Leiferman Enterprises, LLC d/b/a Harmon Auto Glass and its successor Auto Glass Repair and Windshield Replacement Service, Inc. *and* International Union of Painters and Allied Trades–District Council 82. Case 18–CA–18134

October 30, 2009

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

On June 26, 2009, Administrative Law Judge Robert A. Giannasi issued the attached supplemental decision. Respondent Auto Glass Repair and Windshield Replacement Service, Inc. filed exceptions and a supporting brief,[1] and the General Counsel filed an answering brief.

The National Labor Relations Board[2] has considered the supplemental decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[3] and conclusions and to adopt the recommended Order as modified[4] and set forth in full below.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Auto Glass Repair and Windshield Replacement Service, Inc., Minneapolis, Minnesota, its officers, agents, successors, and assigns, shall make whole the individuals named below by paying them the amounts set forth adjacent to their names, plus interest accrued to the date of payment, as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), minus tax withholdings required by Federal and State laws.

Timothy Rannow	$ 4,468.48
Harold Hegg	4,747.93
Robert Leyde	4,699.79
Steven Nyberg	4,766.87
Roger Wegleitner	3,945.92
James Schmidt	4,709.01
Richard Friedland	4,514.35
Daniel Hyland	2,537.16
Joseph Kacures	4,763.80
Timothy Rettner	97.62
Kenneth Salmela	98.57
Michael Leyde	5,142.75
Daniel Walters	4,796.50
Michael Ketter	4,808.30
Mark Krugerud	421.20
TOTAL	$ 54,518.25

Dated, Washington, D.C. October 30, 2009

Wilma B. Liebman, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[1] Respondent Auto Glass Repair and Windshield Replacement Service, Inc. (WRS) also filed a motion for reconsideration or, in the alternative, to add Harmon Auto Glass Intellectual Property, Inc. (HAIP) as a party. In its motion, WRS seeks reconsideration of the judge's ruling that it did not have standing to raise defenses based on the alleged interests of HAIP, a nonparty in this proceeding. However, those defenses were presented to and ruled on by the judge, notwithstanding his initial finding that WRS lacked standing to raise them. Moreover, the judge correctly found that WRS's defenses are meritless. Accordingly, WRS was not prejudiced by the judge's ruling. Further, joinder of HAIP has not been shown to be necessary to the resolution of the issues presented in this case. Accordingly, we deny WRS's motion.

In support of its motion for reconsideration, WRS submitted an April 8, 2009 letter from counsel for the General Counsel. Although no party has filed a motion to strike, we have not considered the letter because it is not a part of the stipulated record and, therefore, is not properly before us. Even if we were to construe WRS's motion as a motion to reopen the record, we would deny the motion on the grounds that WRS has failed to show that the document in question is newly discovered or previously unavailable and that it would require a different result. See *Transit Management of Southeast Louisiana*, 331 NLRB 248 fn. 2 (2000); *Novel Knit, Inc.*, 299 NLRB 58 fn. 2 (1990); Sec. 102.48(d)(1) of the Board's Rules and Regulations.

[2] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act. See *Snell Island SNF LLC v. NLRB*, 568 F.3d 410 (2d Cir. 2009), petition for cert. filed 78 U.S.L.W. 3130 (U.S. September 11, 2009) (No. 09-328); *New Process Steel v. NLRB*, 564 F.3d 840 (7th Cir. 2009), petition for cert. filed 77 U.S.L.W. 3670 (U.S. May 22, 2009) (No. 08-1457); *Northeastern Land Services v. NLRB*, 560 F.3d 36 (1st Cir. 2009), petition for cert. filed 78 U.S.L.W. 3098 (U.S. August 18, 2009) (No. 09-213). But see *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), petition for cert. filed sub nom. *NLRB v. Laurel Baye Healthcare of Lake Lanier, Inc.*, __U.S.L.W.__ (U.S. September 29, 2009) (No. 09-377).

[3] Member Schaumber did not participate in *International Technical Products*, 249 NLRB 1301 (1980), and does not pass on whether it was correctly decided. However, he recognizes that it is current Board law, and he applies it in the present case for institutional reasons.

[4] We have modified the recommended Order to conform to our standard remedial language.

David M. Biggar, Esq., for the General Counsel.
Douglas P. Seaton, Esq., of Edina, Minnesota, and *Gregory M. Erickson, Esq.,* of Minneapolis, Minnesota, for the Respondent.
Richard Johnston, of Little Canada, Minnesota, for the Charging Party.

SUPPLEMENTAL DECISION

Statement of the Case

ROBERT A. GIANNASI, Administrative Law Judge. On May 6, 2009, I granted a motion to submit this case for decision by an administrative law judge, without a hearing and on a stipulated record. The case arises out of a Board decision and order, dated February 21, 2008, and reported at 352 NLRB 152, directing that Respondent Leiferman (and its successors and assigns) make employees whole for any losses suffered as a result of its unfair labor practices, including the unilateral changes it implemented without reaching a good-faith bargaining impasse with the Charging Party Union (the Union). On February 26, 2009, Region 18 issued a compliance specification setting forth amounts allegedly owed under the earlier Board decision and order. Those amounts included 401(k) payments that were discontinued and increases in health insurance premiums that were not paid, in contravention of the extant collective bargaining agreement and existing terms and conditions of employment. The backpay period runs from August 11, 2006, until February 2, 2007, when the purchaser of Leiferman's assets, Auto Glass Repair and Windshield Replacement Service (WRS), began operating the business. Respondent WRS concedes the backpay amounts are owed, but contends that it is not liable for those amounts because a Minnesota court ordered that the sale of Leiferman's assets to WRS was "free and clear of any liens and encumbrances." The General Counsel disagrees because it alleges that the Minnesota court could not compromise claims under Federal law, particularly since the Board did not appear in the Minnesota proceedings. After I granted the motion to submit the case on a stipulated record, the General Counsel and Respondent WRS filed briefs, which I have read and considered.

Based on the entire record in this case, including the stipulation and the briefs of the parties, I make the following

Findings of Fact

Leiferman was engaged in the sale and installation of automotive glass at various facilities in the Minneapolis area. The Union represented some 15 of its employees. The Union and Leiferman were parties to a collective-bargaining agreement effective July 1, 2003, through June 30, 2006.

Leiferman financed the purchase of its business through various agreements with a secured creditor known as Harmon Auto Glass Intellectual Property (HAIP), the most recent of which was entered into in September 2005. Shortly thereafter, Leiferman defaulted on its payment obligations to HAIP. Leiferman and HAIP entered into a so-called forbearance agreement on April 30, 2006, in which Leiferman agreed to make certain payments to HAIP and to complete the sale of Leiferman Enterprises to a third party before September 15, 2006. HAIP's security interest was perfected by filing a UCC-1 with the Secretary of State. Leiferman thereafter defaulted on the payment terms in the forbearance agreement. HAIP then demanded that Leiferman return possession of and grant access to Leiferman's collateral to HAIP. Leiferman refused to do so.

Because of Leiferman's failure to grant possession and access to the collateral described above and because of evidence that Leiferman was engaging in erratic economic behavior in the operation of its business, HAIP filed a complaint for the appointment of receiver or for claim and delivery in the District Court for the State of Minnesota, County of Hennepin, seeking the appointment of a receiver to manage Leiferman. On September 20, 2006, the State District Court issued a Stipulated Order Establishing Receivership and Appointing Receiver. Lighthouse Management Group (Receiver) was appointed as the Receiver. The Court's order authorized the Receiver to operate the business in a manner designed to preserve and maximize the value of the business and its assets, and also authorized the Receiver to pursue the sale of Respondent Leiferman or its assets. After seizing control of Leiferman, and in order to keep Leiferman operating as a going concern, HAIP was forced to invest over $300,000 to continue Leiferman's operations and continue payment to its employees, including those represented by the Union. Leiferman ceased operations and had no financial ability to satisfy its obligations to the employees who had been represented by the Union because it had a negative cash flow of $100,000 per month.

During this same period of time, Leiferman was engaged in negotiations with the Union for the terms of a new collective-bargaining agreement to cover its employees. On August 13, 2006, after about 2 months of negotiations, Leiferman implemented its final offer and unilaterally changed the terms and conditions of employment of its employees. In August through October of 2006, the Union filed unfair labor practice charges with the Board, claiming that Leiferman's conduct violated Section 8(a)(5) and (1) of the Act. On November 1, 2006, the Board issued a complaint and notice of hearing in Case 18–CA–18134 alleging that Leiferman had unlawfully declared impasse and unilaterally implemented changes without having reached a bona fide impasse, in violation of the Act.

Beginning in October 2006, the Receiver sent bid instruction letters to nine potential buyers of Leiferman's assets, together with due diligence data. This data included notice of the potential liability arising from the Board proceeding in Case 18–CA–18134. Leiferman's assets were subsequently purchased by Respondent WRS, which acknowledges that, prior to purchasing Leiferman's assets, it was put on notice of Leiferman's potential backpay liability in Board Case 18–CA–18134. All prospective purchasers of Leiferman, as a condition of their bids, required HAIP indemnify them from any pending claims against Leiferman from the NLRB and the EEOC.

On January 31, 2007, the District Court for the State of Minnesota, County of Hennepin, approved the sale of Leiferman's assets to WRS. The order states that WRS's purchase of Leiferman was "free and clear of any liens and encumbrances." At no time did any representative of the Board, or the Board itself, file a claim with the District Court for the State of Minnesota, County of Hennepin, or otherwise submit to the jurisdiction of the court.

On August 20, 2007, judgment was entered against Leiferman Enterprises LLC and Scott Leiferman awarding HAIP monetary damages in the amount of $3,626,095, plus attorneys' fees and costs in the amount of $97,000.50 for a total judgment of $3,723,095.50. A deficiency of over $3,000,000 remains unpaid.

Since purchasing the assets of Leiferman on about January 31, 2007, WRS has continued Leiferman's business of selling and installing automotive glass to retail customers, without interruption. All additional locations where WRS assumed leases had been locations that were leased by Leiferman. WRS employed 5 of the 15 glass installers who had worked for Leiferman; 2 new glass installers; the 9 store managers who worked for Leiferman (who had installed glass while working for Leiferman and who install glass now with WRS); 4 of the 5 customer representatives who had worked for Leiferman; and the salesperson who had worked for Leiferman. WRS licensed the same trade name that Leiferman had licensed from HAIP. Leiferman had leased the same trade name from HAIP, but HAIP had canceled the lease. However, WRS operated with a different corporate management and a different headquarters. Those glass installers who had worked for Leiferman were paid different benefits and had different terms and conditions of employment, had increased job responsibilities, and used different methods (equipment) to install auto glass. Despite the substantial reductions in overhead, and the fact that its principal worked more than 60 hours per week at a salary of $15,000, WRS operated at a loss in 2007 and 2008.

On February 21, 2008, the Board issued its Decision and Order in Case 18–CA–18134, reported at 352 NLRB 152, directing that Leiferman (and its successors and assigns) make employees whole for any losses suffered as a result of unfair labor practices it found Leiferman committed by making unilateral changes in terms and conditions of employment, which Leiferman implemented without reaching a good-faith impasse during bargaining with the Union.

The backpay period in this proceeding begins on August 11, 2006, when Leiferman unilaterally changed terms and conditions of employment of employees covered by the collective-bargaining agreement in effect from July 1, 2003, to June 30, 2006, by ceasing to make 401(k) payments on behalf of said employees and by increasing monthly contributions of health insurance premiums paid by those employees from 25 to 50 percent of the total monthly cost of those premiums. The backpay period ends on February 2, 2007, after which date WRS began operating the business.

WRS agrees that if it is found to be liable for contributions to employee 401(k) accounts and to make employees whole for the additional 25 percent cost of health insurance premiums, the computations and amounts set forth in paragraphs 9–13 of the Compliance Specification issued in this case are accurate. The total amount owed is $54,518.25, plus interest.

The Issue

The parties agree that the only issue in this case is whether Respondent WRS has backpay liability as a successor to Leiferman, or whether such liability is extinguished because the District Court for the State of Minnesota, County of Hennepin, ordered that the sale of Leiferman's assets to WRS be "free and clear of any liens and encumbrances."

Discussion and Analysis

In *Golden State Bottling Co. v. NLRB,* 414 U.S. 168 (1973), the Supreme Court held that a bona fide purchaser of a business who has knowledge of the seller's unfair labor practices at the time of the purchase and who continues the business without interruption or substantial change in operations, employee complement, or supervisory personnel has joint and several liability for remedying the seller's unfair labor practices. The purchaser is defined as a *Golden State* successor because it must remedy the unfair labor practices of the predecessor. And, unlike in successorship cases for bargaining purposes, this obligation does not require that a majority of the successor's employees be former employees of the predecessor or even that they be represented by a union. *D. L. Baker, Inc*., 351 NLRB 515, 519, 545 (2007). In *Baker*, the Board rejected the respondent's contention that the General Counsel must also prove that the predecessor's potential liability be reflected in the purchase price of the business, citing *Perma Vinyl Corp*., 164 NLRB 968 (1967), enfd. sub nom. *U.S. Pipe & Foundry Co. v. NLRB*, 398 F.2d 544 (5th Cir. 1968). The Board pointed out that the successor is in the best position to remedy the predecessor's unfair labor practices and suffers no unfair hardship because it can account for the potential liability in the purchase price or secure an indemnity clause in the sales agreement. 351 NLRB at 520.

In this case it is clear that Respondent WRS is a *Golden State* successor. According to the stipulation, after it purchased the assets of Leiferman it continued Leiferman's business of selling and installing automotive glass to retail customers without interruption. All additional locations where WRS assumed leases had been locations that were leased by Leiferman. Five of its seven glass installers had worked for Leiferman. The nine store managers who worked for Leiferman now work for WRS and they also install glass, as they did when they worked for Leiferman. WRS licensed the same trade name that Leiferman had licensed from HAIP. Although the former Leiferman glass installers were paid differently and the installation equipment is different, those factors do not outweigh the factors cited above that overwhelmingly show that WRS continued the Leiferman operation without substantial change. Indeed, in its brief, WRS does not argue to the contrary. Accordingly, I find that Respondent WRS continued its predecessor's business within the meaning of *Golden State*. See, in addition to *D. L. Baker*, above, *WXGI, Inc*., 330 NLRB 695, 711 (2000), enfd. 243 F.3d 833 (4th Cir. 2001); and *St. Mary's Foundry*, 284 NLRB 221, 233–234 (1987), enfd. 860 F.2d 679 (6th Cir. 1988).

Nor is there any dispute that WRS had notice of the unfair labor practices of Leiferman prior to its purchase of the assets of Lieferman. The parties stipulated as much. Indeed, not only did WRS had knowledge of Leiferman's unfair labor practice liability, but the terms of the sale provided that HAIP, the secured creditor, would indemnify it for any claims the NLRB had against it as a result of the unfair labor practices of Leiferman. Thus, WRS is not even out of pocket for the roughly $55,000 backpay liability attributable to Leiferman. In these

circumstances, I find that all elements of the *Golden State* successorship requirements have been met and WRS is indeed a *Golden State* successor, jointly and severally responsible for the backpay amounts set forth in this case.

As indicated in the stipulation, the only issue in this case is whether Respondent WRS may escape its *Golden State* liability because, in approving the sale, the Minnesota State Court ordered that the sale of the assets to WRS would be "free and clear of any liens and encumbrances." Respondent WRS contends that this statement means that the NLRB's claims cannot be enforced against it. I reject that contention. Initially, the statement cannot be construed as Respondent WRS submits because that would nullify the very essence of the sale that the state court approved. According to the stipulation, all prospective purchasers of Leiferman, as a condition of their bids, required HAIP to indemnify them for any pending claims against Leiferman from the NLRB. The obvious reason for the condition was to facilitate the sale, which was sought by and would benefit HAIP. Thus, the court's statement about the purchaser taking free and clear of all liens must be read in conjuction with the indemnification that was a condition of the sale. That indemnification specifically recognizes and protects the Board's interest in recovering the backpay owed in this case.

More importantly, even if read as Respondent WRS suggests, the State Court Order cannot override the requirements of Federal law, more explicitly, those of Board remedial orders. In a very similar case, *International Technical Products Corp*., 249 NLRB 1301 (1980), the Board addressed the issue whether a *Golden State* successor's backpay liability could be extinguished by a Federal bankruptcy court order approving the sale of assets of a predecessor "free and clear of all liens, claims, and encumbrances." The Board answered the question in the negative, citing the Board's exclusive authority to remedy unfair labor practices. To rule otherwise, the Board observed, would be "tantamount to a relinquishment by the Board of its statutory obligation to remedy unfair labor practices and also its authority, as found in *Perma Vinyl* and *Golden State Bottling* . . . to proceed against a successor-employer in furtherance of that obligation." Id. at 1303. It would also imply that the bankruptcy court could, by ordering a sale free of encumbrances, effectively nullify a Board order enforcing public rights. As the Board observed, a Board remedial order is fashioned "without regard to a wrongdoer's past, present or future state of assets." Thus, it cannot be classified as a "lien, claim, or encumbrance" within the "common usage of those terms," and it cannot be extinguished simply through the purchase of a bankrupt's assets "free and clear of all liens, claims and encumbrances." Id. at 1303–1304. The Board's holding in *International Technical Products* essentially controls the outcome of this case.

Indeed, this case presents an even stronger case than *International Technical Products* for the imposition of a *Golden State* successorship obligation on Respondent WRS because the Board is enforcing Federal rights as against an alleged reading of a State Court Order. The supremacy clause of the Constitution and the preemption doctrine set forth in *Garner v. Teamsters*, 346 U.S. 485, 490–491 (1953), and *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), make clear that, even when conduct is arguably violative of the Act, state rulings and actions must defer to the "exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." 359 U.S at 245.[1]

In its brief (Br. 9–20), Respondent WRS does not assert its own objections to a *Golden Gate* successorship finding against it. Instead, it asserts the perceived inequity of having the secured creditor in the State Court proceeding (HAIP) be responsible for indemnifying it for the roughly $55,000 owed under the Board's backpay order. This unusual defense must fail. Respondent WRS has no standing in this proceeding to advance the interests of HAIP, which is not, of course, a party in the instant case. Respondent WRS's defense is also speculative. The alleged inequity, if it is to be pursued at all, should be addressed to the Minnesota court, if and when WRS seeks to collect on the indemnification from HAIP and HAIP refuses to pay. But the defense has no merit in any event because, as indicated above, a condition of the sale was that the buyer would be indemnified by HAIP for any claim brought against it by the NLRB. That circumstance cannot defeat a *Golden Sta*te successorship obligation. Indeed, the whole purpose of requiring advance notice of the unfair labor practice liability is to permit the buyer to provide for the risk of that liability. That was accomplished by the condition set forth for the sale of Leiferman's assets. Nothing in Board case law remotely supports Respondent WRS's view of the situation.[2]

Conclusion

On these findings of fact and conclusions of law, and on the entire record, I conclude that Respondent WRS is a *Golden State* successor and liable for the backpay amounts set forth in paragraphs 9 to 13 of the Compliance Specification in this case. Accordingly, I issue the following recommended[3]

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[1] Respondent WRS also alleges that the Minnesota Court Order is the equivalent of a Federal bankruptcy court order, at least in assessing priority claims (Br. 15). But that avails it nothing in the face of the Board's decision in *International Technical Products*. In that case, the Board distinguished the Supreme Court's decision in *Nathanson v. NLRB*, 344 U.S. 25 (1952), which Respondent WRS also cites in support of its position (Br. 15). As the Board noted, the Court in *Nathanson* simply ruled that the Board's claim in a bankruptcy court was not a priority claim. *Nathanson* did not pass on the issue—presented both in *International Technical Products* and here—whether the Board is precluded from proceeding against a successor who has purchased, free and clear of encumbrances, the assets of a bankrupt employer against whom the backpay claim is filed. 249 NLRB at 1304 fn. 10.

[2] Respondent WRS's citation of *Peters v. NLRB*, 153 F.3d 289, 300–302 (6th Cir. 1998), in this connection is unavailing. In that case, the court refused to enforce that part of the Board's order finding Western to be a *Golden State* successor because the sales arrangement with the predecessor did not allow Western to negotiate an indemnity clause or bargain for a price that would capture the risk associated with any unfair labor practice liability. To the extent that the Sixth Circuit decision is contrary to Board law, I am bound to follow Board law. *Iowa Beef Packers*, 144 NLRB 615, 616 (1963), enfd. in part 331 F.2d 176 (8th Cir. 1964). But, in any event, the Sixth Circuit's decision in *Peters* is clearly distinguishable from the situation in this case. Respondent WRS not only had the opportunity to negotiate an indemnification clause, it had one.

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended

SUPPLEMENTAL ORDER

It is hereby ordered that Respondent WRS, its officers, agents, successors, and assigns, shall make whole those individuals named in the compliance specification set forth below, plus interest in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Timothy Rannow	$ 4,468.48
Harold Hegg	4,747.93
Robert Leyde	4,699.79
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Michael Ketter	4,808.30
Mark Krugerud	421.20
TOTAL	$ 54,518.25

Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Dated, Washington, D. C. June 26, 2009