

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

Case 18-CA-18134

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

**EXCEPTIONS
AUTO GLASS REPAIR AND WINDSHIELD
REPLACEMENT SERVICE, INC.'S
TO ADMINISTRATIVE LAW JUDGE'S DECISION**

Introduction

Auto Glass Repair and Windshield Replacement Service, Inc. takes exception to the following recommended findings of fact, conclusions of law, and decision of Administrative Law Judge Robert Giannasi, rendered on June 26, 2009. The exceptions are made under N.L.R.B. Rule § 102.46.

Reference Identification

References to cited abbreviated party identification include the following:

- “ALJD” – Administrative Law Judge Decision
- “WRS” – Auto Glass and Windshield Replacement Service, Inc.
- “HAIP” – Harmon AutoGlass Intellectual Property, LLC
- “Leiferman” – Leiferman Enterprises, LLC d/b/a Harmon Auto Glass
- “Union” – International Union of Painters and Allied Trades – District #82

EXCEPTIONS

1. ALJD p. 3, lines 6-9 The ALJ’s findings of fact reflected the Minnesota State District Court order stated that HAIP purchase of Leiferman was “free and clear of any liens and encumbrances” but failed to acknowledge that all sales proceeds would be paid to Leiferman’s first position secured creditor and why the imposition should be made to reduce the award, or that why it is equitable to provide for the secured creditor to pay for the NLRB award when Leiferman could not pay for the NLRB award.

- ALJD p. 3, lines 15-16 The ALJ’s findings of fact, although notes a deficiency of over \$3,000,000 owed to HAIP, the ALJ nevertheless did not reflect that the NLRB’s underlying complaint failed to allege facts showing malfeasance on the part of a secured creditor to support “equitable subordination” of the first position secured creditor’s claim to that of the NLRB’s unsecured claim.

- ALJD p. 3, lines 15-16 The ALJ’s findings of fact, although notes a deficiency of over \$3,000,000 owed to HAIP, the ALJ nevertheless did not reflect that the NLRB’s underlying complaint failed to allege facts relative to the ability of Leiferman to provide any of the relief the NLRB sought, had Leiferman stayed in business.

ALJD p. 4, line 27

The ALJ stated that WRS is a *Golden State* successor. The conclusion is contrary to the facts and the law.

ALJD p. 4, lines 34-35

The ALJ's analysis regarding his conclusion that WRS continued the Leiferman operation without substantial change, although citing former Leiferman glass installers employment terms and installation equipment. The conclusion is contrary to the facts and the law. For instance, the Stipulation of Facts reflect that WRS employees were paid different benefits and had different terms of employment, and increased job responsibilities. The ALJ failed to recognize that WRS is not bound by the substantive provisions of a collective bargaining agreement negotiated by its predecessor and not agreed to or assumed by WRS. *NLRB v. Burns International Security Services*, 406 U.S. 272 (1972).

ALJD p. 4, circa
lines 34-35

Facts do not show that former Leiferman employees expected the same employment terms if hired by WRS as those of their predecessor employer, and did not otherwise know that employment with WRS would result in different terms of employment or employment conditions.

ALJD p. 4, circa
lines 34-35

Facts do not show that WRS induced former Leiferman employees to mislead or lull them from seeking other positions with other companies.

ALJD p. 4, circa
lines 34-35

The ALJ analysis failed to analyze hiring by WRS as reflecting a general willingness to hire former Leiferman employees but because of different terms of employment further substantiated WRS's clear intent to set its own initial employment terms.

ALJD p. 4, line 36

The ALJ's analysis that WRS continued the Leiferman operation without substantial change and that WRS did not argue to the contrary in its brief. This is contrary to the facts and the law.

ALJD p. 4, line 45-47

The ALJ's analysis and conclusion that because of an indemnification agreement with HAIP, the secured

creditor, WRS is not even out of pocket for roughly \$55,000 backpay liability attributable to Leiferman. There is no analysis of why it is equitable to allow the NLRB to reduce HAIP's recovery on its first position claim.

ALJD p. 4, lines 47-49

The ALJ's analysis finding that all elements of the *Golden State* successorship requirements have been met and WRS is a *Golden State* successor. The analysis is contrary to facts and the law.

ALJD p. 4, lines 49-50

The ALJ's determination that WRS is indeed a *Golden State* successor, jointly and severally responsible for backpay amounts. The analysis is contrary to the law and facts.

ALJD p. 5, lines 11-12

The ALJ's conclusion that the indemnification specifically recognizes and protects the Board's interest in recovering the backpay owed. The conclusion is not supported in fact or under the law.

ALJD p. 5, lines 14-15

That the state court order cannot override the requirements of federal law, more explicitly, those of Board remedial orders is contrary to applicable law, because the laws of creditor priority under state and federal law are identical for all practical purposes in this case.

ALJD p. 5, lines 20-31

The ALJ's reliance on *International Technical Products Corp.*, 249 NLRB 1301 (1980) to assert that the order of the lower court regarding the sale of assets free and clear of all liens, claims, and encumbrances effectively nullifying a Board order enforcing public rights. The ALJ failed to recognize the backpay claim is unsecured, and does not take priority over secured claims.

ALJD p. 5, circa lines 20-31

The ALJ failed to address the balance of equities, particularly since the ALJ decision gives priority of the backpay debt over that of a secured creditor, that encourages the decrease of the new-owners ability to arrange its business, severely restricting managerial start-up flexibility, including decisions relating to acquiring unionized companies.

ALJD p. 5, lines 42-50,
And p. 6, line 36

That the Board is not precluded from proceeding against a successor who has purchased, free and clear of encumbrances the assets of a bankrupt employer for whom a backpay claim is made, citing *International Technical Products* and *Nathanson v. NLRB*. This is contrary to the facts and the law.

ALJD p. 6, lines 1-2

The ALJ found that WRS did not assert “its own objections to a *Golden Gate (sic)* successorship finding against it.” WRS did dispute the finding and asserts the standards are misapplied as to the facts and to the law.

ALJD p. 6, lines 2-4

The ALJ found WRS asserted defense “unusual” regarding the inequity of having a secured creditor in a state proceeding (HAIP) be responsible for indemnifying it for the moneys owed under the Board’s backpay order. The ALJ failed to appreciate the lack of factual demonstration in the NLRB underlying complaint that the initial defendant had sufficient assets or funds to provide relief to the injured party. The ALJ’s decision is contrary to the facts and the law.

ALJD p. 6, lines 2-4

The ALJ did not recognize the agreement between WRS counsel and NLRB General Counsel allowing WRS to argue HAIP defenses and in turn would not object or raise jurisdiction issues. *See* Motion for Reconsideration or in the alternative to add HAIP as a party.

ALJD p. 6, lines 19-22

That the conclusion of the ALJ finding WRS a *Golden State* successor and liable for backpay accounts is contrary to the facts and the law.

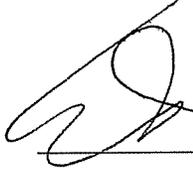
ALJD p.6-7, lines 27-28;
and lines 1-18

That the supplemental order requiring WRS, its officers, agents, successors and assigns, make whole the individuals named and their respective amounts plus interest, is contrary to the facts and the law.

WHEREFORE, for the reasons stated above and more fully addressed in WRS’s brief in support of these Exceptions, WRS respectfully submits that the ALJ’s

recommended decision be reversed and the entire matter against WRS be dismissed.

Dated: July 24, 2009.



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