

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 34**

PRESSROOM CLEANERS,)	
)	
Charged Party,)	
)	
and)	CASE NO. 34-CA-071823
)	
SERVICE EMPLOYEES)	
INTERNATIONAL UNION,)	
LOCAL 32BJ)	
Charging Party.)	

Exceptions to Board Decision

COMES NOW, Pressroom Cleaners, Inc. (hereinafter "Respondent") and for its Exceptions to the Decision and Order of the National Relations Board and pursuant to the NLRB Rules and Regulations 102.46 and 102.48, states as follows:

1. The Board erred in applying *State Distributing, Co.*, 282 NLRB 1048 (1987). The Supreme Court, in *Phelps Dodge Corp. v NLRB*, 313 U.S. 177, 194 (1941) held that the purpose of remedies under the National Labor Relations Act is to restore the parties, as nearly as possible, to where they would have been absent the unfair labor practice. In 1984, the Supreme Court further emphasized that under Section 10(c) of the NLRA, a "backpay remedy must be sufficiently tailored to expunge the actual, and not merely speculative, consequences of the unfair labor practice." *Sure-Tan, Inc. v NLRB*, 467 U.S. 883, 900 (1984). In accordance with established Supreme Court precedence, the NLRB decided *Planned Building Services*, 347 NLRB 670 (2006). The Board held that a successor employer carried the burden of any uncertainty resulting from its actions. However, the employer had the right to introduce

evidence that might provide “an adequate factual basis” for proving the timely bargaining of wage rates different than those required under the predecessor’s agreement. *Id.* at 676.

2. In this case, the evidence at the trial and evidence which will be entered at the compliance stage would establish two facts:

a. That the Respondent’s bid for the contract at Hartford Courant was made based upon a rate of \$9.00 per hour. (Tr. 347: 3-16). That bid was accepted and Respondent operated at Hartford Courant based on that bid. Sums paid by the predecessor far exceeded what were bid on in Respondent’s contract. The parties would have reached impasse quickly as nothing more could be offered by Respondent. The Respondent would have had to give up the contract (as it did in early 2013) to pay what had been paid by the predecessor. There was no other option for Respondent. The Respondent submitted its bid without knowledge of a collective bargaining agreement with the predecessor. (Tr. 215: 3-14).

b. The contract with the Hartford Courant was abandoned by Respondent in January of 2013. The Respondent is no longer performing janitorial work at that facility.

3. Such evidence is not speculative in nature and reflects the true nature of what would have happened between the parties. Therefore, insisting that the rule implemented in *State Distributing, Co.*, retroactively, in this matter, can be nothing short of punitive in nature. *See, Kallman v. NLRB*, 640 F2d 1094, 1103 (9th Cir. 1981). It also is in direct contradiction to federal circuit court precedence, *See, Id.*; *see also, Capital Cleaning Contractors v NLRB*, 147 F3d 999 (D.C. Circuit 1998).

4. The Board's traditional remedy in cases where a successor, because it has committed unfair labor practices, is not allowed to set initial terms and conditions of

employment is to order restoration of those terms and conditions of employment until a new agreement or impasse has been reached. *State Distributing Co.*, 282 NLRB 1048, 1048 (1987). In *Planned Building Services*, 347 NLRB 670, 676 (2006), the Board modified this remedy acknowledging that some appellate courts have rejected this remedy as punitive. Thus the Board modified the traditional remedy in refusal-to-hire cases to allow the successor employer to present evidence, in a compliance proceeding, that it would not have agreed to the predecessor's terms of employment, as well as evidence of the terms it would have agreed to, and the date it would have either reached agreement with the union or would have bargained to impasse. *Planned Building Services*, 347 NLRB at 675. General Counsel's position that the modified test in *Planned Building Services* should be overruled has already been heard and rejected by the D.C. Circuit Court. In *W & M Properties of Conn., Inc. v. NLRB*, 514 F.3d 1341, 1347 (D.C. Cir. 2008), the Court determined that the "Board provided a reasoned justification" for its decision in *Planned Bldg. Services*, and it refused to "upset [the] new standard." Therefore, General Counsel's misguided argument concerning Judge Fish's application of *Planned Building Services* is moot, not to mention the improper forum.

5. Furthermore, an Administrative Law Judge is required to follow established Board precedent which neither the Board nor the Supreme Court has reversed, notwithstanding contrary decisions by courts of appeals. *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984) (citing *Iowa Beef Packers*, 144 NLRB 615, 616 (1983); *Los Angeles New Hospital*, 244 NLRB 960, 962 fn. 4 (1979), *enfd.* 640 F.2d 1017 (9th Cir. 1981); *Pathmark Stores, Inc.*, 342 NLRB 378 fn. 1 (2004); *accord Healthbridge Mgt., LLC et al.*, 34-CA-12964, 2012 WL 2992088 (N.L.R.B. Div. of Judges July 20, 2012). Since *Planned Building Services* has not been reversed by the Board or the Supreme Court, Judge Fish is bound to follow it even though it *may* be inconsistent with

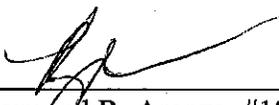
D.C. Circuit law. Therefore, General Counsel's contention that *Planned Building Services* should be overruled must fail.

Respondent respectfully requests that the Board amend its Order consistent with the above.

DATED this 14th day of October, 2014.

PRESSROOM CLEANERS, Respondent

By:



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document, entitled **Respondent's Exceptions to Board Decision**, was served on this 14th day of October, 2014, via electronic mail, on the following parties:

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By:



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