

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Washington, D.C.

2 SISTERS FOOD GROUP, INC. and
FRESH & EASY NEIGHBORHOOD MARKET, INC.

and

Cases 21-CA-038915
21-CA-038932

UNITED FOOD AND COMMERCIAL
WORKERS INTERNATIONAL UNION,
LOCAL 1167

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S ANSWERING BRIEF
TO EXCEPTIONS OF FRESH & EASY NEIGHBORHOOD MARKET, INC. TO
THE ADMINISTRATIVE LAW JUDGE'S DECISION**

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TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	ISSUES PRESENTED	1
III.	PROCEDURAL HISTORY AND FACTUAL BACKGROUND	2
	A. Proceedings after the unfair-labor-practice complaint was issued against 2 Sisters.	2
	B. Proceedings after the compliance specification was issued.	4
IV.	STIPULATION OF FACTS	5
V.	ARGUMENT	7
	A. The ALJ properly found that Fresh & Easy's due process rights were not violated.	7
	1. Fresh & Easy could not have been named in the original complaint because it did not purchase 2 Sisters until after the record in that proceeding had closed.	7
	2. The ALJ's conclusion that Fresh & Easy had no due process right to participate in the appeal process of the ULP proceeding is fully supported by extant Board law.	9
	B. The remedy and order recommended by the ALJ are proper.	12
	C. Fresh & Easy's argument regarding the Board's recess appointments is invalid.	12
VI.	CONCLUSION	12

TABLE OF AUTHORITIES

	Page
<u>Alexander Milburn Co.</u> , 78 NLRB 747 (1948)	10
<u>Armitage Sand & Gravel</u> , 203 NLRB 162 (1973)	10
<u>Center For Social Change</u> , 358 NLRB No. 24 (2012)	12
<u>Coastal Delivery Services, Inc.</u> , 198 NLRB 1026 (1992)	8
<u>Collier v. Estelle</u> , 488 F.2d 929 (5 th Cir. 1974)	9
<u>Dahl Fish Co.</u> , 299 NLRB 413 (1990)	8
<u>Duperry v. Kirk</u> , 563 F. Supp.2d 370 (D. Conn. 2008)	9
<u>Frederick Iron & Steel</u> , 303 NLRB 514 (1991)	10
<u>Golden State Bottling Co. v. NLRB</u> , 414 U.S. 168 (1973)	1, 4, 6, 7, 8, 10, 12
<u>Green Construction of Indiana, Inc.</u> , 271 NLRB 1503 (1984)	9
<u>Lutheran Home at Moorestown</u> , 334 NLRB 340 (2001)	12
<u>Perma Vinyl Corp.</u> , 164 NLRB 968 (1967)	10
<u>Southeastern Envelope Co., Inc.</u> , 246 NLRB 423 (1979)	8
<u>2 Sisters Food Group, Inc.</u> , JD(SF)-24-10	2
<u>2 Sisters Food Group</u> , 357 NLRB No. 168 (2011)	1, 3
<u>United States Pipe & Foundry Co. v. NLRB</u> , 398 F.2d 544 (5 th Cir. 1968)	10
<u>U.S. v. Chemical Foundation</u> , 272 U.S. 1 (1926)	12
<u>Viking Industrial Security, Inc. v. NLRB</u> , 225 F.3d 131 (2nd Cir. 2000)	8, 9
<u>VSI-Technologies</u> , 300 NLRB 95 (1990)	10

I. INTRODUCTION

On November 21, 2012, Administrative Law Judge Eleanor Laws (“ALJ”) issued her decision in these cases, making findings of fact and conclusions of law that Fresh & Easy Neighborhood Market, Inc. (“Fresh & Easy”) is a Golden State¹ successor to 2 Sisters Food Group, Inc. (“2 Sisters”) and is jointly and severally liable to remedy the unfair-labor-practice violations of 2 Sisters. In 2 Sisters Food Group, 357 NLRB No. 168 (2011), the Board found that 2 Sisters violated Section 8(a)(1) of the Act by promulgating and maintaining overbroad work rules and by promulgating and maintaining a mandatory arbitration policy that required employees to waive their right to file charges with the Board, and violated Section 8(a)(1) and (3) of the Act by terminating employee Xonia Trespalacios (“Trespalacios”).

On December 19, 2012, Fresh & Easy filed 5 exceptions to the ALJ’s decision, and a brief in support, primarily challenging the ALJ’s finding that Fresh & Easy’s due process rights have not been violated and objecting to the ALJ’s recommended remedy and order.² However, the record and relevant Board precedent establish that the ALJ’s decision is well-founded. Respondent’s exceptions are without merit and should be rejected.

II. ISSUES PRESENTED

1. Whether the ALJ was correct in finding that Fresh & Easy’s due process rights have not been violated.
2. Whether the remedy and order recommended by the ALJ as to Fresh & Easy are proper.

¹ Golden State Bottling Co. v. NLRB, 414 U.S. 168 (1973).

² 2 Sisters has not filed exceptions to the ALJ’s decision. The recommended order as to 2 Sisters should be summarily enforced.

III. PROCEDURAL HISTORY AND FACTUAL BACKGROUND

A. Proceedings after the unfair-labor-practice complaint was issued against 2 Sisters.

On October 28, 2009, the Regional Director of Region 21 (“Regional Director”) issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing (“complaint”) against 2 Sisters in Cases 21-CA-038915 and 21-CA-038932. On December 14, 2009, these cases were consolidated with a representation case involving 2 Sisters, 21-RC-21137, in a Report on Challenged Ballots and Objections and Order Consolidating Cases and Notice of Hearing issued by the Regional Director. An unfair-labor-practice hearing was held before Administrative Law Judge Lana H. Parke (“ALJ Parke”) for several days in March 2010. The hearing before ALJ Parke concluded and the record in this matter closed on March 29, 2010.

On June 10, 2010, ALJ Parke issued her decision in 2 Sisters Food Group, Inc., JD(SF)-24-10, finding, *inter alia*, that 2 Sisters violated Section 8(a)(1) and (3) of the Act by terminating Trespacios and violated Section 8(a)(1) of the Act by maintaining overbroad work rules and a mandatory arbitration rule that requires employees to waive their rights to file charges with the Board. The ALJ also found that Trespacios’ termination constituted objectionable conduct warranting that the election for union representation conducted on July 17, 2009, in Case 21-RC-21137, be set aside.

On July 23, 2010, 2 Sisters filed exceptions to ALJ Parke’s decision, and a brief in support. On July 26, 2010, the General Counsel filed limited exceptions to ALJ Parke’s decision and a supporting brief.

Over a month after ALJ Parke issued her decision, on July 26, 2010, Fresh & Easy filed a Motion to Intervene and Supplement the Record (“motion to intervene”),

which included a declaration from its chief human resources officer stating that on June 28, 2010, Fresh & Easy purchased the assets of 2 Sisters and hired the majority of its employees. Fresh & Easy moved to intervene to “avoid Fresh & Easy being impermissibly forced into a representation election pursuant to a stipulated election agreement to which it is not a party” (See page 7 of the motion to intervene which is attached under Exhibit 7 of the Stipulation of Facts).

On December 29, 2011, the Board issued its decision, order, and direction of second election in 2 Sisters Food Group, Inc., 357 NLRB at 168. The Board denied Fresh & Easy’s motion to intervene. *Id.*, slip op. at 8. The motion was denied with respect to the request to intervene for the purpose of objecting to any direction of a second election. The Board found that the declaration of the chief human resources officer was not relevant to its decision to set aside the union election or to the disposition of the complaint allegations. The Board further noted that Fresh & Easy has the right to renew its motion to intervene before the Regional Director with respect to subsequent proceedings in this case. *Id.*

By letter dated January 27, 2012, Region 21 solicited a position from Fresh & Easy on whether it wished to intervene in the representation case, 21-RC-21137. Fresh & Easy declined to do so.³

³ Copies of the January 27, 2012 letter and Fresh & Easy’s response to that letter are attached to the document labeled as Exhibit 7 in the Stipulation of Facts.

B. Proceedings after the compliance specification was issued.

On May 1, 2012, the Regional Director issued the compliance specification in these cases, alleging, in part, that Fresh & Easy is a Golden State successor. On May 30, 2012, Fresh & Easy filed with the Board a Motion to Dismiss the Compliance Specification and Notice of Hearing (“motion to dismiss”), arguing that the imposition of successor liability would violate Fresh & Easy’s due process rights. A copy of the motion to dismiss is attached as Exhibit 6 to the Stipulation of Facts. On June 15, 2012, the General Counsel filed an opposition to the motion to dismiss. A copy of the opposition is attached as Exhibit 7 to the Stipulation of Facts. On July 9, 2012, the Board issued an Order denying the motion to dismiss. A copy of the Board’s Order is attached as Exhibit 10 to the Stipulation of Facts.

On August 1, 2012, the ALJ approved a settlement stipulation settling only the issues in these cases regarding the backpay and reinstatement of Trespalacios, and the requirement by the Board that 2 Sisters notify Trespalacios of the rescission of her discharge. That same day, the ALJ granted the parties’ motion to submit the remainder of the issues in these cases on a stipulated record, and approved the parties’ Stipulation of Facts. The remaining issues in these cases include the posting of the Board’s notice to employees, the rescission of the unlawful rules and arbitration policy maintained by 2 Sisters, and a requirement that Fresh & Easy remove from its files any reference to the unlawful discharge of Trespalacios and that it notify her in writing that her termination will not be used against her in any way.

IV. STIPULATION OF FACTS

The parties' Stipulation of Facts, approved by the ALJ on August 1, 2012, provides the following:

From at least 2008, to about June 27, 2010, 2 Sisters was engaged in the nonretail business of processing and supplying food at its meat-processing plant located at 15555 Meridian Parkway, Riverside, California, herein called the Riverside facility.

Fresh & Easy operates retail grocery stores in California, Arizona, and Nevada. From at least 2008, to about June 27, 2010, 2 Sisters sold its meat and related food products exclusively to Fresh & Easy. On about June 28, 2010, Fresh & Easy purchased from 2 Sisters the meat-processing plant and all the assets formerly owned by 2 Sisters at the Riverside facility. On July 26, 2010, counsel for Fresh & Easy served on the General Counsel a copy of a Motion to Intervene and Supplement the Record that Fresh & Easy had filed with the Board on that same date, which asserted that on June 28, 2010, Fresh & Easy purchased the meat-processing plant and all the assets formerly owned by 2 Sisters at the Riverside facility.

Since about June 28, 2010, Fresh & Easy has continued 2 Sisters' business of processing and supplying food, at the Riverside facility, without substantial changes in the operations. There was no interruption in the operation of the Riverside facility when 2 Sisters ceased operating it and Fresh & Easy assumed operating it on about June 28, 2010.

Prior to its purchase of 2 Sisters' assets on about June 28, 2010, Fresh & Easy was aware of the alleged unfair labor practices involving 2 Sisters, at issue in Cases 21-CA-038915 and 21-CA-038932, and of the decision issued in those cases by ALJ Parke

on June 10, 2010.

Since Fresh & Easy took over the operations at the Riverside facility beginning on about June 28, 2010, it has continued to operate at the same location, processes substantially the same products, with substantially the same equipment and machinery, and has substantially the same customers for its products that 2 Sisters had.

The production departments maintained by Fresh & Easy at the Riverside facility since about June 28, 2010, include: shipping and receiving, cooked and breaded, red meat, poultry, and home-meal-replacement (HMR). 2 Sisters previously operated substantially the same departments at the Riverside facility.

In June 2010, Fresh & Easy offered employment to all of 2 Sisters' employees working at the Riverside facility, including all hourly and salaried employees.

On about June 28, 2010, a majority of 2 Sisters' former employees began working for Fresh & Easy at the Riverside facility, performing substantially the same duties that they had formerly performed for 2 Sisters, under substantially the same working conditions, under substantially the same supervisors and managers, and receiving wages and benefits at least as favorable as those that they had when working for 2 Sisters. As of about June 28, 2010, the majority of Fresh & Easy's workforce at the Riverside facility was composed of employees who formerly worked for 2 Sisters at the Riverside facility.

In addition, the parties stipulated that the facts listed above are sufficient to establish that Fresh & Easy would be a successor to 2 Sisters under Golden State, 414 U.S. at 168. Based on these stipulated facts, the ALJ found that Fresh & Easy is a

Golden State successor to 2 Sisters. ALJD 4:22-23.⁴ Fresh & Easy did not except to this finding.

V. ARGUMENT

A. The ALJ properly found that Fresh & Easy's due process rights were not violated.

Fresh & Easy claims that the imposition of successor liability on Fresh & Easy violates its due process rights. Fresh & Easy presented this same argument to the Board in its motion to dismiss. The Board rejected that argument when it denied the motion to dismiss. As discussed below, the ALJ also properly concluded that Fresh & Easy's due process rights have not been breached.

1. **Fresh & Easy could not have been named in the original complaint because it did not purchase 2 Sisters until after the record in that proceeding had closed.**

Fresh & Easy argues that it was prejudiced because the Region neglected to amend the original complaint to name Fresh & Easy as a respondent. However, Fresh & Easy was not part of the original complaint because Fresh & Easy did not purchase 2 Sisters until after the record in unfair labor practice (ULP) hearing had closed and after ALJ Parke had issued her decision. The record in the ULP hearing closed on March 29, 2010, and the ALJ issued her decision on June 10, 2010. Thereafter, on June 28, 2010, Fresh & Easy purchased 2 Sisters. Thus, Fresh & Easy could not have been named in the original complaint.

⁴ Citations to ALJ Law's decision will be referred to as ALJD followed by the appropriate page and line number.

The Region was not obligated to amend the complaint to add Fresh & Easy as a respondent because the Board and the Courts allow “litigation of joint and several liability or previous unnamed parties in supplementary proceedings.” See Dahl Fish Co., 299 NLRB 413, 416 (1990), and cases cited therein. It is well settled that derivative liability “may be imposed upon a party to a supplemental proceeding, even though [it] had not been a party to the proceeding in which the unfair labor practices were found, if [it] was sufficiently closely related to the party found to have committed the unfair labor practices. . . .” Coastal Delivery Services, Inc., 198 NLRB 1026, 1027 (1992). A predecessor/successor relationship is sufficient to impose derivative liability upon a previously unnamed respondent. *Id.* Fresh & Easy does not dispute that it is a Golden State successor. Therefore, the imposition of liability upon Fresh & Easy is proper.

Contrary to Fresh & Easy’s assertions, the Region issued a timely compliance specification naming Fresh & Easy as a respondent. In Southeastern Envelope Co., Inc., 246 NLRB 423, 423-424 (1979), the Board concluded that allowing the litigation of derivative liability in compliance proceedings is appropriate to effectuate the remedial purposes and policies of the Act, even if those issues could have been alleged in the original complaint.

Fresh & Easy’s reliance on Viking Industrial Security, Inc. v. NLRB, 225 F.3d 131 (2nd Cir. 2000) is misplaced. That case involved a claim that two corporations were a single employer. The evidence showed that although the two entities were a single employer at the time of the employee’s termination, their affiliation ended *before* the initial hearing in that case took place. *Id.* at 134. The Court declined to impose derivative liability upon the second corporation because the single-employer relationship

ended prior to the start of the unfair-labor-practice proceedings. Unlike the situation in these cases, in Viking Industrial there was no claim of a predecessor/successor relationship between the two corporations. *Id.* at 134-135. Here, there is no contention that the predecessor/successor relationship has ceased. Therefore, ALJ properly concluded that this case is not applicable. ALJD 7: 28-40.

Another case cited by Fresh & Easy, Green Construction of Indiana, Inc., 271 NLRB 1503 (1984), is also distinguishable. That case dealt with an allegation of single-employer relationship, not with a predecessor/successor relationship, as alleged here. *Id.* Furthermore, in Green Construction, the General Counsel was on notice of the problem regarding the identity of the respondent at the unfair-labor-practice hearing, but failed to amend the complaint before the hearing closed. *Id.* There were no similar issues during the unfair-labor-practice hearing in these cases because the successor relationship had not been established when the unfair-labor-practice hearing closed. Thus, the ALJ correctly found that Green Construction is inapplicable to the circumstances in these cases. ALJD 7: 28-40.⁵

2. The ALJ's conclusion that Fresh & Easy had no due process right to participate in the appeal process of the ULP proceeding is fully supported by extant Board law.

Contrary to Fresh & Easy's contentions, the ALJ fully considered the facts in this matter, applied relevant case law, and properly found that Fresh & Easy was not prejudiced when it did not participate in the appeal process of the original ALJ decision. ALJD 5-7.

⁵ Other cases cited by Fresh & Easy such as Collier v. Estelle, 488 F.2d 929, 932 (5th Cir. 1974), and Duperry v. Kirk, 563 F. Supp.2d 370, 379 (D. Conn. 2008), are also inapplicable since both of those cases involved prisoners' petitions for writ of habeas corpus.

The ALJ relied on current Board and Court decisions to conclude that Fresh & Easy had no due process right to participate in the appeal of ALJ Parke's decision. The ALJ cited to Golden State, as well as other Board and Court decisions to support her finding. Those cases include Alexander Milburn Co., 78 NLRB 747 (1948), Perma Vinyl Corp., 164 NLRB 968 (1967); United States Pipe & Foundry Co. v. NLRB, 398 F.2d 544 (5th Cir. 1968); and Armitage Sand & Gravel, 203 NLRB 162 (1973). ALJD 5-6.

In addition, the ALJ noted that in cases such as Frederick Iron & Steel, 303 NLRB 514 fn. 1 (1991), and VSI-Technologies, 300 NLRB 95 (1990), where alleged successors were included in the original complaint, the Board granted summary judgment against the employers that committed the violations, and stated that the alleged successors would have the opportunity to litigate their successorship status in a compliance proceeding. ALJD 6:49 – 7:3. Thus, there is ample authority supporting the ALJ's finding that Fresh & Easy had no due process right to participate in the appeal of the ULP proceeding.

Fresh & Easy objects to the ALJ's reliance on Alexander Milburn Co., 78 NLRB at 747. However, that case is not materially distinct from the instant cases, and the ALJ properly found that Alexander Milburn is analogous to the situation here. ALJD 5: 40-47. Fresh & Easy attempts to distinguish that case by noting that in that case, the Board first became aware of the sale of respondent's assets during oral argument. That difference is insignificant. Similar to the facts in Alexander Milburn, here Fresh & Easy is not being charged with committing any unfair labor practices of its own. Thus, it did not have a right to defend against those violations, which took place prior to the purchase of 2 Sisters. *Id.* at 769.

On page 9 of its brief in support of exceptions, Fresh & Easy also claims that it moved to intervene in order to ensure that its interests were protected, but that the Region failed to allow its participation after the decision of Judge Parke had already issued. However, Fresh & Easy never sought to intervene before the Board on the issue of its liability for various unfair labor practices; only on the issue of participating in a rerun election. In its motion to intervene, Fresh & Easy explicitly states that its purpose was to intervene to object to any direction of a rerun election. In addition, the Region had no authority to grant or deny Fresh & Easy's motion to intervene. Rather, the Board considered and denied that motion. Therefore, Fresh & Easy's arguments should be rejected.

This compliance proceeding has given the parties ample opportunity to litigate the predecessor/successor relationship between 2 Sisters and Fresh & Easy. Fresh & Easy received notice of the compliance specification, and it filed an answer to it. It has been allowed to present evidence and to defend itself in this proceeding on the issue of its liability. The Board properly denied Fresh & Easy's motion to intervene, noting that the matter could be dealt with in subsequent proceedings. After the Board's order issued, Fresh & Easy was offered the opportunity to intervene in the representation case, but declined. This compliance proceeding permits all parties to fully litigate the issue of Fresh & Easy's unfair-labor-practice liability. Thus, Fresh & Easy as well as the other parties are being afforded adequate due process.

Therefore, the ALJ properly found that Fresh & Easy's due process rights have not been violated.

B. The remedy and order recommended by the ALJ are proper.

Fresh & Easy contends that the remedy and order in the ALJ's decision are inappropriate because they are not supported by the evidence or the case law. However, as discussed above, the ALJ properly considered the facts and applied relevant case law to reach her conclusions. Therefore, the Board should reject Fresh & Easy's arguments and adopt the ALJ's recommended remedy and order.

C. Fresh & Easy's argument regarding the Board's recess appointments is invalid.

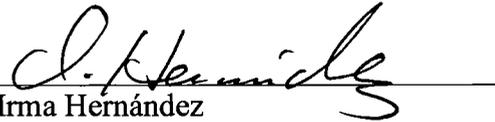
On page 11 of its brief in support of exceptions, Fresh & Easy argues that the Board lacks a legal quorum at this time because the President's recess appointments are invalid. In similar circumstances, the Board has found that it is not appropriate for it to decide whether Presidential appointments are valid. Instead, the Board applies the well-settled "presumption of regularity support[ing] the official acts of public officers in the absence of clear evidence to the contrary." Center For Social Change, Inc., 358 NLRB No. 24 (2012); Lutheran Home at Moorestown, 334 NLRB 340, 341 (2001), citing U.S. v. Chemical Foundation, 272 U.S. 1, 14-15 (1926).

VI. CONCLUSION

The record and Board precedent provide abundant support for the ALJ's findings and conclusions that Fresh & Easy, as a Golden State successor to 2 Sisters, is jointly and severally liable to remedy 2 Sisters' unfair-labor-practice violations, and that its due process rights have not been violated.

Accordingly, it is recommended that the ALJ's rulings, findings, and conclusions be affirmed and that Fresh & Easy's exceptions be rejected.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "I. Hernández", written over a horizontal line.

Irma Hernández
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Dated at Los Angeles, California, this 2nd day of January, 2013.

STATEMENT OF SERVICE

I hereby certify that a copy of **Counsel for the Acting General Counsel's Answering Brief to Exceptions of Fresh & Easy Neighborhood Market, Inc. to the Administrative Law Judge's Decision** in Cases 21-CA-038915 and 21-CA-038932 was submitted by E-filing to the Office of the Executive Secretary of the National Labor Relations Board, on January 2, 2013. The following parties were served with a copy of the same document by electronic mail.

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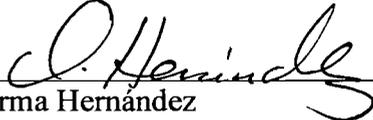
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