

20-1522(L)

20-1973(XAP)

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

305 WEST END HOLDING, LLC, d/b/a 305 WEST END AVENUE OPERATING, LLC, ULTIMATE CARE MANAGEMENT ASSISTED LIVING MANAGEMENT, LLC, A DIVISION OF THE ENGEL BURMAN GROUP, d/b/a ULTIMATE CARE MANAGEMENT, LLC,

Petitioners-Cross-Respondents,

—against—

NATIONAL LABOR RELATIONS BOARD,

Respondent-Cross-Petitioner.

ON APPEAL FROM THE NATIONAL LABOR RELATIONS BOARD

AMENDED SUPPLEMENTAL APPENDIX

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EXHIBIT 2

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**COUNTY AGENCY INC., AND ESPLANADE
PARTNERS LTD. d/b/a ESPLANADE VENTURE
PARTNERSHIP d/b/a THE ESPLANADE HOTEL,
JOINT EMPLOYERS**

Case No. 02-CA-188405

and

**305 WEST END HOLDING, LLC
d/b/a 305 WEST END AVENUE
OPERATING, LLC AND ULTIMATE
CARE MANAGEMENT ASSISTED
LIVING MANAGEMENT, LLC, A DIVISION OF
THE ENGEL BURMAN GROUP d/b/a ULTIMATE
CARE MANAGEMENT, LLC, JOINT EMPLOYERS**

**Case Nos. 02-CA-189863
02-CA-195031**

and

**UNITED FOOD & COMMERCIAL WORKERS
UNION, LOCAL 2013**

**COUNSEL FOR THE GENERAL COUNSEL'S MEMORANDUM IN SUPPORT OF
EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

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**COUNSEL FOR THE GENERAL COUNSEL’S MEMORANDUM IN SUPPORT OF
EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE’S DECISION**

I. STATEMENT OF THE CASE

A. Procedural History

Administrative Law Judge Benjamin W. Green (“the ALJ”) presided over the hearing in this case on March 20, March 23, April 4, April 18-19, May 30-31, and June 21, 2018. On February 7, 2019, the ALJ issued his Administrative Law Judge’s Decision (“the ALJD”),¹ in which he found that 305 West End Holding, LLC d/b/a 305 West End Operating, LLC (“Respondent 305 West End”) violated Section 8(a)(5) the Act when, as a legal successor, it failed and refused to recognize and bargain with the United Food & Commercial Workers Union, Local 2013 (“the Union”).² (ALJD 18-23). Based on extant Board law, the ALJ concluded that Respondent 305 West End was a successor as of the date of the sale. (ALJD 22 at 25-26, 23 at 30-33). Further, the ALJ found that Respondent 305 West End violated Section 8(a)(3) Act when it discriminatorily failed to hire former shop steward Trinidad Hardy. (ALJD 26-27). Moreover, the ALJ found that predecessor-employers, County Agency, Inc. and Esplanade Partners Ltd. d/b/a Esplanade Venture Partnership d/b/a The Esplanade Hotel (“Respondent County Agency” and “Respondent

¹ See *County Agency Inc., et al.*, JD(NY)-03-19 (February 7, 2019). Reference to the ALJD will follow the format, “ALJD [page number] at [line number]. For instance, ALJD 16 at 42-45 is a reference to page 16, lines 42 to 45 of the ALJD. Reference to the Exhibits of the General Counsel and Respondent will be designated as “GC-#” and “R-#,” respectively, with the appropriate number or numbers for those exhibits. References to the transcript in this matter are designated as “Tr. #.” An Arabic numeral(s) after “Tr. #” is a reference to a specific page of the transcript, and an Arabic numeral following a page citation references specific lines of the page cited, e.g. Tr. 15 at 13-16 is transcript page 15 at lines 13 through 16.

² The ALJ found Respondent 305 West End to be a joint employer with Ultimate Care Management Assisted Living Management, LLC, a Division of the Engel Burman Group d/b/a Ultimate Care Management, LLC (“Respondent Ultimate Care Management”). Respondent Ultimate Care Management was added as a party after substantial evidence emerged showing it was heavily involved in the hiring, firing, and overall labor relations decision-making at the facility. (ALJD 18 at 1-10).

Esplanade,” respectively), as joint employers, violated Section 8(a)(5) of the Act when they failed to furnish relevant information to the Union. (ALJD 24-25). The ALJ, however, dismissed the remaining allegations in the Complaint—namely, that Respondent 305 West End unlawfully failed to hire the remaining named discriminatees (aside from Trinidad Hardy).³ (ALJD 27-31).

The General Counsel is only excepting to the extent the ALJ relied on *GVS Properties, LLC*, 362 NLRB 1771 (2015) in reaching his conclusion that Respondent 305 West End is a successor-employer. The General Counsel believes *GVS* should be overturned, and that the Board should apply a new standard. The General Counsel is not excepting to any other findings the ALJ made.

B. Overview of the Operations

Respondent Esplanade, the predecessor-employer, operated an independent senior living residence located at 305 West End Avenue, New York, NY (“the facility”) wherein it employed kitchen and wait staff, housekeepers, front desk concierges, and maintenance staff. (ALJD 3-5; Tr. 81 at 22-24, 126, 200 at 7-19, 198 at 3-6, 299-300). The Union was the exclusive collective-bargaining representative for those employees comprising the bargaining unit of about 55 employees at the facility. (ALJD 3 at 5-18; Tr. 290-291; R-1 and 48). Though Respondent Esplanade sold the property in about July 2016, Respondent 305 West End officially took-over and began operations of the facility on December 5, 2016 (ALJD 3 at 11; Tr. 81 at 2-13, 82 at 15-18, 177 at 6, 198, 251-252).

Respondent 305 West End’s payroll records show that as of December 8, 2016 (the end of the first pay period), it employed 44 employees in the bargaining unit. (ALJD 14; GC-18 and 32).

³ Of note, the ALJ issued an Errata on March 11, 2019, correcting minor typos, misspellings, and incorrect dates in the ALJD.

According to predecessor payroll records, verified by the WARN Act letters sent to everyone in the facility prior to the sale, of those 44 employees in the unit, 36 previously worked for Respondent Esplanade and were represented by the Union. (ALJD 14 at 5-10; GC-60 and 63). Respondent 305 West End identified 15 of those predecessor-employees as building service employees (“BSEs”) that it contends it was required to hire pursuant to the Displaced Building Service Workers Protection Act (“DBSWPA”), a New York City law requiring a purchaser of residential and commercial property to retain for a period of 90 days employees who perform work “in connection with the care or maintenance” of the building. See *N.Y.C. Admin. Code* § 22-505. Those 15 BSEs were housekeeping and maintenance employees. (ALJD 10-11, 14 at 11).

By January 12, 2017, about five weeks after the transfer, records demonstrate that Respondent 305 West End employed 34 incumbent former Respondent Esplanade employees of the 52 total employees in the bargaining unit. (See ALJD Appendix; GC-18, 25, 32, 34, 60, and 63). As of March 9, 2017, 94 days after Respondent 305 West End assumed operations of the facility, records show that predecessor-employees still retained a majority of the unit. (ALJD 16 at 31-36; GC-18, 25, 32, 34, 60, and 63). Though several BSEs are still listed on the payroll dated March 30, 2017, the predecessor-employees no longer comprised a majority of the employees working at the facility on about March 23, 2017, after seven BSEs were terminated. (ALJD 17 at fn. 22; GC-18, 25, 32, 34, 60, and 63).

Regarding Respondent 305 West End’s operations of the facility, as of December 5, 2016, the date of the transfer, and continuing through at least the date of the hearing, all hired employees testified that their jobs continued unchanged with no hiatus or break in service of any kind. (ALJD 19-22; Tr. 80-82, 90, 132-134, 207-208, 439). Indeed, the uncontested record evidence demonstrates that Respondent 305 West End offers the same services as the predecessor-

employers to its residents. (ALJD 19-22; Tr. 91-92, 132-134, 251-253). As former Respondent Esplanade Executive Director and current Director of Resident Relations Marcy Salwen Levitt testified, “there was a complete continuity of services” when Respondent 305 West End assumed operations.⁴ (ALJD 20 at 11-13, 22 at 25-26; Tr. 207 at 16).

II. EXCEPTIONS

A. The Board Should Overturn *GVS Properties*

The ALJ’s conclusion, relying on *GVS Properties, LLC*, 362 NLRB 1771 (2015), that Respondent 305 West End and Ultimate Care Management, as joint employers, violated Section 8(a)(5) by refusing to bargain with the Union as successor employers, is correct under current law. However, the Board should use this opportunity to overrule the misguided decision in *GVS* and clarify that the appropriate time for measuring a putative successor’s workforce in the context of a workforce preservation statute is not until a reasonable time after the expiration of the mandatory retention period. This will allow the putative successor an opportunity to evaluate the predecessor’s employees and make an informed decision as to the composition of its workforce. Applying this standard, the Board should conclude here that the Respondents were not successor employers and therefore did not violate Section 8(a)(5) of the Act.

B. The Board Erred in *GVS Properties*

The Board majority in *GVS* wrongly held that the appropriate time to measure whether a new employer incurs a successor bargaining obligation in the context of a workforce preservation statute is at the time it commences operations, rather than waiting until the end of the mandatory

⁴ Though Respondent 305 West End is allegedly in the midst of seeking a license to become a licensed assisted-living facility wherein it would provide additional medical care, as of the date of the trial, the facility was still unlicensed. In any event, the record evidence shows that even if/when it becomes a licensed facility at some point in the future, the same services will be offered and employees in the bargaining unit will still perform their same job duties as they had always done. (ALJD 20, 21 at 21-24; Tr. 207, 252-254, 439).

probationary period when the new employer has a chance to voluntarily hire its own workforce. *Id.* at 1773. The Board majority reasoned that it has long refused to defer successorship determinations until after the completion of temporary probationary periods either imposed by a successor employer itself or required by a contract of sale, and so it should likewise refuse to defer a successorship determination where the probationary period is required by local law. *Id.* at 1774 (citing, e.g., *Windsor Convalescent Center of North Long Beach*, 351 NLRB 975, 978, 1000 (2007); *Clarion Hotel-Marin*, 279 NLRB 481, 490 (1986), *enforced*, 822 F.2d 890 (9th Cir. 1987)). In arriving at this decision, the *GVS* Board majority failed to properly apply Supreme Court precedent establishing that a new employer only incurs a successor bargaining obligation where it intentionally and voluntarily hires its predecessor's workforce. *See Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 40-41 (1987). In addition, the Board majority ignored the pernicious effects likely to result from its decision, including undermining an employer's fundamental ability to select its own workforce, eliminating successor employers' right to set initial terms and conditions of employment, and subjecting beneficial local and state laws to federal preemption. *See GVS* at 1777-81 (Member Johnson, dissenting).

In *Fall River Dyeing & Finishing Corp.*, the Supreme Court elaborated on the successorship doctrine it initially outlined in *NLRB v. Burns Int'l Sec. Servs., Inc.*, 406 U.S. 272 (1972). In particular, while the Court acknowledged employees' interest in continued representation by their collective-bargaining representative, the Court stressed "the rightful prerogative of owners to independently rearrange their businesses," and noted that "to a substantial extent the applicability of *Burns* rests in the hand of the successor." *Fall River*, 482 U.S. at 40-41 (internal citations and quotation marks omitted). Thus, the Court reasoned, a successor bargaining obligation will be activated only where the new employer "makes a *conscious decision* to maintain generally the

same business and to hire a majority of its employees from the predecessor” (emphasis added), and explained that finding a successorship obligation “makes sense when one considers that the employer *intends* to take advantage of the trained work force of its predecessor.” *Id.* at 41 (emphasis in original).

The Board majority’s decision in *GVS* upends these explicit Supreme Court instructions. The *GVS* majority’s conclusion that a putative successor makes the “conscious” decision described by the Court in *Fall River* because it acquires a business with actual or constructive knowledge of the workforce retention statute ignores that compliance with that law is involuntary. Indeed, in *Burns* itself, the Court rejected a similar argument where the Board had urged that the successor employer should be bound by the predecessor’s collective-bargaining agreement. *Burns*, 406 U.S. at 287. The Court explained that “[a] potential employer may be willing to take over a moribund business only if he can make changes in corporate structure, *composition of the labor force*, work location, task assignment, and nature of supervision.” *Id.* at 287-88 (emphasis added). The Court emphasized that such changes should be achieved through “private bargaining” and not as “a result of Government compulsion” to adhere to a pre-existing contract. *Id.* at 287. Similarly, the *GVS* majority’s creation of a successor bargaining obligation as a result of “Government compulsion” in the form of a worker retention statute contradicts the Court’s holding that a bargaining obligation only arises from voluntarily hiring a workforce and undermines a successor’s ability to structure its business so as to best ensure its profitability and the job security of those it chooses to employ. *See also GVS*, 362 NLRB at 1778-79 (“[the majority’s] conclusion erroneously conflates the decision to purchase a business with the decision to compose its workforce”) (Member Johnson, dissenting).

For these reasons, the perverse conclusion that involuntarily hiring employees in compliance with local law constitutes a “conscious,” voluntary decision to compose a workforce has been rejected by multiple state and federal courts. *See, e.g., Paulsen v. GVS Props. LLC*, 904 F. Supp. 2d 282, 292 (E.D.N.Y. 2012) (in Section 10(j) proceeding, observing that “[t]he key to *Burns* is voluntariness. If the employer is legally precluded as a result of local law from terminating employees except on narrow grounds, then it cannot be held to have made the voluntary decision to become a successor that *Burns* requires.”); *Rhode Island Hospitality Ass’n v. City of Providence*, 667 F.3d 17, 29-30 (1st Cir. 2011) (“Supreme Court caselaw on successorship stresses the voluntary and conscious decisionmaking [sic] by the new employer”; an employer “has made no such ‘conscious decision’” where it is “compelled to continue the employment of the former business’s employees”); *California Grocers Ass’n v. City of Los Angeles*, 52 Cal. 4th 177, 204-06 (Cal. 2011) (under a local worker retention statute, “the predecessor’s employees are essentially probationary and no basis exists for concluding [that] one of the prerequisites of a successorship bargaining obligation, the hiring of a majority of the predecessor’s employees . . . , will come to pass”).

The *GVS* majority’s reliance on cases involving an employer’s own probationary period or a sales-contract-imposed probationary period is misplaced. *See Windsor Convalescent Center of North Long Beach*, 351 NLRB at 975; *Clarion Hotel-Marin*, 279 NLRB at 481. As Member Johnson argued in his dissent in *GVS*, the probationary periods in those successor cases were *voluntarily* embraced by the successor employers, either unilaterally or through a contract that the employer negotiated. *GVS*, 362 NLRB at 1779. By contrast, the Respondents here have no choice but to adhere to the DBSWPA’s mandatory retention period; it is not until that period’s end that the Respondents may make their own staffing decisions. Indeed, since all employers in the industry

must abide by the local statute, the Respondents could not do business at all without accepting these restrictions on hiring; in contrast, where a predecessor employer requires the continued employment of its employees as a condition of entering into a purchase agreement, and the successor entity is unable to negotiate terms that ameliorate that requirement, it has the option of purchasing a different business.

The *GVS* majority also ignored the negative consequences likely to result from its holding. For instance, although a successor employer is typically free to set the initial terms and conditions under which it will offer employment to the predecessor's employees, *Burns*, 406 U.S. at 294, in rare situations in which it is "perfectly clear" that a successor employer plans to retain all of the predecessor's employees, the successor must consult with the incumbent union prior to altering existing terms and conditions of employment. *Id.* at 294-95; *see also Fall River*, 482 U.S. at 47 n.14; *Spruce Up Corp.*, 209 NLRB 194, 195 (1974), *enforced*, 529 F.2d 516 (4th Cir. 1975); *Ridgewood Health Care Center, Inc. and Ridgewood Health Services, Inc.*, 367 NLRB No. 110, slip op. at 5-6 (Apr. 2, 2019). Since it is "perfectly clear" that employers subject to worker retention laws such as the DBSWPA will have to retain their predecessor's employees, finding successorship at the time operations commence will effectively eliminate these successor employers' ordinary right to set initial terms and conditions of employment. *See GVS*, 362 NLRB at 1779-80 (Member Johnson, dissenting). The only way for such an employer to avoid "perfectly clear" successor status would be to "announce new terms of employment no later than the moment it agrees to acquire its predecessor's business," when "informed decisions" about such matters are virtually impossible. *Id.* at 1780 n.5. This would be the case even though it is New York City, not the successor employer, that has determined that the predecessor's workers must be retained.

Additionally, because a “perfectly clear” successor must continue the predecessor’s terms and conditions of employment, a successor employer subject to a workforce retention statute will not only be forced to retain the predecessor’s employees, but it also may be unable to discharge them (other than for misconduct) after the expiration of the retention period if the predecessor had a just-cause dismissal provision, which is common in unionized workplaces. *See Adams & Associates, Inc.*, 363 NLRB No. 193, slip op. at 2-5 (May 17, 2016) (perfectly clear successor violated Section 8(a)(5) by unilaterally discontinuing “just cause” provision of predecessor’s collective-bargaining agreement), *enforced*, 871 F.3d 358 (5th Cir. 2017); *Morris Healthcare & Rehabilitation Center*, 348 NLRB 1360, 1360 n.2, 1366 (2006) (same). This result directly conflicts with the Supreme Court’s holding in *Fall River* and *Burns* that a “successor is under no obligation to hire the employees of its predecessor,” *Fall River*, 482 U.S. at 40 (citing *Burns*, 406 U.S. at 280 n.5), and has a “rightful prerogative” to arrange its business. *Id.*

Finally, as explained by Member Johnson in his dissent, there is a strong likelihood that the Board majority’s decision in *GVS* will prove to be the “death knell” for local worker retention statutes, which serve important public policy purposes. *GVS*, 362 NLRB at 1779. Under the Supreme Court’s *Machinists* preemption doctrine, conduct that is neither protected nor prohibited by the Act may nevertheless be shielded from state regulation if Congress intended it to “be controlled by the free play of economic forces.” *Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Commission (“Machinists”)*, 427 U.S. 132, 140-41 (1976) (internal citations and quotation marks omitted). Under its *Machinists* doctrine, the Supreme Court has found a variety of state and local laws covering private-sector labor relations to be federally preempted. *See Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 619-20 (1986) (city council’s requirement that labor dispute be resolved in order for taxi cab company to renew

its operating franchise); *Chamber of Commerce v. Brown*, 554 U.S. 60, 62 (2008) (state law prohibiting employers that receive state funds from using the funds to promote or deter union organizing). Here, similar to those federally-preempted state and local regulations, the DBSWPA, when considered together with *GVS*, impermissibly interferes with conduct that Congress intended to leave to the free play of economic forces: that is, an employer’s “rightful prerogative ... to independently rearrange [its] business[.]” *Fall River*, 482 U.S. at 40, especially given that “[a] potential employer may be willing to take over a moribund business only if he can make changes in corporate structure, *composition of the labor force*, work location, task assignment, and nature of supervision.” *Burns*, 406 U.S. at 287-88 (emphasis added). Although several courts have rejected federal preemption challenges to workforce retention statutes, they have done so on the assumption that the Board would not rule as it did in *GVS*. 362 NLRB at 1779 (Member Johnson, dissenting) (citing *Rhode Island Hospitality*, 667 F.3d at 29; *California Grocers Ass’n.*, 52 Cal. 4th at 205). The majority’s decision in *GVS*, if permitted to stand, could cause reviewing courts across the nation to find that worker retention statutes—which have the laudable public policy goal of helping low-income workers in industries where contractors change frequently—are federally preempted.

For the foregoing reasons, the Board should overrule *GVS* and conclude that the appropriate time for determining successorship status in the context of a worker retention statute is not until the expiration of the statute’s mandatory retention period, when the putative successor has an opportunity to voluntarily compose its own work force. Furthermore, the Board should conclude that a successor employer is entitled to a reasonable amount of time following the expiration of the retention period to evaluate employees’ performance during the mandatory retention period, conduct any needed interviews, and make final staffing decisions before

measuring the new employer's workforce for purposes of determining successorship status. *Cf. M & M Parkside Towers LLC*, JD(NY)-05-07, 2007 WL 313429, slip op. at 6-8 (Jan. 30, 2007) (successor bargaining obligation not activated until 23 days after expiration of 90-day DBSWPA retention period, when successor employer made permanent job offers).

C. Applying the Correct Standard, the Respondents did not Violate Section 8(a)(5)

Applying the standard above, the Board should conclude that the Respondents did not incur a successorship obligation and therefore did not violate Section 8(a)(5). Upon expiration of the 90-day period, the Respondents evaluated the DBSWPA-covered employees and decided to keep some based on their performance, but also decided to terminate seven employees due to attendance issues and their difficulty with accepting directions. *County Agency, Inc.*, JD(NY)-03-19, 2019 WL 561379, slip op. at 16 (Feb. 7, 2019). At that point, which was approximately eighteen days after the 90-day period expired, new employees outnumbered predecessor employees. Thus, within a reasonable time after the expiration of the retention period, the Respondents were able to evaluate their workforce and make a "conscious" and voluntary decision about whom to retain and whom to discharge. Because new employees outnumbered predecessor employees at that time, the Respondents were not successor employers with an obligation to recognize and bargain with the Union.

III. CONCLUSION

Based on the foregoing, the General Counsel submits that *G/S* should be overturned. A new standard, giving the putative successor a reasonable time after the expiration of the mandatory retention period, should be adopted. Applying this standard, the Board should conclude that the Respondents were not successor-employers and therefore did not violate Section 8(a)(5) of the Act. (See ALJD 18-24).

The General Counsel does not except to any other conclusions in the ALJD.

Dated: New York, New York
April 22, 2019

Respectfully Submitted,

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I, the undersigned employee of the National Labor Relations Board, hereby certifies that I electronically filed a true and correct copy of the above-entitled document with the National Labor Relations Board and served the above-entitled document upon counsel for the parties by electronic mail at the following addresses:

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