UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

AM PROPERTY HOLDING CORP.,
MAIDEN 80/90 NY LLC, AND MEDIA
TECHNOLOGY CENTERS LLC,
a single employer, a joint employer with
PLANNED BUILDING SERVICES, INC.

and

Case Nos. 02-CA-033146
02-CA-033308
02-CA-033558

LOCAL 32BJ SERVICE EMPLOYEES
INTERNATIONAL UNION

and

UNITED WORKERS OF AMERICA
(Party in Interest)

AM PROPERTY HOLDING CORP.,
MAIDEN 80/90 NY LLC, AND MEDIA
TECHNOLOGY CENTERS LLC,
a single employer, a joint employer with
SERVCO INDUSTRIES, INC.

and

Case Nos. 02-CA-033864
02-CA-034018

LOCAL 32BJ SERVICE EMPLOYEES
INTERNATIONAL UNION

COUNSEL FOR THE GENERAL COUNSEL'S OPPOSITION
TO PLANNED BUILDING SERVICES' MOTION FOR RECONSIDERATION

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Dated: February 13, 2018

TABLE OF AUTHORITIES

Cases **Page(s)**

Allied Mechanical Services, Inc., 2011 WL 6886277 (N.L.R.B.) (2011).....2
AM Property Holding Corp., 350 NLRB 998 (2007).....1
AM Property Holding Corp., 365 NLRB No. 162 (2017).....passim
Enloe Medical Center, 346 NLRB 854 (2005).....11
Galloway School Lines, 321 NLRB 1422 (1996).....13
Graymont PA, Inc., 364 NLRB No. 37 (2016).....5
Hacienda Resort Hotel and Casino, 2016 WL 4036087 (N.L.R.B.) (2016).....3
Iron Workers Local 471 (Wagner Iron Works), 108 NLRB 1237 (1954).....4
Love's Barbecue Restaurant, 245 NLRB 78 (1979).....13
Pergament United Sales, 296 NLRB 333 (1989)..... passim
Pergament United Sales v. NLRB, 920 F.2d 130, (2d Cir. 1990).....passim
Pressroom Cleaners, 361 NLRB No. 133 (Dec. 15, 2014).....3
Roy Spa, LLC, 2017 WL 6034112 (N.L.R.B.) (Dec. 5, 2017).....3
Service Employees International Union, Local 32BJ v. NLRB, 647 F.3d 435 (2d Cir. 2011).....1
UFCW, Local No. 1996 (Visiting Nurse Health System) 338 NLRB 1074 (2003).....4
UPMC and Its Subsidiary, 365 NLRB No. 153 (Dec. 11, 2017).....4

INTRODUCTION

On February 15, 2013, Charging Party Local 32BJ SEIU (the Union), Respondent Planned Building Services (PBS), and Counsel for the General Counsel (General Counsel) submitted their respective statements of position to the Board on an allegation that had been remanded to the Board by the United States Court of Appeals for the Second Circuit relating to the Board's decision in *AM Property Holding Corp.*, 350 NLRB 998 (2007).[1] In its decision, the court directed the Board to decide whether due process considerations permitted it to consider whether PBS was an individual successor to Clean-Right and whether PBS was an individual successor.

On December 15, 2017, the Board issued a Decision and Order in this case concluding that PBS was an individual successor to Clean-Right, the predecessor employer at 80-90 Maiden Lane, and that PBS violated Section 8(a)(5) and (1) by failing to recognize and bargain with the Union. 365 NLRB No. 162 (Dec. 15, 2017). Before deciding the merits of the individual successor allegation, the Board determined that consistent with *Pergament United Sales, Inc.*, 296 NLRB 333 (1989),[2] the allegation that PBS was an individual successor, which was not alleged in the complaint, was closely connected to the complaint allegation that PBS and AM Property were a joint successor and that it was fully litigated.

On January 16, 2018, PBS filed a Motion for Reconsideration seeking the Board to reconsider its decision and to remand the case to the Administrative Law Judge so that the parties can, sixteen years after the initial hearing on this matter, continue to litigate whether PBS was an individual successor to the cleaning contractor at 80-90 Maiden Lane.

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[1] *Service Employees International Union, Local 32BJ v. NLRB,* 647 F.3d 435 (2d Cir. 2011).
[2] *Enforced* 920 F.2d 130 (2d Cir. 1990).

General Counsel opposes PBS's motion for reconsideration because the motion merely repeats the same arguments it raised in its statement of position, which were duly considered, but correctly rejected by the Board. Moreover, PBS has failed to identify any material error or demonstrated extraordinary circumstances warranting reconsideration under Section 102.48(c) of the Board's Rules and Regulations.

ARGUMENT

I. The Board should deny PBS's Motion for reconsideration as it fails to establish extraordinary circumstances warranting reconsideration.

Section 102.48(c) of the Board's Rules and Regulations provides that "a party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record after the Board decision or order." 29 C.F.R. § 102.48(c) (2017).[3] Section 102.48(c)(1) adds that "a motion for reconsideration must state with particularity the material error claimed and with respect to any finding of material fact, must specify the page of the record relied on."

In support of its motion, PBS asserts that there are four separate "material errors" that warrant reconsideration of the Board's decision and a remand to the Administrate Law Judge to fully litigate whether PBS was an individual successor to Clean-Right. Even a cursory review of the Board's decision reveals that the purported "material errors" are arguments that the Board has already carefully considered, but ultimately rejected in its Decision.

PBS's disagreement with the Board's decision does not establish the requisite "material error" or "extraordinary circumstances." *See e.g., Allied Mechanical Services, Inc.,* 2011 WL 6886277 (N.L.R.B.) (2001) (Board denies motion for reconsideration that "merely expresses its

[3] Prior to the 2017 amendments to the Board's Rules and Regulations, Section 102.48(c) was codified as 102.48(d).

disagreement with the majority's findings" and notes that such disagreement "clearly is not a ground for reconsideration.").

The Board and its members have consistently recognized that the procedures under Section 102.48 of the Rules are not a vehicle for parties to reargue their cases in the hopes of getting a different result. This recognition is evident in Board members' consistent denial of motions for reconsideration even in cases in which they dissented in the underlying decision. In *Roy Spa, LLC,* 2017 WL 6034112 (N.L.R.B.) (Dec. 5, 2017), for instance, the Board denied an applicant's motion for reconsideration for failing to identify any material error or demonstrate extraordinary circumstances warranting reconsideration. Then Chairman Miscimarra, who had dissented from the majority's decision in the underlying case, agreed that the motion should be denied even while continuing to "adhere to the views expressed in his dissent." *Id.* n.3.

In *Hacienda Resort Hotel and Casino*, 2016 WL 4036087 (N.L.R.B.) (July 26, 2016), the Board denied a charging party's motion for reconsideration for failing to establish "extraordinary circumstances." In his concurrence, Member Hirozawa noted that while he disagreed with the majority's conclusion in the underlying decision regarding the appropriate remedy for the reasons set forth in his partial dissent, he agreed that the motion should be denied.

In *Pressroom Cleaners,* 361 NLRB No. 133 (Dec. 15, 2014), a five member panel of the Board denied a respondent's motion for reconsideration challenging only the portion of the Board's decision overruling a prior case because the arguments advanced by the respondent were the same arguments the Board had already considered and rejected. The Board found no extraordinary circumstances warranting reconsideration, and denied the motion. Two Board members had dissented from the majority's decision in this regard, and they adhered to their

dissent. They agreed, however, that the respondent had not demonstrated extraordinary circumstances warranting reconsideration.

The only new elements of PBS's motion are excerpts from the former Chairman's dissent in the Board's decision and the implication that the dissent should instead be the majority opinion. PBS does not mask its attempt to simply have the Board reconsider its recent decision in the hope that the outcome changes, ostensibly because of the changing constituency of its membership. The Board has expressly held that a change in the Board's composition is not an "extraordinary circumstance" warranting reconsideration. In *UFCW, Local No. 1996 (Visiting Nurse Health System, Inc.),* 338 NLRB 1074, 1074 (2003), the Board in denying a motion for reconsideration filed by the charging party rejected an argument that a change in the Board's composition constituted "extraordinary circumstances" warranting reconsideration of the prior Board's decision in the same case.[4] In denying the motion, the Board relied on *Iron Workers Local 471 (Wagner Iron Works*), 108 NLRB 1237, 1239 (1954), in which the Board held that it "will not entertain any request for reconsideration of Board action based solely on the ground of a change in composition of the Agency's membership." *See also UPMC and Its Subsidiary, UPMC Presbyterian Shadyside,* 365 NLRB No. 153 (Dec. 11, 2017) (The majority affirmed the viability *UFCW, Local No. 1996* in considering motions under the "extraordinary circumstances" standards in Section 102.48 of the Board's Rules).

[4] The motion was additionally untimely and made no showing why the filing period should be extended.

II. The Board did not commit any material error warranting reconsideration.

A. The Board did not commit material error in concluding that the allegation that PBS was an individual successor to Clean-Right was "closely related" to the subject matter of the complaint.

The Board found that the issue of whether PBS was an individual successor was not only "closely related" to the complaint allegation that AM Property and PBS were a joint successor, but was "in all practical terms identical." 365 NLRB No. 162 at 3. In discussing the merits of the allegation, the Board additionally noted that the "test for a single successorship is entirely subsumed within the test for joint successorship." *Id.* at 5. PBS disagrees with the Board's finding and argues in its motion that the Board has inappropriately fused the joint employer issue with the unalleged "individual successor" issue.

It is well-settled that the complaint need not "state the legal theory upon which the General Counsel intends to proceed," but it "must inform the respondent of the acts forming the basis of the complaint." *Pergament United Sales v. NLRB*, 920 F.2d 130, 134-35 (2d Cir. 1990). In relevant part, Section 102.15 of the Board's Rules requires only that the complaint contain "[a] clear and concise description of the acts which are claimed to constitute unfair labor practices, including, where known, the approximate dates and places of such acts and the names of Respondent's agents or other representatives by whom committed." The Board, however, has recognized that the complaint is not the exclusive source of notice of the material issues to be addressed in a Board proceeding and that notice can also be "provided by the General Counsel's representations at the hearing or it might be evident from the respondent's conduct in the proceeding." *Graymont PA, Inc.*, 364 NLRB No. 37 (2016) (citations omitted).

A review of the January 11, 2002, Consolidated Complaint establishes that the issue of whether PBS was an independent successor to Clean-Right at 80-90 Maiden Lane based on its discriminatory refusal to hire former Clean-Right employees is closely connected to the allegations in the complaint that AM Property and PBS were joint successors to Clean-Right. In relevant part to the single successor issue, the last amended consolidated complaint against AM and PBS, dated January 11, 2002, alleged the following:

- The 80-90 Maiden Lane Unit in paragraph 8(b) constitutes a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act. (GCX 1xx, ¶ 8(c)).
- Beginning on April 25, 2000, PBS and AM took over the building and maintenance services at 80-90 Maiden Lane in a basically unchanged form and manner. (GCX 1xx, ¶ 9(a)).
- But for its unlawful hiring scheme, PBS and AM would have employed, as a majority of its employees at 80-90 Maiden Lane, individuals who were previously employees of Clean-Right. (GCX 1xx, ¶ 9(c)).
- PBS and AM have continued the employing entity and constitute a successor to Clean-Right at 80-90 Maiden Lane. (GCX 1xx, ¶ 9(d)).
- AM and PBS have failed and refused to recognize and bargain with Local 32BJ and have unilaterally set the bargaining unit's initial terms and conditions of employment. (GCX 1xx, ¶¶ 13-14(a)).
- PBS imposed a more onerous application process on the former Clean-Right employees and that it conditioned their employment at other locations upon their acceptance of an alleged 8(a)(2) labor organization. (GCX 1xx ¶¶ 11-12).

Consistent with *Pergament* and Section 102.15 of the Board's Rules, the January 11, 2002 complaint gave PBS adequate notice of the specific conduct that supports the conclusion that it is an independent successor to Clean-Right at 80-90 Maiden Lane. The close connection between the complaint allegation that PBS and AM were joint successors and the unalleged theory that PBS is an independent successor is indisputable because, as the Board found, both theories focus on the operations before and after the successor assumed operations at the building and on the continued appropriateness of the bargaining unit. 365 NLRB No. 162 at 3.

PBS inexplicably argues that the requisite "close connection" must be established between the litigated joint employer issue and the unlitigated single employer issue. PBS's argument is absurd and must be rejected. Board cases applying the "close connection" prong of the *Pergament* test examine the relationship between the allegations set forth in a complaint and the allegations that were not. The joint successor theory was alleged in the complaint, and it is that allegation that must be closely related to the unalleged single successor issue. The Board thus properly examined the "close connection" between the complaint allegations on joint successor and the unalleged individual successor issue.

The Board's conclusion that PBS was an individual successor to Clean-Right was "closely related" to the subject matter of the complaint is well supported by the extensive record and established case law. The Board therefore did not commit any material error in reaching this conclusion.

B. The Board did not commit material error in concluding that the allegation that PBS was an individual successor to Clean-Right was "fully litigated."

In *Pergament*, the Board noted that the determination of whether an issue was fully litigated "rests in part on whether the absence of a specific allegation precluded a respondent from presenting exculpatory evidence or whether the respondent would have altered the conduct of its case at the hearing had a specific allegation been made." 296 NLRB at 335. In this case, the Board correctly concluded that the issue of whether PBS was an independent successor to Clean-Right at 80-90 Maiden Lane was fully litigated. The Board notes that PBS, except for one instance, did not claim that it would have introduced different or additional evidence at the hearing had the complaint alleged PBS as a single employer. 365 NLRB No. 162 at 4. The Board then concludes that PBS's failure to introduce the claimed different or additional evidence is not explained or justified given that the evidence relevant to single employer status was equally relevant to the joint successor issue alleged in the complaint. *Id.*

During the hearing, the General Counsel presented evidence to establish that AM Property and PBS were a joint successor to Clean-Right with a bargaining obligation based on their discriminatory hiring scheme. Thus the General Counsel presented evidence about the cleaning operations at 80-90 Maiden Lane after April 2000, the continuing appropriateness of the bargaining unit, and the unlawful hiring scheme to avoid hiring the predecessor employees. PBS vigorously challenged the General Counsel's evidence in this regard by cross-examining General Counsel's witnesses and presenting testimony and a considerable record of its own. The Board did not commit material error in concluding that based on this conduct and the litigation as a whole, the issue of whether PBS was an individual successor was fully litigated. In meeting the General Counsel's case and pursuing its defenses on the joint successor issues, PBS necessarily addressed the factual basis for the allegation that PBS was an individual single successor.

During the hearing, PBS presented the testimony of Robert Francis, its Executive Vice President, to explain its staffing decisions at 80-90 Maiden Lane and to assert that its decisions were not motivated by anti-union animus. (Tr. 1717-1895). General Counsel called Raymond DeArmas, PBS's Operations Manager, in its case to testify about PBS's staffing decisions at 80-90 Maiden Lane and the application and interview process that the former Clean-Right employees were subjected to. (Tr. 261-345). PBS's counsel had the opportunity to ask question of Mr. DeArmas and availed himself of that opportunity. (Tr. 338). PBS similarly had the opportunity to re-call Mr. DeArmas in its case but did not do so. PBS similarly had ample opportunities to challenge the testimony elicited from General Counsel's witnesses regarding the lack of interchange of personnel between 80-90 Maiden Lane and 75 Maiden Lane, which relates to the appropriateness of the bargaining unit but did not do so. (Tr. 904-05, 985, 1119, 1175, 1416).

In its brief to the ALJ, PBS maintained that it did not discriminate against former Clean-Right employees in staffing 80-90 Maiden Lane as it was unaware that the building had a cleaning staff. (PBS post-hearing brief, p. 16-20, 60-64). A review of PBS's briefs to the Judge and to the Board moreover establish that it was well aware that it could be found liable as a successor even in the absence of a joint employer finding. In its brief to the Judge, PBS argued that if PBS failed to hire the former Clean-Right employees for lawful reasons, then "it is not a successor, and it had no obligation to recognize and bargain with Local 32BJ." (PBS post-hearing brief, p. 108-09). PBS further maintained that the former Clean-Right employees would not have "constituted a majority of PBS' workforce" at 80-90 Maiden Lane. (PBS post-hearing brief, p. 109). PBS repeated this argument in its brief to the Board in support of its exceptions.

(PBS exceptions brief, p. 55). In its post-hearing brief, PBS denied that it was a successor but did not directly challenged the appropriateness of the bargaining unit.

Had the complaint specifically alleged that PBS was an independent successor to Clean-Right based on its discriminatory refusal to hire former Clean-Right employees, there is nothing that PBS could have or would have done differently in its defense. PBS, echoing former Chairman Miscimarra's dissent, now argues that its defense on the joint successor allegation was centered on defeating the joint employer allegation as that was the foundation for the joint successor allegation. A review of the record and PBS's briefs to the Administrative Law Judge and to the Board conclusively establishes the fallacy of PBS's new assertion. In its brief to the Board on exceptions, PBS not only argued that it was not a joint employer, but also argued that it was not a successor to Clean-Right under any of the recognized successor theories. (PBS brief in support of exceptions, p. 54-58).

In any event, despite PBS's bare assertions, the elements for the single successor and joint successor theories are substantially equivalent from an evidentiary perspective. PBS had every opportunity to introduce evidence in defense of the single successor issue, as that was equally relevant to the joint successor issue. Clearly, an employer's due process rights are not infringed if it voluntarily fails to rebut an element of a legal theory that was at issue from the inception of the unfair labor practice complaint, as the joint successor theory was in the present case.

The test set forth in *Pergament* is a two-pronged test. In order to satisfy due process, it is clear from the Board's application of this test in dozens of cases, both prongs of the test must be answered in the affirmative for the Board to reach the merits of an allegation not set out in a complaint. It therefore does not matter, in which order the Board performs the test. PBS

nevertheless argues that the Board committed reversible error by addressing whether the "closely connected" part of the test before the "fully litigated" part of the test. This argument, like every other argument in the motion, must be rejected as it is wrong as a matter of law and certainly does not constitute material error or extraordinary circumstance.

The Board's conclusion that PBS was an individual successor to Clean-Right was "fully litigated" is well supported by the extensive record and established case law. The Board therefore did not commit any material error in reaching this conclusion.

C. The Board did not commit material error in concluding that because the unalleged issue of whether PBS was a single successor was fully litigated a remand to the ALJ was not necessary.

The Second Circuit in the instant case directed the Board, in the event that it decided that due process concerns preclude it from reaching this issue of whether PBS is an independent successor to Clean-Right, to then determine whether a remand to the Administrative Law Judge is appropriate under *Enloe Medical Center,* 346 NLRB 854 (2006). In *Enloe Medical,* the Board identified a violation of the Act not alleged in the complaint or advanced by the General Counsel and the respondent filed a motion for reconsideration. The Board, applying the test in *Pergament*, concluded the unalleged theory of the violation was not fully litigated and remanded the case to the judge for the purpose of providing respondent an opportunity to introduce evidence and the parties an opportunity to submit briefs regarding the unallaged issue.

In its motion, PBS argues that the single successor allegation was not fully litigated and should be remanded to the Administrative Law Judge to develop the record on the appropriateness of the bargaining unit, and the substantial continuity of operations between PBS and Clean-Right. A remand to the Administrative Law Judge is not appropriate in this case,

because the Board has already reviewed the record and has decided that the issue of PBS's status as an individual successor was fully litigated.

On the continuity of operations issue, the General Counsel presented the testimony of several employees who worked for Clean-Right at 80-90 Maiden Lane and were subsequently hired by PBS who testified about their work under each employer and the lack of exchange with any other PBS location, including 75 Maiden Lane. The testimony of these employees was supplemented by other employee witnesses who worked for PBS but had not worked for the Clean-Right. PBS, consistent with its admission to the Administrative Law Judge on the appropriateness of the unit described below, did not challenge or rebut the employees' testimony.

The complaint alleged an appropriate bargaining unit of "all classification of service employees employed at 80-90 Maiden Lane." (GCX 1xx, ¶ 8(b) and (c)). A review of the pleadings and the record establishes that the only aspect that PBS ever challenged on the appropriateness of the bargaining unit was the sites to be included in the unit and not the composition of the unit. PBS, in its answer dated January 23, 2002, denied the allegations regarding the appropriateness of the unit and asserted that "the current appropriate unit is comprised of 75 and 80-90 Maiden Lane." (GCX 1 zz, ¶ 8(c)). In its answer, PBS also plead as an affirmative defense that a unit of its employees at 80-90 Maiden Lane "is part of an overall unit contained in its master agreement between [PBS] and the [United Workers of America]," a labor organization the complaint alleged was recognized by PBS in violation of Section 8(a)(2) of the Act. (GCX 1 zz, p. 11; GCX 1 xx, ¶ 17-21). During the hearing, PBS, by its counsel, modified its position on the appropriateness of the 80-90 Maiden Lane bargaining unit by asserting that a bargaining unit of either 80-90 Maiden Lane alone or at both 75 and 80-90 Maiden Lane was an appropriate bargaining unit. (Tr. 10-11). The pleadings, as amended at the

hearing, thus establish that PBS admitted that the unit of its employees working at 80-90 Maiden Lane constituted an appropriate bargaining unit. This issue was thus fully litigated even without considering the presumptions that apply to units in a single facility or to a pre-existing bargaining unit.

PBS additionally argues that the case should be remanded to the Administrative Law Judge to determine whether, if PBS was an individual successor to Clean-Right, PBS had the right to set initial terms of employment that differed from Clean-Right and whether PBS was obligated to bargain with the Union when it purports the Union never requested to bargain. These issues do not require an evidentiary hearing because the issues were fully litigated and the well-established case law compels a finding, based on the established 8(a)(3) failure to hire former Clean-Right employees,that PBS was not free to set the initial terms for the unit and it would have been futile for the Union to request to bargain. Under established case law, where a successor employer unlawfully refuses to hire predecessor employees, it not only has an obligation to bargain with the union that represented them, but it forfeits the right to unilaterally set initial terms and conditions of employment. *Love's Barbecue Restaurant*, 245 NLRB 78, 81-82 (1979); *Galloway School Lines,* 321 NLRB 1422, 1425 (1996).

The Board correctly decided that the issue of whether PBS is an independent successor to Clean-Right was closely related to the complaint allegations and was fully litigated. Thus the Board correctly rejected PBS's request to remand the case to the Administrative Law Judge. *Enloe Medical* does not require a different result. The Board therefore did not commit any material error in reaching this conclusion.

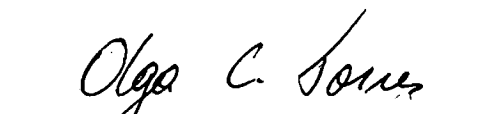
D. The Board's Delay in Issuing its Decision is Not a Basis to remand the case to the ALJ.

PBS asserts that the Board's "inexcusable delay" in deciding this case requires that it now remand the case to the Administrative Law Judge to fully litigate the individual successor issue, and issue that the Board has already decided is consistent with due process. PBS argues that a prompt remand to the Administrative Law Judge now will be more expedient than the alternative of getting to the same place only after PBS successfully appeals the denial of its present motion to a federal appellate court. PBS's argument must be promptly rejected along with all the other frivolous and repetitive arguments included in its motion.

CONCLUSION

Respondent's Motion for Reconsideration should be denied because it fails to demonstrate any extraordinary circumstances or material error, and raises no issues that the Board has not previously considered. Accordingly, Counsel for the General Counsel requests the Board summarily deny it in its entirety.

Respectfully submitted,



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Case Nos. 02-CA-033146 et al.

Date of Electronic Mailing: February 13, 2018

AFFIDAVIT OF SERVICE OF: Counsel For The General Counsel's Opposition To Planned Building Services' Motion For Reconsideration

I, the undersigned employee of the National Labor Relations Board, state under oath that, on the date indicated above, I served the above-entitled document(s) by electronic mail (email), as indicated below, upon the following persons, addressed to them at the following addresses:

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