

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

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UGL-UNICCO SERVICE COMPANY,

Employer,

-and-

AREA TRADES COUNCIL a/w INTERNATIONAL UNION OF
OPERATING ENGINEERS LOCAL 877, INTERNATIONAL
BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 103,
NEW ENGLAND JOINT COUNCIL OF CARPENTERS
LOCAL 51, PLUMBERS AND GASFITTERS UNION (UA)
LOCAL 12, AND THE PAINTERS AND ALLIED TRADES
COUNCIL DISTRICT No. 35,

Petitioner

Consolidated Case No.
355 NLRB No. 155
(August 27, 2010)

-and-

FIREMEN AND OILERS CHAPTER 3, LOCAL 615, SERVICE
EMPLOYEES INTERNATIONAL UNION

Intervenor

GROCERY HAULERS, INC.

Employer

-and-

TEAMSTERS LOCAL 294, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS

Petitioner

-and-

BAKERY, CONFECTIONARY, TOBACCO WORKERS' AND
GRAIN MILLERS, INTERNATIONAL UNION, LOCAL 50

Intervenor

-----X

**BRIEF OF AMICUS CURIAE
SERVICE EMPLOYEES INTERNATIONAL UNION**

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TABLE OF CONTENTS

PRELIMINARY STATEMENT 1

INTEREST OF THE AMICUS CURIAE 1

INTRODUCTION 2

POINT I. THE BOARD SHOULD REVERSE *MV TRANSPORTATION* AND RE-ESTABLISH THE SUCCESSORSHIP BAR 5

 A. THE SUCCESSORSHIP BAR PROMOTES LABOR STABILITY AND ENCOURAGES MEANINGFUL COLLECTIVE BARGAINING 5

 B. A SUCCESSORSHIP BAR IS CONSISTENT WITH WELL-ESTABLISHED BOARD DOCTRINE AND ENHANCES EMPLOYEE FREE CHOICE. 9

POINT II. THE BOARD SHOULD REQUIRE THE ‘PERFECTLY CLEAR’ SUCCESSOR TO BARGAIN WITH THE UNION PRIOR TO SETTING INITIAL TERMS 12

 A. REQUIRING ‘PERFECTLY CLEAR’ SUCCESSORS TO BARGAIN WITH THE UNION PRIOR TO SETTING INITIAL TERMS IS REQUIRED UNDER THE SUPREME COURT’S HOLDING IN BURNS 12

 B. THE BOARD AND COURTS’ NARROW INTERPRETATION OF ‘PERFECTLY CLEAR’ SUCCESSORSHIP IS INCONSISTENT WITH STATUTORY POLICY AND UNNECESSARY TO PROVIDE EMPLOYER FLEXIBILITY 20

 1. *Spruce Up* Undermines the Protections it Purports to Afford Employees..... 20

 2. The Successor Employer’s Need for Flexibility is not Incompatible with a Bargaining Obligation In A ‘Perfectly Clear’ Successorship..... 23

 C. ‘PERFECTLY CLEAR’ SUCCESSORSHIP LAW IS UNWIELDY, INCONSISTENT, AND WRONGLY EQUATED WITH ASSUMPTION OF THE CONTRACT 24

 1. Case Law Under *Spruce Up* Is Inconsistent And Provides No Clear Guidance..... 25

 2. Case Law Under *Spruce Up* Collapses Two Distinct Successorship Doctrines 27

 3. *Canteen Co.* and the Interrupted Reexamination of *Spruce Up*..... 30

CONCLUSION..... 31

TABLE OF AUTHORITIES

	Page(s)
CASES	
<u>Advanced Stretchforming Int'l Inc.</u> , 323 NLRB 529 (1997), enf'd in relevant part 233 F.3d 1176 (9 th Cir. 2000)	30
<u>Auciello Iron Works, Inc. v. NLRB</u> , 517 U.S. 781 (1996).....	12
<u>Banknote Corp. of Am., Inc.</u> , 315 NLRB 1041 (1994), enf'd. 84 F.3d 637 (2d Cir. 1996).....	28, 29
<u>Big Three Industries, Inc.</u> , 201 NLRB 197 (1973)	10
<u>Boeing Company</u> , 214 NLRB 541 (1974)	21, 22
<u>Broadway Volkswagen</u> , 342 NLRB 1244 (2004)	11
<u>Canteen Corp. v NLRB</u> , 103 F.3d 1355 (7 th Cir. 1997)	30, 31
<u>Canteen Co.</u> , 317 NLRB 1052 (1995)	4, 14, 29, 30
<u>Dana Corp.</u> , 351 NLRB 434 (2007)	11, 12
<u>E G & G Florida, Inc.</u> , 279 NLRB 444 (1986)	27, 28
<u>El Paso Disposal, L.P.</u> , 2009 NLRB LEXIS 123 (Apr. 27 2009).....	10
<u>Equipment Trucking Co., Inc.</u> , 336 NLRB 277 (2001)	10
<u>Fall River Dyeing & Finishing Corp. v. NLRB</u> , 482 U.S. 27 (1987).....	6, 14, 21
<u>Fibreboard Paper Prods. Corp. v. NLRB</u> 379 U.S. 203 (1964)	23

<u>Fremont Ford Sales Inc.,</u> 289 NLRB 1290 (1988)	24, 25
<u>Gen. Extrusion Co.,</u> 121 NLRB 1165 (1958)	15
<u>Goya Foods,</u> 347 NLRB 1118 (2006)	11
<u>Howard Johnson Co., Inc., v. Hotel & Restaurant Emp. and Bartenders Int'l. Union,</u> 417 U.S. 249 (1974).....	20
<u>Litton Fin. Printing Div. v. NLRB,</u> 501 U.S. 190 (1991).....	9, 19
<u>MV Transportation,</u> 337 NLRB 770 (2002)	passim
<u>Nazareth Regional High School v. NLRB,</u> 549 F.2d 873 (2d Cir. 1977).....	25
<u>NLRB v. Burns Security Servs.,</u> 406 U.S. 272 (1972).....	passim
<u>NLRB v. Gissel Packing Co.,</u> 395 U.S. 575 (1969).....	11
<u>NLRB v. Katz,</u> 369 U.S. 190 (1962).....	9
<u>Pacific Custom Materials, Inc.,</u> 327 NLRB 75 (1998)	21
<u>Planned Building Servs.,</u> 318 NLRB 1049 (1995)	30
<u>Planned Building Servs., Inc.,</u> 330 NLRB 791 (2000)	18, 21
<u>Priority One Services, Inc.,</u> 331 NLRB 1527 (2000)	3, 10
<u>Regency House of Wallingford, Inc.,</u> 347 NLRB 173 (2006)	10
<u>Ridgewell's, Inc.,</u> 334 N.L.R.B. 37 (2001)	24, 26, 27, 30

<u>Rite Aid Store # 6473,</u> 355 NLRB No. 157 (2010)	12
<u>Road & Rail Servs., Inc.,</u> 348 NLRB 1160 (2006)	13
<u>Roman Catholic Diocese of Brooklyn,</u> 225 NLRB 1052 (1976)	25
<u>S&F Market Street Healthcare LLC,</u> 351 NLRB 975 (2007)	passim
<u>Saks & Co.,</u> 247 NLRB 1047 (1980)	25, 26
<u>Spruce Up,</u> 209 NLRB 194 (1974)	passim
<u>St. Elizabeth Manor,</u> 329 NLRB 341 (1999)	2, 3
<u>Wallkill Valley Gen. Hosp.,</u> 288 NLRB 103 (1988)	10
STATUTES	
National Labor Relations Act, 29 U.S.C. §§151 et.seq.	3, 7, 9

PRELIMINARY STATEMENT

This brief is submitted on behalf of the Service Employees International Union (“SEIU”) as Amicus Curiae. The Board has requested supplemental briefing in order to address the issues of (1) whether it should reconsider or modify MV Transportation, 337 NLRB 770 (2002), and (2) how it should treat the “perfectly clear” successor situation, as defined by NLRB v. Burns Security Servs., 406 U.S. 272, 294-95 (1972), and subsequent precedent. The SEIU urges the Board to reconsider, and reverse, its decision in MV Transportation and restore the “successorship bar,” which gives the incumbent union a reasonable time to bargain with a successor employer without a challenge to its majority status. We further submit that the Board should reverse Spruce Up, 209 NLRB 194 (1974), enf’d, 529 F.2d 516 (4th Cir. 1975), which has rendered virtually meaningless the Supreme Court’s holding in N.L.R.B. v. Burns Security Servs., 406 U.S. 272 (1972) that where a successor makes “perfectly clear” its intent to hire a majority of its workforce from the predecessor’s employees, it must bargain with their representative before setting initial terms of employment.

INTEREST OF THE AMICUS CURIAE

The SEIU has more than two million members across the United States, Canada and Puerto Rico. A majority of its members work in three primary service industries: healthcare, property services, and public services. As the largest healthcare union, SEIU represents more than 1.2 million healthcare workers in hospitals, nursing homes, clinics, home care agencies and other health care institutions. SEIU is also the largest property services union, representing more than 225,000 workers who protect, clean, and maintain commercial and residential buildings. SEIU is the second largest union of public service employees, representing more than 1 million local and state government workers, including public school employees, bus drivers, and child

care providers. SEIU has more than 150 local union affiliates and more than 15 state counsels across North America.

Many of the workers represented by SEIU and its affiliates, particularly those in the healthcare and property services industries, have experienced the anxiety and uncertainty inherent when the identity of their employer is suddenly changed either because of a change in ownership (as is most common in the health care industry) or competitive rebidding of service contracts (as is most common in the property services industry). Our health care members are seeing a growing number of corporate buy-outs and take-overs, many arising out of bankruptcy proceedings. With recent cuts in government support and Medicaid reimbursement rates, non-profit nursing homes are struggling and are prime targets for purchase by for-profit entities that inevitably seek to bring down labor costs as a route to profitability. In the property services sector, building owners and managers change service contractors frequently, often favoring lower bidders. While the new, lower-bidding contractors and for-profit health care institutions generally prefer to retain the predecessor's employees who are familiar with the sites and the work responsibilities, they often seek to lower wages and benefits, and to modify other terms and conditions of employment.

Therefore, the issues raised in these cases, and in the Board's request for supplemental briefing, are of great concern to the SEIU and the working men and women it represents.

INTRODUCTION

In MV Transportation, 337 NLRB 770, a Board majority overturned a decision reached less than three (3) years earlier in St. Elizabeth Manor, 329 NLRB 341 (1999), and held that an incumbent union in a successorship situation is only entitled to a *rebuttable* presumption of continuing majority status, which will not serve as a bar to an otherwise valid challenge to the

union's majority status. MV Transp., 337 NLRB at 770. By eliminating the so-called "successorship bar," the Board in MV Transportation sacrificed the National Labor Relations Act's, 29 U.S.C. §§151 et.seq. ("NLRA" or "Act") stated policies of promoting labor stability and encouraging collective bargaining in the name of protecting employees' right to freely choose their bargaining representative. As discussed below, a return to the successorship bar, and the holding of St. Elizabeth Manor, would be consistent with all three statutory policies. It would provide a measure of stability during the inherently unstable transition period from one employer to another; it would provide the proper incentives for employers to engage in wholehearted and productive collective bargaining; and it would ensure that any choice employees make regarding their bargaining representative is truly a free choice, untainted by disruptive changes in the employment situation that renders employees vulnerable and can significantly undermine the union their eyes.

In addition to contravening the stated purposes of the Act, the holding in MV Transportation is inconsistent with other well established Board doctrines, and the sound reasoning behind those doctrines. It is well settled that the Board will not process petitions filed in the context of unremedied unfair labor practices involving unilateral changes to terms and conditions of employment or employer direct dealing with employees because such actions undermine the Union's perceived authority as bargaining representative and interfere with employees' free choice in an election. See Priority One Services, Inc., 331 NLRB 1527 (2000). A successor employer's exercise of its ability to set initial terms, which unilaterally changes employees' conditions of employment and involves direct dealing with employees, is no less destructive of employees' confidence in their labor union. A successorship bar, by postponing

choices regarding bargaining representatives to a time untainted by such destructive conduct, in fact promotes employee free choice.

The Board should also address the ways in which its related holding in Spruce Up Corp., 209 NLRB 194 (1974), enf'd, 529 F.2d 516 (4th Cir. 1975) has contributed to employee disaffection, labor unrest and volatility at the time of employer transition. Under Spruce Up and its progeny, an employer that intends to hire its workforce from the predecessor's employees, and that otherwise would be a "perfectly clear" successor under the Supreme Court's holding in NLRB v. Burns Security Servs., 406 U.S. 272 (1972), obligated to bargain with the incumbent union before setting initial terms, is permitted to evade this bargaining obligation merely by announcing that it will do precisely that which the Supreme Court said it could not do -- unilaterally set initial terms. The majority in Spruce Up has deprived the employees of their right to bargain collectively through their chosen representative in circumstances where the Supreme Court specifically contemplated that employees would retain that right. By allowing successor employers to undercut the employees' chosen representative and engage in direct dealing, Spruce Up has become a formidable factor in rendering incumbent unions functionally null at the critical and most sensitive moment of employer transition. This undermines, rather than promotes, industrial stability. Accordingly, the Board should adopt the eminently logical reasoning of dissenting Members Fanning and Penello in Spruce Up, 209 NLRB at 199-210, as further explicated in the concurrence of Chairman Gould in Canteen Co., 317 NLRB 1052, 1054 (1995), enf'd Canteen Corp. v. NLRB, 103 F.3d 1355 (7th Cir. 1997).

For all of these reasons, the Board should both (1) restore the successorship bar and (2) require perfectly clear successors, as defined in Burns, to bargain prior to setting initial terms, thereby returning to the fundamental principles that guide the Act.

POINT I.
THE BOARD SHOULD REVERSE *MV TRANSPORTATION*
AND RE-ESTABLISH THE SUCCESSORSHIP BAR

**A. THE SUCCESSORSHIP BAR PROMOTES LABOR STABILITY
AND ENCOURAGES MEANINGFUL COLLECTIVE BARGAINING**

In the seminal case setting forth the basic rules of successorship, NLRB v. Burns Int'l Security Servs., Inc., 406 U.S. 272 (1972), the Supreme Court held that where the predecessor's employees comprise a majority of the successor's workforce, and there is substantial continuity between the enterprises, the successor employer must recognize the incumbent union and bargain with it in good faith. See Id. at 281. While the Burns decision provides a measure of protection to the employees by requiring the new employer to bargain with their union, it also allows substantial flexibility to employers when restructuring their businesses. Thus, the Court declined to bind a successor employer to the terms of its predecessor's collective bargaining agreement, thereby avoiding a perceived limitation on the free transfer of capital. Id. at 291. The Burns Court further held that the successor employer is free, with certain exceptions,¹ to unilaterally set new initial terms and conditions of employment. Id. at 294.

The license Burns gives to successor employers to set initial terms -- i.e., to unilaterally, and often drastically, change wages, benefits, seniority rights, just cause protections, and other terms and conditions of employment achieved through bargaining with the predecessor employer -- fundamentally destabilizes the already uncertain period of transition from one employer to another. It also undermines the relationship between the employees and their chosen

¹ An exception to this rule is when the successor makes it "perfectly clear" that it intends to retain the predecessor's workforce, in which case it must consult with the incumbent union about initial terms prior to imposing those terms. Burns, 406 U.S. at 295. As discussed in Point II below, the Board's holdings in Spruce Up, 209 NLRB 194 (1974), and its progeny turns this aspect of the Burns decision on its head by allowing an otherwise "perfectly clear" successor to avoid that bargaining obligation simply by announcing that it intends to set initial terms.

representative. As the Supreme Court explained in Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27 (1987),

During a transition between employers, a union is in a peculiarly vulnerable position. It has no formal established bargaining relationship with the new employer, is uncertain about the new employer's plans, and cannot be sure if or when the new employer must bargain with it. While being concerned with the future of its members with the new employer, the union must also protect whatever rights still exist for its members under the collective-bargaining agreement with the predecessor employer. Accordingly, during this unsettling transition period, the union needs the presumption of majority status to which it is entitled to safeguard its members' rights and to develop a relationship with the successor.

If the employees find themselves in a new enterprise that substantially resembles the old, but without their chosen bargaining representative, they may well feel that their choice of a union is subject to the vagaries of an enterprise's transformation. This feeling is not conducive to industrial peace. In addition, after being hired by a new company following a lay-off from the old, employees initially will be concerned primarily with maintaining their new jobs. In fact, they might be inclined to shun support for their former union, especially if they believe that such support will jeopardize their jobs with the successor or if they are inclined to blame the union for their layoff and problems associated with it. Without the presumptions of majority support and with the wide variety of corporate transformations possible, an employer could use a successor enterprise as a way of getting rid of a labor contract and of exploiting the employees' hesitant attitude toward the union to eliminate its continuing presence.

Id. at 39-40. When employers are given free reign to circumvent the employees' chosen bargaining representative and impose changed terms and conditions of employment, employees justifiably question whether their collective bargaining rights have meaning and often blame their union for a perceived lack of effectiveness. Many successor employers use this freedom to cut costs and, accordingly, layoffs and wage and/or benefit cuts have become a routine byproduct of business transactions resulting in successorships. The employees who remain after such

upheavals are inevitably left with questions about their security: what are my prospects for continued employment? what will happen to my family if I am laid off? what will my new employment conditions be? how will cuts in salary and benefits affect us? how will I fare in the new corporate environment? Underlying these anxieties is this question: why was the new employer able to make these changes without consulting with my union? The result is the destabilization of relations, not just between the union and the new employer, but between a union and its members, complicating, and often frustrating, the collective bargaining that should be taking place.

Of course, an employer's imposition of initial terms is not a true measure of the union's effectiveness, but a function of successorship law and the freedom it grants to successors. The instability existing during the transition period, and the concomitant disaffection with the union that often flows from employees' disappointment with the union's inability to protect against the implementation of initial terms, will likely diminish over time if the union is able to re-establish a relationship with the employer and its own members, and to make progress in good faith bargaining. This progress is less likely and more difficult to achieve without the successorship bar. First, the union may have to devote resources to reorganizing the bargaining unit and fighting challenges rather than protecting workers and bargaining a contract. Second, the employer has less incentive to engage in whole-hearted bargaining. While some have disputed the validity of this concern, citing the protections of Section 8(a)(5), practitioners on both sides of the table are aware that delay and disingenuous bargaining can undermine the negotiating process, but fall just short of a provable violation of the Act.

SEIU and its affiliated local unions have seen first hand how the rule of MV Transportation can undercut the bargaining relationship. Its experience at Metropolitan of

Miami Hospital (“Metropolitan”) is a case in point. In 2004, SEIU Florida Healthcare Union (“SEIU Florida”) was certified as the representative of the employees at Pan American Hospital (“Pan American”) following an election in which 489 employees voted in favor of representation by SEIU Florida, and only 72 voted against. In February 2006, the parties reached a first collective bargaining agreement that was overwhelmingly ratified by the employees. In November 2006, Pan American was auctioned off in a bankruptcy proceeding and Metropolitan entered into an agreement to purchase Pan American. Metropolitan, the successor, immediately advised SEIU Florida that it would not assume the collective bargaining agreement and would reduce the Pan American workforce by 20 to 25 percent. Metropolitan refused to provide SEIU Florida with the identity of the workers slated for lay off, and when it assumed control of the operations in February 2007, it in fact laid off 20 percent of the former Pan American workers without any notice to the union. Despite Metropolitan’s representation that it would maintain employees’ terms and conditions during bargaining, it instituted targeted unilateral changes to the economic terms aimed at undermining the union. For example, in March 2007, Metropolitan instituted bonuses for registered nurses² and in May 2007, it implemented pay increases for emergency department employees. SEIU was left with a Hobson’s choice -- fight against these changes and appear to stand in the way of increased compensation for employees, or do nothing and allow employees to draw the conclusion that their union representation is meaningless. Metropolitan exploited that reality to undermine the union’s authority in the eyes of its members. Metropolitan also engaged in unreasonable delays in negotiations and surface bargaining tactics designed to erode support for the union. Notwithstanding the union’s immediate request for

² This conduct was the subject of an unfair labor practice charge that was subsequently settled (12-CA-25369).

bargaining, the first scheduled bargaining session was not held until seven (7) weeks after Metropolitan's assumption of control; the employer had cancelled two earlier dates. When the parties finally did meet, Metropolitan repeatedly shifted bargaining positions, delayed in providing necessary information, and refused to respond to the union's economic proposals for more than six (6) months. In November of 2007 -- only four (4) years after 87% of the employees voted in favor of representation by SEIU Florida, less than two (2) years after the employees overwhelmingly ratified a collective bargaining agreement, and only six (6) months after Metropolitan assumed control of the former Pan American operations and began bargaining with the union -- a decertification petition was filed. Unable to combat the employee disaffection fueled by Metropolitan's exploitation of the instability inherent in the successorship situation, SEIU Florida was forced to disclaim interest in the bargaining unit. It simply did not have the time to regenerate hope and confidence among the depleted workforce and to establish a working relationship with this recalcitrant employer. With a successor bar in place, the result could have been far more positive for these workers, and far more consistent with the goals of the Act.

B. A SUCCESSORSHIP BAR IS CONSISTENT WITH WELL-ESTABLISHED BOARD DOCTRINE AND ENHANCES EMPLOYEE FREE CHOICE.

There is a doctrinal disconnect between long-standing Board policy regarding blocking charges, where unilateral changes to terms and conditions of employment or employer direct dealing justify election delays, and the holding in MV Transportation pursuant to which the same conduct by a successor employer does not give rise to an insulated period. Generally, an employer's unilateral change in terms and conditions, in the absence of an impasse, constitutes an unfair labor practice in violation of Section 8(a)(5) of the Act. See NLRB v. Katz, 369 U.S. 190 (1962); Litton Fin. Printing Div. v. NLRB, 501 U.S. 190, 198 (1991) (“[A]n employer

commits an unfair labor practice if without bargaining to impasse, it effects a unilateral change of an existing term or condition of employment.”) The Board has acknowledged the negative effects of such unilateral changes on the relationship between a union and its members:

It is well settled that the real harm in an employer’s unilateral implementation of terms and conditions of employment is to the Union’s status as bargaining representative, in effect undermining the Union in the eyes of the employees. This is so because unilateral action by an employer ‘detracts from the legitimacy of the collective bargaining process by impairing the union’s ability to function effectively, and by giving the impression to members that a union is powerless.’

Priority One Services, 331 NLRB 1527 (2000), quoting Carpenter Sprinkler Corp v. NLRB, 605 F.2d 60, 64-65 (2d Cir. 1979)(internal citations omitted). Thus, for decades the Board has recognized that an employer’s unilateral changes to terms and conditions will preclude the existence of a question concerning representation and block the processing of a petition challenging the incumbent union’s majority status. See Id.; Wallkill Valley Gen. Hosp., 288 NLRB 103 (1988); Big Three Industries, Inc., 201 NLRB 197 (1973). The same is true of employer direct dealing. See, e.g., El Paso Disposal, L.P., 2009 NLRB LEXIS 123, *247 (Apr. 27 2009)(refusing to process decertification petition where employer engaged in direct dealing because such direct dealing “emphasized for the drivers that there existed no necessity for representation by the Union”); Regency House of Wallingford, Inc., 347 NLRB 173, 188 (2006)(finding decertification petition tainted by employer’s direct dealing as the direct dealing “unmistakably communicated to employees that the Union was not necessary” and this message was “detrimental and of lasting affect.”); Equipment Trucking Co., Inc., 336 NLRB 277, 286 (2001)(imposing a bargaining order and temporary decertification bar based, in part, on employer’s direct dealing). Accordingly, the temporary delay in choosing or changing a representative, rather than impairing employee free choice rights, protects those rights as it

insures that when employees do vote, the election will be untainted by employer conduct that undermines confidence in the union. In Broadway Volkswagen, 342 NLRB 1244, 1248 (2004), the Board put it this way:

an affirmative bargaining order, with its attendant bar to raising a question concerning the Union's continuing majority status for a reasonable time, does not unduly prejudice the Section 7 rights of employees who may oppose continued union representation because the duration of the order is no longer than is reasonably necessary to remedy the ill effects of the violation.

see also Goya Foods, 347 NLRB 1118, 1123 (2006)(finding the potential long lasting and negative impact of employer's unilateral changes on union support "outweigh[s] the temporary impact the affirmative bargaining order will have on the rights of employees opposed to continued union representation"). Echoing the same sentiment, the Supreme Court, in NLRB v. Gissel Packing Co., 395 U.S. 575, 613 (1969) stated:

in finding that a bargaining order involved an "injustice to employees who may wish to substitute for the particular union some other . . . arrangement," a bargaining relationship "once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed," after which the "Board may . . . upon a proper showing, take steps in recognition of changed situations which might make appropriate changed bargaining relationships."

quoting Frank Bros Co. v. NLRB, 321 U.S. 702, 705-06 (1944)(noting that until the unlawful unilateral changes are remedied, "the employees' true desires are matters of speculation and argument"). Reversing MV Transportation and restoring the successorship bar would bring

successorship doctrine back in line with well-established Board doctrine and clearly stated statutory policy.³

Finally, it is worth noting that arguments against the successorship bar from employers that are grounded in the purported concern for employee free choice are notoriously disingenuous. As Justice Souter stated in delivering the opinion of a unanimous Court, “[t]he Board . . . is entitled to suspicion when faced with an employer’s benevolence as its workers champion against their certified union. There is nothing unreasonable in giving a short leash to the employer as vindicator of its employees’ organizational freedom.” Auciello Iron Works, Inc. v. NLRB, 517 U.S. 781, 790 (1996).

For the aforementioned reasons the Board should reverse MV Transportation.

POINT II.
THE BOARD SHOULD REQUIRE THE ‘PERFECTLY CLEAR’ SUCCESSOR TO BARGAIN WITH THE UNION PRIOR TO SETTING INITIAL TERMS

A. REQUIRING ‘PERFECTLY CLEAR’ SUCCESSORS TO BARGAIN WITH THE UNION PRIOR TO SETTING INITIAL TERMS IS REQUIRED UNDER THE SUPREME COURT’S HOLDING IN BURNS

More than four decades ago, the Supreme Court in Burns carved out an exception to the general rule that successor employers are free to set initial terms of employment in

instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be

³ A successorship bar would also be consistent with the Board’s long-standing recognition bar doctrine that a majority of the Board overturned in Dana Corp., 351 NLRB 434 (2007). The reasoning that supported the Board’s policy of imposing a recognition bar for a reasonable period immediately following voluntary recognition -- which stood for more than 40 years prior to the Dana decision -- apply to an even greater extent in the successorship context where the new employer’s ability to set initial terms makes the transition period following a change in employers even more volatile and uncertain than in a voluntary recognition situation. The SEIU has also submitted a brief Amicus Curie in Rite Aid Store # 6473, 355 NLRB No. 157 (2010), urging the Board to reverse Dana.

appropriate to have him initially consult with the employees' bargaining representative before he fixes terms.

406 U.S. at 1586. In Spruce Up the Board majority ignored this caveat's plain meaning and instead limited the obligation to "consult" with the union to circumstances where the employer (i) has misled the predecessor's employees into believing that their terms of employment will remain unchanged, or (ii) has failed to "announce" its intent to establish new terms. Spuce Up, 209 NLRB at 195.⁴

The Board majority reasoned that because the successor cannot "realistically anticipate" whether the predecessor employees will agree to work under changed terms, it cannot be "perfectly clear" to the successor that it can, in fact, "plan to retain all of the employees in the unit." Id.; Road & Rail Servs., Inc., 348 NLRB 1160, 1162 (2006) (focus of Spruce Up test is "gauging the probability that the predecessor employees will accept employment with the successor"). The Board majority justified its construction of the Supreme Court's language, which ignores its plain meaning as well as the balance struck by the Court between the competing interests of entrepreneurial freedom and employee collective rights, on the basis that the dissent's reading of Burns would encourage a successor to "refrain from commenting

⁴ The Board's precise language was:

We believe the caveat in Burns, therefore, should be restricted to circumstances in which the new employer has either actively or, by tacit inference, misled employees into believing they would all be retained without change in their wages, hours, or conditions of employment, or at least to circumstances where the new employer, unlike the Respondent here, has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment.

Id. at 195.

favorably at all upon employment prospects of old employees for fear he would thereby forfeit his right to unilaterally set initial terms.” Spruce Up, 209 NLRB at 195. Indeed, the majority opined that “the more cautious employer would probably be well advised not to offer employment to at least some of the old work force under [the] decisional precedent [espoused by the dissent].” Id.

Even assuming the majority’s concerns are well-grounded, which they are not (see Section B, *supra*) they do not justify the substitution of a different test for the test clearly enunciated by the Supreme Court in Burns. As Member Gould in his concurrence in Canteen correctly observed, the “Supreme Court in no way even suggested, much less stated, that the ‘desire’ of the employees or their ‘willingness’ to accept the new employer’s offer was to be considered in determining whether the employer planned to retain all of the employees in the unit.” 317 NLRB at 1055; see also Spruce Up, 209 NLRB at 208 (Member Penello dissent).

Also dissenting in Spruce Up, Member Fanning explained:

The fact that some employees may refuse the offer of employment has nothing to do with the “plans” or intent of the offering employer. It may be that he will have to alter his plans, if the employees refuse the offer of employment, but at the time of the offer, he assuredly plans to retain those employees. Where such is the case, and where the union representing those employees has made an appropriate bargaining demand, I agree with Member Penello that under Burns the successor is obligated to consult with the union “before he fixes terms.”

Id. at 205-06.

By putting the proverbial cart before the horse, the majority places employee entitlement to representation in the effective control of the employer, a principle that is anathema to the Act. Under Spruce Up, Employers can exercise such control by unilaterally setting initial terms; they transform attractive jobs into less attractive ones that some of the predecessor’s work force may

decline to accept.⁵ Allowing the application of the perfectly clear successor rule to “rest[] in the hands of the successor,” Fall River, 482 U.S. at 40-41, runs counter to the caveat in Burns that a successor that intends to hire its workforce from the predecessor’s workforce cannot unilaterally fix initial terms without first consulting with the union that represents the predecessor’s employees.

The irony of the Spruce Up majority’s reading of Burns is that it sanctions direct dealing over the salutary effect of collective bargaining when there is controversy over initial terms, and imposes an obligation to bargain only when none is needed. Under Spruce Up a successor’s obligation to bargain over initial terms attaches only when the successor plans to retain the former workforce at terms consistent with those established through collective bargaining with the predecessor. See 209 NLRB at 206 (Member Fanning dissent). This result, which Member Fanning correctly described as “anomalous, if not absurd,” “would bring to bear the mediatory influence of negotiation where there is no controversy, but deny its appropriate use where there is controversy.” Id.

The Court in Burns was clear that there are different kinds of successors, each with differing obligations: (i) a successor that voluntarily agrees to be bound by the terms of the predecessor’s collective bargaining agreement, Gen. Extrusion Co., 121 NLRB 1165 (1958), (ii) a Burns successor, and (iii) a perfectly clear successor as defined in Burns. A Burns successor does not assume the agreement and does not necessarily plan to employ the predecessor’s entire workforce but, in fact, hires a majority of its workforce from the predecessor’s employees and continues with substantial continuity the predecessor’s operations. While the Burns successor is obligated to bargain with the predecessor employees’ union after it assumes control, it is not

⁵ See Point B, *supra*.

bound by the predecessor's collective bargaining agreement and may set initial employment terms. Burns, 406 U.S. at 284. The "perfectly clear" successor "plans" to hire the represented employees of the predecessor and is obligated to bargain with the employees' representative prior to setting initial employment terms. The terms in effect prior to the transfer of ownership or change of employers will remain in effect until agreement regarding initial terms is reached, or impasse occurs. Then, the new employer, having bargained in good faith, may implement its final offer.

The intent to hire, which is the Burns criterion for finding a "perfectly clear" successor, is manifest in numbers of varying circumstances. Retaining the predecessor employees may be required by a purchase agreement, part of a service contract between a service provider and its customer, necessary to maintain safe staffing and continuity of care, or otherwise demanded by the service provider's customer. There may be a local employee retention law, or some other legal reason, such as an order of a bankruptcy court, that the former employees will be retained or at least offered employment. Frequently, the purchaser of a business needs the skills and experience of the predecessor's workforce and retaining the predecessor workforce ensures a smooth transition during the change in employing entities.

Examples of the Burns "perfectly clear" successor arise frequently in SEIU's health care sector. Its affiliate 1199SEIU United Healthcare Workers East ("1199SEIU") represents approximately 70,000 employees in 537 nursing homes in New York, New Jersey, Massachusetts, Maryland, the District of Columbia, and Florida. Nursing home takeovers are not infrequent. By the nature of the industry, a proposed takeover of operations is generally a matter known to all interested parties well in advance of its execution. Of necessity, the purchaser would, but for Spruce Up, be a "perfectly clear" successor. It must obtain authority

from state licensing agencies (after a transfer of a “certificate of need”), give assurances that operations will continue uninterrupted, and insure that quality patient care and staffing ratios will be maintained. The employees -- particularly patient care workers such as Registered Nurses, Licensed Practical Nurses, Certified Nursing Assistants, Physical Therapists, and Technicians -- cannot easily be replaced and the nursing home cannot operate without them. There is no question but that the new owners intend to operate with the existing staff to the greatest extent possible. The Union is invariably on notice, well in advance, of the successors’ interests and intentions. Bargaining commences early and is often completed well before the new operator takes functional control of the home. Indeed, in most cases, it is to the great advantage of employers to work out all the terms with the union before finally committing to the purchase arrangement so there are no financial surprises or work disruptions when it begins operations. While this “perfectly clear” successor may not adopt the predecessor’s contract, agreement is reached on all initial terms and disruption to labor peace and stability is avoided⁶.

Another SEIU affiliate, SEIU Local 32BJ is the largest property service local in the United States, representing more than 120,000 property service workers, including cleaners, maintenance persons, building superintendents, security officers and food service workers, in residential and commercial buildings and in public and private schools and universities in over

⁶ Other SEIU affiliates have experiences that differ from those of 1199SEIU. For example, the employer transitions experienced by SEIU United Long Term Care Workers Union, Local 6434 (“ULTCW”), a union of approximately 190,000 long-term care workers based in California, are not generally known to the union in advance and the employers do not meet with, or even acknowledge, the union, prior to taking control. Notwithstanding the different experiences of these SEIU affiliates, and as explained further in the brief submitted by ULTCW as Amicus Curiae in this matter, the turmoil that accompanies employer transitions in both settings, in conjunction with a legal environment that allows successor employers to refuse to bargain, make unilateral changes, and deal directly with employees, supports the reversal of both MV Transportation.

eight states as well as the District of Columbia. Many property service employees in the commercial sector and educational institutions are employed by service contractors that bid for the work and entered into a contract with the building manager/owner or school district/university (collectively, “Customer”). Typically, these service contracts contain 30-day cancellation clauses. In advance of notifying the current contractor that its contract is being cancelled or may not be renewed, the Customer puts out a Request for Proposal (“RFP”) and prospective successor contractors submit bids. Thus, the successor will generally be aware more than 30 days in advance of taking over operations that it has been awarded the account and will be replacing the predecessor contractor. As with the health care industry, there generally is a preference for seamless continuity in operations. This is reflected in many RFPs and the subsequent service contracts that commit the successor to offering employment to the incumbent workers. In addition, there are employee retention laws in New York City, the District of Columbia and other localities that require the successor to offer employment to the incumbent employees. Where the Customer is a government agency, there may be an obligation to offer employment to the incumbents, as there currently is for federal service contracts pursuant to an Executive Order. Similarly, in the residential sector, or where there is a sale of a commercial building, there is ample advance notice of the sale and that there will be a change in the employing entity – often months or years – and an equally compelling need to ensure continuity of operations, often reflected in provisions in the sales contract that requires the successor to offer employment to the incumbents. Thus, in myriad circumstances that Local 32BJ and other SEIU property service locals encounter across the country, the successor contractor or building owner would, but for Spruce Up, be “perfectly clear.” As illustrated by Planned Building Servs.,

Inc., 330 NLRB 791 (2000), Spruce Up affords the unsavory employer that wishes to circumvent these contractual commitments and legal restrictions an opportunity to do so.

Of course, not all successors will be “perfectly clear,” as defined by the Burns Court. But, in a great many industries, continuity of operation during a transition from one employer to another is essential and the predecessor employees’ particular skills, knowledge of the business, and/or familiarity with customers, patients and residents, render it essential that the new employer hire the predecessor’s workforce. These “perfectly clear” successors are not meaningfully limited by the obligation to bargain initial terms with the predecessor employees’ union. Where the employer needs, or believes it needs, to cut wages or other terms in order to operate profitably, the only obligation Burns imposes upon the successor is to bargain in good faith with the union to agreement or impasse. As Member Penello explained in his dissent in Spruce Up,

The Court in Burns did not forbid any successor from setting initial terms on its own once it announces it intends to retain its predecessor’s employees. The Court merely said that in this situation “it will be appropriate to have [the new employer] initially consult with the employees’ bargaining representative *before* he fixes terms.” I regard this duty as merely an obligation to refrain from dealing with the unit employees individually concerning their future working conditions until it has notified the union and bargained to an impasse.

Spruce Up, 209 NLRB at 208. The obligation to maintain existing terms while not being contractually bound to a labor agreement is not an alien concept in federal labor law.⁷

⁷ Following the expiration of a collective bargaining agreement, employers are prohibited from making unilateral changes to terms and conditions and must, instead, continue to honor those terms until the parties successfully negotiate a new contract or reach an impasse. Litton Fin. Printing Div. v. NLRB, 501 U.S. 190, 207 (1991). As the Supreme Court noted, in that circumstance, “the obligation not to make unilateral changes is rooted not in the contract but in preservation of existing terms and conditions of employment and applies before [a new] contract

In short, Spruce Up improvidently upset the balance of interests struck in Burns by shifting the focus from the employer's plans (often of necessity) to hire the predecessor's workforce to what the employer *says* about the terms it wishes to set. The difference is that a "perfectly clear" successor under Burns is required to present those initial proposed terms to the union for discussion, rather than as a *fait accompli* to the workers. The consultation (negotiation) that follows may result in changes in those proposed terms, or an impasse that allows their imposition. This is an outcome consistent with the goals of the Act.

B. THE BOARD AND COURTS' NARROW INTERPRETATION OF 'PERFECTLY CLEAR' SUCCESSORSHIP IS INCONSISTENT WITH STATUTORY POLICY AND UNNECESSARY TO PROVIDE EMPLOYER FLEXIBILITY

1. *Spruce Up* Undermines the Protections it Purports to Afford Employees.

The Spruce Up majority's concern that "cautious employers would probably be well advised not to offer employment to at least some of the old work force" if an employer that intends to hire the predecessors' work force has to comply with the Burns caveat and refrain from unilaterally setting initial terms, is misguided.⁸ That some employers which otherwise

has been negotiated." Id. Thus, the Board and the Courts have clearly drawn the distinction between binding an employer to a collective bargaining agreement and obligating it to honor the same terms and conditions of employment as a matter of statutory law. In the successorship context, some successor employers will choose to assume the predecessor's collective bargaining agreement and will be bound by the terms of that agreement as a matter of contract; "perfectly clear" successors, while not bound by the contract, are nonetheless obligated to honor those terms and conditions as a matter of law until, after good faith bargaining with the union, new terms are reached or an impasse arises.

⁸ In her dissent in MV Transportation, Member Liebman aptly described the balance struck by the Burns court between entrepreneurial freedom and workers' protection as "sharply limit[ing] the authority . . . of the employees' bargaining representative in crucial respects." 337 NLRB at 778. In a footnote, Member Liebman notes that the one exception to the generally free reign afforded employers is the "perfectly clear" exception under Burns which imposes the obligation to "consult with the incumbent union about initial terms of employment" of such employees. Id. at 778, n.7. She does not, however, address the extent to which this singular obligation has been undermined and, in practice, rendered a nullity by Spruce Up and been replaced instead by

would have offered employment to the incumbents might “not offer employment to at least some of the old work force” in order to evade a bargaining obligation is hardly a sound rationale upon which to craft national labor policy.⁹

Moreover, there is no empirical evidence to support the majority’s speculation. To the contrary, experience has proved the opposite, as illustrated by Planned Building Servs. Inc., 330 NLRB 791 (2000). In Planned, the purchaser of a suburban mall decided to replace General Growth Management, the cleaning contractor retained by the prior mall owner, with a different contractor, Planned Building Services (“PBS”). Under General Growth, thirty-four unit employees earned between \$10.47 and \$13.84 hourly and had health benefits. Id. at 796. It was PBS’s intent to interview and offer employment to all the incumbent employees, which it in fact did. However, in its offer of employment, PBS slashed wages to \$6.50 hourly and eliminated health benefits. As a result, only nine of the former General Growth employees accepted the employment offer. While it is, of course, unclear what the incumbent union might have accomplished had PBS been required to bargain over initial terms, it is perfectly clear that the right of the employer to “Spruce up” did absolutely nothing to protect labor standards, the jobs of the incumbent workforce, or labor peace.

Board-sanctioned permission to engage in direct dealing in a circumstance where the Supreme Court has concluded that the balance of interests prohibits just that. Accordingly, we respectfully submit that the Board, in its current examination of the obligation imposed by the Supreme Court in Burns on “perfectly clear” successors cannot avoid confronting the effective destruction of that obligation in its decision in Spruce Up.

⁹ Of course it would be unlawful for an employer to refuse to hire the predecessor’s employees to avoid a bargaining obligation. See e.g., Howard Johnson Co., Inc., v. Hotel & Restaurant Emp. and Bartenders Int’l. Union, 417 U.S. 249, 262 n. 8 (1974); Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 40 (1987); NLRB v. Burns Intern. Sec. Services, Inc., 406 U.S. 272, 280-81 n.5 (1972); Pacific Custom Materials, Inc., 327 NLRB 75, 83 (1998).

While not serving to protect jobs, labor standards, collective bargaining or employee free choice, the majority decision in Spruce Up sanctions employers' direct dealing with employees at a time of great vulnerability. Such was the case in Boeing Company, 214 NLRB 541 (1974), where the successor stated that it intended to hire 86 percent of the incumbent work force in order to "maintain continuity of support." Id., 214 NLRB at 543. Four months before it was to commence operations, the successor learned that it was the successful bidder. Under the protective shield of Spruce Up, it then announced wage cuts and refused to bargain with the incumbent union, despite multiple requests. The result was prolonged uncertainty and labor unrest. In protest of the unilateral changes and the successor employer's refusal to bargain with the employees' representative, the employees engaged in a concerted refusal to submit applications for approximately two months. While they eventually submitted unconditional applications, Boeing vividly illustrates the negative correlation between direct dealing and labor peace. Similarly, in Spruce Up, it was the successor's direct dealing that led to the labor unrest.

Member Fanning explained:

[O]nce Respondent Fowler [the successor] had determined to rely on Spruce Up employees to operate his shops, the bone of contention between him and those employees was his refusal to deal with them through their Union. When Fowler informed the Union that "all the barbers who are not working will work," almost a month remained before he was to take over the operation of the barber shops. Had he honored the Union's request to bargain over the change in commission rates he intended to make, the negotiation process would have had time to work out an acceptable agreement without danger of work stoppages during that process.

The decision of employees to work or to withhold their services would then have been made in the light of Fowler's good-faith dealing with their Union and vindication of their exercise of Section 7 rights, not in the light of an adamant denial of such rights.

Spruce Up, 209 NLRB at 206 (Fanning dissent) (citing Chairman Gould concurrence in Canteen Co.)

Thus, rather than protecting the rights of employees to representation and furthering their interests in job retention, the majority decision in Spruce Up has accomplished precisely the opposite.

2. The Successor Employer's Need for Flexibility is not Incompatible with a Bargaining Obligation In A 'Perfectly Clear' Successorship.

Contrary to the distortions that have evolved regarding the bargaining obligations of “perfectly clear” successors, Point C, *supra*, Burns does not bind such a successor with the predecessor’s collective bargaining agreement, nor deny it ability to restructure operations. Rather, the Burns caveat requires only that a perfectly clear successor refrain from direct dealing and “initially” consult with the incumbent union in good faith before the successor “fixes terms.” Burns, 406 U.S. at 295. As Member Fanning noted in his dissent, “fixes” means “the actual establishment of [employment] terms on the day the successor commences operations.” Spruce Up, 209 NLRB at 206 (Member Fanning dissent). Where there is no agreement after good faith pre start-up bargaining, and impasse is reached, the successor is free to unilaterally implement its last proposed terms. Id. at 208 (Member Penello dissent) (noting the employer’s duty is merely “to refrain from dealing with the unit employees individually concerning their future working conditions until it has notified the union and bargained to an impasse”).¹⁰

¹⁰ That initial terms bargaining could, in some instances, continue past the start-up of operations, because the parties have not yet reached agreement or bargained to impasse, does not change the analysis. Upon impasse, the successor would have the right to unilaterally implement. That the successor might be required to maintain the employees’ previous employment terms for a brief period post start-up only serves to encourage meaningful and expeditious pre start-up collective bargaining.

The rights and duties of the parties in such pre-start-up bargaining were not addressed by the Burns Court, and presumably are left for the Board's expertise. Unfortunately, the Board has not had the opportunity to address the proper parameters of those obligations, due to the majority decision in Spruce Up. Indeed, underlying the majority's sanctioning of direct dealing in circumstances where a successor intends to retain the predecessor's work force is a cynical view of the salutary effects of collective bargaining in "promot[ing] the peaceful settlement of industrial disputes." Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 211 (1964), in contravention of a primary purpose of the Act.

C. 'PERFECTLY CLEAR' SUCCESSORSHIP LAW IS UNWIELDY, INCONSISTENT, AND WRONGLY EQUATED WITH ASSUMPTION OF THE CONTRACT

Spruce Up's fundamental inconsistency with Burns, and its incompatibility with the Act's goals, are further evidenced by the case law applying Spruce Up, which is so riddled with contradictions that it can be fairly characterized as irrational. In the thirty-six years since Spruce Up was decided, the Board's analysis has focused not on the parties' rights and duties in bargaining over initial terms, but almost exclusively on when and whether "the successor employer announces its offer of different terms of employment in relation to its expression of intent to retain the predecessor's employees," and whether the successor has actively or tacitly misled employees when it invites them to accept employment. Fremont Ford Sales Inc., 289 NLRB 1290, 1296 (1988). This very narrow focus has lost the proverbial forest for the trees.

Moreover, the decisions under Spruce Up are so fact-dependent and conflicting that there are no bright lines as to when in the transition process the successor may announce new terms or how explicit these announcements must be. In several instances where the Board has attempted to apply the Spruce Up rule in a manner more faithful to Burns, the circuit courts have refused to

enforce the Board's remedial orders, leading to further uncertainty. The case law has become so muddled and confusing that even the difference delineated in Burns, between a successor that assumes the collective bargaining agreement and a "perfectly clear" successor, has been virtually lost.

The glaring inconsistencies, discussed below, between the Board's decisions in Ridgewell's, Inc., 334 N.L.R.B. 37 (2001), enfd 38 Fed. Appx. 29 (D.C. Cir. 2002) and S&F Market Street Healthcare LLC, 351 NLRB 975 (2007), enft denied in relevant part, 570 F.3d 354 (D.C. Cir. 2009) as to whether announcements of changed terms must be express or can be implied, and the District of Columbia Circuit's acerbic decision denying enforcement of the Board's remedial order in S&F Market Street, underscore the need for the Board to overturn Spruce Up and, in keeping with Burns, answer the fundamental questions that Burns left to the Board regarding the parties' rights and duties in bargaining over initial terms.

1. Case Law Under *Spruce Up* Is Inconsistent And Provides No Clear Guidance

Spruce Up's focus on when and how changes in initial terms are announced, and whether employees have been misled, has created an unwieldy and inconsistent body of law. There are no benchmarks for determining how explicit an employer's announcement of changed terms must be, when in the hiring process this announcement must be made, or how significant the proposed changes must be. As a result, the supposedly clear statement of changed terms required by Spruce Up need not be either express or clear, and the successor employer may announce these changed terms at seemingly any point in the transition process.

For example, in Fremont Ford, the successor employer was deemed a "perfectly clear" successor and required to rescind unilateral changes because it had concealed its intent to change employees' terms and conditions until after the incumbent employees had submitted applications

and were being interviewed. 289 NLRB at 1292. Conversely, the Second Circuit in Nazareth Regional High School v. NLRB, 549 F.2d 873 (2d Cir. 1977) denying enf't to Roman Catholic Diocese of Brooklyn, 225 NLRB 1052 (1976), denied enforcement of the Board's order requiring the successor to rescind changes in terms it announced directly to employees. 549 F.2d at 881. The circuit court rejected the Board's conclusion that the bargaining obligation attached when the successor informed the union that it would hire the predecessor's employees, and held that the successor's direct dealing with employees was lawful under Spruce Up. 549 F.2d at 881-82.

In Saks & Co., 247 NLRB 1047 (1980) enf't denied 634 F.2d 681 (2d Cir. 1980), the successor Saks hired the alterations employees previously employed by Gimbels. In concluding that Saks was a "perfectly clear" successor under Burns and therefore obligated to bargain over initial terms, the Board stressed the lack of any evidence that the employer had announced changed terms before employees commenced work. Saks & Co., 247 NLRB at 1051-52. Here too, the Second Circuit denied enforcement, finding that Saks' apparent failure to announce changed terms when it invited employees to apply and interviewed them, was an insufficient basis for finding a "perfectly clear" successor bargaining obligation. Saks & Co., 643 F.2d at 687-88.

The irrationality of the case law under Spruce Up and its lack of clear rules is perhaps best evidenced by the clear and irreconcilable conflict between the Board's decisions in Ridgewell's, 334 N.L.R.B. 37, and S&F Market Street Healthcare LLC, 351 NLRB 975. In Ridgewell's, the Board permitted an employer to unilaterally discontinue fringe benefit contributions although it had never announced any change in benefits. 334 NLRB 37. The Board found that the employer's announcement that the retained predecessor employees would

be independent contractors, while “legally erroneous,” somehow implied the loss of fringe benefits and that such implication was sufficient announcement of changed terms. *Id.* In S&F Market Street Healthcare LLC, the successor, Windsor Convalescent Center (“Windsor”) solicited applications from those predecessor nursing home employees whom it had already decided to hire. 351 NLRB 975. During subsequent interviews, it informed the employees that they would serve a 90 day probationary period and would not receive “company benefits” during this time. *Id.* at 976. One day before it commenced operations, Windsor issued hire letters stating that other unspecified terms and conditions of employment would be set forth in the company’s personnel policies and its employee handbook, which had not been provided. *Id.* The Board found that these statements, particularly the hire letters’ general reference to terms and conditions in the handbook that had yet to be provided, were too vague and open-ended to put employees on notice as to the changed terms. *Id.* at 981-82. The District of Columbia Circuit, however, denied enforcement of the Board’s order in S&F Market Street, relying on Ridgewell’s to find that the successor employer was permitted, under Spruce Up, to make any and all changes it wished to implement based upon these vague statements. S&F Market Street Healthcare, 570 F.3d at 362.

2. Case Law Under *Spruce Up* Collapses Two Distinct Successorship Doctrines

Bogged down in convoluted inquiries about when and how expressly or implicitly an otherwise “perfectly clear” successor must announce changes to initial terms, the case law under Spruce Up has even lost sight of the clear distinction made by Burns between a successor that assumes the predecessor’s collective bargaining agreement and a “perfectly clear” successor that plans to retain a majority of the predecessor employees (see also Section A, *infra*).

In E G & G Florida, Inc., 279 NLRB 444 (1986), for example, the Board sidestepped the fundamental question of how a successor that agrees to assume the predecessor collective bargaining agreement differs from a “perfectly clear” successor. The successor in E G & G repeatedly and publicly stated to the incumbent union and others over a period of several months that it would be adopting the predecessor’s collective bargaining agreement. 279 NLRB at 445-46. Based on these representations, the union facilitated the successor’s bid for the service contract. Id. Just prior to the start of operations, however, the employer reneged on its commitments, and announced unilateral changes. While the Board found that the employer was a “perfectly clear” successor, it did not find that the employer had bound itself to the collective bargaining agreements despite its many statements that it was adopting the agreement. 279 NLRB at 453. In affirming the ALJ, the Board equated the successor’s repeated promises to adopt the collective bargaining agreement with agreeing to hire at existing terms, and did not explain why the employer was merely obligated to bargain over initial terms instead of being bound by the contract it agreed to adopt. 279 NLRB at 444.¹¹

The distinction between assumption of the collective bargaining agreement and “perfectly clear” successorship was again lost in Banknote Corp. of Am., Inc., 315 NLRB 1041 (1994), enf’d. 84 F.3d 637 (2d Cir. 1996), where the incoming employer notified the incumbent unions that it was acquiring the predecessor’s facility and intended to hire its initial work force from the incumbent employees at the facility. In this notification, it also stated that it was not making a

¹¹ The ALJ in E G & G simply expressed concern that binding the successor to the agreement “clearly impinges upon a successor’s freedom to contract - a freedom the Supreme Court has refused to restrain.” 279 NLRB at 453 (citations omitted). The ALJ went on to say “[a]lthough I have relied above on Respondent’s repeated promises to adopt the Union agreement, that finding was to support the principle that Respondent did not intend to change employees’ terms and conditions of employment; but it did not constitute a valid and binding contract adopting M&W’s agreement.” Id.

commitment to recognize the unions or to be bound by their collective bargaining agreements, and in a subsequent communication, the successor disavowed a statement by the predecessor that it had agreed to be bound by the collective bargaining agreement. 315 NLRB at 1041. Even though the successor said nothing about setting new terms and conditions, The Board concluded that the successor's statement that it would not adopt the collective bargaining agreement was tantamount to expressing an intent to change initial terms and conditions.

Although in its March 23 letter to the Unions the Respondent stated its "intention to attempt to hire its initial work force from among the employees currently working at the Ramapo facility," this letter also effectively announced that it would be instituting new terms and conditions of employment. Specifically, the Respondent's statements in the March 23 letter disavowing the notion that the Respondent had agreed to be bound by the terms and conditions of the ABN collective-bargaining agreements and declaring that the Respondent had "not made any such commitments" put the employees on notice that the Respondent would be making changes in the employment terms of the predecessor. In our view, the Respondent's statements in the letter convey to the predecessor's employees the message that the Respondent would not be adopting the predecessor's terms and conditions of employment. Thus, simultaneous with its stated intention to retain the predecessor's employees, the Respondent announced new terms and conditions of employment.

315 NLRB at 1043 (emphasis added).

The District of Columbia Circuit's opinion in S&F Market Street Healthcare LLC, 570 F.3d 354, highlights how far the case law under Spruce Up has strayed from Burns and blurred the distinction between a successor that assumes the agreement and a "perfectly clear" successor. In justifying its denial of enforcement of the Board's order to rescind unilateral changes, the court described the "perfectly clear" caveat in Burns as a "straightjacket," equating the duty to bargain with the forfeiture of the right to implement initial terms and conditions after good faith bargaining. 570 F.3d at 362. It suggested that by requiring the successor to restore unilaterally

changed terms, the Board was binding the successor employer to the predecessor's collective bargaining agreement. Id. This, of course, is not the case. The D.C. Circuit's interpretation of Burns and Spruce Up thus takes the confusion between assumption of the collective bargaining agreement and "perfectly clear" successorship to a new and more confusing low, effectively holding that unless the successor agrees to adopt the predecessor collective bargaining agreement, it cannot be deemed a "perfectly clear" successor and cannot be prohibited from unilaterally implementing changes in initial terms.

3. Canteen Co. and the Interrupted Reexamination of Spruce Up

Only once in this morass, in Canteen Co., 317 NLRB 1052 (1995), has the Board stepped back and considered Spruce Up's restriction of the Burns caveat or the policy rationales that were invoked by the majority in Spruce Up. In Canteen, the Board relied on the employer's statements that it wanted incumbents to apply for work and preliminary discussions with the union about negotiations over a new collective bargaining agreement to find that the employer was a "perfectly clear" successor. 317 NLRB at 1052-53.

Chairman Gould's concurrence correctly called for Spruce Up's reversal, criticizing its legal underpinnings and finding that its purported policy rationales were inconsistent with the Act. Id. at 1054-55. Although it did not join in Chairman Gould's call to reverse Spruce Up, the plurality in Canteen unequivocally rejected the assertion that the "perfectly clear" caveat should only apply when the new employer has failed to announce initial employment terms prior to, or simultaneous with, the extension of *unconditional offers of hire* to the predecessor employees." Id. at 1053 (emphasis in original). However, the plurality failed to identify a clear point in the transition process for determining whether the incoming employer is a "perfectly clear" successor. Id.

In enforcing the Board's order in Canteen, the Seventh Circuit welcomed the Board's willingness to reexamine Spruce Up and consider whether Spruce Up had improperly restricted the "perfectly clear" caveat in Burns. Canteen Corp. v NLRB, 103 F.3d 1355, 1362 (7th Cir. 1997). The court emphasized that the perfectly clear successor "mandate in Burns must still be observed," and pointedly based its enforcement of the Board's remedial order to rescind the unilateral changes in initial terms, only on Burns, not on Spruce Up grounds. Id.

Despite the clear support for a reexamination of Spruce Up from the Seventh Circuit, and Chairman Gould's continued calls for Spruce Up's reversal, e.g., Planned Building Servs., 318 NLRB 1049, 1050 (1995) (Gould dissent), Advanced Stretchforming Int'l Inc., 323 NLRB 529, 530 n.7 (1997), enf'd in relevant part 233 F.3d 1176 (9th Cir. 2000), until now, the Board has not resumed the examination of Spruce Up's legal merits or policy rationales. Instead, as demonstrated by S.F. Market Street and Ridgewell's, the case law under Spruce Up has only become more muddled. This devolution underscores the need for the Board to reverse Spruce Up, and finally, as the Seventh Circuit urged, give meaning to the "perfectly clear" successor's bargaining obligation and the Court's mandate in Burns.

CONCLUSION

For each and all of the foregoing reasons, SEIU requests that the Board reconsider, and reverse, its decision in MV Transportation and restore the "successorship bar," which gives the incumbent union a reasonable time to bargain with a successor employer without a challenge to its majority status; and that it review its treatment of the "perfectly clear" successor, as interpreted by Spruce Up and its progeny, and hold, consistent with the Supreme Court's decision in Burns, that where a successor makes perfectly clear its intent to hire a majority of its

workforce from the predecessor's employees, it must bargain with the incumbent union before setting initial terms of employment.

Dated: November 1, 2010
New York, New York

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of this document is being served this day upon the following persons, by electronic mail, at the addresses below:

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