UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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GVS PROPERTIES, LLC,

Case No.: 29-CA-077359

Respondent,

-and-

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, DISTRICT LODGE 15, LOCAL LODGE 447

Charging Party.

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RESPONDENT GVS PROPERTIES, LLC'S REPLY MEMORANDUM OF LAW IN SUPPORT OF ITS EXCEPTIONS TO THE DECISION AND ORDER OF THE ADMINISTRATIVE LAW JUDGE

On the brief:

Richard M. Howard, Esq.
Alexander Leong, Esq.
Jonathan D. Farrell, Esq.

ARGUMENT

POINT I

THE DEPRIVATION OF GVS' DUE PROCESS RIGHTS WARRANTS REVERSAL OF ALJ'S CHU DECISION

Administrative Law Judge Kenneth Chu's ("ALJ Chu") decision and order dated December 27, 2012 ("Decision") should be reversed on due process grounds. ALJ Chu found that GVS terminated certain of its predecessor's employees "in a transparent effort to dilute the Union's majority and evade its successorship bargaining obligation." (See, Decision P. 9, L. 35-39). ALJ Chu made these findings notwithstanding: (1) General Counsel ("GC") never charged GVS with any 8(a)(3) violations in its Complaint; and (2) ALJ Chu ruled GVS would not be permitted to introduce evidence concerning the reason(s) for the termination of said employees (T. 37)[1]. As such, ALJ Chu's findings constitute an incurable violation of GVS' due process rights, warranting reversal of the Decision.[2]

The GC and Union attempt to minimize ALJ Chu's fundamental due process violation by themselves speculating as to ALJ Chu's possible state of mind in finding that GVS' employment

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[1] References to the Hearing Transcript are designated as "T." followed by the page number.

[2] See Buonadonna Shoprite, LLC, 356 NLRB No. 115 (2011) (employer deprived of due process where ALJ improperly found violation on an alternate and unlitigated theory and employer was led to believe that it would not have to defend such issue); see also, Sierra Bullets, LLC, 340 NLRB No. 32 (2003) (reversing ALJ's finding that employer violated 8(a)(5) on a theory that parties were not at impasse, where employer was led to believe it would not have to defend its decision to declare impasse); Paul Mueller Company, 332 NLRB 1350 (2000).

decisions were motivated by anti-union animus.[3] Such speculation, however, is irrelevant and not a substitute for evidence. The simple fact remains: ALJ Chu made findings of fact concerning GVS' purported motive(s) for its employment decisions, without so much as a hint of evidentiary basis and after both he and the GC stated such issues were not pertinent to the GC's theory of the case. Rather than speculate upon the full extent to which these findings influenced his final decision, we can be sure that his findings were: (1) relevant and material to his conclusion that GVS violated Sections 8(a)(5) and (1) of the National Labor Relations Act, otherwise ALJ Chu would not have included said findings in the critical paragraph of his Decision; (2) in violation of GVS' due process rights, and (3) impermissible and indicative of potential partiality. Accordingly, we respectfully request ALJ Chu's Decision be reversed in its entirety[4], or alternatively, this case should be remanded to a different administrative law judge, to review the record and prepare and serve on the parties findings of fact, conclusions of law, and recommendations with respect to the unfair labor practices alleged in the Complaint.[5]

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[3] The Union and GC's speculation continues regarding a variety of topics, including, inter alia: (a) the state of mind of GVS in deciding to purchase the affected properties and the considerations that went into same; (b) the state of mind of certain employees in deciding to accept the purportedly "below market" offers to retain their services offered by GVS; (c) the nature of the transition from one employer to the next; and (d) the benefit or detriment accompanying doing business in New York City.

[4] Cunningham v Stegall, 13 Fed Appx. 286, 289 (6th Cir. 2001) ("[b]ecause judicial bias infects the entire trial process it is not subject to harmless error review"); see also Maurino v. Johnson, 210 F.3d 638, 645 (6th Cir. 2000); Chapman v. California, 386 U.S. 18, 23, n .8 (1967).

[5] Dayton Power & Light Co., 267 NLRB 202, 202-203 (1983), quoting Indianapolis Glove Co., 88 NLRB 986, 987 (1950)("[I]t is essential not only to avoid actual partiality and prejudgment... in the conduct of Board proceedings, but also to avoid even the *appearance* of a partisan tribunal.")

POINT II

AS BURNS SUCCESSORSHIP DEPENDS ON THE VOLUNTARY AND CONSCIOUS DECISION BY A SUBSEQUENT EMPLOYER TO TAKE ADVANTAGE OF A PREDECESSOR'S WORK FORCE GVS CANNOT BE DEEMED A BURNS SUCCESSOR

Both the GC and Union assert ALJ Chu's Decision to be a statement of longstanding Board law. Both cite to Springfield Transit Management, Inc., 281 NLRB 72 (1986). Springfield, however, dealt not with a local law requiring a mandatory retention of employees for evaluation purposes for a limited time, but with a "perfectly clear" successor and does not constitute applicable precedent.[6] Indeed, this is evidenced by the fact that every other tribunal which has considered such a local law mandating the temporary retention of employees for evaluation purposes, has found either: (1) the NLRB had not yet taken a position, Washington Serv. Contractors Coal. v. District of Columbia, 54 F.3d 811 ID. C. Cir. 1995) (cited by the Union), United States Serv. Indus., Inc., 1995 WL 1918207 (NLRB Division of Judges, 1995); or (2) the GC's position could be found in M&M Parkside Towers LLC, 2007 WL 313429 (NLRB Div of Judges Jan. 30, 2007), California Grocers Association v. City of Los Angeles, 52 Cal.4th 177 (2011), *quoting* Rhode Island Hospitality Association v. City of Providence, 775 F.Supp.2d 416, 432 (D.R.I. 2011) *aff'd* 667 F.3d 17 (1st Cir. 2011).[7] This refusal to

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[6] The GC has taken the position that the Displaced Building Service Worker Protection Act ("DBSWPA") is not a mandatory retention statute, but is instead designed to foster employment stability. One does not exclude the other. The DBSWPA fosters employment stability by mandating that employees are retained for a ninety (90) day evaluation period.

[7] Contrary to the assertions by the GC and Union, GVS has not taken the position that any of these cases or the decision of Judge Cogan denying 10(j) relief in this case, James G. Paulsen v. GVS Properties, LLC, 2012 WL 5612509 (E.D.N.Y., Nov. 13, 2012) is binding upon the NLRB. GVS, however, contends these decisions from respected and persuasive jurists should be considered by the NLRB. The GC and the Union opine these decisions should be ignored at all costs. This would be the height of hubris. It has oft been said that if three (3) people tell you

acknowledge documented facts and revisionist history is similar to the remainder of the approach taken by the GC and the Union.[8]

The ALJ, GC, and Union assert GVS became a Burns successor by virtue of its purportedly conscious decision(s) to purchase the affected properties and retain 7 of 8 of its seller's employees, in compliance with the DBSWPA. Such a view reduces the successorship doctrine to a mere arithmetic equation (by relying solely on the employment and operational facts at the moment of the transfer from Vantage to GVS) and converts the successorship doctrine into a strict liability law. Such a construction runs counter to the Supreme Court's holdings and supporting rationale in NLRB v. Burns International Security Services, Inc., 406 U.S. 272 (1974) and in Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 40–41 (1987). Indeed, to accept the ALJ, GC, and Union's erroneous position as correct, would mean the Supreme Court wasted a great deal of verbiage in these decisions for no real purpose.

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you are drunk, it would be best to lie down. In simpler terms, a wealth of contrary opinion cannot, in good faith, be totally ignored.

[8] The GC refuses to even recognize its relationship to the NLRB. The GC, however, must be counsel to some entity. It cannot exist in a vacuum. Contrary to the GC's purported separation from the NLRB, the enabling statute specifically asserts the GC is General Counsel "of the Board" 29 USC § 153 (d). When the GC espouses a position to an Administrative Law Judge, just as when the Union's counsel or Employer's counsel espouses a position to an Administrative Law Judge, it binds its client, Kregler v City of New York, 770 F Supp 2d 602, 607 (S.D.N.Y. 2011). ("[A]bsent egregious circumstances, a distinct and formal admission made before, during, or even after a proceeding by an attorney acting in his professional capacity binds his client as a judicial admission." Haywood v. Bureau of Immigration, 372 Fed.Appx. 122, 124 (2d Cir. 2010).

Here, when the GC espoused a position to Administrative Law Judge Green in M&M Parkside Towers LLC, 29-CA-27720, 2007 WL 313429 (NLRB Div of Judges Jan. 30, 2007) it cannot ignore that it did so or on whose behalf it did so. The GC represented to the world as well as Administrative Law Judge Green that Burns successorship cannot be determined in the face of a temporary mandatory retention statute, until the employer voluntarily chooses its employee complement or the evaluation period of the statute expires, whichever occurs first.

The GC and Union confuse the rationale for the Supreme Court's holdings with *dicta.* The following statement in Fall River, 482 U.S. at 40-41, is not *dicta*; it is the rationale for the holding and the holding itself:

> [T]o a substantial extent the applicability of Burns rests in the hands of the successor. If the new employer makes a **conscious decision** to maintain generally the same business and to hire a majority of its employees from the predecessor, then the bargaining obligation of §8(a)(5) is activated. This makes sense when one considers that the employer **intends** to take advantage of the trained work force of its predecessor 'to maintain generally the same business and hire a majority of its employees from the predecessor.'"

Similarly, when the Supreme Court in Burns stated, "The source of its [Burns] duty to bargain with the union is not the collective-bargaining contract but the fact that it ***voluntarily*** took over a bargaining unit that was largely intact and that had been certified within the past year," Burns, 402 U.S. at 287, that is not *dicta*, this is the rationale for an obligation to recognize and bargain.

Further, in a precursor decision to Burns, Galis Equip. Co., Inc., 194 NLRB 799 (1972), the Board rejected the myopic and rigid successorship analysis collectively espoused by the ALJ, GC, and Union:

> We agree with the Trial Examiner that in determining whether a purchaser is a successor for the purposes of Section 8(a)(5), the crucial inquiry is the continuity of the employing industry. *We do not however agree with him that that question can be determined merely by looking at the situation as it exists at the moment of transfer. Rather, the determination must be made on the basis of all the relevant facts; and among the matters to be considered are whether the situation at the moment of transfer is intended to be permanent or temporary, and if temporary how different the permanent situation will be. Also relevant is whether a change, if one is contemplated, is imminent and certain or merely speculative.*

(emphasis added). Galis, 194 NLRB at 799.

Notably, in Galis, the Board rejected the Trial Examiner's finding that respondent was a successor, even though the respondent voluntarily and intentionally retained all its predecessor's unit employees when respondent began operations, so it could finish, for a fee, the predecessor's work then in progress.

In Local Union No. 274, Hotel Employees and Rest. Intern. Union, AFL-CIO, 314 NLRB 982, 986 (1994), the NLRB expounded that Burns successorship could only be considered after a successor has begun *normal* operations, stating:

> The determination of successorship is made when the successor has begun normal operations, Fall River Dyeing Corp. v. NLRB, 482 U.S. at 51, with a substantial and representative complement of employees. Id. at 48-49. The employment of Security's employees was meant to be merely temporary, pending the closing of the Hotel for reevaluation of its needs and hiring of personnel. The determination of whether Stadium was a successor would be appropriately delayed until it commenced its regular operation. Galis Equipment Co., 194 NLRB 799 (1972).[9]

Consideration of the totality of circumstances that caused GVS to initially retain its predecessor's employees and the DBSPWA's affect on when successorship can be determined, are conspicuously absent here. It is unquestioned GVS did not choose to hire its predecessor's employees at the time it acquired the affected properties. Rather, GVS retained and evaluated its predecessor's employees for a temporary period as mandated by the DBSWPA.[10] Only at the conclusion of the DBSWPA period did GVS **choose** to employ certain of the predecessor's employees. Accordingly, as the GC asserted and recognized in M&M, the successorship determination cannot be made in the context of DBSWPA until after the conclusion of the 90-

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[9] Local Union 274 renders the Union's and GC's claim of longstanding Board Law an absolute fallacy.

[10] The testimony elicited specifically states it was GVS' practice to wholly replace a seller's employees with a team trained by GVS in how to turn a distressed property around, from losing money to becoming profitable. (T. 22-24).

day period when the employer is free to determine its employee complement and normal operations have begun.[11]

Contrary to the claims made by ALJ Chu, GC and Union, one does not choose to comply with a statute; one is compelled to comply with a statute. Complying with the Selective Service System does not mean one chose to go to Vietnam. It does not mean one supports any particular war or the draft itself. It is merely compliance with a statutory obligation. Obligatory statutory compliance is, by definition, the opposite of voluntary behavior.

Moreover, contrary to the assertions of ALJ Chu, GC, and Union, the voluntary and conscious choice which is critical to successorship is the labor relations decision of a new employer to build its workforce by hiring most of its employees from its predecessor and taking advantage of the knowledge and expertise acquired by those incumbent employees – not, the business decision to engage in a real estate transaction to acquire property. To merge these separate and distinct decisions as ALJ Chu, GC, and Union have done, flies in the face of the successorship doctrine. Indeed, in Burns, the Supreme Court agreed with the NLRB trial examiner's finding that: "Burns was therefore held to have a duty to bargain, which arose when it *selected* as its work force the employees of the previous employer to perform the same tasks at the same place they had worked in the past." (emphasis added) Burns, 406 U.S. at 278. Similarly, in Howard Johnson Co., Inc. v. Detroit Local Joint Executive Board, 417 U.S. 249

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[11] Further, the GC's consistent disregard of documented fact may be found in the argument presented vis-à-vis "probationary status." GVS has never stated that a *voluntary* probationary status played any role in a Burns analysis. Rather, GVS simply pointed out the ALJ's fallacy in considering cases involving *voluntary* probationary status analogous to a *mandatory* temporary retention law. GVS' witness specifically testified that the employees in question were not probationary. (T.35).

(1974), the Supreme Court determined Howard Johnson was not a successor because it "decided to *select* and hire its own workforce to commence its operations of the restaurant and motor lodge." (emphasis added). Id., at 259.

The ALJ's, GC's, and Union's position that GVS made a voluntary decision to take advantage of its predecessor's work force based upon its decision to purchase the affected properties with the purported knowledge that successorship would likely result from GVS' compliance with the DBSWPA, is fatally flawed because it assumes it was reasonable for GVS to believe successorship would likely result from compliance with the DBSWPA. At the time GVS purchased properties, the DBSWPA[12] had been interpreted by the First Circuit Court of Appeals, the Supreme Court of the State of California, the GC and ALJ Green as failing to create Burns successorship in and of itself.[13] Under such circumstances, GVS' decision to purchase the properties and comply with the DBSWPA cannot be realistically construed as choosing to become a Burns successor.[14]

The First Circuit Court of Appeals, would agree that the extant law held compliance with the DBSWPA cannot render a party a Burns successor, as in considering any preemptive effect of such a temporary mandatory retention law, it stated:

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[12] Itself or its clone for the industry and location in question.

[13] See Rhode Island Hospitality Association v. City of Providence, 667 F.3d 17 (1st Cir. 2011); California Grocers Association v. City of Los Angeles, 52 Cal.4th 177 (2011); M&M Parkside Towers LLC, 2007 WL 313429 (NLRB Div of Judges Jan. 30, 2007).

[14] The decision to buy was therefore not a mistake of law (as GC opines), but rather a well based decision consistent with then extant law. Cases cited by GC and the Union involving voluntary probationary periods, contractual agreements to hire or statutes mandating permanent hiring of each predecessor employee as though to the contrary, are inapposite, whereas, the cases referenced by GVS, California Grocers; Rhode Island; and M&M; etc. are directly on point.

> Secondly, the NLRB has not to date clearly moved in the direction plaintiffs posit, and it is far from clear that it will.... *M & M Parkside Towers LLC,* No. 29–CA–27720, 2007 WL 313429 (N.L.R.B. Jan. 30, 2007) (ALJ opinion). There, the ALJ explained that, under a similar 90–day retention ordinance, the appropriate time to make the successorship determination was not when the employees were initially hired pursuant to the ordinance, ... *Id.*
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> While the ALJ's opinion in *M & M Parkside* does not bind the agency, the NLRB's General Counsel (at least as of the date of *M & M Parkside*) has adopted a similar position: that the successorship determination should be made at the end of the three-month retention period. *Id.*

Rhode Is. Hospitality, *supra* at 30. This is the first time the GC has indicated otherwise,

The GC and Union also assert that if GVS' position were accepted, employee Section 7 rights would be adversely affected. To the contrary, under GVS' position (shared by the First Circuit Court of Appeals, the union filing an *amicus* brief in Rhode Island Hospitality Association, *supra* at 432, the California Supreme Court and previously, the GC) employees would have every right to organize. If, however, the GVS position is not accepted, then when a majority of employees begin working for a new employer without union representation or the desire for same, they will nonetheless be saddled with such representation. Section 7 exists to assure employee freedom of choice, not universal union representation regardless of employee desire.

POINT III

THE IMPERMISSIBLE AND UNJUST *EX POST FACTO* EFFECT OF ALJ CHU'S DECISION WARRANTS A FINDING THAT GVS IS NOT A *BURNS* SUCCESSOR

As discussed above, all indications at the time of GVS' purchase were that the Burns successorship analysis would not take place until the completion of the evaluation period. Accordingly, if the Board accepts the GC's newfound position that Burns successorship results

from compliance with the DBSWPA and similar laws - - which it should not - - we respectfully request the Board decline to apply such legal finding retroactively to GVS in this case.

CONCLUSION

For all of the reasons stated in GVS' exceptions and initial brief in support of same and as discussed above, GVS respectfully requests ALJ Chu's Decision be reversed and the Complaint be dismissed in its entirety.

Dated: March 21, 2013

Respectfully submitted,
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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

GVS PROPERTIES, LLC	X	
and	X	Case No.: 29–CA–077359
INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, DISTRICT LODGE 15, LOCAL LODGE 447	X	

AFFIDAVIT OF SERVICE

STATE OF NEW YORK}
} ss:
COUNTY OF NASSAU }

Carene N. Rundlett, being duly sworn, deposes and says: I am not a party to this action; I am over 18 years of age; and I reside in Nassau County, New York

On March 21, 2013, I served a true and correct copy of **Respondent GVS Properties, LLC's Reply Memorandum of Law in Support of its Exceptions to the Decision and Order of the Administrative Law Judge** by enclosing same in a post-paid, properly addressed first-class wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York upon and via electronic mail upon:

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Carene N. Rundlett

Sworn to before me this
21st day of March 2013

Notary Public

YVONNE BLAISE
Notary Public, State of New York
No. 01BL49482566
Qualified in Queens County
Commission Expires June 3, 2015

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