

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.**

In the Matter of

DATA MONITOR SYSTEMS, INC.

and

TEAMSTERS LOCAL UNION NO. 957,
GENERAL TRUCK DRIVERS,
WAREHOUSEMEN, HELPERS, SALES
AND SERVICE AND CASINO
EMPLOYEES

Case 09-CA-145040

**DATA MONITOR SYSTEM'S RESPONSE TO THE
EXCEPTIONS OF THE GENERAL COUNSEL AND THE UNION**

INTRODUCTION

The core question presented in this case is whether Data Monitor Systems had to hire its employees on a newly awarded federal contract purely on the basis of an applicant's seniority with a prior contractor.

Federal law clearly compels the conclusion that the ALJ made below. Controlling federal regulations explicitly provide that DMS was not required to hire the prior contractor's employees on the basis of seniority. The plain language of Executive Order 13495 and its implementing regulations also explicitly provide that DMS was entitled to hire fewer than all of the prior contractor's employees, and that DMS was entitled to determine the criteria upon which it would hire members of the prior contractor's workforce.

In the realm of federal contracting, these regulations refine, and to the extent there may be any inconsistency, supplant the judge and agency made principles of the perfectly clear successor doctrine. Nevertheless, the ALJ correctly concluded that DMS was not a perfectly clear successor under those well-settled legal principles. The perfectly clear successor doctrine applies only if it is perfectly clear that the successor contractor is going to hire all of the prior

contractor's bargaining unit workforce. The undisputed evidence in this case is that DMS made it perfectly clear a number of times prior to hiring its workforce that it was not going to hire all or even nearly all of the prior contractor's bargaining unit employees.

Moreover, the more credible testimony and evidence presented below showed that DMS made it perfectly clear throughout the process that it was not going to hire on the basis of seniority. The ALJ therefore correctly concluded that DMS lawfully hired its workforce on the basis of DMS's own assessment of the overall merit and qualifications of the applicants.

The General Counsel's and Union's exceptions are based upon a process of adopting a fundamental logical fallacy, and then ignoring all the evidence that does not fit that fallacy. Their appeal is based upon contradicting the plain meaning of words and declaring that a job application is inherently a job offer. Their appeal is also based on the premise that this Board should blindly adopt their witnesses' side of the story and completely ignore significant testimony and documentary evidence that DMS presented. In asking the Board to adopt this premise, the Union and General Counsel are also asking the Board to completely reject the well-settled principle that it is the function of the ALJ to make credibility determinations and resolve conflicts in the evidence. Their exceptions directly contradict clear regulations, binding legal precedent, and well-settled principles of adjudicating legal disputes. As such, this Board must reject their exceptions and adopt the recommendations of the Administrative Law Judge.

FACTS

DMS thoroughly summarized the facts in its closing trial brief to the ALJ. In his opinion, the ALJ also thoroughly and accurately recounted and analyzed the evidence presented below. DMS is hereby adopting and referring the Board to those filings, and would merely point out some key facts to familiarize the Board with the evidence.

DMS is a successor contractor to WSI All Star, LLC, on contracts for various services provided to the United States Air Force at Wright Patterson Air Force Base in Ohio. Prior to hiring its workforce, DMS received a list of incumbent WSI employees and their relative seniority from the federal government. *See* Respondent's Exhibit 1; document bates stamped DMS 001011; Trial Transcript, John Sook testimony, pp. 280, 282, 293.

Based on this list and its analysis of the requirements of the contract, it became apparent to DMS management that WSI had more incumbent employees than DMS could hire within the parameters of its successful bid. DMS thus made the decision that it would hire fewer employees than WSI had employed under the prior contract. *See* Trial Transcript, John Sook testimony, pp. 292-93, 337.

From August 6-8, 2014, DMS management interviewed all existing WSI workers who had completed and submitted applications. According to both the WSI employees and DMS management, DMS management informed WSI applicants at the end of each interview that DMS would get back to them via mail about whether DMS would or would not offer the applicant a job. *See* Trial Transcript, John Sook testimony, pp. 297-98, 343; James Gustafson testimony, pp. 368-69; Debra Nichols testimony, p. 143; Michael Harden testimony, pp. 164, 176; James Williams testimony, pp. 193-94; James Beaver testimony, pp. 224, 228; Thomas Franjesevic testimony, pp. 244, 249.

Prior to hiring anyone, DMS Management met with Union business representative Don Minton in Ohio. It was undisputed below that during the course of this meeting, DMS owner James Gustafson told Minton that DMS was "not going to hire the same number of people that are there now." The evidence was disputed as to what extent seniority was discussed, but DMS management testified that Gustafson explicitly told Minton DMS would not be hiring on the

basis of seniority. See Trial Transcript, Donald Minton testimony, p. 27; John Sook testimony, pp. 300-302; James Gustafson testimony, pp. 369-371.

DMS did in fact decline to make employment offers on the basis of seniority. The WSI employees who had received offers all accepted them between August 18 and August 21, 2014. See Respondent's Exhibit 3; Trial Transcript, John Sook testimony, p. 312; James Gustafson testimony, p. 374.

On Friday afternoon, August 29, 2014, Gustafson and Minton signed a bridge agreement letter. The letter provided that “[e]ffective as of the date of the *last signature below*, the parties will adhere to all the terms and conditions of the current Wright Patterson Air Force Base Collective Bargaining Agreements between WSI All Star LLC and Teamsters Local Union No. 957, and agree to an extension period of six (6) months ending March 31, 2015.” The letter further provided that “[n]othing in this letter shall be construed to *retroactively bind* Data Monitor Systems, Inc. to the terms and conditions of the current Collective Bargaining Agreements.” See GC Exhibit 3A, document bates stamped DMS 000383.

ARGUMENT AND AUTHORITY

PROPOSITION I

FEDERAL REGULATIONS GAVE DMS THE DISCRETION TO HIRE FORMER WSI EMPLOYEES ON THE BASIS OF CRITERIA OTHER THAN SENIORITY

A. The General Counsel's and Union's Positions Are Inconsistent With Explicit, Binding Federal Regulations On Government Contracting.

The ALJ was correct to reason that whether DMS complied with Executive Order 13495 and its implementing regulations is a matter for the United States Department of Labor, and not the NLRB, to decide. The point DMS has made about federal regulations is that there is a set of clear, binding DOL and Federal Acquisition Regulations (FAR) which govern the precise issues

presented in this case.¹ Those regulations are consistent with, and in the context of federal government contracting, refine federal legal precedent on the perfectly clear successor doctrine. The Union and General Counsel are, however, urging the NLRB to adopt a new version of the perfectly clear successor doctrine completely at odds with these regulations.

B. Federal Regulations Explicitly Provide That Seniority Provisions In A Predecessor Contractor’s CBA Are Not Binding On A Successor Government Contractor.

DOL Regulations explicitly govern the question of what provisions a successor contractor does and does not have to follow in a predecessor contractor’s Collective Bargaining Agreement. Specifically, the regulations implementing Section 4(a) of the Service Contract Act require a successor contractor on substantially the same federal contract to “pay wages and fringe benefits at least equal to those contained in any bona fide collective bargaining agreement entered into under the predecessor contract.” *See* 29 C.F.R. § 4.163(a); FAR § 22.1002–3(a). However, the same DOL regulation explicitly states that the “obligation of the successor contractor is *limited* to the wage and fringe benefit requirements of the predecessor's collective bargaining agreement and *does not extend* to other items such as *seniority*, grievance procedures, work rules, overtime, etc.” *See* 29 C.F.R. § 4.163(a) (emphasis added).

This DOL regulation is explicitly incorporated into the FAR, which provide that “the Secretary of Labor is authorized and directed to enforce the provisions of the [Service Contract] Act, make rules and regulations, issue orders, hold hearings, make decisions, and take other

¹ The authority to promulgate the FAR resides with the Secretary of Defense, the Administrator of General Services, and the Administrator of the NASA, subject to the approval of the Administrator of Federal Procurement Policy. *See* 41 U.S.C. § 1303; 48 CFR § 1.103; *see also* <http://www.gsa.gov/portal/content/101126>. The FAR are issued through the coordinated action of the Defense Acquisition Regulations Council and the Civilian Agency Acquisition Council. *See* 48 CFR § 1.201-1. Here, the DMS contract is “with” the Department of Defense.

appropriate action.” *See* 48 CFR § 22.1004. Subsection (d) of this FAR explicitly incorporates 29 C.F.R. Part 4, Subpart D, which is where § 4.163(a) is codified. *See* 48 CFR § 22.1004(d).

Thus, in reliance upon explicit DOL and Federal Acquisition regulations, DMS did exactly what it was both required and allowed to do. DMS offered all the bargaining unit workers it decided to hire the same compensation and benefit packages as those set forth in the old WSI CBA’s. However, federal regulations explicitly relieved DMS from having to abide by the seniority provisions of the old WSI CBA’s. Federal Regulations completely resolve the fundamental issue presented in this case, and they resolve it in a manner that compels a conclusion in favor of DMS.

C. Executive Order 13495 Does Not Provide Support For The Union’s And General Counsel’s Position.

Consistent with the ALJ’s opinion, DMS has emphasized that the issue of Executive Order 13495 compliance is for the DOL, and not the NLRB, to decide. *See* 29 C.F.R. § 9.21 *et seq.* (DOL tasked with enforcing EO 13495). While the Executive Order does permeate the process of transitioning rank and file employment on a federal contract from a predecessor contractor to a successor contractor, it does so in a way exactly the opposite of what the Union and General Counsel are advocating. Most federal service contracts must now contain a clause with the following text:

Consistent with the efficient performance of this contract, the contractor and its subcontractors shall, except as otherwise provided herein, in good faith offer those employees (other than managerial and supervisory employees) employed under the predecessor contract whose employment will be terminated as a result of award of this contract or the expiration of the contract under which the employees were hired, a right of first refusal of employment under this contract in positions for which employees are qualified. The contractor and its subcontractors shall determine the number of employees necessary for efficient performance of this contract and may elect to employ fewer employees than the predecessor contractor employed in connection with performance of the work.

See Executive Order 13495 of January 30, 2009, Section 5(a).

Thus, the Executive Order clearly allows the successor contractor to decide how many employees are needed for the contract, and the right to hire fewer than all of the predecessor contractor's employees. As the implementing DOL regulations state, "the successor contractor need not offer employment on the contract to all employees on the predecessor contract, but must offer employment only to the number of eligible employees the successor contractor believes necessary to meet its anticipated staffing pattern." 29 C.F.R. § 9.12(d)(1).

Consistent with its other regulations and the FAR on the subject, the DOL regulations on EO 13495 also clearly provide that the successor contractor has the discretion to determine *which* of those fewer employees will get an offer of employment. Specifically, the regulations state: "*Contractor determines which employees.* The contractor, subject to provisions of this part and other applicable restrictions (including non-discrimination laws and regulations), will determine to which employees it will offer employment. *See § 9.1(b) regarding compliance with other requirements.*" 29 C.F.R. § 9.12(d)(2) (emphasis in original).

Given that other DOL regulations explicitly provide that a successor federal contractor does *not* have to follow the seniority provisions of a predecessor contractor's CBA, a successor's choice not to use seniority in hiring cannot possibly be a violation of some "other applicable restrictions" on making job offers. Successor contractors are allowed to hire less than the entirety of the prior contractor's workforce, and the successor contractor does not have to choose whom it will hire on the basis of seniority.

Moreover, the Department of Labor's comment on the regulations reveals that consistent with the plain language of the regulation, the focus of the "subject to provisions of this part and other applicable restrictions" language of § 9.12(d)(2) is to make sure that the successor contractor does not hire in a discriminatory manner or otherwise in violation of an actual

provision of substantive federal law. The DOL comments state that “[c]onsistent with proposed § 9.1(b), this exception should not be construed to permit a contractor or subcontractor to fail to comply with any provision of any Executive Order, regulation, or law of the United States; therefore, a contractor could not use this exemption to justify unlawful discrimination against any worker.” *See* Federal Register Vol. 76, No. 167, p. 53739 (Monday, August 29, 2011); *see also* 29 C.F.R. § 9.1(b).

Thus, as long as the successor contractor is not unlawfully discriminating or violating some other substantive provision of actual, existing federal law, it is up to the successor contractor to supply the criteria for choosing which predecessor contractor employees it will hire. The “subject to” clause is not a general grant of *carte blanche* to a court or agency to graft additional “legal” restrictions on a contractor’s discretion according to some particular perspective of what is “moral” or “fair.” Indeed, as DMS has already shown, the controlling FAR and DOL regulations have already expressly rejected the seniority restriction that the Union and the General Counsel are trying to impose in this case.

In the realm of federal government contract law, the issues of what terms and conditions the successor contractor must adopt from the prior contractor’s CBA have been answered by regulation. The general common law doctrine of the “perfectly clear successor” has either been refined or supplanted by these regulations. There is no longer any need for an agency or court to make some kind of painstaking, tortured analysis about whether certain facts and circumstances require a successor contractor to follow certain parts of a prior contractor’s CBA. This kind of analysis may still have its place in the realm of private sector labor relations, but in the realm of federal contracting, federal regulations now supply the legal rules and tools of analysis that may have once been left up to the courts and this Board to supply.

In this case, DMS followed all applicable laws, executive orders, and regulations to the letter. DMS exercised its right to hire fewer than all of WSI's incumbent employees. In the case of bargaining unit positions, DMS made offers only to applicants who were incumbent WSI employees. In the case of bargaining unit employees who received offers of employment, those offers were extended on wage and fringe benefit terms equivalent to those set forth in the WSI CBA's. There is no evidence whatsoever that DMS violated any relevant federal regulation in its initial hiring decisions. DMS did not agree to be bound by the WSI CBA's until after it had finished its initial hiring decisions, and it is thus federal regulations, and not the WSI CBA seniority provisions, which governed DMS's hiring decisions in this case.

Above all, the regulations do not empower a court or agency to adopt some new version of a judge-made doctrine that actually contradicts the well-settled version, and then impose the contradictory new version on a federal contractor who indisputably relied upon and followed controlling federal regulations to the letter. As DMS pointed out to the ALJ below, the analysis should really stop right here. Nevertheless, as DMS also demonstrated below, DMS is not a perfectly clear successor under either federal judicial or NLRB precedent.

PROPOSITION II

THE PERFECTLY CLEAR SUCCESSOR DOCTRINE DID NOT REQUIRE DMS TO HIRE EMPLOYEES ON THE BASIS OF THEIR SENIORITY WITH WSI

A. DMS Made It Perfectly Clear That It Would Not Hire All Of WSI's Employees, And That DMS Would Not Hire On The Basis Of Seniority.

The perfectly clear successor doctrine is a very narrow one that is rarely to be applied to a successor union employer. The general rule giving rise to the perfectly clear successor doctrine merely provides that when one employer is a successor entity to a prior employer, the successor employer must recognize the union and bargain in good faith with it. The United States Supreme Court, federal circuit courts, and the NLRB have repeatedly made it clear, however, that the

successor employer is free to set its own initial terms and conditions of employment, including the initial hiring of employees, unless it is “perfectly clear” that the successor employer plans to retain *all* of the employees in the bargaining unit. See *NLRB v. Burns International Security Services*, 406 U.S. 272, 294-95; 92 S. Ct. 1571, 32 L.Ed.2d 61 (1972); *S & F Market Street Healthcare LLC v. NLRB*, 570 F.3d 354, (D.C. Cir. 2009); *NLRB v. Advanced Stretchforming Intern., Inc.*, 233 F.3d 1176 (9th Cir. 2000); *Spruce Up Corp.*, 209 NLRB 194 (1974), *enfd. per curiam*, 529 F.2d 516 (4th Cir. 1975).

The doctrine does not apply if one could merely observe some confusion or debate about the point. There is a reason why the term “perfectly clear successor” is used rather than simply “successor,” “possible successor,” “maybe clear successor,” “somewhat likely successor,” or even “probably clear successor.” The phrase “perfectly clear successor” is a phrase that employs the three words in their ordinary, logical meaning.

As set forth above, federal regulations passed since the older days of *Burns* and *Spruce Up* explicitly govern what a successor contractor such as DMS can and cannot do in its initial hiring.² However, DMS was not a perfectly clear successor to WSI even under the well-settled, traditional analysis of *Burns*, *Spruce Up*, and their progeny. A number of undisputed facts mandate this conclusion. The Union and the WSI employees knew well before the hires were made that DMS was not going to hire all of the WSI employees. This is once again a place where the analysis should end. The core tenet of the perfectly clear successor doctrine is that the successor employer is not bound by the terms and conditions of the predecessor employer unless the successor employer makes it perfectly clear that the employer is going to hire all of predecessor’s employees.

² Aside from being factually inapposite or actually supporting DMS, the ultimate problem with all of the cases the General Counsel and Union are relying upon is that they are private sector cases, not federal contracting cases.

In this case, it is undisputed that DMS did exactly the opposite. DMS made it perfectly clear that it would **not** be hiring all of the WSI employees. This was not a disputed fact below. Union representative Donald Minton expressly acknowledged this at the hearing before the ALJ. Moreover, DMS management and the former WSI employee witnesses agreed that at the end of each employee interview, DMS management specifically told WSI applicants that DMS would get back to them about whether they were going to be hired or not.

There was, of course, a dispute at trial over the extent of discussions about seniority hiring at the initial meeting between Don Minton and DMS management. DMS owner James Gustafson and Vice President John Sook both testified that Gustafson explicitly told Minton that DMS would not be hiring on the basis of seniority. On the other hand, Minton claimed DMS management did not say anything about whether DMS was or was not going to hire by seniority. The question of who was credible on this disputed point was a factual one for the ALJ in the first instance, and not the Board sitting as a reviewing body. Moreover, as the ALJ correctly reasoned, because it was undisputed that Gustafson informed Minton that DMS would not be hiring all of WSI's employees, the question of whether Gustafson also said DMS would not be hiring on the basis of seniority was not really material.

Nevertheless, DMS would point out that Minton's testimony was not particularly credible in light of the other things Minton admits did happen. Even by Minton's own account, Gustafson stated that DMS would not be hiring all of WSI's employees, and Minton responded that several of those employees had recently been brought back from layoff on a seniority basis. Thus, according to Minton, he came right to the brink of talking about whether DMS would hire by seniority, but then for some reason stopped in his tracks. He claims that the subject of the obvious elephant in the room was brought up to some extent, but implausibly denies that the

discussion continued to follow the more natural course that Gustafson and Sook more plausibly recounted.

Lastly, it is undisputed that DMS and the Union knowingly negotiated a bridge agreement which stipulated that DMS would be bound by the WSI CBA's only after DMS had finished making its initial hiring decisions. DMS and the Union thus literally bargained away any notion that DMS would have been obliged to hire on the basis of seniority. Thus, it is perfectly clear under the law and the facts of this case that DMS was not bound by the seniority terms of the collective bargaining agreement at the time DMS hired its workforce.

B. The General Counsel's Position Is Contrary To Legal Precedent And Logic.

The General Counsel's position is positively Orwellian. To make its theory of the case actually fit legal precedent, the General Counsel has to ignore logic and the ordinary meaning of words. Specifically, the General Counsel has to assert that an application for employment is the same thing as an offer for employment. This of course allows the General Counsel to conveniently assert that perfectly clear successor status is set in stone for all eternity at the point of merely handing out of job applications. According to this assertion, nothing the employer does at any other point in the hiring process matters one bit.

There is no support in NLRB, federal circuit, or Supreme Court precedent for this position. That is because it makes no sense at all. An application for employment is not an offer of employment. To the contrary, any ordinary, reasonable person with any experience in the job market knows that an application is nothing more than one of the preliminary, provisional steps involved in seeking a job. A candidate for a job fills out an application to show a prospective employer that the candidate is interested and qualified. The employer then evaluates the

application and other information as part of the process of deciding whether or *not* to hire the employee.

The ALJ below did not abandon his common sense or legal precedent. He realized that most of the WSI applicants had exactly the same kind of common sense that most people in the job market have. The WSI employees knew that what DMS provided them initially were job applications, not job offers. The applications were not perfunctory documents; they requested a very thorough amount of information about the applicants. The applicants did not treat the application process as perfunctory; most of them filled out the information thoroughly and exhaustively. Most of the applicant witnesses also provided thorough, meaningfully updated resumes in support of their applications, and some of them even provided certificates documenting their special qualifications. It was very obvious that neither prospective employee nor prospective employer equated the applications with job offers. *See* GC Exhibit 4(a), esp. application packets of Roxanne James, documents bates-stamped DMS 000288-000295.

The ALJ also correctly concluded that even if an employee had professed to equate a job application with a job offer, that assumption would not have made DMS a “perfectly clear” successor. Once again, the ordinary meaning of words as the federal courts and the Board have used them bears reminding here. From *Burns* to present day precedent, the courts and the Board have consistently made it perfectly clear that a perfectly clear successor is one who, through its own actual words and deeds, makes it “perfectly clear” that it is going to hire all of the predecessor contractor’s employees. Perfectly clear successor status is not determined by the unilateral hiring practices of prior contractors, nor is it established by the unilaterally professed assumptions of a few of the applicants.

The General Counsel is doing nothing more than cherry picking its version of a choice few facts that fits its liking. The General Counsel then declares “look, at this particularly early point in time DMS had not explicitly told all of the employees or the Union that DMS would not be hiring all of the WSI employees. Therefore, DMS was irretrievably bound from that point forward to hire what employees it did hire on the basis of seniority.”

The legal precedent has never followed a path anything like this. To the contrary, the court in *Burns*, the federal circuit courts, and this Board have wisely and logically chosen to analyze the entire circumstances of the transition and hiring process to determine whether it is perfectly clear that a successor contractor would hire all of the predecessor’s employees. *E.g., S & F Market Street Healthcare LLC v. N.L.R.B.*, 570 F.3d 354 (D.C. Cir. 2009) (reversing Board decision that successor employer had an obligation to inform predecessor employees of changes in terms and conditions prior to taking over enterprise). A proper analysis of the entire facts and circumstances reveals that DMS made it perfectly clear that it would *not* be hiring all of WSI’s employees, and DMS was therefore not a perfectly clear successor to WSI.

C. The Union’s Position Is Equally Untenable And Contrary To Precedent.

In addition to repeating the “application equals offer” fallacy of the General Counsel, the Union makes even more remarkably untenable assertions. The Union variously seems to argue that perfectly clear successor status is a shifting one that could apply if a successor hires a majority, maybe just some, or even just one of the predecessor’s bargaining unit employees. *See* Union Exceptions Brief, pp. 8-12. This is the very definition of “perfectly unclear.” The Union seems to settle on a majority hiring standard when it comes to the interplay between Executive Order 13495 and the perfectly clear successor doctrine, but even this directly contradicts federal regulations and binding precedent.

The Union's path to getting the Board to adopt this shifting, uncertain standard is the often advocated, but never adopted, plea to overrule *Spruce Up*. The Union fails to point out, however, that the basic mandate of the perfectly clear successor doctrine was the mandate not of the Board in *Spruce Up*, but of the United States Supreme Court in *Burns*. The Union is thus really asking the Board to "overrule" a United States Supreme Court case – something the Board cannot do. The Union's argument is one for the Supreme Court or Congress, not for this Board.

The Union also spends a great deal of effort attempting to discredit Jim Gustafson's testimony. Aside from missing the point that credibility determinations upon conflicting evidence are for the ALJ in the first instance, the Union's effort conspicuously ignores important evidence that supports Gustafson's credibility.

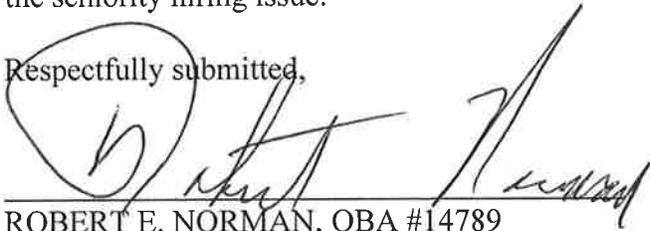
The Union accuses Gustafson of "inventing" testimony at the last minute about informing the Union and WSI employees of DMS's intent not to hire on the basis of seniority. The Union places particular emphasis on this being so in the case of Gustafson's interview of Dorothy Washington. The Union fails to point out, however, that Gustafson's notes of his interview with Washington show that he explicitly documented the seniority discussion with Washington shortly after the interview, and did so in a manner consistent with his testimony. Significantly, Gustafson's documentation of Washington's side of the conversation is quite consistent with both Gustafson's and Washington's testimony. See GC Exhibit 4(a), DMS 000319; Trial Transcript, James Gustafson testimony, pp. 367-68; Dorothy Washington testimony, p. 118. As in the case of Gustafson's initial conversation with Minton, the ALJ was perfectly within his discretion to conclude that Gustafson documented and recounted his interview with Washington in a way that accurately reflected the natural course of how the conversation would have actually transpired.

In the final analysis, the Union, like the General Counsel, is asking the Board to simply ignore a wealth of evidence that does not fit its theory. When this is coupled with the fact that the Union's and General Counsel's theory is contrary to clear, well-settled federal law, it becomes clear that there is no merit to either of their exceptions. There is no basis in either law or fact for the Board to reverse the conclusions of the Administrative Law Judge.

CONCLUSION

Whether viewed from the standpoint of federal regulations or the perfectly clear successor doctrine, the ALJ got it right. The law clearly provides that DMS had the right to hire fewer than all of WSI's employees on the basis of merit rather than seniority. The facts clearly show that DMS made it perfectly clear prior to hiring anyone that it was going to exercise those legal rights. Data Monitor Systems therefore respectfully requests that the Board adopt the recommendations of the ALJ in their entirety on the seniority hiring issue.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of March, 2016, a true and correct copy of the above and foregoing was emailed and/or mailed to the following as indicated:

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