

Avoiding “Perfectly Clear” Successor Status When Acquiring a Property with a Union Workforce Now Requires Greater Vigilance

Thursday, March 30, 2017

The past year has seen increasing numbers of mergers and property acquisitions in the hotel industry. A purchaser looking to acquire a hotel property with a unionized workforce must be aware of rulings by the National Labor Relations Board (“Board”) on successorship in a sale. Essentially, an asset purchaser will be found to be a successor employer with an obligation to recognize and bargain with the union if (i) it continues the seller’s business in substantially unchanged form and (ii) a majority of its workforce at the new location consists of former union-represented employees of the seller.^[1]

Generally, a purchaser may retain the right to set the initial terms and conditions of employment. While a successor employer has the right to set materially different terms and conditions of employment and decline to adopt the existing collective bargaining agreement (“CBA”),^[2] a “perfectly clear” successor does not. The Board considers a new employer to be a “perfectly clear” successor if it “either actively, or by tacit inference, misled employees into believing that they would all be retained without change in their wages, hours or conditions of employment, or . . . has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment.”^[3]

Satisfying the Threshold of Becoming a “Perfectly Clear” Successor

In *Nexeo Solutions, LLC*, 364 NLRB No. 44 (July 18, 2016), the Board established how language in all documents and communications must be carefully crafted to avoid being a “perfectly clear” successor and thereby forfeiting the right to set the initial terms and conditions of employment.

Nexeo sets a new standard for how early a “first comment” can occur, which may result in the purchaser becoming a “perfectly clear” successor. This “first comment” includes not only the purchaser’s but also the *seller’s* communications with its employees. In *Nexeo*, the Board based its decision that the purchaser was a “perfectly clear” successor on the following factors:

- The purchase agreement contained a provision stating that the transaction “shall not result in the severance of any employee,” and that *Nexeo* would provide employees with equally favorable salaries and wages and “substantially comparable” employee benefits.
- Weeks after the purchase, the seller communicated *Nexeo’s* alleged intent to retain the employees but did not make clear that employment would be conditioned on the acceptance of new terms set by *Nexeo*.
- *Nexeo* had, in fact, approved the announcement, acting through a consultant and under a provision in the purchase agreement that required its consultant to approve communications by the seller about the sale.



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Nexeo argued that it could not be a “perfectly clear” successor because it communicated to the employees that it expressly rejected the CBA, would no longer participate in the union pension plan, and would provide different health benefits. The Board majority rejected this position, finding that Nexeo’s communications were too late because they were made some three months after the seller’s communications.

The Board majority also rejected Nexeo’s contention that the company was not responsible for any of the seller’s communications with employees. Nexeo had the right to control—and had, in fact, exercised control over—the seller’s communications and, by failing to repudiate the communications, had ratified them.

The Board also referenced earlier decisions that found terms such as “substantially equivalent” and “comparable” to be not specific enough to inform employees of the nature of the change in employment terms.^[4]

What Asset Purchasers Should Do When Considering an Acquisition of a Property with a Union Workforce

Purchasers seeking to maintain the right to set initial terms and conditions of employment should be aware of the following:

- A purchaser’s intention to set its own terms and conditions must be dealt with early in the acquisition process.
- The “first comment” to employees may be construed to be in either the purchase agreement or the first announcement of the purchase.
- A purchaser must make clear, from the first communication with employees concerning the potential for continued employment, that the offer of employment includes new terms and conditions that must be accepted in order to continue employment.
- All communications to the employees and the purchase agreement should avoid using:
 - language that could infer that the purchaser intends to honor the existing terms and conditions, and
 - vague terms such as “substantially equivalent” or “comparable.”
- If a seller communicates to its employees about continued employment in statements that infer that the purchaser will recognize a CBA or continue the existing terms and conditions of employment—or even if the seller does not mention the terms and conditions of employment—the purchaser must immediately disavow those statements and communicate a correct version to the seller’s employees.

[1] *NLRB v. Burns Security Service*, 406 U.S. 272 (1972).

[2] *Id.* at 294-95.

[3] *Spruce Up*, 209 NLRB 194 (1974).

[4] See *Elf Altochem North America*, 339 NLRB 796 (2003).

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