United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: July 23, 2014

TO: M. Kathleen McKinney, Regional Director
Region 15

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Big Daddy Foods, Inc. d/b/a Vowell's Marketplace, Case 15-CA-124940

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The Region submitted this case for advice concerning whether a bankruptcy court's "free and clear" sale order relieves the purchasing Employer of its obligation to recognize and bargain with the Union as a *Burns* successor.[1] We conclude that the bankruptcy court's "free and clear" sale order does not relieve the Employer of its *Burns* successor bargaining obligation. Accordingly, the Region should issue complaint, absent withdrawal, alleging that the Employer's refusal to recognize and bargain with the Union violated Section 8(a)(5).

FACTS

United Food and Commercial Workers Union, Local 1529 (Union) represented unit employees at a Piggly Wiggly grocery store in Starkville, Mississippi owned and operated by Southern Family Markets (SFM). The Union and SFM were parties to a collective-bargaining agreement effective from March 2009 to February 2012 and extended through late July 2012. At that time, Belle Foods (Belle) bought the Starkville store, hired a majority of SFM's employees, recognized the Union, followed the terms of the expired contract, and began bargaining with the Union for a successor collective-bargaining agreement.

Before the parties could finalize an agreement, Belle filed for Chapter 11 bankruptcy in July 2013.[2] Associated Wholesale Grocers (AWG) purchased 43 of

[1] The Region also asks whether Section 10(j) relief is appropriate and warranted in this case. The propriety and warrant of Section 10(j) relief will be addressed in a separate memorandum.

[2] All remaining dates are in 2013.

Belle's stores, including the one in Starkville. Belle and AWG entered into an Asset Purchase Agreement that stated in part:

> Section 19.7 No Assumption of Liabilities. This Agreement constitutes a sale of certain assets of Seller only and is not a sale of any stock in any entity comprising Seller.
>
> (a) By entering into this Agreement or performing any act or agreement hereunder, except as expressly set forth herein, Buyer does not assume any obligations or liabilities of Seller or the Ultimate Purchaser and shall not be responsible for the payment of any liabilities of, or obligations of, Seller or the Ultimate Purchaser whatsoever…
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> …
>
> (b) There is no agency relationship between Seller and Buyer or Buyer and the Ultimate Purchaser; Buyer is not a successor or assign or alter ego to Seller or the Ultimate Purchaser. Seller and Buyer and Buyer and the Ultimate Purchaser are not involved in a joint venture, Buyer is not required to continue operations at any of Seller's former facilities. If in its sole discretion, Buyer or the Ultimate Purchaser hires former employees, managers or supervisors of Seller, these individuals shall be employed as new employees of Buyer or the Ultimate Purchaser.

On September 27, the bankruptcy court signed an order approving the Asset Purchase Agreement between Belle and AWG and including the following language:

> Neither the purchase of the Assets by Buyer or applicable Ultimate Purchaser, nor the subsequent operation of the Assets as grocery stores by Buyer or applicable Ultimate Purchaser shall cause Buyer or its affiliates, successors or assigns or their respective properties (including the Assets), or the Ultimate Purchasers, as applicable, or their respective affiliates, successors or assigns or their respective properties (including the Assets) to be deemed a successor in any respect of the Debtor's business within the meaning of any laws, rules or regulations relating to any tax, revenue, pension, benefit, ERISA, environmental, labor, employment, products liability or other law, rule or regulation of any federal, state or local government.

On October 1, Big Daddy Foods, Inc. d/b/a Vowell's Marketplace (Employer) purchased the Starkville store from AWG. The Employer interviewed employee applicants on October 3 and 4, at which time it informed them of their initial wages and other terms and conditions of employment. Belle closed the Starkville store on October 6. The Employer opened the store on October 7 with the same management and supervision; a majority of its employees were former Belle employees. The Employer continued the same basic operation as Belle, including by retaining the predecessor's store departments, equipment, vendors, and customers.

The Union made a verbal demand for recognition on October 28, followed by a written demand on January 15, 2014. The Employer ignored both demands and continues to refuse to recognize and bargain with the Union.

ACTION

We conclude that the bankruptcy court's order finalizing the "free and clear" sale of the Starkville store from Belle to AWG does not relieve the Employer of its bargaining obligation as a *Burns* successor.[3] As such, the Region should issue complaint, absent settlement, alleging that the Employer's refusal to recognize and bargain with the Union violated Section 8(a)(5).

Under the Act's successorship doctrine, an employer that takes over a business, hires a majority of its employees from the predecessor's workforce, and continues in effect the same basic operation, has a duty to bargain with the predecessor employees' bargaining representative.[4] The Board applies these principles in situations where an employer takes over a business from a debtor in bankruptcy.[5] It is also well-established that the determination of whether an employer is a successor for purposes of liability under the Act is a question of substantive labor law over which the Board, not the bankruptcy court, has primary jurisdiction.[6]

The Board's 2005 decision in *Foodbasket Partners*[7] demonstrates how the Board's successorship principles, which are based on the successor's own conduct, do not

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[3] *See NLRB v. Burns Int'l Sec. Servs.*, 406 U.S. 272, 281 (1972).

[4] *See id.*

[5] *See Nephi Rubber Prod. Corp.*, 303 NLRB 151, 153 (1991), *enfd.* 976 F.2d 1361 (10th Cir. 1992); *Jersey Juniors, Inc.*, 230 NLRB 329, 332-33 (1977); *Bellingham Frozen Foods v. NLRB*, 626 F.2d 674, 676, 678 (9th Cir. 1980), *enforcing in relevant part* 237 NLRB 1450 (1978).

[6] *See, e.g.*, *Food Basket Partners v. NLRB*, 200 F.App'x 344, 347 (5th Cir. 2006) ("[b]ankruptcy courts lack jurisdiction to determine successorship obligations under federal labor law"), *citing NLRB v. Laborer's Int'l Union of N. Am.*, 882 F.2d 949, 955 (5th Cir. 1989); *Horizons Hotel Corp. v. NLRB*, 49 F.3d 795, 802 (1st Cir. 1995); *In re Goodman*, 873 F.2d 598, 602-603 (2d. Cir. 1989) (Board, not bankruptcy court, had jurisdiction to decide whether a new employer is an alter ego of, or successor to, an earlier employer for purposes of liability under the Act).

[7] 344 NLRB 799 (2005), *enfd.* 200 F.App'x 344 (5th Cir. 2006).

interfere with the policy underpinnings of the Bankruptcy Code's "free and clear" sale rules protecting an asset purchaser from liability for the predecessor's misconduct. In *Foodbasket Partners*, the predecessor had filed for bankruptcy, its assets were sold to one of its creditors pursuant to a "free and clear" bankruptcy court order, and then the respondent employer subsequently purchased six of the bankrupt employer's stores.[8] The Board adopted the ALJ's conclusion that the free and clear sale did not privilege the employer to ignore its *Burns* bargaining obligation.[9] The ALJ explained that the employer incurred its bargaining obligation as a successor based on its own conduct, rather than that of the predecessor.[10] The ALJ also explained that the employer's post-bankruptcy third-party purchase of the predecessor's assets, upon which its *Burns* bargaining obligation was premised, was not the kind of pre-bankruptcy "liability" the bankruptcy code was designed to extinguish.[11]

Similarly, in *NLRB v. Horizons Hotel*,[12] the First Circuit upheld the Board's determination that a *Burns* successor had violated Section 8(a)(5) by refusing to bargain, notwithstanding that its purchase of the business was pursuant to a free and clear sale.[13] The court found that the Board, rather than the bankruptcy court, had exclusive jurisdiction to determine the merits of the case because the complaint was directed solely at the employer purchaser and its own unlawful acts, and "[sought] no remedy against the bankruptcy estate."[14]

First, as these cases illustrate, a bargaining obligation is not the type of property interest that a "free and clear" sale eliminates. The goal of a "free and clear" sale is to maximize the purchase price of the debtor's assets, which, in turn, enhances the

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[8] *See id.*, 344 NLRB at 800.

[9] *See id.* at 800-801.

[10] *See id.* at 801. *See also* 200 F.App'x at 347 (employer "had a duty to bargain with the union under the NLRA because of its conduct after the purchase of [predecessor's business]").

[11] *See Foodbasket Partners*, 344 NLRB at 801.

[12] 49 F.3d 795 (1st Cir. 1995), *enforcing* 312 NLRB 1212 (1993).

[13] *See id.*, 49 F.3d at 802, 806.

[14] *Id.* at 802, *citing In re Carib-Inn of San Juan Corp.*, 905 F.2d 561, 562 (1st Cir. 1990).

payout made to creditors from the sale proceeds.[15] An asset purchase agreement's references to "obligations" and "liabilities" pertain to interests which can be satisfied by a money payment. The duty to bargain—the mutual obligation of a union and employer to meet and confer in good faith with respect to wages, hours, and other terms and conditions of employment—is not such a liability. Thus, an obligation to bargain is not a "debt" or "claim" as defined in the Bankruptcy Code[16] because a violation of that obligation cannot be reduced to a specific monetary judgment.[17]

Indeed, because a bargaining obligation does not convert to a specific monetary value, it is not an "interest in such property" that can be nullified through a "free and clear" sale.[18] Notably, a bargaining obligation may be imposed on a successor employer even where there is no transfer of property. In the seminal *Burns* case itself, for example, the Court upheld the imposition of "successor" bargaining obligations under the NLRA on an entity that provided guard services, even where there had been no actual transfer of assets to the successor employer.[19] Thus, courts have specifically recognized that a finding of successorship under the NLRA does not require a transfer of assets.[20]

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[15] *See generally In re WBQ P'ship*, 189 B.R. 97, 108 (Bankr. E.D. Va. 1995) (discussing policy underlying Bankruptcy Code's "free and clear" provision, 11 U.S.C. § 363(f)).

[16] The Bankruptcy Code defines "claim" as a "right to payment" and "debt" as the "liability on a claim." *See* 11 U.S.C. § 101(5)(A), (12) (2010).

[17] *See, e.g.*, *In re Creative Rest. Mgt., Inc.*, 141 B.R. 173, 178 (Bankr. W.D. Mo. 1992) ("the sale free and clear does not immunize the buyer from any responsibility to conduct a re-run election" because election would not in and of itself "give rise to a right of payment"), *opinion vacated due to settlement between the parties* 150 B.R. 232 (Bankr. W.D. Mo. 1992).

[18] 11 U.S.C. § 363(f) (2010) ("[t]he trustee may sell property … free and clear of any interest in such property").

[19] *See Burns*, 406 U.S. at 274-75.

[20] *See, e.g.*, *Tom-A-Hawk Transit, Inc. v. NLRB*, 419 F.2d 1025, 1027-28 (7th Cir. 1969) ("[t]he duty of an employer who has taken over an 'employing industry' to honor the employees' choice of bargaining agent is not one that derives from a private contract, nor is it one that necessarily turns upon the acquisition of assets or assumption of other obligations … [i]t is a public obligation arising by operation of the [NLRA]"), *quoting Maintenance, Inc.*, 148 NLRB 1299, 1301 (1964).

Second, as recognized by the ALJ in *Foodbasket Partners*, the Bankruptcy Code is concerned with eliminating monetary liabilities and obligations incurred *prior* to the sale of the bankrupt entity's assets.[21] Thus, courts have held that a "free and clear" sale cannot, "in order to maximize the sales price," insulate a purchaser from liability for the bankrupt company's conduct, where the claim did not arise until after the sale.[22] In *Zerand-Bernal Group, Inc. v. Cox*,[23] for example, the Seventh Circuit upheld the plaintiff's right to recover damages from his employer, based on an injury caused by a defective machine manufactured by the bankrupt company and purchased by the employer pursuant to a broad "free and clear" bankruptcy order.[24] The defective machine caused injury to the plaintiff several years after the bankruptcy proceedings had ceased.[25] The employer argued that the plaintiff's suit was precluded by the broad bankruptcy order, including the bankruptcy court's purported retention of exclusive jurisdiction over future product liability matters "relating to" the bankruptcy sale.[26] The Seventh Circuit held that the bankruptcy court did not have jurisdiction to enjoin the product liability suit to protect the asset purchaser, and rejected the argument that a bankruptcy court could insulate a "free and clear sale" purchaser from such future liability.[27]

Similarly, in *Ninth Avenue Remedial Group v. Allis-Chalmers Corp.*, cited by the ALJ in *Foodbasket Partners*, the court held that a "free and clear" asset sale could not immunize the asset purchaser from EPA Superfund liability for costs incurred in cleaning up hazardous materials disposed of by its predecessor, stating that "a sale free and clear does not include future claims that did not arise until after the

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[21] *See Foodbasket Partners*, 344 NLRB at 801 (noting that Bankruptcy Code is designed to extinguish pre-sale liabilities). *See also* 200 F.App'x at 347 (bankruptcy order can discharge predecessor's duties that arose prior to bankruptcy petition but not successor's future obligations).

[22] *See Zerand-Bernal Group, Inc. v. Cox*, 23 F.3d 159, 163 (7th Cir. 1994); *Ninth Avenue Remedial Group v. Allis-Chalmers Corp.*, 195 B.R. 716, 731 (N.D. Ind. 1996).

[23] 23 F.3d 159 (7th Cir. 1994).

[24] *See id.* at 162-63.

[25] *See id.* at 161.

[26] *See id.* at 161-62.

[27] *See id.* at 163.

bankruptcy proceedings concluded."[28] The court reasoned that the bankruptcy court's equitable power to permit assets to be transferred "free and clear" must be interpreted consistent with its power to discharge claims under a plan of reorganization.[29] A party whose claims did not exist at the time of the bankruptcy proceeding could not have been expected to assert those claims against any proceeds of the sale.[30]

Consistent with these principles, as applied in *Foodbasket Partners* and *Horizons Hotel*, the bankruptcy court's "free and clear" sale order of the Starkville store does not privilege the Employer's refusal to recognize and bargain with the Union. The facts of this case are virtually identical to those in *Foodbasket Partners*. The Employer's bargaining obligation does not qualify as a pre-sale monetary obligation or liability. Rather, the Employer incurred its *Burns* bargaining obligation by its own, post-sale decisions to hire a majority of predecessor employees and substantially continue the predecessor's business.[31] As the Fifth Circuit aptly noted when enforcing the Board's *Foodbasket Partners* decision, while the bankruptcy court's order may shield the Employer from liabilities that arose before the bankruptcy, the Employer's post-sale conduct "create[d] a new duty to bargain."[32]

Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer's refusal to recognize and bargain with the Union violated Section 8(a)(5).

/s/
B.J.K.

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cc: Injunction Litigation Branch

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[28] 195 B.R. 716, 732 (N.D. Ind. 1996), *cited in Foodbasket Partners*, 344 NLRB at 801.

[29] *See id.* at 731-32.

[30] *See id.*

[31] *See Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 43 (1987) ("substantial continuity" between predecessor and successor measured by similarity between businesses; employees' jobs, employment conditions, and supervision; and products or services offered, production process, and customers).

[32] *Foodbasket Partners v. NLRB*, 200 F.App'x at 347.