

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

DATA MONITOR SYSTEMS, INC.	:	
	:	
Respondent,	:	
	:	
and	:	CASE NO. 09-CA-145040
	:	
TEAMSTERS LOCAL UNION NO. 957,	:	
GENERAL TRUCK DRIVERS,	:	
WAREHOUSEMEN, HELPERS, SALES	:	
AND SERVICE AND CASINO	:	
EMPLOYEES	:	
	:	
Charging Party	:	

**REPLY BRIEF OF TEAMSTERS LOCAL UNION NO. 957,  
GENERAL TRUCK DRIVERS, WAREHOUSEMEN, HELPERS,  
SALES AND SERVICE AND CASINO EMPLOYEES IN SUPPORT OF  
EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

Charging Party Teamsters Local Union No. 957 (“the Union”) files its Reply Brief in this matter to the Response of Respondent Data Monitor Systems, Inc. (“Respondent”) filed on March 8, 2016. Charging Party is compelled to respond to several legal and factual assertions of Respondent. Respondent’s position evinces a fundamental misapprehension of the Board’s role in interpreting and enforcing provisions of the National Labor Relations Act. Respondent’s entire argument essentially rests on the proposition that the Department of Labor’s (“DOL”) regulations as well as Executive Order 13495 supersede or preempt the Board’s interpretation and application of the Act. Respondent takes this position notwithstanding the clear directive and the comments to the implementing regulations stating that they should not be construed in a

manner that allows a contractor or a subcontractor to not comply with any provision of any executive order, regulation, or law of the United States. Because Respondent made its workforce retention decisions with regard to employees of WSI in violation of federal law, Sections 8(a)(1) and 8(a)(5) of the Act, these arguments must be rejected.

**I. ARGUMENT**

**A. Executive Order 13495 and Implementing Regulations do not Supplant or Otherwise Supersede Federal Labor Law as Interpreted and Enforced by the Board.**

Respondent's arguments that it was not required to comply with federal labor law because of the existence of Executive Order 13495 and other DOL implementing regulations is unavailing. Respondent fails to adequately explain how these regulations and Executive Order 13495 excuse its failure to comply with its obligations as a perfectly clear successor under established Board law. The DOL and Federal Acquisition Regulations ("FAR") do not support Respondent's position with regard to hiring by seniority as required by a predecessor employer's collective bargaining agreement, and in fact support the opposite conclusion. Respondent specifically overlooks FAR § 22.1204(a) entitled "Certified service employee lists." That section reads in part:

Not less than thirty days before completion of the contract, the predecessor contractor is required to furnish the contracting officer a certified list of the names of all service employees working under the contract and its subcontracts at the time the list is submitted. The certified list must also contain anniversary dates of employment of each service employee under the contract and subcontracts for services.

FAR § 22.1204(a). The regulations cited by Respondent reference seniority in several places, a curious inclusion if these regulations in fact allow successor contractors to freely ignore seniority in its workforce decisions. 29 C.F.R. § 9.12(e)(1) specifically states that "the contractor shall,

not less than thirty (30) days before completion of the contractor's performance of services on a contract, furnish the Contracting Officer with a list of the names of all service employees working under the contract and its subcontracts at the time the list is submitted. The list shall also contain anniversary dates of employment of each service employee under the contract and its predecessor contracts with either the current or predecessor contractors or their subcontractors." The sections of the regulations cited by Respondent specifically require anniversary dates for each service employee to be provided to the contractor prior to beginning the contract. Perhaps not surprisingly, Respondent submits no reasoning for the regulations to specifically include the anniversary dates requirement if in fact contractors are able to wholly disregard that information in hiring decisions.

Respondent's position that it did not have to consider seniority of WSI employees flies in the face of the administrative decision to require anniversary dates for each service employee working under the predecessor contract to be provided to future contractors. Respondent actually received the WSI seniority list from the contracting officer. (Tr. 337) Far from Respondent's claim that these regulations "expressly rejected" the principle of seniority, they expressly include it.

Respondent points to nowhere in the documented exhibits that supports the assertion that it had made perfectly clear to WSI employees or Charging Party that it would not be retaining all of the employees in the bargaining unit. It is undisputed that Respondent sought to employ not simply a majority of its workforce but its entire workforce from prior WSI employees. (Tr. 197) Contrary to Respondent's position, finding that Respondent is a "perfectly clear" successor is entirely consistent with both Supreme Court precedent and Board law.

**1. The Administrative Law Judge failed to address and properly consider significant testimony from WSI employees and Charging Party that they were not advised of any changes that would be made to terms and conditions of employment. (Tr. 89, 142, 170, 193, 244).**

Although the ALJ's credibility determinations supported James Gustafson in his description of the discussion with Charging Party business representative Don Minton regarding hiring by seniority, several factors warrant reversing this credibility determination. First, if Respondent made it a priority in every awarded contract to advise the former employees that it would not hire by seniority, one might expect to find evidence of the alleged discussion between Minton and Respondent in any of the email responses to Don Minton, or any of the grievance responses addressing the failure to hire by seniority. In several communications over a period of weeks, from emails to Charging Party's representative to the grievance responses, this discussion with Minton regarding not hiring by seniority was not referenced or expressed once to Charging Party.

Close examination of the exhibits in this case reveals not a single instance where Respondent advised Charging Party that it would not be hiring based on seniority, nor refers to any notification to Minton or Charging Party in the past. The August 19-21 emails between Minton and Gustafson do not raise the matter. (GC Ex. 3(a)) In the early September emails between Minton and Frank Anderson after the decision not to retain senior employees, Respondent does not raise the position. (GC Ex. 5(a)) Most tellingly, in the September 22, 2014 grievance responses themselves, no such discussion between Minton and Respondent is so much as referenced. (GC Ex. 5(c); 5(e); 5(g); 5(i))

Seemingly aware of its tenuous position on this point, Respondent cites the "bridge agreement" entered into by the parties as evidence that it was not bound to observe the accrued

seniority of WSI employees. (Response, p. 4) However the bridge agreement, signed on August 29, 2014, does not shield Respondent from its obligation as a successor employer, one which was aware that it had to make an offer of first refusal to all of the predecessor employer's employees before hiring any other persons not so protected, beginning in early August when it began seeking applications from every WSI employee. For the Union to have waived on August 29-the date the bridge agreement was signed by both parties-Respondent's obligations as a perfectly clear successor, which attached long before August 29, there must be evidence that the Union "fully discussed and consciously explored" the issue with Respondent which resulted in a clear and unmistakable waiver. Allied Signal, Inc., 330 NLRB 1216 (2000). There is no such evidence here, and in fact the parties did not discuss the meaning or the import of the bridge agreement provision that Respondent claims insulates it from its perfectly clear successor obligations.

Once the obligation of being a perfectly clear successor attached, at the latest when Respondent sought applications from all of the incumbent employees of WSI to whom it had an obligation to offer a right of first refusal, Respondent could no longer make unilateral changes to any terms and conditions of employment, including seniority.

**B. Even assuming that Respondent advised Charging Party it would not retain every WSI employee, it is still a "perfectly clear" successor under Burns.**

Respondent's arguments, and the ALJ's decision, can be reduced to a simple proposition: because Respondent advised the Union that it would not hire every single WSI employee, it gained the right to unilaterally set initial terms and conditions. It argues that this is so even when the only evidence of communication to WSI employees that there would be changes to terms and conditions is a disputed exchange during the interview of a single employee.

The obligation and the status as a perfectly clear successor plainly attached in this case when Respondent sought applications from the incumbent WSI employees. Some of the applicants did not even submit a resume with their application, strong evidence that the employees understood the hiring was going to be done by seniority as it had been done in the past. (Tr. 250) Some WSI employees received the applications the same day of their interviews. (Tr. 186, 189, 236)

While Respondent cites the District of Columbia Circuit's decision in S & F Market Street Health Care, LLC v. NLRB, 570 F.3d 354 (D.C. Cir. 2009), the Board has not reversed its position in its decision in that case. Windsor Convalescent of North Long Beach, 351 NLRB 975 (2007). A Board majority in that case disagreed with the ALJ's conclusion that informing applicants that they would be employed in a temporary or probationary status should have indicated to them that their terms and conditions of employment would change making the new employer not a perfectly clear successor. Similarly, even had Respondent informed applicants that it would be hiring less than every WSI employee, such information would have been insufficient to dispense with the obligation to maintain the predecessor employer's terms and conditions. The Board majority in Windsor Convalescent explicitly recognized that every single employee of the predecessor may not be retained, but that other factors may compel a finding of "perfectly clear" status.

Those factors are present here. Executive Order 13495 gave WSI employees an entirely reasonable expectation that they would be offered a right of first refusal with Respondent, and that the offer of first refusal would be done based on those employees' anniversary dates of hire that must be provided to the new contractor, and as set forth in the collective bargaining agreement of the predecessor employer. Respondent did nothing to diminish that expectation.

Respondent failed to announce any changes to terms and conditions of employment when it first learned of its award of the government contract at Wright Patterson Air Force Base. Respondent failed to announce any changes to terms and conditions of employment when it was first contacted by Mr. Minton to schedule dates for negotiations. Respondent failed to announce any changes to terms and conditions of employment when sought job applications through WSI from every WSI employee. Finally, Respondent failed to announce any changes to terms and conditions of employment within the job application packets it provided WSI to distribute to every WSI employee. Even had Respondent attempted to impose a probationary period for the WSI employees that continued with Respondent, under Windsor Convalescent, such action would still be insufficient to avoid its status as a perfectly clear successor.

The record is devoid of evidence significant enough for Respondent to be relieved of its obligation to maintain the same terms and conditions existing under the predecessor employer's collective bargaining agreement. The overwhelming evidence established that WSI employees had no reason to believe that Respondent would disregard accumulated seniority in hiring decisions. Even in prior transitions where new contractors solicited applications, unrefuted testimony established "you knew that a hundred percent that you were just going to carry on with the new contractor" and that the hiring was always done by seniority. (Tr. 183) Even if the Board should decline to overturn its decision in Spruce Up Corp., 209 NLRB 194 (1974), because Respondent did not clearly indicate it would be changing terms and conditions of employment to WSI employee-applicants, it was obligated to bargain as a perfectly clear successor prior to implementing changes to terms and conditions and laying off 11 senior employees under N.L.R.B. v. Burns International Security Servs., 406 U.S. 272 (1972).

## II. CONCLUSION

Under existing Board precedent, Respondent became a perfectly clear successor when it solicited job applications from all of the WSI workforce without announcing changes to their terms and conditions of employment. As such, it was required to bargain with Charging Party prior to setting initial terms and conditions of employment, and violated the Act when it hired the former WSI employees without following the seniority provisions in the existing collective bargaining agreement. Charging Party requests the Board reject the findings of the ALJ and hold that Respondent is a perfectly clear successor under Burns and Spruce Up which violated Sections 8(a)(1) and (5) of the Act when it failed to use seniority provisions and/or unilaterally changed seniority provisions prior to bargaining those changes with Charging Party. Charging Party respectfully requests the Board issue an appropriate remedy to address the violation.

Respectfully submitted,

**DOLL, JANSEN & FORD**

  
John R. Doll  
11 W. First St., Suite 1100  
Dayton, Ohio 45402-1156  
(937) 461-5310  
(937) 461-7219 (fax)  
jdoll@djflawfirm.com

Attorney for Local 957

## CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Reply Brief was served upon Counsel for the Respondent, Robert E. Norman, Esq. (rnorman@cheekfalcone.com), and Counsel for the General Counsel by electronic mail on this 22nd day of March, 2016.