Oral Argument Not Yet Scheduled

No. 16-60715

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CREATIVE VISION RESOURCES, LLC
Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD
Respondent/Cross-Petitioner

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

RESPONSE TO PETITION FOR REHEARING EN BANC

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On September 25, 2017, a panel of the Court (Judges King, Prado, and Southwick) enforced an Order of the National Labor Relations Board against Creative Vision Resources. *Creative Vision Resources, L.L.C. v. NLRB*, 872 F.3d 274 (5th Cir. 2017), *enforcing* 364 NLRB No. 91, 2016 WL 4524111. The Board found that Creative violated the National Labor Relations Act by refusing to bargain over initial employment terms after Creative made it "perfectly clear" that it intended to retain its predecessor's employees without announcing changed terms. *Creative*, 2016 WL 4524111, at *1. Creative filed a petition for rehearing *en banc*, and the Court directed the Board to respond.

The panel correctly applied Board and court law concerning perfectly clear successors. Creative offers no grounds for the extraordinary and disfavored step of *en banc* review. 5th Cir. R. 35.1. Creative's repeated protests that the panel decision conflicts with Supreme Court and in-circuit precedent misrepresent both the prevailing law and the facts of this case. Accordingly, its petition should be denied.

STATEMENT OF THE CASE

1. Prior to 2011, employer Berry III supplied Richard's Disposal, a waste disposal company, with "hoppers"—workers who ride on garbage trucks and empty trash cans. Local 100, United Labor Unions, represented the hoppers.

Berry III paid the hoppers a flat daily rate of $103 and did not deduct taxes or Social Security. *Creative*, 872 F.3d at 277.

Alvin Richard III, vice president of Richard's Disposal, established Creative to provide hoppers to Richard's Disposal instead of Berry III. Between mid-May and June 1, 2011, Richard distributed employment applications and tax withholding forms to Berry III employees. *Id*. To be hired, the hoppers only had to return the completed documents. *Id*. at 278. Richard personally gave applications and forms to about 20 hoppers, explaining that, unlike Berry III's flat daily rate, Creative would pay $11/hour, plus overtime, and make required deductions. Per Richard's request, hopper Eldridge Flagge distributed applications and forms to about 50 hoppers. *Id*. at 277. Because Richard did not tell Flagge about the planned changes to pay, Flagge did not tell the hoppers to whom he gave applications. *Id*. at 277, 287. Richard did not seek applicants from other sources. *Id*. at 278, 283 n.2.

Richard planned to start operations on May 20, but he did not have enough completed applications. By June 1, Richard had received 70 completed applications from Berry III hoppers, enough to assign hoppers to trucks. *Id*. at 278, 283. The same day, he cancelled Richard's Disposal's agreement with Berry III. *Id*. at 278, 284.

The next day, June 2, Creative began supplying hoppers to Richard's Disposal. When the hoppers arrived at work, a supervisor told them about the takeover by Creative and that Creative planned to institute new work rules and change compensation. Some hoppers left rather than accept the new terms. On June 6, after learning about the takeover, the Union requested bargaining. Creative did not reply. *Id*. at 278.

2. Sections 8(a)(5) and 8(d) of the Act, 29 U.S.C. § 158(a)(5) and (d), require an employer to bargain with its employees' representative over "wages, hours, and other terms and conditions of employment." That bargaining obligation extends to successor employers who acquire a business with a unionized workforce. Under Board and court law, an "ordinary" successor must bargain with the employees' union but may set the initial terms and conditions of employment. In contrast, a successor that makes it "perfectly clear" that it intends to retain the predecessor's employees must consult with the union before fixing employment terms. *NLRB v. Burns Int'l Security Servs., Inc.*, 406 U.S. 272, 294-95 (1972), and *Spruce Up Corp.*, 209 NLRB 194 (1974), *enforced mem.* 529 F.2d 516 (4th Cir. 1975)). Where an employer makes clear its intent to retain the employees without giving prior notice that their employment will be on different terms, it may not then implement changes without first bargaining with the union. *NLRB v. Houston Bldg. Servs., Inc.*, 128 F.3d 860, 864 n.6 (5th Cir. 1997) (per curiam).

3. Applying that settled case law, the Board found that Creative was a "perfectly clear" successor to Berry III because, between mid-May and June 1, it intended to hire all hoppers who submitted applications and failed to clearly announce its changed employment terms prior to or simultaneously with its expressed intent to hire them. Creative therefore violated Section 8(a)(5) and (1) of the Act by failing to bargain with the Union before changing employment terms. *Creative*, 364 NLRB No. 91, 2016 WL 4524111, at *3-4.

On review, the panel affirmed the Board's decision, finding that Creative was a perfectly clear successor under *Burns* and failed to give notice of any changes to employment terms prior to expressing its intent to hire the hoppers. *Creative*, 872 F.3d at 280-85.[1]

ARGUMENT

I. The Panel's Decision Comports with Supreme Court and Fifth Circuit Precedent

The panel properly articulated and applied Supreme Court and circuit precedent in upholding the Board's determination that Creative is a perfectly clear successor, with the obligation to bargain before changing employment terms, because it had made clear its intent to hire Berry III's workforce without providing sufficient, timely notice of the changed terms of employment. *Creative*, 872 F.3d

[1] Creative does not challenge the Board's findings that it is an "ordinary" successor obligated to bargain with the Union.

at 281. As the panel explained, under *Burns*, a successor employer is "ordinarily free to set initial terms," without bargaining with the incumbent union. *Id*. at 280 (quoting *Burns*, 406 U.S. at 294). Nevertheless, "there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit." *Id*. (quoting *Burns*, 406 U.S. at 294-95). *See also Adams & Assocs., Inc. v. NLRB*, 871 F.3d 358, 373 (5th Cir. 2017); *Coastal Int'l Sec., Inc. v. NLRB*, 320 F. App'x 276, 284 (5th Cir. 2009) (per curiam). In that circumstance, where the incumbent union's eventual majority is certain and the successor "evinces a 'perfectly clear' intention to retain the predecessor's employees, it must consult with their bargaining representative before fixing its own terms." *Creative*, 872 F.3d at 281 (summarizing *Burns* and *Spruce Up*). *See also Houston Bldg.*, 128 F.3d at 864 n.6.

The Board will find an employer to be a perfectly clear successor under *Burns* where the new employer has "actively or, by tacit inference, misled employees into believing they would be retained without changes," or where it "has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment." *Spruce Up*, 209 NLRB at 195. Thus, as the panel explained, where an "employer holds itself as if it will adhere to the terms of the previous [collective-bargaining agreement]," it must

first bargain before making any changes. *Creative*, 872 F.3d at 821 (quoting *Houston Bldg*., 128 F.3d at 864 n.6). *See also Adams*, 871 F.3d at 373.

The Board, with the approval of this court and others, has long held that a successor that fails to announce new terms prior to or simultaneously with its intent to hire becomes a perfectly clear successor and must bargain with the union before making changes. *See, e.g.*, *Houston Bldg*., 128 F.3d at 864 n.6; *Spitzer Akron, Inc. v. NLRB*, 540 F.2d 841, 843, 845 (6th Cir. 1976). This requirement, as the panel explained, "ensures that incumbent employees will not be 'lulled into a false sense of security' by a successor's announcement that it intends to retain the incumbents." *Creative*, 872 F.3d at 283 (quoting *Int'l Ass'n of Machinists & Aerospace Workers v. NLRB*, 595 F.2d 664, 675 (D.C. Cir. 1978) ("*IAM*")). Prompt notice of new terms is required to give employees "sufficient time to rearrange their affairs" should they decide to leave rather than accept them. *Id*. (quoting *IAM*, 595 F.2d at 675 n.49).

Applying *Burns* and *Spruce Up*, the panel upheld the Board's finding that Creative was a perfectly clear successor because it did not announce new terms between mid-May and June 1 when it collected applications and expressed an intent to hire Berry III's hoppers. Creative no longer disputes that it intended to hire every hopper who submitted an application and that it did not seek outside applicants. And as Creative now admits, only 20 of the 70 hoppers hired by June 1

were informed by Richard of the changed employment terms.[2] (Pet. 5.) Because Creative did not clearly announce its intent to establish new terms when it hired the hoppers between mid-May and June 1, the panel correctly applied settled Board and Circuit law in sustaining the Board's conclusion that Creative was a perfectly clear successor, and its unilateral announcement of new terms on June 2 was therefore unlawful.

II. Creative's Arguments Do Not Warrant En Banc Review and Were Correctly Rejected by the Panel

Creative's arguments in favor of rehearing are based on misstatements of precedent and the panel's decision. It fails to show that the panel made an error of "exceptional public importance" or that its decision is in conflict with Supreme Court or Fifth Circuit precedent as required for *en banc* review. 5th Cir. IOP 35. Moreover, many of Creative's erroneous claims stem from its failure to acknowledge that its own actions made it clear prior to commencing operations that a majority of its workforce would be drawn from the Berry III bargaining unit,

[2] Although Creative claims (Pet. 5-6) that "all of the small unit of hoppers knew the terms before beginning work," this statement is contrary to the facts affirmed by the panel. *See Creative*, 872 F.3d at 288 & n.5. Any alleged factual errors in the panel decision "are generally matters for panel rehearing but not for rehearing en banc." 5th Cir. IOP 35. *See Gonzalez v. So. Pacific Transp. Co.*, 773 F.2d 637, 641 (5th Cir. 1985). In any event, while Creative disputes the factual finding, it fails to explain why that finding is incorrect.

and that Creative accordingly had an obligation to bargain before it announced new terms.

A. The Panel's Decision Does Not Conflict with *Burns*

First, Creative mischaracterizes the panel's decision as holding that the June 2 announcement of new terms was untimely "because it occurred *the same day* the hoppers were formally hired and operations commenced." (Pet. 7.) According to Creative, this holding conflicts with *Burns*, which Creative describes as finding ordinary successorship "<u>even though [the initial terms] were announced on the same day as formal hiring</u>." (Pet. 7.) Creative's characterization of *Burns* is incorrect.

The operative timing here was not "formal hiring," which Creative claims occurred June 2. (Pet. 7.) Instead, as the panel correctly affirmed, Creative expressed an intent to retain the hoppers between mid-May and June 1 but did not clearly announce new terms by that time. *Creative*, 872 F.3d at 282. The panel's approach is consistent with that of other circuits. *See Dupont Dow Elastomers, LLC v. NLRB*, 296 F.3d 495, 506 (6th Cir. 2002); *Canteen Corp. v. NLRB*, 103 F.3d 1355, 1364-65 (7th Cir. 1997); *IAM*, 595 F.2d at 675. The "intent to retain employees" language mirrors the language of *Burns* establishing the need to consult with the union over 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." *Burns*, 406 U.S. at 295. Further, as the panel discussed, its analysis comports with this Court's prior decisions in *Adams*, 871 F.3d at 373-74 & n.6 (announcements of new terms after the successor evinced an intent to retain the predecessor employees were untimely), and *Houston Building*, 128 F.3d at 864 n.6 (successor cannot set initial terms unless it gives "prior notice of its intention"). *Creative*, 872 F.3d at 282. As explained in *Burns*, the intent to retain employees is crucial because at that point the union's majority is not in doubt, and bargaining over initial terms is appropriate. *Burns*, 406 U.S. at 295.

Applying that principle, the panel correctly affirmed that Creative expressed an intent to hire the Berry III hoppers by June 1—prior to the announcement of new employment terms on June 2 as operations began. As the panel explained, Creative is simply "wrong to assume that an expression of intent to retain the incumbent workforce is limited to express announcements or formal hiring." *Creative*, 872 F.3d at 284-85 (citing *Canteen*, 103 F.3d at 1363). Because Creative failed to recruit from outside sources and intended to hire every Berry III hopper who submitted an application, the panel found "the hiring process was a formality and [] Creative sought to hire the Berry III hoppers en masse." *Id*. at 284. Given that Creative no longer challenges these factual findings, it cannot seriously contest the panel's conclusion that Creative's June 2 announcement of new terms was

untimely because by that time it had made clear its intent to retain the Berry III employees.

Finally, Creative mischaracterizes the facts and holding of *Burns*. In Creative's telling, it and *Burns* share a common story—setting initial terms on the same day as formal hiring—and should share a common outcome: ordinary successorship. (Pet. 7.) But Creative misreads the story. In *Burns*, the successor took over its predecessor's contract to provide security; Burns formally hired employees on July 1, but its obligation to bargain with the union matured when it "selected its force of guards late in June." *Burns*, 406 U.S. at 295. Unlike Creative, Burns specified new terms when it made employment offers, and there was "no evidence that Burns ever unilaterally changed" those terms "after its obligation to bargain with the union became apparent." *Id*. Burns, therefore, was an ordinary successor obliged to bargain with the union but not bound to its predecessor's collective-bargaining agreement. The panel's decision here fully comports with *Burns*: a successor can set initial terms and conditions of employment, but it must clearly announce those terms when it first makes clear its intent to hire the predecessor's employees. Because Creative failed to do so, it was a perfectly clear successor required to bargain over initial terms.

B. The Panel Did Not Hold that Cancellation of the Contract with Berry III Precipitated Creative's Bargaining Obligation

Creative also claims that the panel erred by holding that its bargaining obligation was triggered when Richard cancelled Berry III's contract. (Pet. 7.) But the panel never held that. Rather, as the panel explained, "[i]n perfectly clear successor cases, the 'composition of the successor's work force' alone is the 'triggering fact for the bargaining obligation." *Creative*, 872 F.3d at 292 (quoting *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 46 (1987)). Again, the triggering event for the bargaining obligation was Creative's intent to retain the Berry III hoppers, which it had expressed by June 1 at the latest. The panel only stated factually that when Creative received enough applications to begin operations, Richard cancelled the Berry III contract. It accorded no legal import to that cancellation. *Id*. at 278, 284.

C. The Panel Correctly Affirmed the Board's Finding that *Fall River*'s Substantial-and-Representative-Complement Analysis Does Not Apply

Contrary to Creative's next claim, the panel decision does not conflict with *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 41 (1987), or *NLRB v. Houston Building Service, Inc.*, 936 F.2d 178 (5th Cir. 1991). (Pet. 8.) Specifically, the panel correctly rejected Creative's argument that the bargaining obligation began on June 2, the day Creative claims it "formally hired" a "substantial-and-representative complement" of employees and began operations.

(Pet. 7-8.) In *Fall River*, the Court upheld the Board's substantial-and-representative complement rule for determining when a successor has a bargaining obligation where "it is not clear when the new employer will reach a full complement of employees." 482 U.S. at 47 (quotation omitted). But, in the perfectly clear successor context, whether the employer has hired a substantial-and-representative complement of its workforce is irrelevant because it is, as the panel explained, "[s]elf-evident" that the perfectly clear exception "only applies when it is 'perfectly clear' that the union's majority status will survive the transition from predecessor to successor." *Creative*, 872 F.3d at 291.

Nor does the panel decision conflict with *Houston Building*. Although Creative claims *Houston Building* involves perfectly clear successorship, the Board and Court analyzed it as an ordinary successor case. There, Houston Building claimed that it was not a successor at all, had hired the predecessor employees only temporarily, and had hired outside employees. 936 F.2d at 179 (*enforcing Houston Bldg. Serv.*, 296 NLRB 808, 810-12 (1989)). The Court affirmed that Houston Building was an ordinary successor required to bargain upon the union's demand, because it had hired a substantial-and-representative complement when it began operations. *Id*. at 180; 296 NLRB at 813. As Creative acknowledges (Pet. 9), the Court used the substantial-and-representative complement analysis to determine the appropriate date for assessing whether the predecessor's employees constituted

a majority of Houston Building's workforce. 936 F.2d at 180. Here, in contrast, Creative does not dispute that the Union's majority was never in doubt. Thus, the substantial-and-representative-complement rule is inapplicable. *Creative*, 872 F.3d at 291.

D. The Panel Correctly Affirmed the Board's Finding that a Bargaining Demand Is Not Required in Perfectly Clear Successor Cases

Creative next argues (Pet. 10-14) that the panel, assertedly in conflict with *Burns* and *Fall River*, created a "new test" that does not require a bargaining demand. Under *Burns* and *Fall River*, some situations involving ordinary—not perfectly clear—successors require unions to first demand bargaining in order to trigger a bargaining obligation.[3] In Creative's telling, its changes to employment terms were therefore lawful because they preceded the Union's bargaining demand. Nothing in those decisions requires a bargaining demand where the union's majority is never in doubt. The majority is not in doubt because the successor intended to hire every predecessor applicant without telling them of any changes to employment terms. Accordingly, as the panel explained, a bargaining demand is "superfluous" in the perfectly clear successor context because the successor could "easily discern" that the union will retain its majority. *Creative*, 872 F.3d at 291-92 (quoting *Banknote Corp. of Am. v. NLRB*, 84 F.3d 637, 645-46

[3] The additional cases cited by Creative similarly involve ordinary, not perfectly clear, successors. (Pet. 14 n.6.)

(2d Cir. 1996)). *See also Spitzer Akron, Inc. v. NLRB*, 540 F.2d 841, 843, 845 (6th Cir. 1976); *Cadillac Asphalt Paving Co.*, 349 NLRB 6, 7-8, 10 n.31 (2007); *C.M.E.*, 225 NLRB 514, 514-15 (1976). Indeed, where Creative failed to notify the Union (and most of its employees) of any changed terms, there would have been no reason for the Union to request bargaining earlier.

While attempting to draw parallels between the "perfectly clear" successorship here and the requirement of a bargaining demand in some ordinary successorship cases, Creative again mischaracterizes the panel's decision and *Burns*. (Pet. 12.) According to Creative, the panel held that "when a successor takes over rapidly and immediately hires, the rationale for the bargaining demand rule 'dissipates.'" (Pet. 11, emphasis omitted.) That holding, according to Creative, conflicts with *Burns*, which also involved a "rapid transition [and] immediate hiring," but required a bargaining demand.[4] As with its criticism of the panel's citation to *Banknote* (Pet. 11), Creative misses the panel's point: Creative knew it had an obligation to bargain with the Union by June 1 at the latest, when enough Berry III hoppers had submitted applications to ensure that Creative's workforce would come from the predecessor, thus guaranteeing the Union's majority and requiring bargaining over any changes in the employment terms.

[4] The Supreme Court explicitly stated in *Burns* that the bargaining obligation arose in late June when Burns selected its workforce—before the union's July 12 request to bargain, which Burns unlawfully refused. *Burns*, 406 U.S. at 295.

Creative claims that *Houston Building* extends the bargaining demand requirement to perfectly clear successors, despite conceding that the case "did not use that terminology." (Pet. 14 n.5.) As described above (p. 12), Houston Building disputed that it was a successor at all, and the Board and Court analyzed *Houston Building* as an ordinary successor case. 936 F.2d at 179. Thus, there is no conflict with the panel's analytically distinct decision here.

Further, Creative's claim that Houston Building "was found not to be an 'ordinary successor," and must, therefore, be a perfectly clear successor, includes no supporting citation. (Pet. 14 n.5.) The Court found Houston Building had hired a substantial-and-representative complement of employees when the union demanded bargaining and ordered it to bargain. 936 F.2d at 179-80. Nothing in *Houston Building* requires a bargaining demand in the perfectly clear successor context. 936 F.2d at 180. Thus, the panel correctly affirmed that while a bargaining demand may be required in the ordinary successor context, it is unnecessary in the perfectly clear successor context. *Creative*, 872 F.3d at 291-92.

E. The Panel's Decision Does Not Conflict with *Adams & Associates*

Contrary to Creative's claims, no case, including *Adams*,[5] requires a finding that a perfectly clear successor actively misled employees. (Pet. 15-17.) As an

[5] The Court discussed the Board's alternative theory that Adams was a perfectly clear successor but did not pass on it, ultimately affirming the Board's finding that

initial matter, Creative made no such argument to the panel below. Therefore, it cannot be made here. *United States v. Richards*, 646 F.2d 962, 963 (5th Cir. 1981) (per curiam) ("absent exceptional circumstances we do not consider issues that are first presented in an application for rehearing").

In any event, as Creative acknowledges, under *Spruce-Up*, the perfectly clear exception applies where a successor has "either actively, or by tacit inference, misled employees" *or* "has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment." (Pet. 15, quoting *Spruce Up*, 290 NLRB at 195.) The Board and panel correctly analyzed Creative's conduct under the second prong of *Spruce Up*.

As the panel explained, "even when employees 'are not affirmatively led to believe that existing terms will be continued,' the expression of intent to retain the incumbents can, by itself, 'engender expectations,' causing employees to 'forego the reshaping of personal affairs.'" *Creative*, 872 F.3d at 290 (quoting *IAM*, 595 F.2d at 674). *See also Spitzer Akron*, 540 F.2d at 843; *Bachrodt Chevrolet Co.*, 205 NLRB 784 (1973), *enforced*, 515 F.2d 512 (7th Cir. 1975) (table). Nothing in *Adams* suggests that actively misleading employees is required for perfectly clear successor status. 871 F.3d at 373 n.6.

Adams "forfeited its right to set initial terms" because it attempted to avoid successorship through discriminatory hiring. *Adams*, 871 F.3d at 374.

CONCLUSION

For the foregoing reasons, the Board respectfully asks the Court to deny Creative's petition for rehearing en banc.

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December 2017

UNITED STATES COURT OF APPEALS
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	)	
Respondent/Cross-Petitioner	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its Response to Petition for Rehearing En Banc contains 3,832 words of proportionally-spaced, 14-point type, the word processing system used was Microsoft Word 2010, and the PDF file submitted to the Court has been scanned for viruses using Symantec Endpoint Protection version 12.1.6 and is virus-free according to that program.

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Dated at Washington, DC
this 18th day of December, 2017

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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	)	No. 16-60715
v.	)	
	)	Board Case No.
NATIONAL LABOR RELATIONS BOARD	)	15-CA-020067
	)	
Respondent/Cross-Petitioner	)	

CERTIFICATE OF SERVICE

I hereby certify that on December 18, 2017, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I further certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not by serving a true and correct copy at the addresses listed below:

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