

Before You Acquire That Business, Understand the NLRB's Successor Bar Doctrine

Labor & Employment Law Update

By Beverly Alfon on April 24, 2017

When a change of ownership occurs for a business that employs individuals who are represented by an incumbent union, the new owner must be aware of the National Labor Relations Board's (NLRB) successor bar doctrine. It used to be that following a sale or a merger of a business, there was a window of time during which employees, the new employer, or a rival union, could challenge a union's majority status as representative of those employees. However, in 2011, the NLRB modified the doctrine in *UGL-UNICCO Service Co.*, 357 NLRB No. 76 (Aug. 26, 2011), holding that for stability, the new relationship between the successor employer and incumbent union should be insulated from challenges for a reasonable period of time (6 months if the new employer adopts the previous terms and conditions; 6-12 months if the new employer sets new terms and conditions).

A few weeks ago, a federal appellate court in *NLRB v. Lily Transportation Corp.* (1st Cir. March 31, 2017), affirmed the revised successor bar doctrine, holding that the NLRB had a sound basis to implement it. The court also held that the NLRB properly applied that revised successor bar doctrine in finding that Lily Transportation unlawfully refused to bargain with a union that represented a group of truck drivers at a newly acquired facility.

Lily argued to the board that less than a month after it took over operations, it received signed statements from a majority of drivers indicating that they no longer wanted to be represented by the union. Lily argued that the successor bar would force a union upon the employees who had clearly rejected it. The NLRB rejected the argument and required Lily to negotiate with the union.

On appeal, Lily challenged the validity of the successor bar doctrine itself. It argued that the NLRB should be required to provide reasoned explanation for the change in precedent. The court rejected the arguments, reasoning:

The greater the number of successor situations with unionized employees, the greater the potential volatility in union-management relationships across the national labor market. The greater the level of that instability, the greater the

likelihood of precipitate disruption in litigation challenging union support during the unsettled period with the new employer.

Bottom line: NLRB activism or not, the modified successor bar doctrine has survived the scrutiny of a federal appellate court. Employers must carefully evaluate all potential labor and employment issues prior to the acquisition of any business.

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