JD(NY)–04–15
New York, NY

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

NOVEL SERVICE GROUP, INC.

and **Case Nos. 02-CA-113834**
02-CA-118386

LOCAL 32BJ, SERVICE EMPLOYEES INTERNATIONAL UNION

JoAnne Wong, Esq., Counsel for the General Counsel
Andrew L. Strom, Esq., Counsel for the Charging Party
Robert I. Gosseen, Esq., Counsel for the Respondent

DECISION

Statement of the Case

Raymond P. Green, Administrative Law Judge. I heard this case in New York City on October 28 and 29, 2014. The charge in 02-CA-113834 was filed on September 23, 2013 and the charge in 02-CA-118386 was filed on December 5, 2013. The Complaint was issued on August 28, 2014 and alleged as follows:

1. That for a number of years, the Union had been recognized as the exclusive collective bargaining representative of the handymen and cleaning employees of a company called Quality Building Services ("QBS") who were employed at 295 Madison Avenue, New York City.

2. That the Respondent acquired a contract from the building owner to perform the cleaning services at 295 Madison Avenue and that since August 29, 2013, the Respondent has continued to operate with a majority of its work force having previously been employed by QBS.

3. That since August 28, 2014, the Respondent has refused to respond to the Union's demands for recognition.

4. That on November 25, 2013, the Respondent issued disciplinary warnings to the following employees because they engaged in a three day strike and engaged in other union and/or protected concerted activity:

Alberto Solano
Norma Farjardo
Marlon Escoto
Cleofe Vinieski
Husnija Bektesevic
Rolando Brito
Jose Mercado

5. That on December 2 and 3, 2013, the Respondent discharged Marlon Escoto, Rolando Brito and Husnija Bektesevic because they engaged in a three day strike and engaged in other union and/or protected concerted activity:

6. That but for the illegal discharges described above, a majority of the employees in the unit that had been employed by QBS would have been employed by the Respondent.

7. That by failing and refusing to recognize the Union as the bargaining representative of the employees at 295 Park Avenue, the Respondent has violated Section 8(a)(5) and (1) of the Act. 7.

8. That since on or about August 28, 2013, the Respondent has unilaterally (a) reduced wages, (b) eliminated health benefits and (c) eliminated other benefits without affording the Union an opportunity to bargain.

Based on the evidence as a whole, including my observation of the demeanor of the witnesses and after consideration of the Briefs filed, I hereby make the following findings and conclusions.

Findings and Conclusions

I. Jurisdiction

It is admitted and I find that the Respondent is engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. It also is admitted that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

For a number of years, the cleaning employees who worked at an office building located at 295 Park Avenue, New York City, have been represented by Local 32BJ, Building Service Employees International Union. Prior to the Respondent, these employees were employed by a company called Quality Building Services ("QBS") and there was a collective bargaining agreement covering them which ran from January 1, 2012 through December 31, 2015.

Sometime in or before August 2013, the owner or managing agent of the building decided to open this work up for bid and the Respondent successfully bid for the cleaning work for the entire building. [1] When the contract with QBS ended on August 28, 2013, the Respondent commenced performing the same services on August 29. [2] The owner of the Respondent is Ed Lekaj.

However, before commencing to perform the contract, the Respondent was notified that under a local law, it was required to hire, (on a 90 day basis), the employees who were then employed by QBS as of the date that the Respondent took over.

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[1] The owner of the building is Tahor 26 Owner, LLC.

[2] The contract between the Respondent and the building owner was signed on July 11, 2013 and was to run from August 19, 2013 to August 18, 2014. The Respondent bid for the contract on the basis of proposed labor costs of $19.00 per hour for 8 employees; an amount per employee that was lower than contained in the predecessor's contract with the Union.

This law, enacted in 2002, called the Displaced Building Service Workers Protection Act or DBSWPA, required a purchaser of an apartment or commercial building, (meeting certain minimum size standards), to retain for a period of 90 days all of the employees employed at the time of the purchase. Finally, the law required the new employer to make, at the end of the 90 day "transition period," a written evaluation of the employees involved and to offer permanent employment to those employees who are rated as satisfactory.

By letter dated August 23, 2013, the Union advised the Respondent that it was the representative of the cleaning employees and had learned that the Respondent had obtained the cleaning contract for 295 Madison Avenue. It went on to state that it was, on behalf of the employees, making an unconditional application for employment

On August 27, the Respondent tendered a letter to each of the cleaning employees and requested that they sign it. This letter was in the form of a job offer and set forth the initial terms and conditions of employment. It read:

> This letter has been prepared to detail our offer of employment at 295 Madison Avenue to you. Please take a few moments to read these items.
> You understand and agree that your employment with Novel Service Group, Inc. will be on at-will basis, and that neither you nor Novel Service Group, Inc. has entered into a contract regarding the terms or the duration of your employment.
>
> Information relevant to the job:
>
> Job Classification: Custodian
>
> Start Date: August 30, 2013
>
> Term of Employment: We are offering employment for a term of 90 days. After the 90-day period expires, if you wish to continue working for us you must reapply for employment and we do not intend to hire everyone who has reapplied.
>
> Prior Wages & Terms: Any wages or other terms and conditions of your employment by QBS are hereby revoked and no longer in force.
>
> Your employment: At will; you are subject to termination with or without cause.
>
> Hours: Full-time: 8 hours per day; shift times to be set.
> Status: Hourly position; non-exempt status.
>
> Wages: $12.00 per hour up to 40 hours in a work week; $18.00 per hour for any hours worked in excess of 40 in a work week.
>
> Payroll: Twenty six (26) pay periods (bi-weekly) per year.
>
> Benefits: None at present.

There is no dispute about the fact that before setting the initial terms of employment, the Respondent did not notify or offer to bargain with the Union.

On August 28, 2013, the Union requested recognition on behalf of the cleaning employees, Also, on this date, the Union notified the Respondent that it had advised the QBS employees to complete applications for employment but that some of the terms offered violated the Displaced Building Service Workers Protection Act. Specifically the letter stated:

> (T)he Act requires your company, after the ninety day transition period has expired to offer employment to those who have performed satisfactorily. Additionally, under the Act, employees cannot be terminated during the ninety day transition period except with cause. The employees do not waive these rights or other rights they may have under the Act. Nor do they or the Union waive rights under the National Labor Relations Act. [3]

On August 29, 2013, the Respondent started cleaning the building with eight of the nine former employees of QBS. (One of these employees actually started work on September 2, because he was on vacation at the time). It also hired a new employee, Edmond Smakaj, (aka Mondi), to be the lead man or "supervisor."

Since the Respondent commenced its operations at the building on August 29, 2013, utilizing the former employees plus Smakaj and minus the vacationing employee, their start dates should be calculated as of August 29 and not August 30. Assuming arguendo that all of these employees, except for Smakaj, could be considered as "contingent" employees on August 29, their status as permanent employees should become fixed as of November 27, 2013 at the latest.

With respect to Mr. Smakaj, the General Counsel contends that he was a supervisor or agent within the meaning of Section 2(11) and/or 2(13) of the Act. In this regard, the evidence establishes that Smakaj was designated either as the leadman or "supervisor" for the building. However, the evidence also shows that apart from acting as a conduit between the owner and the other employees, to transmit infrequent communications, he did cleaning work along with the other employees and had none of the duties, powers or responsibilities listed in Section 2(11) of the Act. I therefore do not conclude that he was a supervisor within the meaning of the Act. Also, except as to messages or communications specifically transmitted by him between the owner Ed Lekaj to the other employees, I do not conclude that he was a general agent.

Within a week or two, the evening shift employees, (except for Smakaj), began handing out leaflets in front of the building during the day and went to work at night. (The day porter did not participate because he was at work during the day). These leaflets publicized the fact that the employees had their wages and benefits substantially cut by the new employer. The basic theme of the leaflets was to induce the tenants of the building to convince the owner to terminate the contract with the Respondent and to enter into a contract with a company having an agreement with the Union. This hand billing activity continued until about the first week of November 2013.

On September 4 and September 20, 2013, the Union again requested that the Respondent recognize and bargain.

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[3] It is obvious to me that by no later than mid August, the Union and the Respondent were communicating with each other, essentially by writing letters drafted by experienced labor relations counsel.

On September 18, 2013, the Union held a large rally at the entrance to the building that was attended by about 500 people. This included the building's cleaning employees except for the day porter and Smakaj. The employees of the Respondent were placed on a podium outside the front entrance and one of them, Marlon Escoto, was a featured speaker. (Using amplification equipment).

Another and perhaps even larger rally, (accompanied by the now famous inflated rat), took place on November 20, 2012. At this rally, there were perhaps a thousand people in attendance, including the employees of the Respondent, (except for the day porter and Smakaj) who occupied an elevated space on a platform set up outside the building's entrance.

At the end of this rally, at around 4:00 p.m., the cleaning employees, except for Smakaj, and Jose Mercado, the day porter, put on picket signs and commenced circling in front of the building's entrance. They did not report to work on that day or on the following two days. On November 21 and 22, Mercado also did not report to work and joined the picketing. The picket signs apparently identified Local 32BJ as the origin of the activity and identified the problem as being the fact that the employees were not being paid what they had been paid when employed by QBS. There was testimony that during this three day period that the Respondent's owner was in the lobby when the picketing was going on and that he was aware that the employees had not reported to work. (Lakaj also had the benefit of experienced labor counsel by this time). In my opinion, the contention that Lakaj was unaware that these employees were engaged in a strike relating to their terms and conditions of employment is absurd.

On November 22, 2013, the Union on behalf of the employees, made an unconditional offer to return to work. This was accepted and the employees returned on November 23.

On November 25, the Respondent issued written warnings to the employees who had not reported to work on the three previous days. These stated:

> You were absent without authorization on [November 20, 21 and 22]. Your absence left us short-handed and struggling to adequately clean the building. Significantly, you failed to call in or to notify your supervisor in advance, as you were instructed to do when you were hired. Your conduct was irresponsible and will not be tolerated.
>
> You are warned that any repetition of this conduct on your part may result in the immediate termination of your employment without further notice or writing. [4]

In addition to the warnings described above, the Respondent, on November 25, gave an additional warning to Brito. This read:

> Reviewing our records we found that you called in sick on five successive Fridays between October 4 and November 1, 2013. That pattern of absences, in effect giving you a three-day weekend, is abusive. It will not be tolerated…

As to this warning, Brito testified that he did not take five days off, although conceding that he called in and received permission to take off on two Fridays and one Thursday during that period of time.

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[4] In Mercado's case, he received only one similar warning; for being absent on November 22.

November 26, 2013 arrived and this was the 90th day after the Respondent commenced cleaning 295 Madison Ave.

On December 2 and 3, 2013, Lakaj wrote out evaluations for the former QBS employees. He states that he made these evaluations based on his observation of their work. (An evaluation of a cleaner's work need not be made by direct observation; it can be made by observing how clean the area is to which he is assigned). Brito and Bektesevic and Escoto, received, on the face of the documents, less than satisfactory evaluations. The others received satisfactory or better evaluations.

On December 2, the Respondent discharged Marlon Escoto and Rolando Brito. (It can be recalled that Escoto was one of the speakers at the September 18 rally). Huesnija Bektesevic was discharged on December 3.

In the case of Escoto, the discharge letter that the Respondent sent to him stated inter alia;

> Our evaluation of your overall work performance, including your attendance record, forecast that you would not be a satisfactory employee going forward.
>
> Twice during your short period of employment with us, you called out allegedly "sick" on the evening prior to a holiday. Once on October 31, 2013 and the second time just last week on November 27, 2013, when you gave yourself in effect a five-day mini-vacation.
>
> Approximately one week ago you were absent again, without authorization or prior notification to us, for two nights in addition to Friday. Because of your no-call, no authorization absences we were forced to scramble to cover your work. You apparently believed either that owing to your absences you had in effect quit or been terminated. You were informed that that was not the case. When you finally showed up for work – for the first time – you advised that you were absent because of a union demonstration in front of the building (which because of its timing by the way, allowed you time to demonstrate and still come to work). We recognize that you have every right to engage in any demonstration of your choice, and for any reason and, of course, we neither hindered you from or terminated you for doing so – but you had a responsibility to call in and not leave us in the lurch, as you did between Halloween and Thanksgiving.

The letter sent by the Respondent to Brito was similar to that sent to Escoto. It stated, inter alia;

> Our evaluation of your overall work performance, including your attendance record, forecast that you would not be a satisfactory employee going forward.
>
> On at least five occasions during your short period of employment with us, you took without authorization or notification to us, Fridays off, thus giving yourself a three-day weekend.
>
> Approximately one week ago you were absent again, without authorization or prior notification to us, for two nights in addition to Friday. Because of your no-call, no authorization absences we were forced to scramble to cover your work.

> You apparently believed either that owing to your absences you had in effect quit or been terminated. You were informed that that was not the case. When you finally showed up for work – for the first time – you advised that you were absent because of a union demonstration in front of the building (which because of its timing by the way, allowed you time to demonstrate and still come to work). We recognize that you have every right to engage in any demonstration of your choice, and for any reason and, of course, we neither hindered you from or terminated you for doing so – but you had a responsibility to call in and not leave us in the lurch, as you did between Halloween and Thanksgiving.

The discharge letter that was sent to Husnija Berktesevic, dated December 3, 2013, was much shorter and did not mention the absences that occurred during the strike. It simply stated that his overall work performance "forecasts that you would not be a satisfactory employee going forward."

In the meantime, and after August 29, 2013, there was a degree of turnover within the cleaning employee group.

On September 23, 2013, Janina Barglowska, a former employee of QBS, resigned and her work was split up between the other employees.

On November 12, 2013, Janusz Pasdro, a former QBS resigned and returned to work at that company. (Presumably because his salary would be almost twice what he was earning at the Respondent).

In or about mid November to the second week in December, 2013, a group of six new employees were hired. These were described by Lakaj as being "floaters" who would be called upon to work at various locations including 295 Madison Avenue as needed to replace cleaning staff when they were not available. All of these people, like Lakaj, seem to have come from an Albanian community and his testimony was that they were referred by other people within his company. Although initially hired to fill in on an as needed basis, these people became permanent employees when some of the other former QBS employees started to quit in December 2013.

Regarding the history of the Respondent's work force at 295 Madison Avenue, the record shows the following:

As of August 29, when the Respondent commenced operations at the building, it employed eight of nine of the predecessor's employees plus the lead man, Edmond Smalak. The other former employee was on vacation and he started work for the Respondent on September 2, 2013. Accordingly, if we were to determine majority status as August 29, it would be obvious that a majority of the Respondent's work force in this unit was comprised of the predecessor's employees.

But let us assume that we should not count majority status as of August 29, but rather from either a date when employees were offered permanent jobs or if no such offers were officially made, then on November 27, 2013, 91 days after the Respondent began performing services at the building. This would then mean that the count should be based on who was employed by the Respondent in the unit as of November 27, 2013.

By mid November, 2013, the number of employees, including Smalak, who were employed at the building was nine. Of the original 10 people who cleaned the building, one of

the original employees, Janina Barglowska, had resigned on September 23 and her work was split up and reassigned to two of the other employees. (Leaving the unit at nine employees, of whom eight were formerly employed by QBS). On November 12, 2013, Janusz Pasdro, another former QBS employee resigned and was probably replaced by a new hire. Therefore, as of this date, the unit would have consisted of seven former QBS employees and two employees who were not previously employed by the Predecessor.

As noted above, the Respondent hired a group of new employees and the payroll records show that they first show up on the records as having worked during the bi-weekly period ending November 22, 2013. These were; Genc Ternava, 24 hours; Gani Ternava, 80 hours during; Vjolica Guzia, 32 hours; and Dorian Cokaj, 80 hours. What the payroll records do not show is to what extent if any, these employees worked any hours at 295 Madison Avenue, although it probably is safe to say that one of them replaced Janusz Pasdro who had resigned on November 12.

As far as I can tell from this record, as of November 27, 2013, the unit consisted of nine employees who were assigned as full time or regular part-time workers at 295 Madison Avenue, (including Smalak), of which seven were former QBS employees. Thus, if we are going to count majority status as of November 27, 2013, then a majority of the Respondent's workforce in an appropriate unit still consisted of the predecessor's employees.

On December 13, 2013, Alberto Solano and Norma Veliz-Fajardo resigned and both returned to work at QBS. [5]

The payroll records show that during the bi-weekly period from December 7 to December 20, 2013, Merita Picori and Hane Lumaj were hired by the Respondent. I will assume that either they or one of the other people previously hired in late November or early December, replaced Alberto Solano and Norma Veliz-Fajardo.

On December 20, 2014, Jose Mercado resigned and returned to work at QBS.

On January 3, 2014, Cleofe Vinieski resigned and he also returned to work at QBS.

I am going to assume that each was replaced by one of the new hires.

III. Analysis

(a) The Warnings and Discharges

As noted above, in September, soon after the Respondent began servicing the building, the employees who had originally been employed by the predecessor, commenced assembling at the main entrance in order to hand out leaflets to the public. This activity continued until about the first week of November and constituted protected concerted activity within the meaning of Section 7 of the Act.

[5] The General Counsel suggests that it would be reasonable to assume that these two employees resigned because they feared being discharged in the future. That may be. But it equally could be the case that they resigned because they were able to go back to their former employer and receive double the pay plus benefits.

Thereafter, and following a large union rally held outside the building on November 20, 2013, these employees stayed outside with picket signs and did not report to work. (Employee Mercado joined the striking employees on November 21 and 22). This strike continued until November 22 when the Union, on behalf of the strikers, made an unconditional offer to return to work.

It is clear that these employees unambiguously and publicly engaged in a strike led by their union in order to protest against the wages and benefits offered by the Respondent. I find it remarkable and simply not credible that the employer would assert that it was not aware that its employees were engaged in a strike and that it viewed this only as a situation where a group of employees simply failed to call in before not showing up for work.

Inasmuch as the Respondent issued warnings because the striking employees were absent from work on the days during the strike, I conclude that these warnings were in retaliation for their participation in protected, concerted and union activities and therefore were violations of Section 8(a)(1) and (3) of the Act.

I also conclude that the discharges of Marlon Escoto, Rolando Brito and Husmija Beklesevik, were also motivated by their union and/or concerted activity and therefore violated Section 8(a)(1) and (3) of the Act.

In the case of Escoto and Brito, the discharge letters specifically refer to their absences on the dates when the strike occurred. In fact, both letters indicate to me that had it not been for their last absences on November 20 to 22, 2013, neither would have been discharged on account of any previous absences. I therefore conclude that the predominant reason for their discharges was because both of these employees engaged in a strike to protest their wages and conditions of employment and accordingly that their discharges violated Section 8(a)(1) and (3) of the Act.

In the case of Beklesevic, the discharge letter dated December 3, did not mention any of his absences during the strike period; instead referring only to his overall work performance. Inasmuch as Beklesevic participated in the strike and the credible evidence did not tend to show that he had received any warnings for any alleged previous misconduct, I shall conclude that he too was discharged because of his participation in union and concerted activity.

(b) The Successorship Issue

In *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987), the Supreme Court held that a purchasing employer is required to recognize and bargain with a union representing the predecessor's employees when there is a "substantial continuity" of operations after the transaction *and* if a majority of the new employer's work force, in an appropriate unit, consists of the predecessor's employees when the new employer has reached a "substantial and representative complement."

In addition, the Court after reviewing its previous decisions on this issue, went on to state the following: [6]

[6] For an excellent review of the history of the successorship doctrine as applied to both unfair labor practice cases and to contract enforcement cases under Section 301 of the Statute, see Chapter 15 of

Continued

The rationale behind the presumptions [of continuing majority status] is particularly pertinent in the successorship situation and so it is understandable that the Court in Burns referred to them. During a transition between employers, a union is in a peculiarly vulnerable position. It has no formal and established bargaining relationship with the new employer, is uncertain about the new employer's plans, and cannot be sure if or when the new employer must bargain with it. While being concerned with the future of its members with the new employer, the union also must protect whatever rights still exist for its members under the collective-bargaining agreement with the predecessor employer. [7] Accordingly, during this unsettling transition period, the union needs the presumptions of majority status to which it is entitled to safeguard its members' rights and to develop a relationship with the successor.

The position of the employees also supports the application of the presumptions in the successorship situation. If the employees find themselves in a new enterprise that substantially resembles the old, but without their chosen bargaining representative, they may well feel that their choice of a union is subject to the vagaries of an enterprise's transformation. This feeling is not conducive to industrial peace. In addition, after being hired by a new company following a layoff from the old, employees initially will be concerned primarily with maintaining their new jobs. In fact, they might be inclined to shun support for their former union, especially if they believe that such support will jeopardize their jobs with the successor or if they are inclined to blame the union for their layoff and problems associated with it. Without the presumptions of majority support and with the wide variety of corporate transformations possible, an employer could use a successor enterprise as a way of getting rid of a labor contract and of exploiting the employees' hesitant attitude towards the union to eliminate its continuing presence.

In addition to recognizing the traditional presumptions of union majority status, however, the Court in Burns was careful, to safeguard "'the rightful prerogative of owners independently to rearrange their businesses.'" *Golden State Bottling Co. v. NLRB,* 414 U.S. 168, 182, (1973), quoting *John Wiley & Sons, Inc. v. Livingston,* 376 U.S. 543, 549, (1964). We observed in Burns that, although the successor has an obligation to bargain with the union, it "is ordinarily free to set initial terms on which it will hire the employees of a predecessor," 406 U.S., at 294, and it is not bound by the substantive provisions of the predecessor's collective-bargaining agreement. Id., at 284. We further explained that the successor is under no obligation to hire the employees of its predecessor, subject, of course, to the restriction that it not discriminate against union employees in its hiring. Id., at 280, and n. 5; see also *Howard Johnson Co. v. Hotel Employees,* 417 U.S. 249, 262, and n. 8, (1974). Thus, to 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

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the Developing Labor Law, (6th Edition and 2014 supplement). Published by Bloomberg, Bureau of National Affairs.

> the employer *intends* to take advantage of the trained workforce of its predecessor. (Footnotes omitted).

I also note that in *Fall River Dyeing*, the Court rejected the argument that a successor determination should not be made until the successor reaches a full complement of employees. It stated that this would unduly frustrate the existing employees' choice of having representation. Instead it held that the determination of successor status should be when the new employer obtains a substantial and representative complement of employees. The Court stated:

> This rule represents an effort to balance "the objective of insuring maximum employee participation in the selection of a bargaining agent against the goal of permitting employees to be represented as quickly as possible." 775 F.2d, at 430-431, quoting *NLRB v. Pre-Engineered Building Products, Inc.,* 603 F.2d 134, 136, (CA10 1979).

There is no dispute and the facts show that the Respondent is engaged in the same business as the predecessor and that its employees are doing essentially the same type of work. Additionally, the evidence is that at the outset of its operations on August 29, 2013, a majority of the Respondent's work force had previously been employed by the predecessor and had been represented under a collective bargaining agreement with the Union.

It is the position of the General Counsel and the Charging Party that the Respondent hired the predecessor's employees on August 29, 2013 and because they constituted a majority in an appropriate unit, the Respondent, having reached a substantial and representative complement, became a successor as of that date under the doctrine enunciated in *Fall River Dyeing*, supra.

Alternatively, the General Counsel argues that a successorship relationship would have been established as of the end of the 90 day period because at that time, a majority of the Respondent's workforce consisted of the predecessor's employees. The General Counsel recognizes however, that at some time thereafter, and because some of the predecessor's employees quit, a majority of the work force consisted of newly hired employees. She nevertheless argues that even if the majority was lost due to voluntary quits, it is reasonable to find that those individuals left because they feared anti-union retaliation demonstrated by the discharge of the three strikers.

In addition, the General Counsel and the Union contend the Respondent is a "perfectly clear" successor in that the evidence would show that it intended to hire all of the predecessor's employees for its work force. As such, they argue that although the Respondent notified these people that they would be working at lower rates of pay and without the other benefits they had enjoyed at the predecessor, the Board should reconsider and overrule its opinion in *Spruce Up*, 209 NLRB 194 (1974). [7] They argue that although the Respondent notified the employees of new terms and conditions of employment before their hire, it nevertheless should be required to maintain the existing terms of employment that had existed with the predecessor until such time as there has been, through good faith bargaining, either an agreement to change those terms and conditions or a valid impasse.

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[7] *Spruce Up* was decided by the Board after the Supreme Court's decision in *v. Burns International Security Services, Inc*., 406 U.S. 272, (1972).

The Respondent contends that although it employed the predecessor's employees on August 29, it did not hire them into permanent positions. It asserts that the only reason it employed these people was because it was compelled to do so by the local law requiring an employer in this industry to employ the former employees for a period of 90 days, after which the employer could choose to keep all or some of the employees or hire other workers. In this context, the Respondent contends that the work force it inherited at the outset of its operations cannot be considered as a representative complement of the employees who might or might not be employed after the 90 period expired. It argues that the predecessor's employees were explicitly notified that they were to be employed on a contingent basis only and had no expectation of future employment at the end of the 90 day period.

It therefore is the Respondent's position that because it did not offer to hire most of the predecessor's employees on a permanent basis before the 90 day period, it is necessary to wait until some time after the 90 day period in order to determine whether or not a majority of its work force consisted of the predecessor's union represented employees. [8]

Additionally, the Respondent argues that under one of the rationales of *Fall River Dyeing*, the decision to hire its complement from the predecessor's workforce must be a voluntary one; demonstrating "that the employer *intends* to take advantage of the trained workers of its predecessor." As to this language, the General Counsel contends that it constitutes dicta and is therefore not binding. And although my inclination is to agree, my faith is undermined by the emphasis that the Court placed on the word "intends", thereby indicating a conscious decision as to its importance.

Indeed, Federal District Judge Brian M. Cogan, in the context of a 10(j) application, denied an injunction in similar circumstances. *James G. Paulsen, v. GVS Properties, LLC.*, 904 F. Supp. 2d 282 (E.D.N.Y. 2012). In that case, the contractor who took over the cleaning services at a New York City building hired, pursuant to the local statute, on a probationary basis, a majority of its employees from the predecessor's work force. Nevertheless, by the end of the 90 day period, due to turnover, its workforce did not contain a majority who had previously worked for the predecessor. Relying on the above quoted language in *Fall River Dyeing*, and the holding in *Burns* that an employer is free, absent anti-union intent, to hire its own workforce, Judge Cogan opined that GVS did not become a successor when it commenced operations, since it did not intend to hire, at the beginning of the 90 day period, the predecessor's work force and was therefore not in a position to make "such a voluntary position." He stated:

> The Supreme Court has made it clear that Burns successorship is based on an employer's voluntary choice to hire more than fifty percent of its workforce from its predecessor' workforce. See Fall River, 482 U.S. at 41 (explaining that the successorship doctrine is based on the "conscious decision" of the new employer "to maintain generally the same business and to hire a majority of its employees from the predecessor" and that "[t]his makes sense when one considers that the

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[8] The Respondent notes that in *Fall River Dyeing*, supra, the Court, citing its previous decision in *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272, (1972), indicated that a successor, even though having an obligation to bargain, nevertheless "is under no obligation to hire the employees of its predecessor, subject of course, to the restriction that it not discriminate against union employees in its hiring. The Respondent therefore argues that any State or local law which would compel an employer to permanently hire the employees of a predecessor would be inconsistent with the Supreme Court's holding and would therefore be preempted.

> employer intends to take advantage of the trained work force of its predecessor”)…. [9]

Interestingly, the ALJ who heard the GVS case on its merits, came to the opposite conclusion. (JD-39-12). In essence, he concluded that despite classifying these people as probationary employees, they nevertheless were hired at the time of the takeover, and because they comprised a majority of Respondent’s work force at the time it commenced operations, the Respondent was a Burns successor having an obligation to bargain. Because he concluded that the Employer actually hired these people, it made no difference that it may have been compelled to do so by virtue of the local law. That case and others involving substantially similar issues are now pending before the Board. [10]

In my earlier opinion in *M & M Parkside Towers, LLC*, JD-05-07, I concluded that although the employees who were hired from a predecessor had no guaranteed expectation that they would be offered permanent position and because they had not yet been offered permanent jobs, their status was indeterminate at the outset and one could not, at that the commencement of operations, determine if a majority of the Respondent’s work force was going to be composed of the predecessor’s employees. I also concluded that these workers were subsequently offered permanent jobs and that when their employment status was resolved, it was shown that a majority of the successor’s work force was comprised of the predecessor’s employees. According, I found that the Respondent was a *Burns* successor and therefore had an obligation to recognize and bargain with the Union.

This remains my thinking on the matter and I note that this is consistent with Judge Cogan’s opinion in *Paulsen v. GVS Properties, LLC*, where at footnote 5 he stated:

> If, however, at the end of the 90 day period, a new employer become a Burns successor by voluntarily hiring a majority of its employee from its predecessor’s work force, it would be required to recognize and bargain with the union before established the terms and conditions of continued employment.

In *M & M Parkside*, I also stated that for the purposes of establishing when in the New York City building cleaning service industry, the predecessor’s employees become permanent employees of a new employer, this should be determined as of the time actual offers of employment are made, or if not formally made before the 90 day period mandated by the local law, within a reasonable period of time thereafter.

Having considered the matter anew, I think that this formula is too vague and indeterminate. In my opinion, it is within the police power of the State or its localities, to require a new employer in an industry with a high degree of contractor turnover and with attendant potential adverse effects on many employees, to employ for only a limited period of time, with

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[9] It could be argued that Judge Cogan interprets *Fall River Dyeing* as requiring that an employer make two decisions before it can be considered a *Burns* successor as of the time it takes over a predecessor’s operations. The first would be an intention to acquire the business operations of a predecessor and operate it in substantially the same manner. And the second would be an *explicit intention* by the employer to hire, on a permanent basis, those of its predecessor’s employees in the bargaining unit so that they would make up a majority of its own workforce.

[10] See *Nexeo Solutions, LLC*, JD-42-12 and *M & M Parkside Towers LLC*, JD-05-07. (The latter case was decided by me and is relied on by the Respondent in this case.)

no guarantee of permanent employment, the predecessor's employees. [11] At the same time, I think that this kind of law can escape being pre-empted by the National Labor Relations Act, if it preserves the ultimate right of an employer to choose what people it intends to hire as its permanent employees. [12]

The local law gives an employer 90 days within which to decide whether or not to offer permanent jobs to the predecessor's employees. It also gives an employer sufficient time to recruit, hire and train other employees if it chooses not to retain some or all of the predecessor's employees. It therefore is my opinion that 90 days constitutes a reasonable amount of time for an employer to make a choice and to implement whatever choice it makes. Therefore, in the context of this case and in this industry, (which does not required a skilled work force), I think that employment status should be determined as of the date that the employer makes an accepted offer of employment or of not formally made by the 90th day, then on the 91st day after that employee has performed services for the employer. That is, if the employer has not chosen to get rid of an employee previously employed by his predecessor, then the employer should be deemed to have voluntarily hired that employee.

Since the record in this case shows that as of November 27, 2013, a majority of the Respondent's work force consisted of the predecessor's employees, I conclude that it is a successor having an obligation to recognize and bargain with the Union. I therefore do not think that it makes any difference whether the successor bargaining obligation arose on August 29,

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[11] I have no intention of seeking to revive *Lochner v. New York*, 198 U.S. 45 (1905), where the Supreme Court held that a New York law limiting how many hours bakery workers could work, was an unconstitutional interference with the employer's economic and property rights. That case was overruled by *Bunting v. Oregon*, 243 U.S. 426 (1917).

[12] In the United States, virtually all employees, except for those hired by employers having agreements containing "just cause" provisions, are employed as "at will" employees. This does not mean that they should be construed as being anything other than permanent employees. It only means that in the absence of a contract requiring just cause for discharge, the normal status of permanent employees is that they can be discharged for any reason that is not otherwise prohibited by law. (For example age, sex, or race related reasons).

On the question of pre-emption, I would imagine that in the unlikely event that an employer were to decide, in the absence of a valid collective bargaining relationship, to give hiring preference to individuals because of their union affiliation, that would violate Section 8(a)(3) of the Act, assuming that one could find a person to file a charge within the 10(b) limitations period. Similarly, if an employer and a union entered into an agreement before any employees were hired, and before a collective bargaining relationship was established, (outside of the construction industry), that gave hiring preference to union members or to employees who were employed by employers having contracts with the Union, the Employer would violate Section 8(a)(1) & (3) and the Union would violate Section 8(b)(1)(A) & (2) of the Act. Cf. *Newspaper and Mail Deliverer' Union*, 361 NLRB No. 26, (2014). Moreover, I can't imagine that those types of violations could be excused simply because a local government chose to sanction or impose such an arrangement on an employer. On the other hand, I think that an employer could, on its own volition *or* as part of a negotiated contract, agree to hire all or some of the old company's employees for legitimate and non-union related reasons. For example, a new employer could, on its own, <u>*or*</u> as part of a mutually negotiated contract, agree to hire employees from a predecessor simply because it wants to use an already trained work force to commence operations. In the later situation, one cannot say that the successor was motivated by the fact that the employees were either members of or represented by a union. At the same time, one cannot say that the successor was "forced" to hire the former employees because an agreement to do so would be part of a negotiated contract where both sides would have to come to mutually acceptable terms.

2013 when it commenced work at the building or on November 27, 2013, after the 90 day period expired.

The next question is whether the Respondent had any obligation to maintain the existing terms and conditions of the predecessor, before offering to bargain with the Union. And since the Respondent explicitly notified employees on August 27, before they commenced working for it, that they would be working under new terms and conditions, (inferior to those of the predecessor), it doesn't really matter whether the bargaining obligation attached on that date or on November 27, 2013.

The General Counsel and the Union argue that the Respondent, because it intended to hire substantially all of the predecessor's employees, was a "perfectly clear" successor as that term is used in *NLRB v. Burns Security Services*, 406 U.S. 272, (1972). They argue that the Board should overrule *Spruce Up Corp*., 209 NLRB 194 (1974), where the Board opined that the *Burns* "perfectly clear" caveat should:

> Be restricted to circumstances in which the new employer has either actively or, by tacit inference, misled employees into believing they would all be retained without change in their wages, hours or conditions of employment, <u>*or*</u> at least to circumstances where the new employer … has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment.

Thus, they argue that if the Respondent in this case is a "perfectly clear" successor, then it should be required to bargain with the Union before establishing wages, hours and conditions of employment even if the successor clearly announced its intent to establish a new set of conditions before offering employment to the predecessor's employees.

I obviously cannot overrule existing Board precedent and shall not do so here. This is an argument that can be made to the Board and counsel can do so without comment by me.

Conclusions of Law

1. The Respondent, Novel Service Group, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 32BJ, Service Employees International Union, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent, is a successor having an obligation to recognize and bargain with Local 32 BJ.

4. At all times material herein, Local 32BJ has been and is now, the exclusive representative of the building and maintenance employees employed by Novel Service Group, Inc., at 295 Madison Avenue, New York, New York, for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By failing and refusing to recognize, meet and bargain with Local 32BJ, Novel Service Group, Inc., has violated Section 8(a)(1)&(5) of the Act.

6. By issuing disciplinary warnings to and discharging employees because they engaged in a strike and engaged in concerted activity for their mutual aid and protection, the Respondent has violated Section 8(a)(1) & (3) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having concluded that the Respondent unlawfully discharged Marion Escoto, Rolando Brito and Husnija Bertesevic, it must offer them reinstatement and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them. Backpay shall be computed in accordance with *F.W. Woolworth Co., 90 NLRB 289 (1950),* with interest at the rate prescribed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB No. 8 (2010). The Respondent shall also be required to expunge from its files any and all references to the unlawful discharges and to notify the employees in writing that this has been done and that the unlawful discharges will not be used against them in any way. The Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. The Respondent shall also compensate these employees for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than one year. *Tortillas Dan Chavas*, 361 NLRB No. 10 (2014).

Having concluded that the Respondent unlawfully issued disciplinary warnings to Alberto Solano, Norma Farjardo, Marion Escoto, Cleofe Ninieski, Husnija Bertesevic, Rolando Brito and Jose Mercado, the Respondent shall be required to expunge from its files any and all references to the unlawful warnings and to notify the employees in writing that this has been done and that the unlawful warnings will not be used against them in any way.

Having no authority to overrule *Spruce Up Corp*., 209 NLRB 194 (1974), I shall not conclude that the Respondent unilaterally altered terms and conditions of employment and I shall not order it to restore those terms as they existed under the predecessor's contract with the Union.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended [13]

ORDER

The Respondent, Novel Service Group, Inc., its officers, agents, and representatives, shall

1. Cease and desist from

[13] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Refusing to recognize and bargain with Local 32BJ, Service Employees International Union as the exclusive representative of the employees in the appropriate unit concerning terms and conditions of employment.

(b) Discharging or issuing disciplinary warnings to employees because of their union or protected concerted activity.

(c) In any like or related manner, interfering with, restraining or coercing employees in the exercise of their Section 7 rights.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with Local 32BJ, Service Employees International Union as the exclusive representative of the employees in the appropriate unit, concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(b) Within 14 days from the date of this Order, offer Marion Escoto, Rolando Brito and Husnija Bektesevic, full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(c) Make Marion Escoto, Rolando Brito and Husnija Bektesevic whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the Remedy section of this Decision

(d) Remove from its files any reference to the unlawful actions against Alberto Solano, Norma Farjardo, Marion Escoto, Cleofe Ninieski, Husnija Bektesevic, Rolando Brito and Jose Mercado and within three days thereafter, notify them in writing, that this has been done and that the disciplines and/or discharges will not be used against them in any way.

(e) Reimburse Marion Escoto, Rolando Brito and Husnija Bektesevic an amount equal to the difference in taxes owed upon receipt of a lump sum backpay payment and taxes that would have been owed had there been no discrimination against them.

(f) Submit the appropriate documentation to the Social Security Administration so that when backpay is paid to Marion Escoto, Rolando Brito and Husnija Bektesevic it will be allocated to the appropriate periods.

(g) Within 14 days from the date of this Order, remove from its files any reference to the unlawful actions against Alberto Solano, Norma Farjardo, Marion Escoto, Cleofe Ninieski, Husnija Bektesevic, Rolando Brito and Jose Mercado and within three days thereafter, notify them in writing, that this has been done and that the disciplines and/or discharges will not be used against them in any way.

(h) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(i) Within 14 days after service by the Region, post at its facilities in New York, New York, copies of the attached notice marked "Appendix." [14] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, or sold the business or the facilities involved herein, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since November 27, 2013.

(j) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. January 15, 2015

_____
Raymond P. Green
Administrative Law Judge

[14] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.
To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to recognize and bargain with Local 32BJ, Service Employees International Union as the collective bargaining representative of our drivers located at the Toyota Mansfield, Massachusetts facility.

WE WILL NOT discharge or issue disciplinary warnings to employees because of their union or protected concerted activity.

WE WILL NOT in any like or related manner, interfere with, restrain or coerce employees in the exercise of their Section 7 rights.

WE WILL on request, bargain with Local 32BJ, Service Employees International Union as the exclusive representative of the employees in the appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL offer Marion Escoto, Rolando Brito and Husnija Bektesevic full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them.

WE WILL remove from files any reference to the unlawful actions against Alberto Solano, Norma Farjardo, Marion Escoto, Cleofe Vinieski, Husnija Bektesevic, Rolando Brito and Jose Mercado and within three days thereafter, notify them in writing, that this has been done and that the disciplines and/or discharges will not be used against them in any way.

Novel Service Group, Inc.
(Employer)

Dated _____ **By** _____
(Representative) **(Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

26 Federal Plaza, Federal Building, Room 3614

New York, New York 10278-0104

Hours: 8:45 a.m. to 5:15 p.m.

212-264-0300.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/02-CA-113834 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 212-264-0346.