THE UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

NEXEO SOLUTIONS, LLC,

Respondent,

and

TRUCK DRIVERS, OIL DRIVERS, FILLING STATION AND PLATFORM WORKERS' UNION, LOCAL NO. 705, AN AFFILIATE OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

and

BROTHERHOOD OF TEAMSTERS AND AUTO TRUCK DRIVERS, LOCAL NO. 70 OF ALMEDA COUNTY, AFFILIATED BROTHERHOOD OF TEAMSTERS,

Charging Parties.

Case Nos. 13-CA-46694

13-CA-62072

20-CA-35519

REQUEST TO FILE BRIEF, AND BRIEF OF SERVICE EMPLOYEES INTERNATIONAL UNION AND AMERICAN FEDERATION OF LABOR – CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICI CURIAE*

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I. PRELIMINARY STATEMENT

The Service Employees International Union ("SEIU") and the American Federation of Labor – Congress of Industrial Organizations ("AFL-CIO") respectfully request permission to file this brief as *amici curiae*, and urge the Board to reconsider and reverse its decision in *Spruce Up*, 209 NLRB 194 (1974), *enforced*, 529 F.2d 516 (4th Cir. 1975).

In his decision below, the Administrative Law Judge ("ALJ") suggests that it might be time for the Board to modify *Spruce Up*, "or revisit that case entirely." *Nexeo Solutions, LLC*, 2012 NLRB LEXIS 543, *45 (May 7, 2012). This suggestion is well taken, particularly in light of the extent to which the ALJ, lost in a morass of contradictory Board decisions, misconstrued and misapplied *Spruce Up* in this case. Moreover, even when correctly applied, *Spruce Up* is an unwieldy and illogical decision that cannot be reconciled with the plain language of the Supreme Court's "perfectly clear" caveat in *NLRB v. Burns Sec. Servs.*, 406 U.S. 272 (1972). The majority decision in *Spruce Up* denigrates collective bargaining and sacrifices employee rights in the name of protecting employees. Yet it is precisely the "right of employees to organize and bargain collectively" that Congress has identified as the key to industrial peace. 29 U.S.C. § 151.

The legal landscape has changed considerably since *Spruce Up* was decided, on the tail of *Burns*, nearly forty years ago. An increasing number of worker protection laws, such as the federal and state Worker Adjustment and Retraining Notification (WARN) acts and municipal worker retention laws, encourage, as a matter of policy, continuity in the workforce during times of employer transition. Moreover, reexamining Spruce up is particularly appropriate at this time given "the number and scale of corporate mergers and acquisitions [which] has increased dramatically over the last 35 years . . . The significance of this 'macroeconomic phenomenon,' of

course, is that it means much more is at stake in the Board's approach to successorship issues -- and in getting it right. If transactions resulting in successorship are far more common, and if they indeed destabilize collective-bargaining relationships, then the need for the Board to evaluate its doctrines carefully, and to adjust them appropriately, is clear." *UGL-UNICCO Serv. Co.*, 357 NLRB No. 76, Slip. Op. *20 (Aug. 26, 2011).

For these reasons, and because *Spruce Up* furthers no statutory goal and has upset the balance between employees' Section 7 rights and entrepreneurial freedom that was carefully crafted by the Supreme Court in *Burns*, we urge the Board to take this opportunity to revisit *Spruce Up* and reverse it.

II. REQUEST TO FILE BRIEF AS AMICI CURIAE

The AFL-CIO and SEIU respectfully request permission of the Board to file this brief as *amici curiae* for the following reasons.

The AFL-CIO is a federation of 56 national and international labor organizations with a total membership of approximately 12 million working men and women, a substantial percentage of which are covered by the National Labor Relations Act. The AFL-CIO's affiliates represent workers in a wide range of industries and are regularly required to deal on behalf of represented employees with situations where there has been a change in the identity of the employing entity and there is uncertainty or disagreement over whether and at what point the new entity has an obligation to bargain. As a result, even where it is clear that the new employer intends to retain the existing workforce, represented employees are often presented with the prospect of significant changes in their employment term without any opportunity for input into or discussion of those changes. Because the transition between employers is a time when employees are particularly vulnerable, the AFL-CIO has a compelling interest in the

establishment and maintenance of clear rules regarding the obligations of successors which properly take into account the interest of employees faced with such a transition in continued representation by their union.

With more than 150 local union affiliates and over fifteen state counsels, the SEIU represents more than two million working men and women members across the United States, Canada and Puerto Rico. SEIU represents more than 1.2 million healthcare workers in hospitals, nursing homes, clinics, home care agencies and other healthcare institutions. It is also the largest property services union in the United States, representing more than 225,000 workers who safeguard, clean and maintain commercial and residential facilities, including office buildings, apartment houses and educational institutions.

Many union-represented workers have experienced the anxiety and uncertainty that necessarily arises when the identity of their employer changes, either because there is a change in ownership (as is most common in the healthcare industry) or because of competitive rebidding of service contracts (as is most common in property services). Working men and women in the healthcare sector are seeing a growing number of corporate buyouts and takeovers, many arising out of bankruptcy proceedings. With recent cuts in government support and Medicaid reimbursement rates, non-profit nursing homes are prime targets for purchase by for-profit entities that frequently seek to reduce labor costs. In property services, building owners and managers frequently change the service contractors that employ SEIU members, often favoring low bidders. While the lower-bidding contractors and for-profit healthcare institutions generally prefer to retain the predecessor's employees, since they are familiar with the worksites and job responsibilities, these new employers often seek to lower wages and benefits and modify other terms of employment.

Whether, in these situations, the employees' union has the right to collectively bargain initial terms, or, as *Spruce Up* has permitted, lacks the ability to represent the employees, is an issue of great concern to the AFL-CIO and the SEIU and the millions of working men and women that these organizations represent.

III. ARGUMENT

A. INTRODUCTION

In *NLRB v. Burns Sec. Servs.*, 406 U.S. 272, 294-95 (1972), the Supreme Court carved out an exception to the general rule that successor employers may set initial employment terms in instances where it is "perfectly clear" that a successor "plans to retain" the predecessor's workforce. In confirming that the Board had correctly implemented the Act when it imposed a duty to bargain on successor employers that retain, as a majority of their workforce, the predecessor employees, the Supreme Court also stuck a balance between entrepreneurial freedom and employees' section 7 rights when it stated that the "perfectly clear" successor must bargain with the union that represents predecessor employees before fixing initial terms.

Ignoring the clear import of this caveat, the Board majority in *Spruce Up*, 209 NLRB 194 (1974), *enforced*, 529 F.2d 516 (4th Cir. 1975), held that an employer may evade the obligation to bargain over initial terms of employment under the "perfectly clear" caveat in *Burns* by "clearly" announcing that it is not going to do so. Thus, *Spruce Up* permits an employer that plans to hire its workforce from the predecessor's employees and would be a "perfectly clear" successor under *Burns* and thus obligated to bargain with the union before fixing initial terms to evade this obligation merely by announcing that it is going to do precisely that which the Supreme Court said it could not do: unilaterally set initial terms.

In arriving at this perplexing conclusion, the *Spruce Up* majority ignored not only the plain language of *Burns* but also the policy rationales and goals which informed Congress when it enacted the National Labor Relations Act, 29 U.S.C. § 151 *et seq*. (the "Act"). Central to the Act is the fundamental principle that employees' right to representation and collective bargaining is key to the free flow of commerce and industrial peace:

> The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract and employers who are organized in the corporate form or other forms of ownership associations substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.
>
> Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Id.

None of the goals identified in the Act—safeguarding commerce from interruption and promoting its flow—is furthered by *Spruce Up* or the unwieldy and confusing case law that *Spruce Up* has spawned. To the contrary, by favoring employer unilateral action and direct dealing over collective bargaining, and curtailing employee rights with the dubious aim of protecting employees, *Spruce Up* has fostered that which it claims to be preventing: job insecurity and labor unrest.

Since *Spruce Up's* reversal will not impinge upon the "right" of successor employers to set initial terms in appropriate circumstances, it is time for its reversal and for the Board to restore the balance between entrepreneurial freedom and employee Section 7 rights that the Supreme Court envisioned in *Burns*. Accordingly, the Board should adopt the reasoning of dissenting Members Fanning and Penello in *Spruce Up,* 209 NLRB at 199-210, as further explicated in the concurrence of Chairman Gould in *Canteen Co.*, 317 NLRB 1052, 1054 (1995), *enforced, Canteen Co. v. NLRB*, 103 F.3d 1355 (7th Cir. 1997), and reverse *Spruce Up*.

B. *SPRUCE UP* IS INCONSISTENT WITH THE CLEAR LANGUAGE OF BURNS

More than four decades ago, the Supreme Court in *Burns* confirmed what the Board in enforcing the Act had recognized: that a "mere change of employers or of ownership in the employing industry," does not abrogate the duty to bargain imposed by Section 8(a)(5). *Burns*, 406 U.S. 272 at 279. In holding that the Board had "correctly implemented the express mandates" of Sections 8(a)(5) and 9(a) when it ordered the successor employer in *Burns* to bargain with the incumbent union, the Supreme Court noted that it was implementing consistent Board precedent and the Act's underlying principles which, the Court explained, "mandate," *id*., "continuity of [the] bargaining obligation" where there is substantial continuity in operations and a majority of the successor's workforce were employees of the predecessor. *Id.* at 285.

As the Supreme Court explained, the bargaining obligation in the successor context -- which attaches by virtue of the incumbent union's continued majority status in a unit that remains appropriate -- can attach before (as well as after) the successor takes over the predecessor's operations. *Id.* at 294-95. In many situations, continued majority status may not be apparent until after the successor has completed its hiring process. However, in some situations it will be evident that the successor does not plan to make wholesale changes in the

workforce. Recognizing that the incumbent union will continue to enjoy majority status when no wholesale changes are planned, the Supreme Court carved out an exception to the general rule that successor employers are free to set initial terms of employment in

> instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms.

406 U.S. at 1586. The exception recognizes what the Court has described as “the significant interest of employees in being represented as soon as possible.” *Fall River Dyeing and Finishing Corp. v. National Labor Relations Board*, 482 U.S. 27, 49 (1987).

In *Spruce Up*, the Board majority ignored this caveat’s plain meaning, and instead limited the obligation to consult with the union to circumstances where the employer (i) has misled the predecessor’s employees into believing that their terms of employment will remain unchanged, or (ii) has failed to “announce” its intent to establish new terms. *Spruce Up,* 209 NLRB at 195.[1] The Board majority reasoned that because the successor cannot “realistically anticipate” whether the predecessor employees will agree to work under changed terms, it cannot be “perfectly clear” to the successor that it can, in fact, “‘plan to retain all of the employees in the unit.’” *Id.; Road & Rail Srvs., Inc.,* 348 NLRB 1160, 1162 (2006) (focus of *Spruce Up* test is “gauging the probability that the predecessor employees will accept employment with the successor”). The

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[1] The Board’s precise language was:

> We believe the caveat in *Burns,* therefore, 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, or at least to circumstances where the new employer, unlike the Respondent here, has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment.

Id. at 195.

Board majority based this limitation not on any legal analysis, but on policy grounds: in the majority's view, adherence to the plain language of the *Burns* "perfectly clear" caveat would encourage a successor to "refrain from commenting favorably at all upon employment prospects of old employees for fear he would thereby forfeit his right to unilaterally set initial terms." *Spruce Up*, 209 NLRB at 195. The majority opined that "the more cautious employer would probably be well advised not to offer employment to at least some of the old work force under [the] decisional precedent [espoused by the dissent]." *Id.*

Even assuming the majority's concerns are well-grounded, which they are not, *see* Point C *infra*, they are based on a misreading of the *Burns* Court's exception which turns on the successor's "plans." 406 U.S. at 586. As Chairman Gould correctly observed in his concurrence in *Canteen*, the "Supreme Court in no way even suggested, much less stated, that the 'desire' of the employees or their 'willingness' to accept the new employer's offer was to be considered in determining whether the employer planned to retain all of the employees in the unit." *Canteen*, 317 NLRB at 1055; *Planned Bldg. Servs., Inc.*, 318 NLRB 1049 (1995) (Chairman Gould dissenting) (*Spruce Up* "represents a misreading of the Supreme Court's decision in . . . *Burns*); *see also Spruce Up*, 209 NLRB at 208 (Member Penello dissenting); at 205-06 (Member Fanning dissenting).

Member Fanning explained:

> The fact that some employees may refuse the offer of employment has nothing to do with the "plans" or intent of the offering employer. It may be that he will have to alter his plans, if the employees refuse the offer of employment, but at the time of the offer, he assuredly plans to retain those employees.

Id. Where the successor plans to hire the predecessor's employees and the union has made a bargaining demand, "I agree with Member Penello that under *Burns* the successor is obligated to consult with the union 'before he fixes terms.'" *Id.*

The crux of *Spruce Up* and the part that is most destructive to Section 7 rights and collective bargaining is the notion that a successor that plans to retain the incumbent employees has the "right" unilaterally to set initial terms as long as it "*Spruces Up*," *i.e*., makes those terms known to the employees. However, nothing in the plain language of the Supreme Court's caveat, which focuses solely on the successor's "plans to retain," even remotely suggests that such a successor may bypass the employees' union and unilaterally set initial terms. Indeed, this is precisely what *Burns* prohibits. Since the *Spruce Up* majority's "spin" on the *Burns* caveat is inconsistent with its plain meaning, *Spruce Up* should be reversed.

C. THE POLICY RATIONALES CITED BY THE *SPRUCE UP* MAJORITY COLLAPSE UNDER SCRUNITY

Chairman Gould, in calling for *Spruce Up*'s reversal, criticized not only its jurisdictional underpinnings as inconsistent with the plain language of *Burns*, but also its purported policy rationales as inconsistent with the goals of the Act. *Canteen*, 317 NLRB at 1054-55. Chairman Gould was correct, as we explain below.

The majority asserted that a contrary interpretation of *Burns* would discourage employers from "commenting favorably . . . upon [the] employment prospect of old employees," lest, by doing so, they sacrifice their right under *Burns* to set initial terms. *Spruce Up*, 209 NLRB at 195. Indeed, the Board went so far as to opine that the "more cautious employer would be well advised not to offer employment to at least some of the old work force under a [contrary] decisional precedent." The Board opined that a contrary interpretation would "discourage continuity in employment relationships," for what it described as "legalistic and artificial considerations." *Id.* None of these alleged policy rationales hold up under scrutiny.

The gist of the majority's stated rationale is that curtailing bargaining rights during periods of employer transition will better protect incumbent employees' job security. This

paternalistic approach ignores the reality that employees have little, if anything, to gain from an employer's "favorable comments" about their employment prospects when those comments are accompanied by an announcement of new (and usually unattractive) employer-imposed terms of employment. While there is little to be gained, there is much to be lost when the employees' representative is temporarily stripped of its ability to advocate on their behalf. Contrary to the conclusion reached by the *Spruce Up* majority, employee retention is better protected with a rule that requires perfectly clear successors to negotiate initial terms than a rule that does not.

In fact, the Board has acknowledged that pre-start up bargaining where there is a "perfectly clear" successor promotes both job retention and labor peace. As the Board explained in *Road & Rail Srvs.*, the benefits of pre-start up bargaining are multifold. Pre-start up bargaining affords "employee[s] . . . an opportunity, through their union, to have the successor consider their interests and concerns before changes actually occur," 348 NLRB at 1162, and leads to job retention and stability:

> [T]here is a much greater likelihood that employees will choose to remain with the successor because they have a voice, through their representative, in establishing the terms and conditions under which they will work . . . The atmosphere of stability naturally enhances the probability that employees of the predecessor will stay on with the successor.

Id. "[T]hese stabilizing factors," which the Board described as "tending to temper the uncertainty occasioned by a change in ownership," "are absent when a successor undertakes unilateral action." *Id.*

Nor is there evidence that *Spruce Up* has done anything to curtail employer discrimination in the successor context. There are dozens of Board decisions in the nearly forty years since *Spruce Up* was decided holding that successor employers unlawfully have refused to hire the incumbent employees, notwithstanding that the successor could have hired them under

unilaterally imposed, new employment terms. As long as employees continue to assert their rights to collectively bargain, there will be employers that commit unfair labor practices in an attempt to undermine those efforts. It is contrary to the policies underlying the Act for the Board to reduce the rights of employees in a futile attempt to discourage employers from acting unlawfully. Indeed, the *Spruce Up* majority's stated concern that "cautious employers would probably be well advised not to offer employment to at least some of the old work force" if an employer that plans to hire the predecessors' work force has to comply with the *Burns* caveat is based on the assumption that, absent the latitude to set initial terms, employers would violate the Act. *Spruce Up*, 209 NLRB at 195. It is unlawful for a successor to refuse to hire the predecessor's employees in order to avoid a bargaining obligation. Arguing that watering down representation rights is necessary to reduce the incentive for employers to discriminate is not a logic that the Board should espouse, or, to our knowledge, has ever espoused other than in *Spruce Up*.[2]

There is no empirical evidence to support the majority's speculation that curtailing employees' section 7 rights will protect their employment. To the contrary, as illustrated by *Planned Bldg. Servs., Inc.*, 330 NLRB 791 (2000), *Spruce Up* affords the ill-motivated employer that wishes to circumvent a commitment to hire the incumbents the opportunity to do so.

In *Planned*, the purchaser of a suburban mall decided to replace General Growth Management ("General Growth"), the cleaning contractor retained by the prior mall owner, with a different cleaning contractor, Planned Building Services ("PBS"). Under General Growth, thirty-four unit employees earned between $10.47 and $13.84 hourly and had health benefits.

[2]This same perverse logic could be used to weaken many aspects of employers' obligations under the Act. For example, if an employer were not required to provide information to the employees' union, employer opposition to organizing efforts might diminish. This is hardly a rational basis on which to argue that the duty that Section 8(a)(5) imposes on employers should be eliminated.

330 NLRB at 796. It was PBS's intent to interview and offer employment to all incumbent employees, which it in fact did. However, in its offer of employment, PBS unilaterally declared that wages would be reduced to $6.50 hourly and that there would be no health coverage. As a result, only nine of the former General Growth employees accepted the employment offer. It is perfectly clear that the right of the employer to "*Spruce Up*" did absolutely nothing to protect labor standards or the jobs of the incumbent workforce.

In sum, rather than protecting employees' jobs and furthering their interests in job retention, as the *Spruce Up* majority claimed it would, *Spruce Up* has accomplishes precisely the opposite. Since the policy consideration upon which the majority's decision rests is one of accommodating employer violations of the Act rather than furthering the Act's purposes, *Spruce Up* cannot be sustained on the basis of the majority's policy considerations.

D. IN THE NAME OF PROTECTING "EMPLOYMENT RELATIONSHIPS," *SPRUCE UP* HAS IMPROVIDENTLY SHIFTED THE BALANCE STRUCK IN *BURNS* AWAY FROM EMPLOYEE RIGHTS AND UNDERMINED COLLECTIVE BARGAINING

In *Burns*, the Supreme Court recognized "the rightful prerogative [of successor employers] independently to arrange their businesses," which, it held, must be balanced against the interest of employees in continued representation by their union. *Burns*, 405 U.S. at 301 *(quoting John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 549 (1964)); *Fall River*, 482 U.S. at 41. The Court held, that where there is substantial continuity between the operations of a predecessor and successor employer, and a majority of the successor's employees previously were employed by the predecessor, the Act's policies of promoting stability in collective bargaining relationships and preserving industrial peace support the imposition of a bargaining obligation on the successor employer. *Burns*, 406 U.S. at 280-81; *Fall River*, 482 U.S. at 38-39. While the successor must bargain with the employees' representative, it is not required to adopt

the predecessor collective bargaining agreement. Not being bound to adopt the predecessor's agreement or its substantive terms, the successor also "is ordinarily free to set initial terms on which it will hire the employees of the predecessor." *Burns*, 406 U.S. at 294.

In developing its successor doctrine, the Board has recognized that the transition between employers places a union and the employees it represents in a "peculiarly vulnerable position," *Fall River*, 482 U.S. at 39, and that requiring the successor to bargain with the employees' union promotes stability and preserves industrial peace. *Id.* 38-39; *see also UGL-UNICCO Serv. Co.*, 357 NLRB No. 76, Slip. Op. at *22-24 (explaining that reinstituting the successor bar serves the policies of the Act by preserving stability in collective bargaining relationships and preserving industrial peace). As the Supreme Court in *Fall River* keenly observed, during a time of employer transition employees "without their chosen bargaining representative . . . may well feel that their choice of a union is subject to the vagaries of an enterprise's transformation," and "concerned primarily with maintaining their new jobs[,] . . . might be inclined to shun the union, especially if they believe that such support will jeopardize their jobs." All this, states the Supreme Court, is "not conducive to industrial peace." *Fall River*, 482 U.S. at 39; *Brooks v. NLRB,* 348 U.S. 96, 103 (1954) ("[t]he underlying purpose of this statute is industrial peace").

In *Fall River*, the Supreme Court held that a successor's obligation to bargain was not limited to the period immediately after the incumbent union was certified, the situation in *Burns*, but rather broadly applied regardless of when and through what process employees had exercised their section 7 right to representation. The reasoning and policy rationales for imposing a bargaining obligation on successors articulated in *Fall River* apply with equal, if not greater, force to the "perfectly clear" bargaining obligation recognized in the *Burns* caveat.

In sum, under the guise of protecting employees, *Spruce Up* has impermissibly upset the balance of interests struck in *Burns* by shifting the focus from the employer's plans to what the employer *says* about the terms it wishes to set. Allowing the application of the perfectly clear rule to "rest[] in the hands of the successor," *Fall River,* 482 U.S. at 40-41, runs counter to the caveat in *Burns* that a successor that plans to hire its workforce from the predecessor's workforce cannot unilaterally fix initial terms without first consulting with the employees' union. The difference is that a "perfectly clear" successor under *Burns* is required to present the initial proposed terms to the union for discussion rather than as a *fait accompli* to the workers.

The "perfectly clear" caveat calls for bargaining prior to setting initial terms whenever a successor employer "plans to retain" the incumbent workforce. The caveat is consistent with a fundamental premise of the Act -- that collective bargaining is a positive process that promotes labor peace, rather than an inconvenience that unions and employers should avoid. Moreover, when the bargaining obligation attaches is significant. The Supreme Court has recognized that the uncertainty inherent in employer transitions weighs against delay and in favor of the continuity of representation rights. *Fall River*, 482 U.S. at 48 (important objective of the successor doctrine is to ensure that employees are "represented as quickly as possible"). As opposed to the rule in *Spruce Up,* which postpones bargaining until after the new employer unilaterally has imposed its own terms and taken over operations, the rule in *Burns*, which requires the perfectly clear successor to bargain once it "plans to retain" the predecessor's employees, is consistent with this goal.

While not serving to protect jobs or job standards, *Spruce Up* also has not fostered stability in labor relations. This is illustrated by *Boeing Co.,* 214 NLRB 541 (1974), *review denied*, *International Ass'n of Machinists & Aerospace Workers v. NLRB*, 595 F.2d 664 (DC Cir.

1975), where even before being awarded the contract, the successor stated that it intended to hire eighty-six percent of the incumbent work force in order to "maintain continuity of support." *Id.* at 543. Four months before operations were to commence, the successor learned it was the successful bidder. Under the protective shield of *Spruce Up*, the successor then announced wage cuts and refused to bargain with the incumbent union, despite multiple requests that it do so. The result was prolonged uncertainty and labor unrest. In protest against the unilateral changes and the successor employer's refusal to bargain with the employees' representative, the employees engaged in a concerted refusal to submit applications for approximately two months. While the employees eventually submitted unconditional applications, *Boeing* vividly illustrates the negative correlation between the direct dealing sanctioned by *Spruce Up* and labor peace.

Similarly, in *Spruce Up*, it was the successor's direct dealing that led to contention. Member Fanning explained:

> [O]nce Respondent Fowler [the successor] had determined to rely on Spruce Up employees to operate his shops, the bone of contention between him and those employees was his refusal to deal with them through their Union. When Fowler informed the Union that "all the barbers who are not working will work," almost a month remained before he was to take over the operation of the barber shops. Had he honored the Union's request to bargain over the change in commission rates he intended to make, the negotiation process would have had time to work out an acceptable agreement without danger of work stoppages during that process. . . The decision of employees to work or to withhold their services would then have been made in the light of Fowler's good-faith dealing with their Union and vindication of their exercise of Section 7 rights, not in the light of an adamant denial of such rights.

Spruce Up, 209 NLRB at 206 (Fanning dissent).

The irony of the *Spruce Up* majority's reading of *Burns* is that it sanctions direct dealing over the salutary effect of collective bargaining when there is controversy over initial terms, and imposes an obligation to bargain only when none is needed. Thus, under *Spruce Up*, a

successor's obligation to bargain over initial terms attaches only "when the successor plans to retain the former employees at the terms that their union already established through collective bargaining with the predecessor employer but <u>not</u> when the successor plans to retain them at terms different from those previously established." *Spruce Up*, 209 NLRB at 206 (Member Fanning dissent) (emphasis added). This result, which Member Fanning correctly described as "anomalous, if not absurd," "would bring to bear the mediatory influence of negotiation where there is no controversy, but deny its appropriate use where there is controversy." *Id.* Underlying the *Spruce Up* majority's sanctioning of direct dealing is a cynical view that collective bargaining hinders stable employment and harmonious labor relations, a view that is entirely at odds with Congress' own declaration of policy and with the pronouncements of the Supreme Court. *See Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 211 (1964) (collective bargaining "promot[es] the peaceful settlement of industrial disputes); *Auciello Iron Works v. NLRB*, 517 U.S. 781, 785 (1996) ("object of the National Labor Relations Act is industrial peace and stability, fostered by collective-bargaining agreements providing for the orderly resolution of labor disputes"); *see also NLRB v. Truck Driver Local Union No. 449, Int'l Bhd. of Teamsters*, 353 U.S. 87, 95 (1957) (describing multiemployer bargaining as "a vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining").

Since the efficacy of collective bargaining is key to the statutory scheme, the *Spruce Up* majority's contrary view should not continue to be sanctioned by the Board.

E. THE SUCCESSOR'S NEED FOR FLEXIBILITY IS NOT INCOMPATIBLE WITH A BARGAINING OBLIGATION IN A "PERFECTLY CLEAR" SUCCESSORSHIP

While reversing *Spruce Up* may impose, as the Supreme Court intended, a bargaining obligation on perfectly clear successors, that obligation is an easily managed one, and certainly does not deny the perfectly clear successor the ability to restructure operations where it wishes to

do so. Rather, the *Burns* caveat only requires that the perfectly clear successor refrain from unilateral action and direct dealing and consult with the incumbent union in good faith before it "fixes terms." *Burns*, 406 U.S. at 295; *Spruce Up,* 209 NLRB at 208 (Member Penello dissenting) (noting that the employer's duty merely is "to refrain from dealing with the unit employees individually concerning their future working conditions until it has notified the union and bargained to an impasse").

As Member Fanning noted in his dissent, "fixes" means "the actual establishment of [employment] terms on the day the successor commences operations." *Spruce Up*, 209 NLRB at 206 (Member Fanning dissenting). Where there is no agreement after good faith pre-start up bargaining and impasse is reached, the successor is free to unilaterally implement its last proposed terms. *Id*. at 208 (Member Penello dissenting).[3]

Many of the circumstances in which pre-start up bargaining will attach can be clearly defined so that uncertainty will not unduly burden the transaction. The *Burns* standard for a successor to be a "perfectly clear" one -- having "plans to retain" -- can be met in varying ways. A "plan[ ] to retain" the incumbents may be required by a purchase agreement, as is the case here, or the requirement may be a term in the service contract between a new service provider and its customer. There may be a local employee retention law, or some other legal reason, such as an order of a bankruptcy court, that require the successor to retain or at least offer employment to the predecessor's employees. The successor may plan to hire the predecessor's employees in order to maintain safety or continuity of care. Most frequently, the successor needs the skills and

[3] The Board has recognized that pre-start up bargaining, an "elemental purpose" of the *Burns* caveat, is not an Section 8(a)(2) violation. *Road & Rail*, 348 NLRB at 1162-63.

experience of the predecessor workforce and retaining the incumbent employees will ensure a smooth transition during the change in employing entities.

In none of these circumstances will pre-start up bargaining shackle the successor, as the new employer almost always knows well in advance of the start-up date that it will be taking over operations. Where, as here, there is a sale of a business, the parties will have negotiated the terms of their arrangement well in advance of the takeover date. Here, there was a five-month delay between the parties' entry into the purchase and sale agreement and Nexeo's actual takeover date. The same is true in many industries. In the nursing home industry in New York State, licensing agencies require new employers to obtain Department of Health authorization (after transfer of a "certificate of need"), and to provide assurances that operations will continue uninterrupted and that staffing ratios will be maintained. There will be no question but that the new operator plans to operate with the existing patient care workers to the greatest extent possible, as these employees, without whom the nursing home could not operate, cannot easily be replaced. In the property service sector, the service employees who clean and safeguard buildings are often employed by service contractors whose services are contracted for by the customer. Most of these service contracts contain a thirty-day cancellation clause. In advance of notifying the current contractor that it is being replaced, the customer puts out a request for proposals and prospective successors submit bids to the customer. The successful bidder will nearly always be aware more than thirty days in advance of taking over that it has been awarded the service contractor and will be replacing the predecessor.

Rather than addressing the parameters of the rights and duties of the parties in such pre-start up bargaining, and developing policies and case law that foster the basic statutory purpose of promoting industrial peace through collective bargaining, since *Spruce Up,* the Board has

focused, instead, on the minutiae of the facts and circumstances that could or could not constitute a pre-takeover announcement of changed terms, and the timing of that announcement, to determine whether the successor had successfully evaded an obligation to bargaining. Those inquiries only serve to frustrate the goals of the Act.

F. SPRUCE UP HAS PRODUCED INCONSISTENT AND CONFUSING CASE LAW

Spruce Up should be reversed for the additional reason that its fundamental inconsistency with *Burns* has made it almost impossible to apply -- as most recently demonstrated by the ALJ decision in *Nexeo* -- and, as a result, *Spruce Up* has fostered litigation and labor unrest in place of collective bargaining. Because *Spruce Up* changed the focus of the "perfectly clear" test from whether the employer plans to retain the incumbent employees to whether the employees are likely to accept employment, the Board has spent considerable energy analyzing whether the potential successor has actively or tacitly misled employees, whether it failed to clearly announce new terms, and the legal effect of when "the successor employer announces its offer of different terms of employment in relation to its expression of intent to retain the predecessor's employees." *Fremont Ford Sales Inc.*, 289 NLRB 1290, 1296 (1988). The decisions under *Spruce Up* are so fact-dependent and conflicting that the case law can fairly be characterized as irrational. There are no bright lines as to when in the hiring process the employer's announcement of changed terms must be made, and how explicit the announcement must be, and even the difference delineated in *Burns* between a successor that assumes the collective bargaining agreement and a "perfectly clear" successor has been virtually lost.

A return to the simpler and clearer rule articulated in *Burns* would put an end to this fruitless parsing and confusion, and provide for a quicker and more cogent determination of whether and on what terms a successor must bargain with the incumbent union, thereby minimizing uncertainty and labor unrest. *See supra*, pp. 13-14.

1. *Spruce Up* Has Created Confusion about *When* an Employer Must Announce New Terms In Order to Preserve its Right to Set Initial Terms

At what point during the hiring process the employer may announce new terms and thereby avoid becoming a "perfectly clear" successor has been unclear since *Spruce Up*. The Board generally has adhered to *Spruce Up*'s admonition that a successor is not free to set initial terms unless it announces those terms *prior* to or *simultaneously* with its expression of intent to retain, some circuit courts have held that subsequent announcements are sufficient. *Compare*, *Fremont Ford*, 289 NLRB at 1291-92, 1297 (successor employer that concealed its intent to change terms until after incumbent employees had submitted applications was a "perfectly clear" successor); and *Starco Farmers Mkt.*, 237 NLRB 373, 373 (1978) ("[W]here the new employer's offer of different terms was simultaneous with the expression of intent to retain the predecessor's employees, the Board has found no duty to bargain over initial employment terms. . . [W]here the offer of different terms was subsequent to the expression of intent to retain the predecessor's employees, the Board has regarded the expression of intent as controlling and has found that the new employer was obligated to bargain with union before fixing initial terms") (internal citations omitted) *with Nazareth Reg'l High School v. NLRB*, 549 F.2d 873, 881-82 (2d Cir. 1977) (denying enforcement of Board's order requiring successor to rescind changes in terms it announced directly to employees; rejecting claim that bargaining obligation attached when successor informed union that it would hire predecessor's employees, and holding that employer's subsequent announcement of changed terms privileged the employer to implement those changes).

The Sixth Circuit has changed course on the question of timing. In *Peters v. NLRB*, 153 F.3d 289, 298 (6th Cir. 1998), the Court held that so long as an employer announces new terms "before or immediately after commencing operations," it is not a perfectly clear successor. But

just four years later, taking great pains to distinguish *Peters*, the court held that the announcement must be made at the time the employer expresses its intent to retain. *Dupont Dow Elastomers, LLC. v. NLRB*, 296 F.3d 495, 502-03 (6th Cir. 2002), *reh'g denied*, 2002 U.S. App. LEXIS 23306 (6th Cir. 2002) (*citing Spitzer Akron, Inc. v. NLRB*, 540 F.2d 841 (6th Cir. 1976)).

2. *Spruce Up*'s Progeny Offers No Guidelines for How Explicit An Employer's Announcement of New Terms Must Be

Spruce Up's focus on how changes in initial terms are announced has created an equally muddled body of law concerning how explicit an employer's announcement of changed terms must be in order to preserve its right to set initial terms.

One question that has generated profound conflict is whether it is sufficient for an employer to announce that there will be changes in terms, without specifying any of those changes, or whether the successor must delineate the precise terms that it intends to change, and relatedly, whether the announcement of an intent to change one term privileges the employer to implement changes to any and all initial terms. In *Henry M. Hald High School Ass'n*, 213 NLRB 415, 415 (1974), the Board found that the employer's statements at the time it offered employment to the incumbent employees that it was not in "any way clear in my mind what the working conditions and terms and so forth would be," and that "nothing had been drawn up as yet about working conditions" were clear enough to permit the employer to implement initial terms. Similarly, in *Banknote Corp. of Am.*, 315 NLRB 1041, 1043 (1994), *review denied*, *Banknote Corp. of Am. v. NLRB*, 84 F.3d 637 (2d Cir. 1996), the Board found that a successor's statement that it had not agreed to be bound by the predecessor's collective bargaining privileged it to set initial terms, even though the employer failed to specify what changes it intended to

make.[4] However, in *East Belden Corp.*, 239 NLRB 776, 793 (1978), *enforced without opinion*, *NLRB v. East Belden Corp.*, 634 F.2d 635 (9th Cir. 1980), the Board adopted the ALJ's conclusion that the purchaser of a restaurant was a "perfectly clear" successor despite the fact that it told the incumbent employees that at some time in the future, it would be making certain unspecified changes in terms. The ALJ rejected the employer's claim that this was a sufficiently clear *Spruce Up* announcement, stating that "the predecessor's employees, when offered continued employment by the Respondent, were not clearly informed of the nature of the changes which Respondent intended to institute in the future, rather Respondents announcement was couched in generalized and speculative terms." 239 NLRB at 793. And in *Elf Atochem North Am., Inc.*, 339 NLRB 796, 796, 798 (2003), the Board agreed with the ALJ that when the employer stated that it "will provide employees with equivalent salaries and comparable health, welfare and benefits package, including pension, savings plan and vacation," the term "comparable" was not specific enough to clearly inform employees of the nature of the changes which the employer intended to implement.

In each of these cases, had the parties understood that their bargaining rights and obligations were to be determined in accordance with *Burns*, as opposed to *Spruce Up*, the extensive litigation concerning what precise words were used and when concerning initial terms likely would have been avoided, and to extent there was litigation, it would have focused on the single and simple issue of whether the employer planned to retain all of the incumbent workers.

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[4] As *Banknote Corp.* demonstrates, case law under *Spruce Up* has even lost sight of the distinction made in *Burns* between a successor that assumes the predecessor's collective bargaining agreement and a "perfectly clear" successor. 315 NLRB at 1043; *see also E G & G Florida, Inc.*, 279 NLRB 444, 444-46, 453 (1986) (successor employer that announced prior to commencement of operations that it would adopt predecessor's CBA, but reneged on promise, was not bound to CBA, but was a "perfectly clear successor"); *S&F Market Street Healthcare LLC v. NLRB*, 570 F.3d 354, 362 (DC Cir. 2009) (denying enforcement of the Board's order to rescind unilateral changes, and suggesting that by requiring the successor to restore unilaterally changed terms, the Board was binding the successor employer to the predecessor's collective bargaining agreement).

Instead of the convoluted litigation that has arisen post-*Spruce Up*, the parties' rights and duties could have been quickly settled, bargaining commenced sooner, and labor unrest avoided.

The irrationality of the case law under *Spruce Up* is perhaps best evidenced by the irreconcilable conflict between the Board's decisions in *Ridgewell's, Inc.*, 334 NLRB 37 (2001), *enforced*, *Ridgwell's, Inc. v. NLRB*, 2002 U.S. App. LEXIS 11850 (DC Cir. 2002) and *S&F Market Street Healthcare LLC*, 351 NLRB 975 (2007), *enforcement denied in relevant part, S&F Market Street Healthcare LLC v . NLRB*, 570 F.3d 354 (DC Cir. 2009). In *Ridgewell's*, the Board permitted an employer to unilaterally discontinue fringe benefit contributions although it had never announced any change in benefits. The Board found that the employer's announcement that the retained predecessor employees would be independent contractors, while "legally erroneous," somehow implied the loss of fringe benefits and that such implication was a sufficient announcement of changed terms. 334 NLRB at 37. In *S&F Market Street*, the successor, Windsor Convalescent Center, solicited applications from those predecessor nursing home employees whom it had already decided to hire. 351 NLRB 975. During subsequent interviews, it informed the employees that they would serve a 90-day probationary period and not receive "company benefits" during this time. *Id*. at 976. One day before it commenced operations, Windsor issued hire letters stating that other unspecified terms and conditions of employment would be set forth in the company's personnel policies and its employee handbook, which Windsor had not provided. *Id*. The Board found that these statements, particularly the hire letters' general reference to terms and conditions in the handbook that had yet to be provided, were too vague and open-ended to put employees on notice as to the changed terms. *Id.* at 981-82. The District of Columbia Circuit, however, denied enforcement of the Board's order in *S&F Market Street*, relying on *Ridgewell's* to find that the successor employer was permitted under

Spruce Up to make any and all changes it wished to implement based upon these vague statements. *S&F Market Street Healthcare LLC*, 570 F.3d at 359-60, 362.

There is likewise confusion in the case law about whether an employer forfeits its right to set initial terms by merely failing to announce new terms[5], or only forfeits that right when the employer has either misled employees into thinking their terms would not change or promised to honor the predecessor's terms, despite *Spruce Up*'s clear language that the mere failure to announce new terms is sufficient to render an employer a "perfectly clear" successor. 209 NLRB at 195. In *Saks & Co.*, 247 NLRB 1047 (1980), *enforcement denied*, *Saks & Co.*, 634 F.2d 681, 687-88 (2d Cir. 1980), the successor Saks hired the alterations employees previously employed by Gimbels. In concluding that Saks was a "perfectly clear" successor, the Board stressed the lack of any evidence that the employer had announced changed terms before employees commenced work. *Saks & Co.*, 247 NLRB at 1051-52. The Second Circuit denied enforcement, finding that Saks' apparent failure to announce changed terms when it invited employees to apply and interviewed them was an insufficient basis for finding a "perfectly clear" successor bargaining obligation. *Saks & Co.*, 634 F.2d at 687-88. Instead, according to the Second Circuit, a successor employer does not forfeit the right to set initial terms unless it promises the incumbent employees it will maintain the predecessor's terms. *Id.*; *see also Nazareth Reg'l High School*, 549 F.2d at 881 ("The important consideration in determining

[5]In one case, the Board declined to even require any *Spruce Up* announcement. In *United Maint. & Mfg. Co.*, 214 NLRB 529 (1974), the Board held that an employer that offered employment to the predecessor's employees was privileged to set initial terms even though it had neither announced new terms nor misled employees, because it was not clear that the employees would have accepted employment on any terms, as evidenced by the fact that they had been picketing the predecessor over its collective bargaining proposals. 214 NLRB at 529, 536. In other words, the "perfectly clear" successor determination depended not at all on the employer's plans, but entirely on what the Board speculated were the employees' plans, an analysis that, guided by *Spruce Up*, completely inverts the *Burns* "perfectly clear" successor test.

whether it is perfectly clear that a successor intends to retain all of the employees is whether they have all been promised re-employment on the existing terms").

The instant case provides a stark example of how incoherent the "perfectly clear" caveat has become as a result of *Spruce Up*. In *Nexeo*, the Respondent entered into an agreement of purchase and sale ("APS") that obligated it to retain all of the predecessor's employees under terms "substantially comparable in the aggregate" to those provided by the predecessor. *Nexeo*, 2012 NLRB LEXIS 543 at **6-8. Retaining the current workforce was an integral part of the parties' economic deal. Three months later, prior to commencing operations, Respondent announced new terms, including changes to health insurance and the elimination of the employees' pension. *Id*. at **14-24. Noting that "the Board has not consistently applied *Spruce Up* in the literal fashion its language suggests," the ALJ contributed to the confusion in his attempt to apply it here. *Id*. at *42. On the one hand, the ALJ, despite acknowledging that the "APS did not purport to set initial terms," *id.* at *44, nonetheless misconstrues *Spruce Up* to find that Nexeo was not a "perfectly clear" successor because it did not *mislead* the employees: "*Spruce Up* therefore makes clear that . . . there must be at least a finding that a successor employer misled employees into believing their working conditions would remain the same. . . On February 15 and 16 Nexeo gave the Local 70 and Local 705 the promised details in the form of the extremely detailed letters fully described above." *Id*. at *45-46. In the same paragraph, however, the ALJ states that "had Nexeo told employees that they would receive benefits that were 'substantially equivalent' or 'comparable' without a more detailed explanation, it could have been a perfectly clear successor because it would not have sufficiently advised employees of the details of their initial terms," hence conceding that an employer forfeits the right to set initial terms not only by misleading employees, but also where it fails to announce new terms.

Id. at *45 (*citing Elf Atochem North Am.*, 339 NLRB at 796)). Had the ALJ applied the *Burns* test, this lengthy and tortured analysis of whether the employer, via the APS or its subsequent written and verbal communications, clearly announced new terms, or actively or tacitly misled employees, and when those announcements occurred, would have been unnecessary. Instead, the ALJ would have had simply to decide whether Nexeo planned to retain all of the incumbent employees, and as the ALJ found, according to the explicit terms of the APS, it clearly did.

3. ***Canteen* and the Interrupted Reexamination of *Spruce Up***

Only once in this morass, in *Canteen*, has the Board stepped back and considered *Spruce Up*'s restriction of the *Burns* caveat or the policy rationales that were invoked by the majority in *Spruce Up.* In *Canteen*, the Board relied on the employer's statements that it wanted incumbents to apply for work and preliminary discussions with the union about negotiations over a new collective bargaining agreement to find that the employer was a "perfectly clear" successor. 317 NLRB at 1052-53.

Chairman Gould's concurrence correctly called for *Spruce Up*'s reversal, criticizing its legal underpinnings and finding that its purported policy rationales were inconsistent with the Act. *Id.* at 1054-55. Although they did not join in Chairman Gould's call to reverse *Spruce Up*, the members of the plurality in *Canteen* unequivocally rejected the assertion that the "perfectly clear" caveat should "only apply when the new employer has failed to announce initial employment terms prior to, or simultaneous with, the extension of *unconditional offers of hire* to the predecessor employees." *Id.* at 1053 (emphasis in original). However, the plurality failed to identify a clear point in the transition process for determining whether the incoming employer is a "perfectly clear" successor. *Id.*

In enforcing the Board's order in *Canteen*, the Seventh Circuit welcomed the Board's willingness to reexamine *Spruce Up* and consider whether it had improperly restricted the

"perfectly clear" caveat in *Burns*. *Canteen Corp.*, 103 F.3d at 1362. The court emphasized that the perfectly clear successor "mandate in *Burns* must still be observed," and pointedly based its enforcement of the Board's remedial order to rescind the unilateral changes in initial terms, only on *Burns*, not on *Spruce Up*. *Id*.

Despite the clear support for a reexamination of *Spruce Up* from the Seventh Circuit, and Chairman Gould's continued calls for *Spruce Up*'s reversal, *e.g., Planned Bldg. Servs.*, 318 NLRB at 1050 (Gould dissent), *Advanced Stretchforming Int'l Inc.*, 323 NLRB 529, 530 n.7 (1997), *enforced in relevant part*, 233 F.3d 1176 (9th Cir. 2000), until now, the Board has not resumed the examination of *Spruce Up*'s legal merits or policy rationales. Instead, as demonstrated by *S.F. Market Street* and *Ridgewell*'s, the case law under *Spruce Up* has only become more muddled. This devolution underscores the need for the Board to reverse *Spruce Up*, and finally, as the Seventh Circuit urged, give meaning to the "perfectly clear" successor's bargaining obligation and the Court's mandate in *Burns*.

IV. CONCLUSION

For the reasons stated above, the amici AFL-CIO and SEIU respectfully request that the Board overrule *Spruce Up,* and restore the proper balance between employees' Section 7 rights and entrepreneurial freedom that was stuck by the Supreme Court in *Burns*.

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

This is to certify that the Request to File Brief, and Brief of Service Employees International Union and American Federation of Labor - Congress of Industrial Organizations as *Amici Curiae* has been filed electronically with the Office of the Executive Secretary of the National Labor Relations Board on this 22nd day of January 2013, and true and correct copies are being served this day upon the following persons, by electronic mail:

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