

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
Region 18

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

**GENERAL COUNSEL'S ANSWERING  
BRIEF TO RESPONDENT'S EXCEPTIONS**

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## I. OVERVIEW

This case is before the Board on Respondent's Exceptions to the decision of Administrative Law Judge Robert Giannasi dated June 26, 2009. In his decision, Judge Giannasi found that Respondent Auto Glass Repair and Windshield Replacement Service, Inc. (hereafter WRS) was a *Golden State* successor to Leiferman Enterprises, LLC, d/b/a Harmon Auto Glass (hereafter LE or Leiferman) and liable for the amounts set forth in paragraphs 9 to 13 of the Compliance Specification.

The case was submitted to Judge Giannasi on a stipulated record consisting of a Stipulation of Fact<sup>1</sup> with five attached exhibits. In paragraph 15 of the Stipulation WRS, the Union<sup>2</sup> and Counsel for the General Counsel agreed that the only issue in the case is whether WRS has back pay liability as a successor to LE, and if so, whether this liability was extinguished by the Minnesota State District Court, which approved the sale of Leiferman's assets to WRS in an Order which provided that the sale would be "free and clear of any liens and encumbrances."

Accompanying Respondent's Exceptions is a Motion for Reconsideration or in the Alternative to add Harmon Auto Glass Intellectual Property, Inc. (hereafter HAIP) as a party to the proceedings. In this brief, Counsel for the General Counsel will first address WRS's Motion for Reconsideration. Next, the brief will discuss the Motion to add HAIP as a party to the proceeding. Finally, Counsel for the General Counsel will address Respondent's exception to the finding that WRS is a *Golden State* successor to LE, liable for the back pay amounts set forth

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<sup>1</sup> When citing to the Stipulation of Fact, it will be referred to as "Stip." Citation to exhibits attached to the Stipulation will be referred to as "Exh."

<sup>2</sup> International Union of Painters and Allied Trades-District Council 82 (hereafter the Union).

in the Compliance Specification, and its exception to the finding that this liability was not extinguished by the order of the Minnesota State District Court.

## II. ARGUMENT

### A. The Motion for Reconsideration of the Decision of the Administrative Law Judge Cannot be Filed Under Section 102.48(d)(1) of the Board's Rules

Respondent cites Section 102.48(d)(1) of the Board's Rules and Regulations as support for its Motion for Reconsideration. Respondent's reliance on this Section of the Board's Rules is misplaced. Section 102.48(d)(1) begins with this sentence, "A party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record *after the Board decision or order.*" (emphasis added.) Under this section of the Board's Rules, such a motion may be filed only after a Board decision has issued.

In this case the Board has not issued a decision. Rather, the decision of the Administrative Law Judge was transferred to the Board in an Order by the Board's Executive Secretary dated June 26, 2009. The case is now pending before on the Board on Respondent's exceptions to this decision. Motions filed under Section 102.48(d)(1) cannot be filed until after a decision by the Board. *New Otani Hotel & Garden*, 325 NLRB 928, 946 (1998) (motion to reopen not filed at post-decisional stage, and technically not properly filed under Rule 102.48(d)(1)). See also *Woodlawn Hospital*, 274 NLRB 796 803 (1985) (Rule 102.48(d)(1) governs requests for reconsideration, rehearing, or reopening of the record *after* a Board decision). (emphasis added)

Respondent's Exceptions in essence ask the Board to reconsider the decision of the Administrative Law Judge. Its Motion for Reconsideration, in addition to being untimely, is also unnecessary as it asks the Board to do what it will already be doing when it considers WRS's

exceptions. For these reasons, Respondent's Motion, insofar as it requests reconsideration of the decision by the Administrative Law Judge, should be denied.

B. The Motion to Add HAIP as a Party

Respondent correctly states that Counsel for the General Counsel stated that he would not oppose WRS's attempt to advance arguments or defenses on behalf of HAIP before the Administrative Law Judge. However, contrary to Respondent's assertion, there was never any agreement to modify the Stipulation of Fact and attached Exhibits – the entire record in this case – in any manner. That is a different matter. This Stipulation was entered into by the parties after numerous, lengthy discussions. Respondent made many changes and additions to the Stipulation during these discussions. The Stipulation sets forth the only issue in this case in paragraph 15. That remains unchanged.

Respondent now appears to claim that Counsel for the General Counsel agreed to some additional form of stipulation. (Respondent's Motion, pages 2 and 5.) Counsel for the General Counsel only agreed that Respondent could assert whatever defenses it chose to. There was no agreement to modify the Stipulation or the issue. Respondent made no argument to the Administrative Law Judge that Counsel for the General Counsel had agreed to modify the Stipulation or the issue in this matter with regard to HAIP.

Respondent is free to move to the Board that HAIP be named as a party. Counsel for the General Counsel does not oppose any arguments that WRS advances on behalf of HAIP. However, Counsel for the General Counsel does not agree that the record or issues involved have changed.

### C. The Golden State Successor Doctrine

In many of its exceptions, Respondent contends that the Administrative Law Judge erred in concluding that WRS was a *Golden State* successor to Leiferman Enterprises. Respondent fails to cite any facts or law which supports its argument. The Stipulation of Facts clearly supports Judge Giannasi's conclusion that WRS is a *Golden State* successor.

#### 1. Applicable Legal Principles

The Board's successor doctrine was announced in *Perma Vinyl Corp.*, 164 NLRB 968 (1967), enfd. sub nom. *United States Pipe and Foundry Co. v. NLRB*, 398 F.2d 544 (5<sup>th</sup> Cir. 1978), in which it held that "one who acquires and operates a business of an employer found guilty of unfair labor practices in basically unchanged form under circumstances which charge him with notice of unfair labor practice charges against his predecessor should be held responsible for remedying his predecessor's unlawful conduct." (citation omitted) *Id.* at 969. The Supreme Court sustained the Board's *Perma Vinyl* doctrine in *Golden State Bottling Company v. NLRB*, 414 U.S. 168 (1973), holding that a successor employer may be required to remedy its predecessor's unfair labor practices if, at the time it acquired the predecessor's operations, it had notice of the unfair labor practice charges against the predecessor and the successor continued to operate the business in basically unchanged form. *Id.* at 171, n. 2.

An employer is a successor if there is a "substantial continuity" of the predecessor's business enterprise. *Fall River Dyeing and Finishing Corp.*, 482 U.S. 27, 43 (1987). There is substantial continuity between the predecessor and the "new" enterprise when the new company has "acquired substantial assets of its predecessor and continued, without interruption or substantial change, the predecessor's business operations." *Golden State Bottling Co.*, 414 U.S. at 184.

To determine whether an employer is a successor as defined by *Golden State*, the Board looks at such factors as the continuity in business operations; whether the same plant or factory is used; whether the same jobs continue under the same working conditions; whether the same supervisors are employed; whether the same equipment, machinery and methods of production are used; and whether the same product or services are offered. While the continuity of employment is a factor, *Golden State* successorship does not depend on a showing that the predecessor's employees constitute a majority of the new employer's work force. *D.L. Baker, Inc.*, 351 NLRB 515, 545 (2007), citing *Bell Glass Co.*, 293 NLRB 700, 707 (1989), enfd. 983 F.2d 1073 (7<sup>th</sup> Cir. 1992).

The successorship analysis is essentially factual and based on the totality of the circumstances of a given situation. *Fall River Dyeing and Finishing Corp.*, 482 U.S. at 42. No controlling weight is given to any one criterion. *Fall River Dyeing Corp.*, 272 NLRB 839, 840 (1984); *Indianapolis Mack Sales*, 272 NLRB 690, 693 (1984), enf. denied 802 F.2d 280 (7<sup>th</sup> Cir. 1986); *Miles and Sons Trucking Service, Inc.*, 269 NLRB 7, 13 (1984), citing *Band-Age, Inc.*, 217 NLRB 449, 452 (1975), enfd. 334 F.2d 1 (1<sup>st</sup> Cir. 1976), cert. denied 429 U.S. 921.

## 2. The Business Enterprise Operated by WRS

### a. Continuity of Operations

The Stipulation sets forth the following relevant facts. Leiferman was engaged in the sale and installation of auto glass at various facilities located in the Minneapolis area. (Stip., para. 4.) WRS purchased Leiferman's assets. At that time, WRS had notice of the potential back pay liability to Leiferman as a result of the Board's Complaint and Notice of Hearing in Case 18-CA-18134. (Stip., para. 8.) After purchasing Leiferman's assets, WRS continued Leiferman's business of selling and installing automotive glass to retail customers without interruption.

(Stip., para.11.) Both Leiferman and WRS leased the same trade name from the same entity that was used in operation of the business. (Stip., para. 11.)

b. Facilities Involved in WRS Operations

The Stipulation reveals that after WRS purchased Leiferman's assets, all of the additional leased facilities WRS used in its operations had been facilities used by Leiferman. (Stip., para.11.) Thus, as a result of the purchase of Leiferman's assets, WRS did not lease any new facilities that had not been used by Leiferman when it was engaged in the sale and installation of auto glass.

c. WRS's Employee Complement

The parties have agreed that when WRS assumed the business operation, it employed 15 glass installers, five of whom had worked for Leiferman; two new glass installers; the nine store managers who had worked for Leiferman and who installed glass both for Leiferman and WRS; four of the five customer service representatives who had worked for Leiferman; and the salesperson who had worked for Leiferman. (Stip., para. 11.)

d. WRS Supervision

The Stipulation reflects that WRS had different corporate management from that of Leiferman, and that Leiferman's nine store managers were retained. (Stip., para. 11.)

e. Working Conditions

The Stipulation states that the glass installers employed by WRS were paid different benefits and had different terms of employment from those provided to glass installers by Leiferman. Without any detail, it states that the glass installers had more responsibility than when they were doing the same work for Leiferman. (Stip., para. 11.)

f. Equipment

Without being specific as to what or how the equipment changed, the Stipulation provides that the equipment used by the installers to install glass for WRS was different than the equipment they used to install glass when employed by Leiferman. (Stip., para. 11.)

3. WRS Is a *Golden State* Successor Employer and Liable for Leiferman's Unlawful Conduct

Counsel for the General Counsel submits that on the record facts set forth in the Stipulation there can be no genuine dispute that WRS is a *Golden State* successor. As such, it is jointly and severally liable for the back pay due to employees as a consequence of Leiferman's unfair labor practices. See, e.g., *The Bell Company, Inc.*, 243 NLRB 977, 979 (1979), enfd. in part 561 F.2d 1264 (7<sup>th</sup> Cir. 1977). WRS continued Leiferman's business of selling and installing automotive glass without interruption, leasing the same trade name from the same source as Leiferman. It hired some of Leiferman's glass installers, who had been represented by the International Union of Painters and Allied Trades – District Council #82 (Union) while working for Leiferman. While it did not hire a majority of Leiferman's glass installers, that is not required to find that WRS was a successor within the meaning of *Golden State*. *Id.* at 979 (employer that hired three of seven predecessor employees found to be a *Golden State* successor); *Bell Glass Co.*, 293 NLRB 700, 707 (1989), enfd. 983 F.2d 1073 (7<sup>th</sup> Cir. 1992), citing *Golden State Bottling v. NLRB*, 414 U.S. 168 (1973), n. 6.

While WRS uses some new, undefined equipment, this does not compel a finding that there is no continuity of Leiferman's business enterprise. WRS, like Leiferman, sells and installs automotive glass at the same locations and under the same trade name used by Leiferman. *WXGI, Inc.*, 330 NLRB 695, 711 (2000), enfd. 243 F.3d 833 (4<sup>th</sup> Cir. 2001) (continuity of

business enterprise where successor's change from traditional or legendary to more modern country music format was still country music, announced and played on the air to the same market audience from the same building). While employees' benefits and terms of employment may differ from those of Leiferman, they still perform the work of auto glass installation. And while corporate management may have changed, the store managers who worked for Leiferman continue to be employed by WRS.

These facts point to the inescapable conclusion that once WRS bought Leiferman's assets and began operating the business, there was a substantial continuity of the business enterprise. Board authority supports this conclusion. A successor will have *Golden State* liability to remedy the predecessor's unfair labor practices where it uses substantially the same employees who perform the same functions with the same equipment and the same supervisors for substantially the same customers. *American Signature, Inc.*, 334 NLRB 880, 882 (2001). In *AC Electric*, 333 NLRB 987 (2001), the successor purchased a substantial amount of assets from the seller which were needed to operate the same type of enterprise. It received most of its work from the same source as the seller. *Id.* at 1002. The terms and conditions of employment it provided to its employees differed substantially from those of the seller, which were set forth in a collective bargaining agreement. The Board held that the employer was a *Golden State* successor, jointly and severally responsible for all back pay at the rates that the predecessor was obligated to under the Union's contract. *Id.* at 988.<sup>3</sup>

Where the successor used the same facilities in the same location used by the predecessor; operated the same type of foundry business as the predecessor, performing the same

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<sup>3</sup> The Court noted in *Golden State* that where a purchaser does not hire a majority of the seller's union represented employees, it will not be liable for any outstanding orders that the predecessor bargain with the Union. 414 U.S. 425, n. 6. In those circumstances, like *AC Electric* and the present case, the economic terms and conditions of employees of the predecessor are likely to differ from those of the successor.

type of work serving customers in the same geographical area and used the same equipment and production methods, the Board found it to be a *Golden State* successor. *St. Mary's Foundry*, 284 NLRB 221, 234 (1987), *enfd.* 860 F.2d 679 (6<sup>th</sup> Cir. 1988). In *St. Mary's*, the Board specifically rejected the successor's argument that it could not be a *Golden State* successor as it had not hired a majority of the predecessor's employees. "When an employer acquires a business from another, with knowledge of the seller's unfair labor practices and operates the business "in substantially unchanged form" (citation omitted), a finding that the old employees constitute a majority of the purchaser's work force is unnecessary for the imposition of at least monetary remedies (citations omitted)." *Id.* n. 4.

The Receiver appointed to manage Leiferman's business, in an effort to sell the business, sent a letter with due diligence data and notice of the Board's Complaint and Notice of Hearing in Case 18-CA-18134 to WRS and others. WRS admits that it had notice of the potential back pay liability at the time it purchased Leiferman's assets. (Stip., para. 8.) With this knowledge, WRS had the opportunity to negotiate a reduction in the price it paid for Leiferman's assets to reflect the potential liability for remedying Leiferman's unfair labor practices, or secure an indemnity clause in the agreement covering the sale which would indemnify it from liability arising from those unfair labor practices. See *Golden State*, 414 U.S. at 425.<sup>4</sup>

Here, like the employers who purchased businesses in *WXGI*, *American Signature*, *AC Electric* and *St. Mary's Foundry*, the preponderance of the evidence demonstrates that WRS operated Leiferman's business in substantially unchanged form without interruption. It continues to sell and install auto glass from the same facilities, using a substantial number of

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<sup>4</sup> If WRS did not have the opportunity to protect itself from the liability of Leiferman's unlawful conduct, the principles of *Golden State* may not apply and it would not be required to assume Leiferman's liability. See, e.g., *Hill Industries*, 320 NLRB 1116, 1117 (1996) (business relationship between seller and purchaser was insufficient to establish *Golden State* successorship). That is clearly not the case here.

Leiferman's employees, including all of the store managers. Because it operates in the same facilities as Leiferman, WRS is marketing the business to the same customers in the same geographical area as Leiferman had done. In addition, WRS had notice of the potential back pay liability at the time it purchased Leiferman's assets. Without question, WRS is a successor employer within the meaning of *Golden State* and is liable for Leiferman's back pay liability.

D. The Administrative Law Judge's Decision is Fully Consistent With The Minnesota State District Court's "Free and Clear" Sale Order

Respondent excepts to the Judge's decision, claiming that it gives an unsecured back pay claim priority over the secured claim of HAIP, and disregards the "free and clear" language in the state court's order. The most reasonable reading of the State District Court's order is that it permits the imposition of *Golden State* liability notwithstanding that the purchase was to be "free and clear" of other liabilities. Thus, as a condition of the sale, HAIP agreed to indemnify WRS for any NLRB or EEOC liability that might result from its purchase of Leiferman's business. The State District Court was well aware of this indemnification agreement when it ultimately approved the sale to WRS "free and clear of any liens and encumbrances." Had the court intended its order to insulate WRS from *Golden State* successor liability, notwithstanding the fact that HAIP had already agreed to indemnify WRS for any NLRB liability, it would have drafted the order accordingly. See, e.g., *Foodbasket Partners*, 344 NLRB 799, 800 (2005) (free and clear sale order drafted to insulate purchaser from successor liability under "any theory of antitrust, environmental, successorship or transferee liability, labor law, de facto merger, or substantial continuity".)

Moreover, the court had no policy reason to issue a free and clear sale order that would effectively negate the indemnification agreement. The underlying purpose of a free and clear

sale order is to maximize the purchase price of the debtor's assets, which, in turn, enhances the payout made to creditors from the sale proceeds. Here, that underlying purpose was advanced when HAIP agreed to indemnify WRS so as to facilitate a prompt sale for the maximum return. And, contrary to WRS's contention, a finding that *Golden State* successor liability survives the free and clear sale order will have no detrimental impact on WRS's ability to reorganize and operate the business, because any money WRS spends fulfilling its back pay obligation can be reimbursed by HAIP.<sup>5</sup>

E. The Board's Remedial Authority Under *Golden State* Preempts Minnesota's Statutory Scheme for Creditor Priority

Respondent excepts to the judge's conclusion that the state court order cannot override the requirements of federal law. To the extent WRS is contending that holding HAIP to its indemnification agreement would undermine Minnesota's scheme for secured creditor priority, that state statutory scheme is preempted by the National Labor Relations Act. In *Brown v. Hotel Employees*, 468 U.S. 491, 501 (1984), the Supreme Court held that state action that "actually conflicts" with federal law is preempted by direct operation of the Supremacy Clause. An actual conflict between state and federal law arises when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.*, quoting *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963). Here, the Board has found that Leiferman violated Section 8(a)(1) and (5) by unilaterally implementing its final contract offer without bargaining to impasse, and has ordered Leiferman to make employees whole for any loss of earnings or benefits suffered as a result of the unfair labor practice. *Harmon Auto Glass*, 352 NLRB 152, 154 (2008). Moreover, federal law unquestionably

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<sup>5</sup> Of course, if WRS believes that the indemnification agreement is inequitable to HAIP, nothing prevents it from declining to seek indemnification from HAIP.

requires that WRS, a *Golden State* successor, remedy Leiferman's unfair labor practice. *Golden State Bottling Co. v. NLRB*, 414 U.S. at 171-72, 184-85. As interpreted by WRS, the state court's free and clear sale order would preclude the Board from carrying out its congressionally mandated duty to remedy unfair labor practices and would therefore be in direct conflict with federal law. In these circumstances, the Supremacy Clause mandates that federal law preempts state law.<sup>6</sup> Accordingly, WRS's arguments regarding the priority of various classes of creditors under state law, and regarding the limited state law exceptions to these rules, are irrelevant.

### III. CONCLUSION

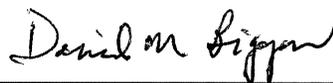
WRS's exceptions should be denied in their entirety. A preponderance of the record evidence and applicable case law support the position of Counsel for the General Counsel and the decision of the Administrative Law Judge. WRS is a *Golden State* successor, and is liable for the unfair labor practices of Leiferman Enterprises. The argument, whether made by WRS or HAIP, that the order of the Minnesota State District Court extinguishes this liability should be rejected, as the NLRA preempts Minnesota State law under these circumstances. In hindsight, HAIP's decision to finance Leiferman Enterprises' operations turned out to be a bad business decision. Respondent cannot require employees who exercise rights guaranteed by federal law, and who obtain enforcement of those rights under federal law, to shoulder part of the impact of this bad business decision through the use of a proceeding in a Minnesota State Court applying Minnesota law. The decision of the Administrative Law Judge should be affirmed, and that

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<sup>6</sup> WRS's arguments regarding the priority of creditor relationships might carry more weight if this case involved the federal Bankruptcy Code and therefore required the Board to reconcile the NLRA with another federal statute. See, e.g., *In re New England Fish Co.*, 19 B.R. 323, 326-27 (Bkrcty. W.D. Wash. 1982) ("free and clear" sale under the Bankruptcy Code eliminated liability for predecessor's Title VII employment discrimination, citing *Nathanson v. NLRB*, 344 U.S. 25 (1952))

Board should issue an Order requiring Respondent to pay the amounts set forth in paragraphs 9 – 13 of the Compliance Specification.

Dated at Minneapolis, Minnesota this 13<sup>th</sup> date of August, 2009.



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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of Counsel for the General Counsel's Answering Brief to Respondent's Exceptions was served by electronic mail on the 13<sup>th</sup> day of August, 2009, on the following parties:

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