

**IN UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

PLANNED BUILDING SERVICES, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Case No. 18-1082

NLRB Case Nos.

02-CA-033146-1

02-CA-033308-1

02-CA-033558-1

02-CA-033864-1

02-CA-034018-1

**PLANNED BUILDING SERVICES, INC.’S  
PETITION FOR REVIEW OF A DECISION AND ORDER OF  
THE NATIONAL LABOR RELATIONS BOARD**

Pursuant to Rule 15(a) of the Federal Rules of Appellate Procedure and 29 U.S.C. § 160(f), Petitioner Planned Building Services, Inc., (“PBS”) hereby petitions the United States Court of Appeals for the District of Columbia Circuit for review of the Decision and Order issued by Respondent National Labor Relations Board (“Board”) on December 15, 2017, in the cases captioned *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 Local 32BJ, Service Employees International Union and United Workers of America (Party In Interest) and AM Property Holding Corp., Maiden 80/90 NY LLC, and Mediate Technology Centers, LLC, a single employer, a joint employer with Servco Industries, Inc. and Local 32BJ, Service Employees International*

*Union*, Board Case Nos. 02-CA-033146-1, 02-CA-033308-1, 02-CA-033558-1, 02-CA-033864-1, and 02-CA-034018-1 (the “Decision and Order”). A copy of the Board’s Decision and Order, which is reported at 365 NLRB No. 162, is attached hereto as Exhibit “A”.

The Decision and Order is a final order, as the Board denied PBS’ Motion for Reconsideration in an order issued on March 6, 2018 (“Order Denying Reconsideration”). A copy of the Board’s Order Denying Reconsideration is attached hereto as Exhibit “B”. Furthermore, PBS is a party aggrieved by the Decision and Order. *See Bell & Howell Co. v. N.L.R.B.*, 598 F.2d 136, 143 n.12 (D.C. Cir. 1979) (“When the Board enters a final order against the charged party, it is clear that the phrase ‘any person aggrieved’ in s[ection] 10(f) enables him to seek immediate review in the appropriate Court of Appeals.”).

Additionally, PBS’ Petition for Review is timely, as the National Labor Relations Act places no limitation governing the timeliness of petitions for review of Board orders. *See N.L.R.B. v. Cent. Dispensary & Emergency Hosp.*, 145 F.2d 852, 854 (D.C. Cir. 1944) (petition timely filed with D.C. Circuit when Board waited “over a year in bringing the case before us for enforcement”). Therefore, this Court has jurisdiction over this matter and venue properly lies in this Circuit. *See* 29 U.S.C. § 160(f) (“Any person aggrieved by a final order of the Board . . .

may obtain a review of such order . . . in the United States Court of Appeals for the District of Columbia . . .”).

Initially, the Board’s Decision and Order must be set aside because the Board’s inexcusable delay in issuing its Decision and Order—with nearly six years passing since the Board first accepted remand, and nearly 18 years elapsing since the Union first filed its unfair labor practice charges—has vitiated the Administrative Procedures Act and materially prejudiced PBS. *See* 5 U.S.C. § 555(b) (The Board must act “[w]ith due regard for the convenience and necessity of the parties or their representatives” such that “within a reasonable time, [it] shall proceed to conclude a matter presented to it.”); *TNS, Inc. v. N.L.R.B.*, 296 F.3d 384, 403 (6th Cir. 2002) (noting that federal appellate courts may “refuse to enforce agency awards when undue delay has made their enforcement inequitable” and vacating Board decision for case initially filed in 1982 when “the Board did not issue its second decision until September 1999, more than four years” after accepting remand from the D.C. Circuit).

Additionally, the Board’s Decision and Order violates PBS’ due process rights and must be vacated because, despite nearly two decades of litigation, the issue of whether PBS was an “individual successor” to Clean-Right, an in-house cleaning contractor (“Clean-Right”), has never been litigated in any shape, fashion or form. Because the General Counsel’s theory of the case focused exclusively on

whether PBS and AM Property Holding Corp. (“AM”)—the entity with which PBS contracted to provide cleaning services at the Manhattan office building located at 80-90 Maiden Lane—were “joint employers,” the “individual successor” issue has never been fully litigated. Nor is the “individual successor” issue closely connected to the “joint employer” issues actually litigated, particularly since AM and Clean Right are wholly separate entities, and “joint employer” and “successorship” constitute two distinct factual and legal issues. *See, e.g., Bellagio, LLC v. N.L.R.B.*, 854 F.3d 703, 712-13 (D.C. Cir. 2017) (“The Board may not find and remedy a violation of the Act not specified in the complaint unless the issue is closely connected to the subject matter of the complaint and has been fully litigated.”).

Finally, the Board’s decision also disregarded controlling judicial authority under *N.L.R.B. v. Burns Security Services*, 406 U.S. 272 (1972), which holds that a successor is not bound by its predecessor’s contractual obligations but rather is free to set its own initial employment terms. *See Pressroom Cleaners*, 361 NLRB No. 57, slip. op. at 7 (2014) (disagreeing with *Love’s Barbeque*, 245 NLRB 78 (1979) because it deviates from *Burns* and stating that “even if the new employer is a legal ‘successor’ obligated to recognize and bargain with the predecessor’s union, the successor employer is not required to adopt the predecessor’s collective-bargaining agreement, and the successor employer generally has the right to unilaterally

establish its initial employment terms without bargaining”) (Member Miscimarra, concurring in part and dissenting in part).

In sum, PBS respectfully requests that, upon review of the Board’s Decision and Order, this Court set them aside on the grounds that the Decision and Order fail to adhere to controlling judicial and statutory authority, depart from established Board precedent without rational explanation, are not supported by substantial evidence in the record as a whole, and/or are otherwise contrary to law.

Respectfully submitted,

**FOX ROTHSCHILD LLP**

*/s/ David J. Garraux*

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Dated: March 20, 2018

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**PETITIONER PLANNED BUILDING SERVICES, INC.’S  
RULE 26.1 CORPORATE DISCLOSURE STATEMENT**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1, Petitioner Planned Building Services, Inc., (“PBS”) hereby certifies that PBS’ parent companies are Planned Companies Holdings, Inc., The FirstService Residential, Inc., and Firstservice Corporation. No publicly held corporation owns 10% or more of PBS’ stock.

Respectfully submitted,

**FOX ROTHSCHILD LLP**

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***Attorneys for Petitioner,  
Planned Building Services, Inc.***

Dated: March 20, 2018

**CERTIFICATE OF SERVICE**

I hereby certify that on March 20, 2018, Petitioner Planned Building Services, Inc.'s *Petition for Review, Corporate Disclosure Statement*, and attached decisions were served via overnight Federal Express or electronic mail on the following individuals:

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