

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29**

GVS PROPERTIES, LLC,

Respondent,

and

Case No.: 29-CA-077359

INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE
WORKERS, AFL-CIO, DISTRICT
LODGE 15, LOCAL LODGE 447,

Charging Party.

**EXCEPTIONS TO THE DECISION OF THE
ADMINISTRATIVE LAW JUDGE**

Please take notice that pursuant to the National Labor Relations Board Rules and Regulations, Section 102.46, GVS Properties, LLC, (“Respondent”), by its attorneys Meltzer Lippe Goldstein & Breitstone, LLP, respectfully submits the following Exceptions to the Decision of the Administrative Law Judge Kenneth W. Chu in the above-referenced matter:

1. The Administrative Law Judge (“ALJ”) erred in asserting the Region’s application for §10(j) relief was taken independent of the complaint filed with the Board (Footnote 2)^{1/}, prejudicing Respondent for the reasons set forth in this document as well as in Respondent’s Brief In Support of Exceptions to the Administrative Law Judge’s Decision (the “Brief”). The Region’s application was specifically predicated upon the proceedings before the Board and the record for the §10(j) proceeding was, upon the Region’s motion, the same record as in the Board proceeding.

^{1/} Parenthetical references beginning with the word footnote refer to the numbered footnote of the ALJ’s decision. Parenthetical references beginning with the letter P followed by a number and the letter “1” followed by a number, refer to the page and line of the ALJ’s Decision.

2. The ALJ erred in asserting that the “issue before the Board is very different from the injunctive relief sought in the federal court.” (Footnote 2), prejudicing Respondent for the reasons set forth in this document as well as in Respondent’s Brief. In the federal court proceeding, U.S. District Court Judge Cogan found no reason to believe an unfair labor practice occurred. The ALJ was charged with determining if an unfair labor practice occurred. The issues are therefore the same. The Region simply had a lesser burden before Judge Cogan. Judge Cogan found the Region did not meet that burden and Judge Cogan is presumed to have acted properly and in accordance with his duties. Settlemier v Sullivan, 97 U.S. 444, 448-49, 24 L. Ed. 1110 (1878).
3. The ALJ erred in stating that witness Nicholas Conway stated the employees initially retained by Respondent were not probationary employees (P. 5 L. 45), prejudicing Respondent for the reasons set forth in this document as well as in Respondent’s Brief. Mr. Conway stated said employees were not probationary because he had no choice but to hire them pursuant to the Displaced Building Service Worker Protection Act (“DBSWPA”). More specifically, Mr. Conway stated:

“I had no choice in who I hired. These are employees who were there, who I was required by this City law to hire. I had no choice. They weren’t people I hired and put on a probationary period or anything else. I was required to hire these employees.” (T P. 35 L. 11)²

² / Parenthetical references beginning with the letter “T” refer to the page and line (“P” and “L”) of the trial transcript.

4. The ALJ erred when he reduced the U.S. Supreme Court's decision in NLRB v. Burns International Security Services, Inc., 406 U.S. 272 (1974) to an arithmetic equation without regard to the reason(s) a subsequent employer hired the former employer's employees (P. 7 L. 40 – P. 8 L. 2), prejudicing Respondent for the reasons set forth in this document as well as in Respondent's Brief. The ALJ failed to consider that successorship recognition and bargaining obligations are triggered by the voluntary act of the subsequent employer.

5. The ALJ erred when he asserted that in Fall River Dyeing and Finishing Corp. v. NLRB, 482 U.S. 27, 40–41 (1987) it was a conscious decision of a subsequent employer that resulted in Burns successorship obligations, yet failed to properly apply the effect of the DBSWPA to any potential conscious decision, (P. 8 L. 9), prejudicing Respondent for the reasons set forth in this document as well as in Respondent's Brief.

6. The ALJ erred when he asserted that Respondent violated Section 8(a)(5) of the NLRA in failing to recognize and bargain with the prior employer's union (P. 8 L. 14-15), prejudicing Respondent for the reasons set forth in this document as well as in Respondent's Brief. The ALJ ignored consistent prior persuasive precedent, including, but not limited to, M&M Parkside Towers LLC, 2007 WL 313429 (N.L.R.B. January 30, 2007) and the General Counsel's position therein that the DBSWPA should be considered as to when a new employer becomes a Burns successor.

7. The ALJ erred in stating that the “DBSWPA was never intended or designed for a successor employer to circumvent or to avoid its obligations to bargain collectively with a recognized union.” P. 8 L. 21-24), prejudicing Respondent for the reasons set forth in this document as well as in Respondent’s Brief. By the ALJ’s reasoning, the DBSWPA was apparently designed to mandate union recognition, in violation of employee Section 7 rights. As such, the DBSWPA would be preempted by the National Labor Relations Act (“NLRA”).
8. The ALJ erred in asserting that job stability is dependent upon union recognition (P. 8 L. 24-35), prejudicing Respondent for the reasons set forth in this document as well as in Respondent’s Brief. The DBSWPA provides 90 days for an employee to prove his/her value to a subsequent employer. This is the only level of job security the DBSWPA can legally provide, to wit: an audition, not a permanent position.
9. The ALJ erred in noting that both Burns (and its progeny) and the DBSWPA provide some degree of employment stability where there is workforce and enterprise continuity (P. 8 L. 39-42), without noting the need under Burns and its progeny that said continuity be the subject of voluntary decision-making, not government mandate, prejudicing Respondent for the reasons set forth in this document as well as in Respondent’s Brief.
10. The ALJ erred in citing to Fall River Dyeing and Finishing Corp. v. NLRB, *supra*, without noting its mandate that the employer consciously decide to take advantage of

the prior employer's work force and not have them foisted upon it by governmental mandate (P. 8 L. 41-45), prejudicing Respondent for the reasons set forth in this document as well as in Respondent's Brief. As stated in Fall River:

[T]o a substantial extent the applicability of Burns rests in the hands of the successor. If the new employer makes a *conscious decision* to maintain generally the same business and to hire a majority of its employees from the predecessor, then the bargaining obligation of §8(a)(5) is activated. This makes sense when one considers that the employer *intends* to take advantage of the trained work force of its predecessor 'to maintain generally the same business and hire a majority of its employees from the predecessor.'" (emphasis added).

11. The ALJ erred in finding that Respondent made a voluntary decision to employ more than half of its employee complement from the prior employer's employee complement by purchasing a building subject to the DBSWPA (P. 9 L. 26-30), prejudicing Respondent for the reasons set forth in this document as well as in Respondent's Brief. The DBSWPA does not provide a building purchaser an option as to whether to continue to employ any or all of the prior employer's employees. GVS' compliance with its legal obligations under DBSWPA does not constitute a voluntary act of choosing to hire a majority of its workforce from its predecessor, which is necessary for Burns successorship to attach. The choice upon which Burns successorship rests is not the decision to purchase a property or business, but an employer's voluntary decision to hire a majority of its workforce from its predecessor's workforce. Further, compliance with the DBSWPA does not mandate union recognition or the DBSWPA would be preempted by the NLRA, California Grocers Association v. City of Los Angeles, 52 Cal.4th 177, 205, 254 P. 3d 1019, 1035, 127 Cal Rptr. 3d 726, 746 (2011). Moreover, existing law indicates that Burns

successorship would not result from compliance with the DBSWPA, Rhode Island Hospitality Association v. City of Providence, 775 F.Supp.2d 416, 432 (D.R.I. 2011) *aff'd* 667 F.3d 17 (1st Cir. 2011), stating:

Although the NLRB has not yet developed a consistent position, existing case law indicates that the successor employer will be obligated to bargain with the union only if the successor employer retains its predecessor's employees beyond the mandatory employment period or if it extends an offer for permanent employment prior to the expiration of the mandatory retention period.

12. The ALJ erred in finding that Respondent became a Burns successor by its purported voluntary and conscious decision to hire seven (7) out of eight (8) of its predecessor's employees. (P. 9 L. 30-31.) ALJ Chu's finding is erroneous as a matter of law because Burns successorship arises when a new employer hires a majority of its employees from its predecessor, not when a new employer hires a majority of its predecessor's employees. Fall River Dyeing, 482 U.S. at 46. ALJ Chu's finding is also erroneous because the DBSWPA compelled GVS to retain its predecessor's employees for ninety (90) days and temporarily deprived GVS of the ability to voluntarily choose to take advantage of its predecessor's workforce and hire a majority of its employees from its predecessor, which is a prerequisite for Burns successorship to attach. Accordingly, it was improper for ALJ Chu to determine GVS became a Burns successor at the start of the ninety (90) day period mandated under DBSWPA or any time during such ninety (90) day period.

13. The ALJ erred in asserting the initial layoff of one (1) employee and subsequent discharge of three (3) employees at the conclusion of the ninety (90) day DBSWPA

period was, “a transparent effort to dilute the Union’s majority and evade its successorship bargaining obligation.” (P. 9 L. 35-39), prejudicing Respondent for the reasons set forth in this document as well as in Respondent’s Brief. Only the Respondent submitted evidence as to why and how the hire and fire decisions were made (T. P. 23 L 3, the new employer historically installed its own employees who knew how to turn a building around), (T. P. 32 L. 22, Respondent felt the property was overstaffed) (T. P. 42 L. 11 Respondent hired four employees to replace the three discharged because Respondent determined one building was understaffed).

The only evidence submitted as to the basis for the layoff in question was that GVS believed it could operate the properties in question with the remaining employees. (T. P. 29).

The only evidence submitted as to the basis for the terminations in question were termination notices and evaluations and unrebutted testimony that the three (3) employees in question were, “particularly bad employees.” (T. P. 37 L. 11) More significantly, Respondent was not permitted to introduce all evidence of the basis for the terminations as (T. P. 37 L. 22) General Counsel stated:

Objection, Your Honor. The employer’s reason for terminating these employees is not relevant.... *There has been no allegation that the employer’s motives in terminating the employees at this point was improper, ...*

And, the ALJ stated at (T P. 38 L. 1-3)

I agree. We don’t need to go into the reason for the termination. There’s no charge on these terminations. (Emphasis added.)

It is truly striking that the ALJ would first limit the testimony, noting the absence of any basis within the Complaint for further inquiry; then reach a contradictory conclusion in complete disregard of all of the unrebutted evidence; and finally premise a decision based upon an unsubstantiated contradictory conclusion.

14. The ALJ erred in stating that “Board law clearly recognizes that, in similar circumstances, obligations under local law do not permit an employer to escape its successorship obligation.” (P. 9 L. 40-41), prejudicing Respondent for the reasons set forth in this document as well as in Respondent’s Brief. Board Law is obviously not so clear, considering M&M Parkside Towers LLC, *supra*; the previously quoted statement from Rhode Island Hospitality Association v. City of Providence, *supra*; the General Counsel’s position in M&M Parkside Towers, LLC, that a determination of a representative complement could not be determined until after the conclusion of the DSBWPA period; and the previously quoted statement from Rhode Island Hospitality Association v. City of Providence, *supra*. (“Although the NLRB has not yet developed a consistent position...”)

15. The ALJ erred in stating that if the DBSWPA did not automatically create a Burns successor it would preempt the NLRA and deny employees the right to collectively bargain (P. 10 L. 11), prejudicing Respondent for the reasons set forth in this document as well as in Respondent’s Brief. Under an unbiased analysis, employees would not be prejudiced, they would be free to organize and bargain, like any other employees.

16. The ALJ erred in stating that “It simply flies against logic to allow new employers to discharge employees with years of seniority after the 90 day probationary period...” (P. 10 L. 12-14), prejudicing Respondent for the reasons set forth in this document as well as in Respondent’s Brief. The ALJ ignores the fact that if the employees had been long term non-union employees, the DBSWPA would have that exact effect and, in any other industry, without such a statute, any successor employer would not have even a ninety (90) day hiring obligation. In other words what flies against logic (and the absence of obvious bias) is the ALJ’s position.
17. The ALJ erred in stating that Burns successorship was strictly an arithmetic equation, without regard to the voluntariness (or absence thereof) of the temporarily retraining of the prior employer’s employees while they are evaluated for continued employment, (P. 10 L. 20-23), prejudicing Respondent for the reasons set forth in this document as well as in Respondent’s Brief.
18. The ALJ erred in treating a voluntary and “unilaterally imposed probationary period” with a mandatory evaluation period imposed by state or local law (P. 10 L. 33- P. 11 L. 23 and footnote 10), prejudicing Respondent for the reasons set forth in this document as well as in Respondent’s Brief. The ALJ’s footnote is remarkably self-contradictory. The ALJ asserts, on the one hand, that Burns successorship occurred the moment Respondent hired the prior employer’s employees (as mandated by the DBSWPA) and recognition was requested, and then asserts the right to discharge for cause or operational need, as if this would in any way alter the obligation imposed by

the ALJ's already corrupted viewpoint. This is most clearly evidenced by the alternative suggestion of the ALJ that Respondent could have simply assumed the prior CBA. This is an alternative neither Burns nor the DBSWPA requires and which serves no benefit if the purpose is the evaluation of employees, rather than simply demanding full employment for union employees, with no similar obligation for non-union employees.

19. The ALJ erred in asserting that preemption of the DBSWPA by the NLRA was not before him (Footnote 9), prejudicing Respondent for the reasons set forth in this document as well as in Respondent's Brief. As set forth above, this issue is specifically addressed in cases cited to the ALJ in Respondent's post trial brief. Further, such "complete preemption" is an element of subject matter jurisdiction, which can never be waived and which courts have an independent duty to determine. Arbaugh v Y&H Corp., 546 U.S. 500, 514, 126 S. Ct. 1235, 1244, 163 L. Ed. 2d 1097 [2006].

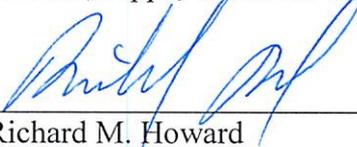
20. The ALJ erred in asserting that if he held Burns successorship did not occur upon hire, regardless of the mandatory hiring/evaluation period, it would cause employers to seek to impose arbitrary probationary periods (P. 11 L. 15-20), prejudicing Respondent for the reasons set forth in this document as well as in Respondent's Brief. The ALJ apparently misunderstands a government's power to mandate an evaluation period and the absence of any similarity in the effect of same compared to the effect of a unilaterally imposed probation period.

21. The ALJ erred in finding that Respondent violated Sections 8 (a) (1) and (5) of the NLRA by refusing to recognize and/or bargain with the Union (P. 12 L. 20-22), prejudicing Respondent for the reasons set forth in this document as well as in Respondent's Brief. Respondent never made a voluntary choice or conscious decision to employ the prior employer's work force. Rather, Respondent complied with the DBSWPA and evaluated the prior employer's employees. Respondent proceeded in accordance with M&M Parkside Towers LLC, *supra*, Rhode Island Hospitality Association v. City of Providence, *supra* and California Grocers Association v. City of Los Angeles, *supra*. Such compliance could have and did result in qualified employee(s) being retained, regardless of union affiliation.
22. The ALJ erred in asserting that Respondent contended the purposes of the DBSWPA and NLRA were inapposite (P. 10 L. 6), prejudicing Respondent for the reasons set forth in this document as well as in Respondent's Brief. Rather, Respondent recognizes the underlying principles of the measures and argues that the proper interpretation of the interplay between the DBSWPA and the NLRA is that espoused by the General Counsel and Administrative Law Judge Raymond Green in M&M Parkside Towers LLC.
23. The ALJ erred in asserting the ironic conclusion the Respondent's argument could mean that the DBSWPA would pre-empt the NLRA, prejudicing Respondent for the reasons set forth in this document as well as in Respondent's Brief. Respondent has

merely argued that the successorship determination could not be made in this case until after the 90-day compulsory retention period expired - - not that it ends the successorship inquiry. Indeed, Respondent submits employees' Section 7 rights are not diminished by interpreting the interplay between the DBSWPA and Burns successorship in the same manner recognized by the General Counsel and Administrative Law Judge in M&M Parkside Towers, LLC, as employees continue to have the right to organize and engage in concerted activity. Nor did Respondent suggest the DBSWPA was intended to circumvent the collective bargaining rights of employees, as the ALJ apparently charges. If anything, the ALJ's findings in this case lead to the logical conclusion that the DBSWPA pre-empts the NLRA - - since ALJ Chu apparently concludes that the DBSWPA was designed to ensure successorship status either by compliance with the 90-day mandatory retention period or assuming the collective bargaining agreement.

Dated: Mineola, New York
February 7, 2013

Respectfully submitted,
Meltzer, Lippe, Goldstein & Breitstone, LLP



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