UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

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AM PROPERTY HOLDING CORP.,
MAIDEN 80/90 NY LLC, AND MEDIA
TECHNOLOGY CENTERS LLC,
a single employer, a joint employer with
PLANNED BUILDING SERVICES, INC.

and

Case Nos. 2-CA-33146-1
2-CA-33308-1
2-CA-33558-1

LOCAL 32B-32J, SERVICE EMPLOYEES
INTERNATIONAL UNION, AFL-CIO

and

UNITED WORKERS OF AMERICA
(Party in Interest)

AM PROPERTY HOLDING CORP.,
MAIDEN 80/90 NY LLC, AND MEDIA
TECHNOLOGY CENTERS LLC,
a single employer, a joint employer with
SERVCO INDUSTRIES, INC.

and

Case Nos. 2-CA-33864-1
2-CA-34018-1

LOCAL 32B-2J, SERVICE EMPLOYEES
INTERNATIONAL UNION, AFL-CIO

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CHARGING PARTY SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 32BJ's POSITION STATEMENT
ON REMAND FROM THE SECOND CIRCUIT

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INTRODUCTION

The Second Circuit has remanded this case "so that the Board can consider in the first instance whether [Planned Building Services] PBS was an individual successor to Clean-Right and whether – based on the particular facts in this case – reaching this issue would comport with due process." *SEIU Local 32BJ v. NLRB,* 647 F.3d 435, 449 (2d Cir. 2011). The answer to both of these questions is "Yes."

This is a successor refusal-to-hire case. When PBS was awarded the contract to clean 80-90 Maiden Lane on April 25, 2000, it refused to hire the employees of the predecessor cleaning contractor, Clean-Right. Charging Party Service Employees International Union, Local 32BJ ("Local 32BJ" or "the Union") had represented the Clean-Right employees, and it filed a charge alleging that PBS discriminated "against employees previously represented by Local 32B-32J[1] at 80 Maiden Lane in hiring and job assignments to evade successorship obligations under the Act."

Thus, from the very start of these proceedings, PBS was aware that it was being accused of individually refusing to hire the Clean-Right employees, and of doing so to avoid a bargaining obligation with Local 32BJ. As explained below, the issue of PBS's individual liability as a successor was "fully litigated." There are no additional material facts or arguments that PBS would have presented if Counsel for the General Counsel had more specifically alleged in the complaint an alternate theory that PBS was individually liable as a successor.

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[1] Local 32BJ subsequently changed its name from 32B-32J to "32BJ."

There is no need to re-open the record. Instead, on the existing record, the Board should find that PBS was individually liable as a successor to Clean-Right, and that it violated Section 8(a)(5) by refusing to bargain with Local 32BJ.

In addition, if the Board finds that PBS violated Section 8(a)(5), it should overturn its decision in *Planned Building Services ("PBS III"),* 347 NLRB 670, 676 (2006) and no longer permit respondents in successor refusal-to-hire cases to cut off liability by making a counterfactual showing about what would have happened if the employer had not violated the Act in the first instance.

STATEMENT OF FACTS

This is a summary of the key facts relevant to the issues remaining on remand. AM Property Holding Corp. ("AM") purchased 80-90 Maiden Lane on April 25, 2000, and on that same day, it entered into a contract with PBS to provide night-time cleaning services. *AM Property Holding Corp.,* 350 NLRB 998, 1018-19 (2007). Although AM had previously contracted with PBS at other buildings, this contract was only for the 80-90 Maiden Lane location. *Id.*

On July 18, 2000, Local 32BJ filed a charge in Case 2-CA-33146-1 alleging that PBS discriminated "against employees previously represented by Local 32B-32J at 80 Maiden Lane in hiring and job assignments to evade successorship obligations under the Act." Local 32BJ subsequently filed an amended charge on September 27, 2000 alleging that PBS was a joint employer with the building owner, AM Property Holding Corporation (and two related entities).

The ALJ found that Michael Francis, the Chief Executive Officer of PBS, "was aware, in April 2000, that if PBS hired a majority of its employees who were represented by Local 32BJ it would have an obligation to recognize and bargain with the Union." *AM Property,* 350 NLRB at 1021. Further, Francis had "conceded that in the past, when staffing new building accounts, he made hiring decisions based upon whether an obligation to bargain with the Union would result." *Id.*

The Complaint alleged that service employees employed at 80-90 Maiden Lane constituted an appropriate unit for bargaining. Order Further Amending Consolidated Complaint and Notice Rescheduling Hearing ("Complaint") at ¶¶ 8(b); 8(c). In its Answer PBS denied "that the service employees employed by Respondent at 80-90 Maiden Lane constitute an appropriate unit as contained in ¶ 8(c), and note[d] that the current appropriate unit is comprised of 75 and 80-90 Maiden Lane." PBS's Answer to Order Further Amending Consolidated Complaint and Notice Rescheduling Hearing ("Answer") at ¶8(c).

The Complaint further alleged that PBS refused to hire certain individuals who worked for Clean-Right because those employees were members of and assisted Local 32BJ. Complaint at ¶ 10. In addition, the Complaint alleged that PBS failed and refused to recognize and bargain with Local 32BJ as the exclusive bargaining representative of the employees at 80 Maiden Lane. *Id.* at ¶ 13.

AM also owned the building at 75 Maiden Lane – across the street from 80-90 Maiden Lane. One month before AM hired PBS to provide cleaning services at 80-90 Maiden Lane, it entered into a contract with PBS to provide cleaning services at

75 Maiden Lane. GC Exh. 16. After AM terminated its contract with PBS at 80-90 Maiden Lane in June 2001, it continued its contract with PBS at 75 Maiden Lane, and the ALJ found that the 75 Maiden Lane contract remained in effect through the time of the hearing. 350 NLRB at 1028.

On May 11, 2000, PBS entered into a collective bargaining agreement with the United Workers of America ("UWA") covering the workers at 75 and 80-90 Maiden Lane. The Board found that PBS's recognition of UWA was illegal because UWA did not represent an uncoerced majority of the PBS employees. *AM Property Holding Corp.,* 355 NLRB No. 151 (2010).

Since PBS did not admit the employees at 80-90 Maiden Lane constituted an appropriate unit, Counsel for the General Counsel questioned witnesses regarding the potential community of interest between the workers at 80-90 Maiden Lane and the workers at 75 Maiden Lane. The PBS employees at 80-90 Maiden Lane testified that they rarely, if ever, worked at 75 Maiden Lane. Transcript of ALJ Hearing ("TR") 904-5; 1119; 1175; and 1416. In addition, PBS's supervisor[2] Dennis Henry testified that the PBS employees at 75 Maiden Lane had a different supervisor, the 75 Maiden Lane employees never worked at 80-90 Maiden Lane, and the 80-90 employees only went to 75 Maiden Lane "once in a blue moon." TR 2154-2155.

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[2] Although PBS referred to Henry as a supervisor, the ALJ found that Henry was not a supervisor as that term is defined in the Act. 350 NLRB at 1032-33. Nevertheless, the ALJ found that Henry was PBS's agent. *Id.* at 1033. While the Board did not explicitly find that Henry was PBS's agent, the Board found that Henry unlawfully assisted the United Workers of America ("UWA") by directing employees to attend UWA meetings, and the Board attributed this violation to PBS. *Id.* at 1007, 1010.

ARGUMENT

A. PBS Was a Successor to Clean-Right.

1. A Bargaining Unit Consisting of PBS's Employees at 80-90 Maiden Lane Was Presumptively Appropriate.

The Second Circuit found that "the Board has long treated a unit limited to a single facility as presumptively appropriate." 647 F.3d at 449. Moreover, the Court saw "no reason why the Board – consistent with well-established policy – should not have presumed" that the employees at 80-90 Maiden Lane constituted an appropriate bargaining unit. *Id.* Local 32BJ likewise sees no reason why the single-site presumption would not apply here. The Board has previously applied the single-site presumption in the property services industry. *See, e.g., Sierra Realty Corp.,* 317 NLRB 832, 836 (1995).

2. It is Irrelevant That PBS Only Took Over a Portion of Clean-Right's Operations at 80-90 Maiden Lane.

PBS might try to argue that somehow it should not be deemed a successor to Clean-Right because it only took over a portion of Clean-Right's operations, but the Board has consistently rejected that argument. For instance, in *Simon DeBartolo Group,* 325 NLRB 1154 (1998), *enf'd.* 241 F.3d 207 (2d Cir. 2001), the Board found that an employer was a successor where the predecessor's bargaining unit consisted of approximately 40 employees in a variety of classifications, and the successor hired four HVAC employees. The Board explained that a successorship obligation is not defeated where only a portion of a predecessor's operation is transferred. Similarly, in *Bronx Health Plan,* 326 NLRB 810 (1998), *enf'd.* 203 F.3d 51 (D.C. Cir.

1999), the Board found substantial continuity (and thus a successorship obligation) where the new unit consisted of 17 employees who had previously been part of a bargaining unit of 3,500 employees. *Id.* at 810. Likewise, in *Lincoln Park Zoological Society,* 322 NLRB 263 (1996), the Board found substantial continuity where the predecessor's unit consisted of 2,500 workers at 100 locations and the successor's unit consisted of 75 workers at a single site.

Here, there has already been a finding that "the Clean-Right employees were replaced by ... PBS employees performing essentially the same work in the same building in the same manner with no hiatus in operations." *AM Property,* 350 NLRB at 1040. Moreover, PBS took over the night cleaning, which was the bulk of Clean-Right's work at 80-90 Maiden Lane. In light of the continuity of the operation, any diminution in the size of the bargaining unit would not defeat a finding of successorship.

3. PBS Has Already Tried and Failed to Overcome the Presumption That a Single-Site Unit Was Appropriate.

Since PBS refused to admit that the workers at 80-90 Maiden Lane constituted an appropriate bargaining unit, the General Counsel put in extensive evidence on this point at the hearing. This evidence established that there was virtually no interchange between the PBS employees at 80-90 Maiden Lane and the employees at 75 Maiden Lane. The evidence also established that the workers at 75 Maiden Lane had their own supervisor.

For an employer attempting to overcome the presumption that a single-site unit is appropriate, the relevant factors include "central control over daily

operations and labor relations, including extent of local autonomy; similarity of skills, functions and working conditions; degree of employee interchange; and bargaining history, if any." *D&L Transportation, Inc.,* 324 NLRB 160, 160 (1997). The Board has held that the "absence of [employee] interchange ... is a critical factor in assessing whether the single-facility presumption has been rebutted." *First Security Services Corp.,* 329 NLRB 235, 236 (1999). Accordingly, even where there is extensive centralization of labor relations, the Board has found that the single site presumption is not overcome where employees are hired for a specific work location and there is no employee interchange. *See, e.g. Van Lear Equipment, Inc.,* 336 NLRB 1059, 1063 (2001); *Esco Corp.,* 298 NLRB 837 (1990).

The Board has also found that separate direction and oversight of employees supports a finding that a single site unit is appropriate even where, as here, the direction and oversight is provided by a nonsupervisory leadperson. *Esco Corp.,* 298 NLRB at 840; *see also North Hills Office Services,* 342 NLRB 437, 437, n. 3 (2004)(finding limited local autonomy supported appropriateness of single-site unit where on site supervisor oversaw work on night staff, released employees if they needed to leave work, trained employees, and recommended disciplinary measures).

Another factor supporting the appropriateness of a single-site unit here is that PBS and AM Property entered into a separate service contracts for 80-90 Maiden Lane and for 75 Maiden Lane. *First Security Services Corp.,* 329 NLRB 235, 237 (1999); *Executive Resources Associates,* 301 NLRB 400, 401-402 (1991). In *Executive Resource Associates,* the Board explained why the existence of separate

site-specific service contracts supports a finding that workers at different sites have a separate community of interest. The Board pointed out that the where the service contracts expire at different times, the workers at the different sites have potentially divisive representational and bargaining concerns. That concern is present here, where, as noted above, PBS lost its contract at 80-90 Maiden Lane while retaining its contract at 75 Maiden Lane.

Finally, in an earlier case that went to trial shortly before the events at issue here, the Board found that single-site units were appropriate at three other PBS buildings in lower Manhattan. *Planned Building Services ("PBS III"),* 347 NNLRB 670, 717 (2006).

For all of these reasons, the Board should find that a single-site unit consisting of PBS's employees at 80-90 Maiden Lane was appropriate for bargaining, and accordingly, PBS was an individual successor to Clean-Right.

B. Finding that PBS Was an Individual Successor to Clean-Right Would Not Raise Any Due Process Concerns.

1. The Issue Was Already Fully and Fairly Litigated.

The Second Circuit's decision here reaffirmed established Board law holding that "the Board may find and remedy a violation even in the absence of a specific allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated." *Pergament United Sales*, 296 NLRB 333, 334 (1989), *enf.d.*, 920 F.2d 130 (2d Cir. 1990).

It should be clear that the issue of whether PBS was an individual successor to Clean-Right with an obligation to bargain with Local 32BJ was "closely

connected" to the allegations in the Complaint. The Complaint alleged that PBS refused to hire individuals who worked for Clean-Right because those employees were members of and assisted Local 32BJ, and that PBS failed and refused to bargain with Local 32BJ as the representative of the employees at 80-90 Maiden Lane.

PBS's liability as an individual successor to Clean-Right was "fully litigated" under the standard set forth in *Pergament.* In deciding whether an issue was fully litigated, the inquiry is not necessarily whether the parties directly addressed the issue, but rather "whether the absence of a specific allegation precluded a respondent from presenting exculpatory evidence or whether the respondent would have altered the conduct of its case at the hearing had a specific allegation been made." *Pergament,* 296 NLRB at 335. In other words, as the Ninth Circuit has explained, an issue is "fully litigated" where "there was no more exculpatory evidence that could have been introduced." *George C. Foss Co. v. NLRB*, 752 F.2d 1407, 1412 (9th Cir. 1985).

Here, had the General Counsel more specifically alleged that PBS was independently a successor to Clean-Right, there is nothing that PBS could have or would have done differently in its defense. It made exactly the same arguments and presented exactly the same evidence that it would have presented if faced with that specific allegation. In fact, PBS treated the Complaint as alleging that it was an independent successor to Clean-Right. Thus, in its post-hearing brief to the ALJ, PBS included an argument heading labeled "PBS Was Not a Successor;" similarly in

its exceptions brief it included an argument headed "PBS Was Not a *Burns* Successor." PBS Post-Hearing Brief at 108; PBS Exceptions Brief at 55. In each of the two briefs, PBS argued that "for lawful reasons the alleged discriminatees never constituted a majority of PBS's workforce at 80 Maiden Lane." PBS Post-Hearing Brief at 109; PBS Exceptions Brief at 55.

Any evidence or argument PBS might have been able to muster in support of the position that a bargaining unit limited to the employees at 80-90 Maiden Lane was not appropriate would have been equally relevant to the allegations that were set forth in the Complaint. In fact, PBS was limited in the arguments it could make regarding bargaining units by its own unlawful conduct with respect to the UWA. Having recognized UWA in a unit consisting of only two buildings, 75 Maiden Lane and 80-90 Maiden Lane, PBS could not contend that the only appropriate unit would also include additional sites, and in fact, in its Answer, PBS asserted that a unit consisting of both 75 and 80-90 Maiden Lane was appropriate.

Ironically, if the Board were to find that the only appropriate unit includes 75 Maiden Lane, the only effect would be to increase PBS's liability. PBS only had six employees at 75 Maiden Lane, GC Exh. 16, and thus, the twelve former Clean-Right employees would have also constituted a majority of the larger unit.[3]

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[3] At the hearing, PBS recognized that arguing for a unit that included 75 Maiden Lane would not help its cause. Thus, when the ALJ asked whether PBS was asserting that the appropriate unit combined 80-90 Maiden Lane with 75 Maiden Lane, PBS's attorney responded, "We don't really think it makes a difference." TR 10.

Whether or not the General Counsel more specifically alleged that PBS was an individual successor to Clean-Right, PBS would have presented the same exculpatory evidence. Thus, the issue was "fully litigated," and the Board should find that PBS was an individual successor to Clean-Right.

2. Even if the Issue Had Not Been Fully Litigated, PBS May Now Present its Arguments and Ask to Reopen the Record.

The Board has already found that PBS refused to hire (or consider hiring) the former Clean-Right employees in violation of Section 8(a)(3) of the Act. *AM Property,* 350 NLRB at 1004. The Complaint further put PBS on notice that the General Counsel was alleging that PBS took this step in order to avoid a successor bargaining obligation. The record in this case is replete with evidence supporting a finding that PBS was an individual successor to Clean-Right. In *Mammoth Coal Co.,* 358 NLRB No. 159 (2012), the Board recently reaffirmed its authority to find and remedy a violation where the record supports a violation on a theory that differs from the General Counsel's original theory of the case.

As explained above, the question of whether PBS was an individual successor to Clean-Right has already been fully litigated. But, if PBS can somehow persuade the Board that there are additional arguments it would have made or additional evidence it would have introduced if this alternate theory had been specifically alleged in the Complaint, then PBS now has the opportunity to come forward with that evidence and argument. This is the approach the Board took in *Mammoth Coal,* where the Board recognized that the respondent "could not sustain a due process argument with an unsupported claim of hypothetical prejudice." *Mammoth*

Coal, 358 NLRB No., 159, slip op. at 9. In *Enloe Medical Center,* 346 NLRB 854 (2006), the Board recognized that where it finds a violation that had not been fully and fairly litigated, the Board may cure any potential due process issue by providing the respondent with another opportunity to defend itself against the violation. Here, consistent with *Mammoth Coal,* if PBS identifies evidence that it might have introduced if there had been a specific allegation that it was an individual successor, then the Board can cure any potential due process violation by reopening the record to receive that evidence. But, there is no need to either reopen the record or remand the case unless PBS satisfies two conditions: (1) it must identify evidence that it might have introduced; and (2) it must explain why it did not introduce that evidence in the first instance.

PBS had notice that it was potentially liable as a successor to Clean-Right. The Board should now find and remedy that violation. In the unlikely event that PBS can explain how and why it would have presented additional evidence and argument if the Complaint had specifically alleged that it was an individual successor to Clean-Right, the Board can cure any potential due process violation by giving PBS an opportunity to present its evidence and argument now.

C. If the Board Finds That PBS Was an Individual Successor to Clean-Right, it Should Overrule its Decision in *PBS III* Regarding the Appropriate Remedy.

The Board has long held that when a would-be successor refuses to hire employees of the predecessor in violation of Section 8(a)(3) in order to avoid a bargaining obligation, the successor must restore the terms and conditions of employment established by the predecessor. *See, e.g. State Distributing Co.,* 282

NLRB 1048 (1987). In *PBS III,* the Board modified this remedy to permit a respondent to present evidence in a compliance proceeding that it would not have agreed to the monetary terms of the predecessor's collective bargaining agreement, and to establish the date on which it would have bargained to agreement and the terms of that agreement or the date on which it would have bargained to impasse and the terms it would have implemented. *PBS III,* 347 NLRB at 676.

The Board's decision in *PBS III* came in response to the D.C. Circuit's misguided decision in *Capital Cleaning Contractors, Inc. v. NLRB,* 147 F.3d 999 (D.C. Cir. 1998). The Board should take this opportunity to overrule *PBS III,* and explain why *Capital Cleaning* is based on a misunderstanding of the Act and of the rationale for the remedy in a successor refusal-to-hire/refusal-to-bargain case, and why it is inconsistent with the Supreme Court's decision in *Fibreboard Paper Products Corp. v. NLRB,* 379 U.S. 203 (1964) and the more recent D.C. Circuit decision in *Deming Hospital Corp. v. NLRB,* 665 F.3d 196, 203 (D.C. Cir. 2011).

Moreover, if the Board intends to adhere to its decision in *PBS III,* then in order to remain consistent, the Board would need to overrule its decisions in *Ex-Cell-O Corp.,* 185 NLRB 107 (1970) and *Tiidee Products,* 194 NLRB 1234 (1972) and allow unions to present evidence about gains they would have been able to obtain in bargaining in order to obtain a make-whole remedy where employers refuse to bargain in good faith.

1. The D.C. Circuit's *Capital Cleaning* Decision is Based on a Misunderstanding of the Act and of the Rationale for the Board's Traditional Remedy in a Successor Refusal-to-Hire Case.

In *Capital Cleaning,* the D.C. Circuit joined every other circuit that considered the issue to uphold the Board's decision that "when a successor refuses to hire its predecessor's employees based on anti-union animus, the successor loses the right to set the initial terms and conditions of employment." *Capital Cleaning,* 147 F.3d at 1008. But, the D.C. Circuit held that in order to avoid a punitive remedy, the Board should have imposed the terms of the predecessor's collective bargaining agreement "only for a period allowing for a reasonable time of bargaining."[4] *Id.* at 1011. The D.C. Circuit further asserted that the best evidence of what a successor would have agreed to in bargaining is the wage rate that the successor paid without bargaining, and thus "in order realistically to approximate what would have happened absent discrimination the Board must take account of what actually did happen." *Id.*

The D.C. Circuit's decision is based on a series of misunderstandings. First, the D.C. Circuit misunderstands why Congress passed the Act in the first place. Congress made a finding that the inequality of bargaining power between employees and employers "depress[es] wage rates," and that collective bargaining would "restor[e] equality of bargaining power" and thereby raise wages. 29 U.S.C. §

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[4] By contrast, the Second Circuit has held that a remedy requiring restoration of the predecessor's terms and conditions is not punitive since "it is hardly clear what terms would have been reached had the [employer] not ... discriminated," and it is appropriate to impose on the wrongdoer the risk that "his own wrong has created." *NLRB v. Staten Island Hotel Ltd. Partnership,* 101 F.3d 858, 862 (2d Cir. 1996).

151. Thus, the idea that an employer's unilaterally imposed wage rate is the best evidence of what would have happened if the employees had engaged in collective bargaining is at odds with the entire theory of the Act, not to mention 75 years of experience demonstrating that collectively bargained wages and benefits tend to be considerably higher than wages and benefits paid by non-union employers.

More importantly, *Capital Cleaning* is based on a misunderstanding of the nature of the remedy that the Board had ordered. When the Board orders a successor employer to restore the predecessor's terms and conditions as part of a refusal-to-hire/refusal-to-bargain remedy, the Board isn't making a determination about what the parties would have agreed to if not for the employer's unlawful acts. In fact, the Board has never been willing to engage in that type of conjecture. *See Tiidee Products,* 194 NLRB at 1235("We know of no way by which the Board could ascertain with even approximate accuracy ... what the parties 'would have agreed to' if they had bargained in good faith"). If the Board were trying to engage in a counterfactual exercise, then it would have to permit the union to put in evidence that it might have been able to secure **higher** wages and benefits from the successor. *Cf. NLRB v. Burns Intl. Security Services, Inc.,* 406 U.S. 272, 288 (1972)("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"). As the Board explained in *State Distributing Co.,* 282 NLRB1049, "it is appropriate to calculate backpay on the basis of the contractual rates paid by the predecessor ... because the successor's unlawful failure to recognize and bargain with the union has left us without an

adequate or reasonable basis for calculating what rates would have been arrived at through lawful bargaining."

The other reason why the Board required the successor to restore the predecessor's terms and conditions as part of any remedy is that this step is necessary in order to facilitate bargaining going forward. The D.C. recently recognized as much in *Deming Hospital.* There, the D.C. Circuit explained that the reason an employer must rescind its unlawful unilateral action before attempting bargaining is that "[e]mployers cannot force unions to come to the bargaining table in a position of weakness." *Deming Hospital,* 665 F.3d at 203. Thus, "in cases involving unlawful unilateral changes, the Board's normal remedy is to order restoration of the status quo as a means to ensure meaningful bargaining." *Id.* The Supreme Court endorsed this remedial approach in *Fibreboard.* In that case, the employer had contracted out maintenance work without first bargaining with the union representing maintenance employees. The Court agreed that as a remedy "the Board was empowered to order the resumption of maintenance operations and reinstatement with back pay." *Fibreboard,* 379 U.S. at 215. The Court described the Board's order as "restoring the *status quo ante* to insure meaningful bargaining." *Id.* at 216.[5] This principle applies with equal force in the typical

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[5] In *Fibreboard,* if the employer had bargained in the first instance, it might well have reached impasse quickly and been able to lawfully contract out the work. By the same token, where a union engages in unlawful secondary activity that inflicts monetary damages on an employer, the union might have been able to accomplish the same result lawfully. When either a union or an employer breaks the law, they aren't given an opportunity for a do-over to prove that they could have accomplished the same result without breaking the law. Yet, this is exactly what *PBS III*

successor case. While here PBS has lost its contract at 80-90 Maiden Lane, so there likely will be no prospective bargaining,[6] in the ordinary successor case the remedy requires the employer to bargain with the union. If the successor employer doesn't restore the status quo, then the union is forced to come to the table in the same position of weakness that the D.C. Circuit found objectionable in *Deming Hospital.*

2. *PBS III* is Self-Contradictory, it Discourages Collective Bargaining, and it Makes it More Difficult to Enforce the Act.

The Board's decision in *PBS III* failed to acknowledge the contradiction between ordering the employer to bargain while simultaneously providing for litigation regarding what would have happened if the employer had bargained in good faith from the start. In *PBS III,* the Board ordered the respondent to recognize and bargain with the union. But, at the same time, the Board provided for a compliance hearing where the parties would litigate what would have happened if they had bargained when the employer first took over the predecessor's operations. It is virtually impossible to imagine how the parties would proceed on both tracks simultaneously. In the compliance proceeding, presented with the opportunity to wipe out years of back pay liability, any employer would try to build a case that it would have quickly reached impasse and imposed lower wages and benefits than the predecessor provided. This approach would inevitably infect the prospective

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provides: the employer engages in illegal acts that enable it to drive down wages; then, when the employer is caught it is given a chance to reduce its liability by showing that it could have accomplished the same result lawfully.

[6] But, Local 32BJ's understanding is that PBS still cleans 75 Maiden Lane, so if the Board determines that the appropriate bargaining unit includes that building as well, then there would be prospective bargaining.

bargaining since any concessions made by the employer at the bargaining table would weaken its case in the compliance proceeding. The Board itself acknowledged this concern in *Tiidee Products,* and relied upon it as one reason for refusing to engage in a counterfactual inquiry when an employer fails to bargain in good faith. *See Tiidee Products,* 194 NLRB at 1235 ("[r]espondent ... is not likely to agree upon any new wage benefits for employees for fear that the Board would give them retroactive effect in devising a backpay formula for the past refusal to bargain. This would further delay the commencement of meaningful bargaining and thus not effectuate the purposes of the Act").

Even where the Board's order doesn't include a prospective bargaining obligation, the *PBS III* remedy discourages an employer from engaging in meaningful collective bargaining throughout its entire enterprise as long as a refusal-to-hire case is pending. If an employer knows that the amount of its liability in one case depends upon proof that it would have quickly reached impasse and imposed low wages and benefits, then the employer would be extremely reluctant to make concessions or reach agreements in any other bargaining that might take place while the case is pending.

Thus, while the Act is designed to "encourag[e] the practice and procedure of collective bargaining," 29 U.S.C. § 151, *PBS III* discourages collective bargaining. Instead of treating collective bargaining as a process where unions and employers come together and engage in compromise and meaningful give and take, *PBS III*

encourages unsavory employers to treat collective bargaining as a game where the object is to reach impasse as quickly as possible.

PBS III also encourages employers to break the law in the first place, and then to prolong the resulting labor dispute. As the Board noted in *State Distributing,* allowing an employer to cut-off its backpay liability where it has not bargained means that the employer may end up "enjoying a financial position that is quite possibly more advantageous than the one it would occupy had it behaved lawfully." *State Distributing,* 282 NLRB at 1049. Moreover, the opportunity to reduce its liability in a compliance proceeding means that employers suffer no consequences from delaying the resolution of the unfair labor practice case. The *PBS III* rule also makes settlement more difficult because of the uncertainty regarding the employer's potential liability. Unless the General Counsel is willing to settle for a small fraction of the potential backpay, the employer will likely insist on taking its chances at a compliance hearing.

3. *PBS III* Cannot Be Reconciled with *Ex-Cello-O* and *Tiidee Products.*

Forty years ago, the D.C. Circuit encouraged the Board to engage in counterfactual proceedings that would give workers a remedy where their employer refuses to bargain in good faith. In *Intl. Union of Elec. Workers v. NLRB ("Tiidee Products"),* 426 F.2d 1243 (D.C. Cir. 1970), the D.C. Circuit criticized the Board's practice of only issuing prospective remedies in most refusal to bargain cases. The court observed that "a prospective-only doctrine means that an employer reaps from his violation of the law an avoidance of bargaining which he considers an economic

benefit." *Id.* at 1249. The court ordered the Board to consider a remedy based upon "a determination of what the parties themselves would have agreed to if they had engaged in the kind of bargaining process required by the Act." *Id.* at 1253.

On remand, the Board decided that it was not "practicable" to try to determine what the parties would have agreed to if the employer had bargained in good faith. *Tiidee Products,* 194 NLRB 1234, 1235 (1972). Furthermore, as explained above, the Board recognized that the prospect of a legal proceeding to determine what might have happened in bargaining will inevitably interfere with actual bargaining. The Board's decision on remand in *Tiidee Products* was consistent with its earlier decision in *Ex-Cell-O Corp.,* 185 NLRB 107 (1970) where it also declined to impose a remedy based on what it is reasonable to assume the parties would have agreed to if the employer had bargained in good faith.

In *PBS III,* the Board did not attempt to reconcile its decision with its contrary approach in *Ex-Cell-O* and *Tiidee Products.* This failure is especially egregious because in *Ex-Cell-O* and *Tiidee Products* the Board's refusal to engage in a counterfactual inquiry operated to "reward the wrongdoer and to give him an advantage over a law-abiding competitor," *Tiidee Products,* 426 F.2d at 1251, whereas in *PBS III,* the Board ordered a counterfactual inquiry in order to give the wrongdoer an opportunity to reduce its liability.

The Board is either equipped to engage in counterfactual inquiries about "what would have happened" in bargaining, or it is not. When a counterfactual inquiry would provide a meaningful remedy for workers who have been deprived of

an opportunity to bargain collectively, the Board has insisted that it lacks the ability to engage in such an inquiry. If that is true, then there is no basis for the Board to engage in a counterfactual exercise in order to reduce an employer's backpay liability. The Board must either overrule *PBS III* or overrule *Ex-Cello-O* and *Tiidee Products.*

CONCLUSION

For the reasons set forth above, the Board should find that PBS was an individual successor to Clean-Right, and thus, it violated Section 8(a)(5) by refusing to recognize and bargain with Local 32BJ. Further, the Board should overrule its decision in *PBS III* and order PBS to retroactively restore the predecessor's terms and conditions.

Dated: February 15, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document, entitled **CHARGING PARTY SERVICE EMPLOYEES INTERNATIONAL, LOCAL 32BJ's POSITION STATEMENT ON REMAND FROM THE SECOND CIRCUIT** was served on this 15th day of February 2013 via electronic mail on the following parties:

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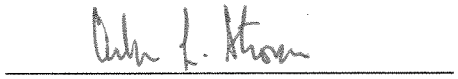

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