primarily to the Board, subject to limited judicial review.'"[20]

The basis for *Golden State* liability "is not focused on the conduct of the successor but, rather, the need to prevent mere changes in the title to the business from frustrating the national labor policy of remedying unfair labor practices."[21]

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[17] *Id.* at 178-79 (internal quotation marks omitted).

[18] *Winco Petroleum*, 668 F.2d at 977 (quoting *Golden State*, 414 U.S. at 184-85).

[19] *Id.* at 978 (quoting *Golden State*, 414 U.S. at 181).

[20] *Golden State*, 414 U.S. at 181 (citation omitted).

[21] *NLRB v. Aquabrom, Div. of Great Lakes Chem. Corp.*, 855 F.2d 1174, 1180 (6th Cir. 1988) (internal quotation marks omitted).

Thus, the Supreme Court and this Court have determined that imposing liability on a successor who purchases a business with knowledge of the predecessor's unfair labor practices serves "important" policies of the Act: "[a]voidance of labor strife, prevention of a deterrent effect on the exercise of rights guaranteed employees by § 7 of the Act, … and protection for the victimized employee."[22]

It is well established, therefore, that the Board may order a new employer to make whole the victims of its predecessor's unlawful conduct if (1) the successor employer "acquired the enterprise with knowledge of the labor litigation" and (2) "continued to operate the enterprise without substantial change or interruption."[23] Yet, "[u]nlike successorship for bargaining purposes, a [*Golden State*] obligation does not require that a majority of the successor's employees be former employees of the predecessor, and also does not turn on whether those employees are represented by a union."[24]

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[22] *Golden State*, 414 U.S. at 185. *Accord Winco Petroleum*, 668 F.2d at 977.

[23] *Winco Petroleum*, 668 F.2d at 977 (citing *Golden State*, 414 U.S. at 179-86). *See also NLRB v. South Harlan Coal, Inc.*, 844 F.2d 380, 382 (6th Cir. 1988) (successor liable for predecessor's unfair labor practices "when (1) there exists substantial continuity of business operation … and (2) the successor had knowledge of the unfair labor practices of its predecessor prior to the date of purchase").

[24] *Bell Glass Co.*, 293 NLRB 700, 707 (1989), *enforced*, 983 F.2d 1073 (7th Cir. 1992). *See also St. Marys Foundry*, 284 NLRB 221, 221 n.4 (1987) (to impose monetary remedy, as here, "a finding that the old employees constitute a majority

B. Substantial Evidence Supports the Board's Finding that WRS Was a *Golden State* Successor to Leiferman

First, it is undisputed (Br. 12, JA 9 ¶8) that WRS knew of the unfair-labor-practice liability before purchasing Leiferman's operations. Second, WRS continued Leiferman's operations without substantial change. After the purchase, WRS continued, without interruption, Leiferman's business of selling and installing retail automotive glass, and under the same trade name. It operated from the same locations as Leiferman. Its supervision was identical because WRS employed the same nine store managers as Leiferman. The store managers also installed glass, as they had with Leiferman. Of the seven glass installers that WRS employed, five came from the Leiferman operation. For the employees — the victims of the unfair labor practices — the essential nature of the operation and their jobs were the same. Substantial evidence supports the Board's finding that WRS was a *Golden State* successor to Leiferman because it had knowledge of the unfair-labor-practice liability before the sale and it substantially continued Leiferman's operation. Accordingly, WRS is obligated to remedy Leiferman's unfair labor practices under *Golden State*.

In challenging the successorship finding, WRS does not dispute that it continued Leiferman's business of automotive glass sale and installation under the

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in the purchaser's work force is unnecessary"), *enforced*, 860 F.2d 679 (6th Cir. 1988).

same trade name at the same locations with the same supervision. Instead, it emphasizes (Br. 19, 31, 33) that it paid the glass installers different benefits and increased their job responsibilities. That bare assertion does not negate WRS' *Golden State* successor liability. A new employer often brings different ideas to a business; such changes, however, do not eliminate the successor's liability if they do not alter the "essential nature" of employees' jobs from the employees' perspective.[25] *Golden State* liability is imposed where there is no *substantial* change to the operation.[26] Here, the employees' jobs were essentially the same — installing automotive glass — in the same locations under the same trade name and with the same direct supervision from the same store managers.

WRS only vaguely asserts (Br. 31-33) unspecified changes to benefits and job responsibilities. Because it is unclear what changes WRS made, it has fallen far short of showing a "substantial" change in the employees' jobs. Likewise, asserted (Br. 14, 33) changes to upper corporate officers do not defeat the

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[25] *WXGI, Inc. v. NLRB*, 243 F.3d 833, 845 (4th Cir. 2001) ("changes did not alter the essential nature of the employees' jobs"); *Nephi Rubber Prods. Corp. v. NLRB*, 976 F.2d 1361, 1365 (10th Cir. 1992) ("calculation of pay was different, and the overall rate was somewhat less, but the nature of the work remained substantially the same"). *See also Fall River Dyeing*, 482 U.S. at 43 (in assessing whether there is "substantial continuity," the Board properly "keeps in mind the question whether 'those employees who have been retained will understandably view their job situations as essentially unaltered.'" (quoting *Golden State*, 414 U.S. at 184)).

[26] *Golden State*, 414 U.S. at 184; *Winco*, 668 F.2d at 978; *WXGI*, 243 F.3d at 845.

successorship finding. Obviously, when a new company takes over, its corporate officers will be different. WRS has not shown that any changes to the corporate officers affected the employees, let alone altered the essential nature of their jobs.[27]

WRS' related discussion (Br. 30-32) of a purchaser's right to set terms and conditions of employment reflects a misunderstanding of the Board's Order in this case. The Board ordered WRS to make the employees whole for Leiferman's unfair labor practices, a purely monetary remedy. It did not bind WRS to the Union-Leiferman collective-bargaining agreement or restrict WRS' ability to set terms and conditions of employment for its employees, whether they came from Leiferman or were hired independently. The "perfectly clear" successorship doctrine,[28] referenced by WRS (Br. 31 n.53), used to bind a successor to the predecessor's collective-bargaining agreement, simply is not applicable to this case.

Next, WRS incorrectly implies (Br. 18-19, 32) that, because it hired only 5 of the 15 glass installers employed by Leiferman, it is not a successor. Instead, the

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[27] *Winco Petroleum*, 668 F.2d at 982 (rejecting corporate reorganization as basis to defeat successorship; "essential inquiry is whether operations, as they impinge on union members, remain essentially the same after the transfer of ownership").

[28] *See Peters v. NLRB*, 153 F.3d 289, 297 (6th Cir. 1998) (explaining that, generally, a successor employer may set initial terms of employment without bargaining with union unless successor makes it "perfectly clear" that it plans to retain all employees, and where it would be appropriate to have it initially consult with union).

relevant ratio is the percentage of the successor's workforce that is populated by the predecessor's employees, *not* (as WRS suggests) the percentage of the predecessor's employees hired by the successor.[29] Here, five of WRS' seven glass installers came from Leiferman, which amply supports the Board's successorship finding.

C. There Is No Requirement that the Predecessor Be Able To Remedy Its Own Unfair Labor Practices Before the Board Imposes Successor Liability

WRS' claim (Br. 19-20, 33-37) that it should not be held liable because Leiferman would have been unable to satisfy the remedy reflects a misunderstanding of successorship law. There is no requirement that the Board demonstrate the predecessor's ability or inability to remedy the unfair labor practices before imposing liability on the successor.[30] Indeed, changes in ownership often occur because the predecessor is in financial difficulty. The rationale behind the Supreme Court's decision in *Golden State* is that the victimized employees must obtain a remedy, whether from the predecessor or the successor who purchased the business with knowledge of the pending Board

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[29] *See Winco Petroleum*, 668 F.2d at 981 n.6 (bargaining order issued against successor).

[30] *See e.g., id.* at 977-78 (no finding regarding predecessor's ability to remedy unfair labor practices); *WXGI*, 243 F.3d at 844-45 (same); *NLRB v. St. Marys Foundry Co.*, 860 F.2d 679, 681-83 (6th Cir. 1988) (same); *South Harlan Coal*, 844 F.2d at 383-84 (same).

litigation.[31] In making the purchase, the successor stands in the place of or in privity with the predecessor.[32]

The law does not support WRS' assertion (Br. 33) that the predecessor's ability to provide relief is an "essential element" of successor liability. Contrary to WRS' assertion (Br. 33-34), the Seventh Circuit's decision in a non-Board case, *Musikiwamba v. ESSI, Inc.*,[33] does not establish that proposition. In *Musikiwamba*, the court merely discussed the predecessor's ability to pay among factors it considered in deciding whether the plaintiff could assert successor liability, stating that "[n]o one factor is controlling."[34] The *Musikiwamba* court only considered the predecessor's ability to pay because it was concerned that it would be "grossly unfair" to hold a successor liable "when the predecessor is fully capable of providing relief or when the successor did not have the opportunity to protect itself by an indemnification clause in the acquisition agreement or a lower purchase

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[31] *Golden State*, 414 U.S. at 184-85. *Accord Winco Petroleum*, 668 F.2d at 977.

[32] *Golden State*, 414 U.S. at 180.

[33] 760 F.2d 740, 750 (7th Cir. 1985) (holding that successor liability under the Act and under 42 U.S.C. § 1981 "require a somewhat different analytical framework").

[34] *Id.* at 750-53 (ultimately allowing plaintiff to amend complaint and proceed with claim of successor liability). The Ninth Circuit case cited by WRS (Br. 29 n.51), *Steinbach v. Hubbard*, 51 F.3d 843, 847 (9th Cir. 1995), similarly states that a predecessor's inability to provide relief "does not foreclose [successor] liability."

price."[35] Those concerns are not present here. At the time of the sale, WRS knew that Leiferman was insolvent and would be unable to satisfy the Board remedy. To protect itself, WRS required and obtained indemnification from HAIP. WRS' ability to negotiate the purchase price was not restricted in any way. Thus, under those circumstances, WRS cannot now rely on Leiferman's insolvency to escape the successor liability that it fully anticipated.

Moreover, instead of requiring a showing of the predecessor's ability to pay, courts have concluded that successorship liability provides not a windfall to employees but a second chance. After *Musikiwamba*, the Seventh Circuit clarified its views and recognized that "a second chance is precisely the point of successor liability."[36] That court, in yet another case, *EEOC v. Vucitech*, held that when the successor knows about the liability and the predecessor's likely inability to pay the judgment, "the presumption should be in favor of successor liability."[37] WRS misreads (Br. 34-36) that case as somehow supporting its position that the predecessor's inability to pay precludes the imposition of successor liability. In

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[35] *Musikiwamba*, 760 F.2d at 750.

[36] *Chicago Truck Drivers Union Pension Fund v. Tasemkin, Inc.*, 59 F.3d 48, 51 (7th Cir. 1995) ("[i]nstead of being dispositive … the availability of relief from the predecessor is a factor to be considered along with other facts in a particular case").

[37] 842 F.2d 936, 945 (7th Cir. 1988).

fact, the court, in imposing successor liability, criticized the district court for "attach[ing] great and in our view undue weight to the fact that because [the predecessor] had gone broke, there was an element of windfall in making [the successor] liable …." [38] Thus, the court rejected the position that WRS espouses here. In *Vucitech*, as here, successor liability was imposed without regard to whether the predecessor could pay the judgment or whether the successor is guilty of misconduct.

Similarly, the Third Circuit explained that "[t]he notion that successor liability cannot be invoked where it would leave the creditor 'better off' is a curious one. The doctrine of successor liability is premised on the idea that the creditor cannot obtain satisfaction from the predecessor. To read this factor, or to impose a new one to require a court to look at whether the creditor is better off, seems to undermine the basic rationale underlying the doctrine."[39]

This is a case in which a "second chance" for a Board remedy was not only contemplated by the successor, WRS, but also planned for by securing HAIP's agreement to indemnify. WRS' and HAIP's indemnification agreement is exactly

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[38] 842 F.2d at 945. *See also id.* at 946 ("we do not understand these decisions [including *Musikiwamba*] to have imposed an iron-clad requirement" that the predecessor be able to pay a judgment).

[39] *Brzozowski v. Correctional Physician Assocs., Inc.*, 360 F.3d 173, 179 (3d Cir. 2004).

what the Supreme Court envisioned in *Golden State*. The purpose of *Golden State*'s requirement of notice of the potential unfair-labor-practice liability before seeking a remedy from the purchaser/successor is to allow the purchaser to account for that risk in striking a deal for the sale via a reduction in the purchase price or indemnification.[40]

WRS and HAIP did just that. In order to facilitate the sale, boost the purchase price, and recoup its losses from the loan to Leiferman, HAIP agreed to the indemnification provision that WRS required before purchase. Contrary to WRS' claim (Br. 35) that the employees are reaping a "windfall," the employees are only recouping what was owed to them under the contract — a payment anticipated by WRS and HAIP. It is not inequitable to fulfill the remedy guaranteed to the employees under the Act and planned for by the parties. Indeed, where WRS bears no out-of-pocket liability for the remedy, it is curious that it is expending its allegedly scarce[41] resources to contest the Board's Order before this Court.

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[40] *Golden State*, 414 U.S. at 185.

[41] WRS operated at a loss in 2007 and 2008 and has yet to pay HAIP the "vast majority" of the over $700,000 it owes for the Leiferman purchase (Br. 15, 37 n.65, 38 n.70, JA 9 ¶10).

D. The State Court "Free and Clear" Order Approving the Terms of the Sale, Including Indemnification, To Which HAIP and WRS Agreed, Cannot Extinguish the Board's Remedy Under Federal Labor Law

Neither the facts nor the law support WRS' argument (Br. 2, 11, 15, 21, 23) that the Board's remedy was extinguished by language in the state court order that WRS' purchase of Leiferman's assets would be "free and clear of any liens and encumbrances." That argument fails for two reasons: (1) the order specifically approved the terms of the sale, which *included* WRS' and HAIP's express agreement to have HAIP, in effect, pay the Board remedy, and (2) a state court order cannot trump federal labor law.

First, the state court order approved the terms of the sale *and* found them equitable. It states that "[t]he manner and terms of the proposed sale by the Receiver to Buyer [WRS] are fair and commercially reasonable." (JA 67 ¶ 4.) It is undisputed (Br. 29) that one of the conditions of the sale was WRS' and HAIP's agreement to have HAIP indemnify WRS against any liability from the Board proceeding as well as an EEOC case. (JA 9 ¶ 8.) As such, WRS can hardly assert (Br. 30) that neither it nor HAIP bargained for a result in which HAIP ultimately would have to pay the Board remedy. As the Board found (JA 4), to read the state court order as WRS does "would nullify the very essence of the sale that the state court approved." The indemnification agreement demonstrates that both HAIP and WRS did bargain for exactly this result. Thus, as the Board reasonably concluded

(JA 4), "the [state] court's statement about the purchaser taking free and clear of all liens must be read in conjunction with the indemnification that was a condition of the sale."

There is no evidence to support WRS' assertion (Br. 25) that both HAIP and WRS "relied" on the state "free and clear" order in determining the terms of the sale. Nothing in the stipulated record indicates that, when HAIP and WRS agreed to indemnification, they contemplated an order from the state court extinguishing liability to the Board. Indeed, if WRS were relying on obtaining a free and clear order, it would have had no need for indemnification from HAIP.

Second, the Board is enforcing federal rights. The state court order cannot extinguish those rights. It is clear that the Board correctly found that the Act preempts the state court order to the extent its "free and clear" language could be construed to foreclose the Board's remedy. The Supremacy Clause of the United States Constitution requires that the states yield to federal law.[42] The Supreme Court has held that states are prohibited from taking actions that have "a direct tendency to frustrate the purpose of Congress to leave people free to make charges

[42] U.S. Const. art. VI ("[t]his Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding").

of unfair labor practices to the Board."[43] A ruling that the state court order eliminates the Board's remedy under federal labor law would violate the Supremacy Clause because such a result obviously would frustrate the purpose of the Act, notably remedying unfair labor practices.

The doctrine of preemption arises from the Supremacy Clause and operates to invalidate state law that "either frustrates the purpose of the national legislation or impairs the efficiency of those agencies of the Federal government to discharge the duties, for the performance of which they were created," or stands "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[44] The federal preemption doctrine has long been applied to preclude enforcement of state regulations that threaten interference with national labor policy established under federal law.[45]

Here, reading the "free and clear" language as WRS does would have just such an obstructive effect on the Board's make-whole remedy. "Making the workers whole for losses suffered on account of an unfair labor practice is part of

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[43] *Nash v. Florida Industrial Comm'n*, 389 U.S. 235, 239-40 (1967) (Florida commission's denial of unemployment compensation because employee filed unfair-labor-practice charges with Board violated Supremacy Clause).

[44] *Id.* at 240 (quotation marks and citations omitted).

[45] *See Lodge 76, Int'l Ass'n of Machinists and Aerospace Wrkrs v. Wis. Employment Relations Comm'n*, 427 U.S. 132 (1976); *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959) ("*Garmon*").

the vindication of the public policy which the Board enforces."[46] Thus, as this Court explained, preemption "protects the jurisdiction of the National Labor Relations Board … by displacing state jurisdiction over conduct which is arguably within the compass of § 7 or § 8 of the Act."[47] This Court recognized that the rationale behind *Garmon* preemption is to support Congress' "overriding interest in nationally uniform application of the [Act], rather than in protecting particular conduct of private bargaining parties."[48] Here, Leiferman's unlawful conduct is clearly within the scope of Section 8 of the Act, and the remedy that WRS seeks to avoid indisputably is within the remedial authority granted the Board by Section 10 of the Act.

WRS' argument regarding the effect of the "free and clear" clause of the state court's order is inconsistent and specious. Principally, WRS relies (Br. 53-55) on the free and clear language as the basis for its position that the state court order precludes the Board from imposing the unfair-labor-practice liability on WRS, arguing (Br. 55) that "the district court did lawfully absolve WRS of that financial liability [to the Board] as an encumbrance." Yet, it also claims (Br. 51)

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[46] *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197 (1941).

[47] *Williams v. Watkins Motor Lines, Inc.*, 310 F.3d 1070, 1072 (8th Cir. 2002) (internal quotations and citation omitted).

[48] *Id.*

that the state court order "did not interfere" with the Board's enforcement of the Act. If, as WRS asserts, the free-and-clear language of the state court order eliminates the Board remedy, there could be no more clear interference with the Board's enforcement of the Act.

E. The Court Need Not Reach WRS' Arguments Regarding HAIP's Status as Secured Creditor

The only issues the Court needs to resolve are those related to WRS. That is, it must determine whether substantial evidence supports the Board's finding that WRS is the *Golden State* successor to Leiferman and, accordingly, whether the Board acted within its broad remedial discretion in ordering WRS to remedy the unfair labor practices of Leiferman. The Court need not reach any issues related to the interests of HAIP, which is not the subject of the Board's Order, was not a party before the Board, and never sought to intervene in support of WRS before this Court.

In any event, HAIP agreed to indemnify WRS for any liability to the Board. Nothing in the stipulated record indicates that HAIP will not honor that agreement. Further, there is nothing inequitable in enforcing the Board's Order against WRS, where it anticipated successor liability and secured HAIP's indemnification for that liability. To the extent that enforcing the Board's Order against WRS ultimately results in HAIP's footing the bill, that is the arrangement that WRS and HAIP made. It *would be* inequitable to allow WRS and HAIP to now rely on the state

court's "free and clear" language to walk away from the indemnification agreement in an attempt to deny the employees their remedy under the Act.

1. The Board's Order runs against WRS, not HAIP; WRS lacks standing to advance HAIP's interests

The Board's Order runs against WRS, not the secured creditor, HAIP. Thus, WRS' assertion (Br. 25) — that "the NLRB is unable to point to any case where a secured creditor is forced to pay for a successor liability judgment" — misses the point. It is HAIP's own private agreement with WRS, not the Board Order, that might require HAIP to do something. Accordingly, the Court need not resolve any issues related to HAIP's interests.

On these facts, the Board correctly found (JA 1 n.1, 4) that WRS has no standing to advance arguments on behalf of HAIP. HAIP did not seek to participate in the case before the Board and has not sought to intervene in support of WRS before the Court. WRS cannot assert the interests of HAIP, a third party, before this Court.[49]

The letter from counsel for the General Counsel to WRS' counsel, cited by WRS (Br. 58-59, 62) as evidence of some agreement between the parties regarding

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[49] *See Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 263 (1977) ("In the ordinary case, a party is denied standing to assert the rights of third persons."); *Warth v. Seldin*, 422 U.S. 490, 509 (1975) (prudential standing rule "normally bars litigants from asserting the rights or legal interests of others in order to obtain relief from injury to themselves").

WRS' ability to advance HAIP's interests, is not dispositive of the standing issue. First, as the Board noted (JA 1 n.1), the letter was never entered into the stipulated record and therefore was not properly before the Board. If WRS wished to bring to the Board's attention any agreement between itself and the General Counsel regarding WRS' standing to raise HAIP's interests, it should have included any such stipulation in the record. Further, the Board, as the adjudicator, is not bound by the litigation strategy of the General Counsel who prosecutes unfair-labor-practice complaints before the Board.[50] Thus, even assuming the General Counsel agreed not to challenge WRS' standing to assert HAIP's interests, that agreement did not preclude the Board, in adjudicating this case, from finding a lack of standing — particularly where any agreement between the parties regarding standing was never part of the stipulated record before the Board.

In any event, despite WRS' lack of standing to assert arguments on HAIP's behalf, the Board did consider those arguments. First, the administrative law judge discussed and rejected WRS' claim that it would be inequitable to require HAIP to indemnify WRS for the unfair-labor-practice liability. (JA 4.) Then, in

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[50] *See generally NLRB v. Fed. Labor Relations Auth.*, 613 F.3d 275, 278 (D.C. Cir. 2010) ("The General Counsel has 'final authority, on behalf of the Board, in respect of the [investigation and prosecution of unfair labor practice complaints],' 29 U.S.C. § 153(d), whereas the Board adjudicates those complaints. This bifurcated structure reflects the intent of the Congress 'to differentiate between the General Counsel's and the Board's "final authority" along a prosecutorial versus adjudicative line.'").

considering WRS' motion for reconsideration or, in the alternative to add HAIP as a party, the Board weighed those arguments, asserted on HAIP's behalf, and, in agreement with the judge, found them lacking. (JA 1 n.1, 4.) Specifically, the Board found that the alleged inequity of HAIP's indemnifying WRS for the liability to the Board should be addressed to the state court that approved the sale, which was conditioned upon indemnification. (JA 1 n.1, 4.) Also, the Board found that where WRS and HAIP agreed to indemnification, they could not use that indemnification agreement to defeat WRS' *Golden State* obligation. Indeed, as the Board observed, "the whole purpose of requiring advance notice of the unfair labor practice liability is to permit the buyer to provide for the risk of that liability. That was accomplished by the condition set forth for the sale of Leiferman's assets." (JA 4.) While it is true that HAIP did not commit any unfair labor practices, it still agreed to take on that liability to the Board on WRS' behalf. Accordingly, there is nothing inequitable about WRS enforcing its indemnification agreement with HAIP.

Thus, where the Board's Order does not run against HAIP, the Court need not reach WRS' arguments asserting HAIP's interests as secured creditor. In any event, as we show next, none of those arguments warrant reversal of the Board Order running against WRS.

2. By agreeing to pay the Board's remedy, HAIP effectively agreed to subordinate the priority of its claim

Because the Board's Order runs against WRS not HAIP, this case does not present the issue of whether the Board can leapfrog HAIP in the line to reach Leiferman's assets. Simply put, the Board is not a creditor in a line with HAIP for Leiferman's assets. Yet, even if the Court were to consider HAIP's interests, there is no reason for the Court to deny enforcement of the Board's Order against WRS. Despite its position as Leiferman's secured creditor, HAIP accepted responsibility for the Board's potential remedy by agreeing to indemnify WRS. Thus, HAIP's own actions, not the Board's Order, subordinated any priority of HAIP's claim.

WRS has offered no evidence in the stipulated record indicating that HAIP is not willing to honor its indemnification agreement and reimburse WRS for satisfying the Board's remedy. Should HAIP refuse to honor its indemnification agreement, WRS' recourse is to enforce that agreement against HAIP, not seek to evade the Board's remedy.

In any event, WRS' reliance (Br. 38-41) on federal bankruptcy cases, including *Nathanson v. NLRB*,[51] to support the notion that HAIP, as a secured creditor, has priority over the Board, is misplaced. Leiferman's insolvency was resolved in state court; therefore, federal bankruptcy cases are inapplicable.

[51] 344 U.S. 25 (1952).

Moreover, *Nathanson* only held that the Board's remedy did not warrant governmental priority in a federal bankruptcy proceeding because the money collected by the Board would go to employees, not to the public revenue.[52] Thus, *Nathanson*'s rejection of a governmental priority for the Board in bankruptcy court has nothing to do with the Board's right to collect its remedy against WRS.

The Board is ordering WRS to pay, not attempting to collect from the remains of Leiferman's assets ahead of secured creditor HAIP. Further, in *Nathanson*, the Court was resolving a tension between two federal schemes: the remedial policies of the Act on the one hand and the priority scheme of the bankruptcy code on the other. Here, WRS incorrectly seeks to elevate a state court order over the Board's remedy under federal law.

WRS' assertion (Br. 38-43, 44-45) — that HAIP would not have had to pay the Board's remedy had Leiferman been dissolved under federal bankruptcy law — is pure speculation and essentially beside the point. As we have repeatedly noted, HAIP chose the state receivership route and then chose to indemnify WRS against successorship liability. On this record, the Court has no reason to determine what "priority" the Board *may have had* relative to HAIP in a federal bankruptcy court. Rather this Court need only resolve whether to enforce the Board's Order against WRS.

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[52] *Nathanson*, 344 U.S. at 27-28.

In any event, consideration of WRS' arguments (Br. 38-43, 44-45) relative to its federal bankruptcy hypothetical still does not warrant not enforcing the Board's Order against WRS. Irrespective of whether Minnesota creditor law may be similar to federal law, it remains preempted state regulation that cannot defeat the Board's remedial scheme. The issue in this case is not, as it was in *Nathanson*, how the Board's "claim" competes with those of other unsecured creditors for a share in the bankruptcy distribution, but rather the asserted supremacy of a state law process used by a single secured creditor to liquidate all of a debtor's assets solely for its own benefit. On these facts, it would be inequitable to conclude that the remedial interests of the Act must accommodate HAIP, a single secured creditor, whose state law "priority" rights it chose to bargain away when it forced the liquidation of Leiferman and agreed to indemnify the purchaser, WRS, from any liability under the Act.

3. On these facts, the Court need not resolve WRS' policy arguments relating to HAIP's status as secured creditor of Leiferman

a. WRS and HAIP made voluntary and informed business decisions and may not escape their consequences now

The Court need not reach WRS' policy arguments (Br. 22-25, 27-29, 38, 43, 45, 50-51, 60-61) advancing HAIP's interests as Leiferman's secured creditor. WRS' attempt to portray itself and HAIP as hapless victims of unfortunate

circumstances completely ignores the undisputed facts of the indemnification agreement and terms of the sale. WRS and HAIP made informed decisions and cannot now avoid their consequences.

First, to the extent that WRS claims (Br. 20, 38) that HAIP will suffer "financial prejudice" by, in effect, paying the Board remedy, HAIP has only itself to blame. HAIP clearly was a sophisticated lender, which not only secured a lien on Leiferman's assets, but also apparently required Scott Leiferman to personally assume liability for his company's debt (Br. 13, noting judgment against Scott Leiferman). Somehow, HAIP let the loan get away from it. HAIP's agreement to indemnify WRS is simply one more consequence of the collapse of HAIP's loan to Leiferman.

Specifically, HAIP tried to control the fallout from Leiferman's insolvency by having a receiver appointed who was required to obtain HAIP's "prior written consent" before selling Leiferman's assets (JA 51 ¶ 2). Then, with its eyes wide open, HAIP made the decision to indemnify all potential purchasers. It likely concluded that taking on WRS' potential liability to the Board (about $55,000) was worth the risk to improve the chance of a sale and increase the purchase price ($700,000) in the hopes of recouping as much of the money it lent to Leiferman as possible.

While WRS claims that HAIP was "forced" or "required" (Br. 38, 45) to indemnify, it ignores its own role in forcing HAIP to do so and as well as HAIP's control over the sale. WRS can hardly argue that it should be allowed to evade liability to the Board because the Board's remedy will unfairly prejudice HAIP. WRS itself imposed the indemnification agreement on HAIP. It also concedes (Br. 29) that indemnification was a condition of the sale approved by HAIP and the state court. To the extent that HAIP lacked palatable choices in exercising its control over the sale of Leiferman, it put itself in the position of having to accede to WRS' indemnification demand. HAIP made the loan to Leiferman and controlled the aftermath of Leiferman's insolvency. WRS cannot now evade the liability for which both it and HAIP planned by hiding behind the indemnification agreement that it demanded.

The fact that Leiferman still owes HAIP about $3 million (Br. 13, 17, 29, 50) does not negate HAIP's agreement to effectively assume the liability to the Board. Given that Leiferman's finances were obviously in shambles, HAIP likely knew that it would not recoup its losses before the Board remedy came to fruition and its promise to indemnify came due. That the indemnification promise was specifically required by all the potential purchasers highlights the fact that everyone involved anticipated that the Board might reach this very conclusion, and they acted accordingly.

Because HAIP and WRS made voluntary business decisions regarding indemnification, the Sixth Circuit's decision in *Peters v. NLRB*,[53] upon which WRS relies (Br. 27-29), is inapposite. There, the court refused to impose *Golden State* liability against a second-generation successor where the first-generation successor, a receiver, was held not liable because that theory had not been pled in the complaint.[54] As the Board pointed out here (JA 4 n.2), the *Peters* court did not enforce the Board's imposition of successor liability because the sale did not allow the second-generation successor to negotiate an indemnity clause or a price that would capture the risk of unfair-labor-practice liability.[55] Thus, *Peters* did not disavow the applicability of *Golden State* successorship liability in a state receivership scenario; it merely held that, given the restrictions on the second-generation purchaser's ability to negotiate the deal, "[t]he equitable balance that existed in *Golden State* did not exist in the circumstances of this case."[56]

In the instant case, by contrast, WRS could and did account for the risk of liability to the Board in making its bid for Leiferman's assets by insisting on and obtaining an indemnification agreement with HAIP. Thus, the facts do not support

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[53] 153 F.3d 289, 300-02 (6th Cir. 1998).

[54] *Peters*, 153 F.3d at 301.

[55] *Id.*

[56] *Id.*

WRS' assertion (Br. 25, 29, 30) that it and HAIP were unable to avoid the consequences of Leiferman's acts. HAIP chose to indemnify WRS, which, in turn, chose to purchase Leiferman's business and assets.

b. Successor liability does not require malfeasance on the part of the successor; it is not inequitable to hold WRS and HAIP to their obligations and agreements

WRS' claim (Br. 23, 46-49) that successor liability cannot be imposed because neither WRS nor HAIP engaged in malfeasance is erroneous. WRS' assertion (Br. 46-49) that successor liability cannot be imposed without a finding that the sale was an attempt to "wash the assets of their employment liabilities" is incorrect. While those facts may have been present in the two cases WRS cites (Br. 46-49), WRS overreaches in claiming that such factual findings are a requirement for the imposition of successor liability. Neither of those cases establishes such a requirement.[57] Moreover, the Board and courts have imposed *Golden State* successor liability without any finding of an intent to evade

[57] *Chicago Truck Drivers Union Pension Fund v. Tasemkin*, 59 F.3d 48, 51 (7th Cir. 1995) (no holding that intent to wash assets is required for successorship liability; successor liability claim could proceed where acquisition had effect, "intended or no," of frustrating creditors); *EEOC v. SWP*, 153 F.Supp.2d 911, 917-18 (N.D. Ind. 2001) (no holding that intent to evade or wash assets is required for successorship liability).

employment liability or other malfeasance on the successor's part.[58] Indeed, in finding that the Board's remedial powers are not limited to the actual perpetrator of the unfair labor practices, the Supreme Court in *Golden State* held that Board orders may properly run against the perpetrator's successors "'to whom the business may have been transferred, whether as a means of evading judgment *or for other reasons*'" even where the successors have not themselves committed any unlawful acts.[59]

Next, WRS' policy arguments (Br. 24-25) that the result in this case discourages the salvation of troubled businesses or lending to unionized companies lack any basis on this record. The result in this case turns on the facts that WRS purchased Leiferman with knowledge of the liability to the Board and substantially continued Leiferman's operations. Recognizing that the Board would impose successor liability on those facts, it obtained indemnification from HAIP. The implications of this case are no larger than those facts. Indeed, WRS' own conduct disproves its assertion. Despite the impending and expected successor liability, WRS was not discouraged from purchasing Leiferman's business and assets.

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[58] *See e.g., NLRB v. St. Marys Foundry Co.*, 860 F.2d 679, 681-83 (6th Cir. 1988) (no finding regarding any intent to evade employment liability); *NLRB v. South Harlan Coal, Inc.*, 844 F.2d 380, 383-84 (6th Cir. 1988) (same).

[59] *Golden State*, 414 U.S. at 176 (emphasis in original) (citation omitted).

WRS' related assertion (Br. 24-25) that lenders like HAIP will shy away from lending to unionized companies also lacks any foundation on these facts. Whatever lessons HAIP takes away from its bad loan to Leiferman likely will have more to do with the $3.7 million it lost on that deal than the $55,000 it agreed to reimburse WRS for the unfair-labor-practice remedy. The record does not indicate that the union status of Leiferman's employees caused or even contributed to Leiferman's defaulting on its obligations to HAIP. Indeed, HAIP also indemnified WRS for liability stemming from an EEOC claim, which obviously had nothing to do with the Union. Purchasers and lenders recognize and account for liability coming from any number of sources. Thus, there is no merit to the bare assertion that this case would discourage lenders from dealing with unionized companies.

More generally, *Golden State* successor liability does not detract from market growth. It imposes liability only on successors who purchase with knowledge of the potential Board remedy. The Supreme Court recognized that, in requiring that knowledge, the purchaser could account for any risk in setting the terms of the sale, by lowering the price paid for the business or — as here — requiring indemnification of any possible liability.[60] Thus, *Golden State* successorship liability adequately accounts for market forces.

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[60] *Id*. at 185.

The Supreme Court in *Golden State* further determined that, in striking a balance among the interests of the successor, the public, and the affected employees, it is proper for the Board to emphasize protection for the employees.[61] To deny the remedy to the employees here would be construed by them as a failure of federal law.[62] It cannot be more equitable to deny the Board-ordered remedy to the employees so that WRS and HAIP may renege on their agreement to have HAIP pay that remedy.

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[61] *Id*. at 181-82.

[62] *Id*. at 184-85, 186-87.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that this Court grant the Board's application for enforcement, deny the petition for review, and enter a judgment enforcing in full the Board's Order.

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD	*	
	*	
Petitioner/Cross-Respondent	*	Nos. 10-2801,
	*	10-2978
v.	*	
	*	Board Case No.
LEIFERMAN ENTERPRISES, LLC a/b/a HARMON	*	18-CA-18134
AUTO GLASS AND ITS SUCCESSOR, AUTO GLASS	*	
REPAIR AND WINDSHIELD REPLACEMENT	*	
SERVICE, INC.	*	
Respondent/Cross-Petitioner	*	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 9,532 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2003.

COMPLIANCE WITH CONTENT AND VIRUS SCAN REQUIREMENTS

Board counsel certifies that the contents of the accompanying CD-ROM, which contains a copy of the Board's brief, is identical to the hard copy of the Board's brief filed with the Court and served on the respondent/cross-petitioner. The Board counsel further certifies that the CD-ROM has been scanned for viruses using Symantec Antivirus Corporate Edition, program version 10.1.9.9000 (10/24/2010 rev. 3). According to that program, the CD-ROM is free of viruses.

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Dated at Washington, DC
this 28th day of October 2010

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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	*	
Petitioner/Cross-Respondent	*	Nos. 10-2801,
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Respondent/Cross-Petitioner	*	

CERTIFICATE OF SERVICE

I hereby certify that on October 28, 2010, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system.

I certify foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not by serving a true and correct copy at the addresses listed below:

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Dated at Washington, DC
this 28th day of October 2010