# Labor and Employment Law

## Premature Recognition: Isn't There a Better Way?

*By John S. Irving**

### I. The Problem: When Is Union Recognition "Premature" and Unlawful?

How many times do labor lawyers see this? Company A is interested in purchasing Company B or a portion of it. The prospective buyer may be seeking to expand its business, its product lines, its capacity, or to acquire strategic customers. It has the cash or financing to do so. Target Company B seeks to exit a business or a portion of it, discontinue production of a product, or raise cash. It, too, may be motivated by a variety of strategic or financial reasons. Often there is financial distress or some other urgency. The seller may be in Chapter 11 bankruptcy reorganization, perhaps contemplating an auction sale supervised by the bankruptcy court under Section 363 of the Bankruptcy Code. The employees of the seller for many years have been represented by a particular union. The seller may have been suffering losses, its market may have contracted, capital investment may be needed, and/or it may be suffering financially from restrictive and costly labor agreements and pension liabilities.

The purchaser sees a business opportunity but is not stupid. Before it commits its capital, it analyzes its risks and opportunities for business success. Seller's labor contract does not expire for three years and contains a "successors" clause purporting to require the seller to bind any purchaser to the agreement, with potential seller liability to the union and union represented employees if it fails to do so.

The union is not stupid either. It recognizes its strategic and legal leverage and considers itself a player in any sale transaction. It seeks to protect jobs and benefits, often including defined benefit pension plans and retiree insurance benefits. The union is realistic and open minded, however, and prefers a constructive relationship with a prospective buyer that will permit the business to succeed, but without alienating its members and retirees.

The prospective is not ideologically "anti-union." A substantial portion of its own workforce is union-represented by a different union. The buyer does not mind becoming a "*Burns*" successor by hiring a majority of the seller's union-represented employees and recognizing and bargaining with their union.[1] However, the purchaser does not wish to assume a burdensome agreement or working conditions that may have undermined the seller's competitive position. On the other hand, the buyer understands, as a practical matter, that it may not be free as a *Burns* successor to set its own initial terms because the seller is insisting on assumption of its labor contact in order to insulate itself from successorship liability potentially imposed by its labor contract. Neither does the buyer wish to face the prospect of a strike once it takes over.

The buyer would like to meet with the union, discuss its operational plans and, ideally, negotiate a new, binding labor agreement. Its operational plans may include downsizing, consolidation, relocation of work, subcontracting or other cost cutting measures—any of which is likely to raise union concerns and may even be barred by the seller's labor contract. Timing is important.

The practical desires of all parties are understandable and reasonable. Negotiation of a new labor agreement between the union and the prospective buyer makes sense. From the purchaser's standpoint it would lessen its risks, add predictability to the transaction, and promote its business objectives and profitability. The union sees opportunities for capital infusion, revitalization and job preservation. Can the buyer and the union just sit down together and negotiate a new labor agreement? Does the National Labor Relations Act permit them to do so? Some would say yes. Some would say no. Some would say maybe. The answer is no one knows for sure.

### II. Convergence of Legal Principles

A number of statutory and labor case concepts appear to converge one way or another on this practical problem.

(1) The seller has no collective bargaining relationship with the union and no employment relationship yet with the seller's employees.

(2) The Supreme Court has held that an agreement between a labor organization and an employer that is outside of a collective bargaining relationship may not fall within federal labor antitrust exemptions.[2]

(3) Except in the construction industry, employers may not negotiate "pre-hire" agreements with unions.[3] To do so constitutes unlawful assistance to the union violative of Section 8(a)(2).[4]

(4) Section 8(a)(2) is violated if an employer extends recognition to a union prematurely, before it represents a majority of the employer's employees in an appropriate unit, and such a violation is not excused even though the union later attains majority status.[5]

(5) "[I]t is well settled that an employer can recognize a union by virtue of bargaining with it."[6]

(6) Even if a union represents an employee majority, recognition can be premature and violate 8(a)(2) if the employer has not employed a "representative employee complement" and is not engaged in "normal business operations."[7]

(7) Section 301 provides for enforcement of agreements between employers and unions, but those agreements must be lawful, and the purchaser must have a lawful bargained agreement with the seller's unions. 29 U.S.C. § 185(a).

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(8) The Board held that recognition and signing of an agreement was premature and violative of 8(a)(2) even though signing was conditioned upon the union achieving majority status.[8]

(9) However, a collective bargaining agreement provision that extends coverage to employees at "additional stores" is not unlawful because implicit in the understanding is that the union will establish its majority status.[9]

(10) The Supreme Court's decision in *Burns* has been applied to assets purchases and establishes a purchaser's obligation to bargain with a seller's union once a majority of a purchaser's workforce is comprised of former employees of the seller, or once a prospective purchaser indicates an intention to hire all or a majority of the seller's employees.[10]

So what is this prospective purchaser, Company A, to do? It has hired none of the seller's employees. Bargaining with a union alone may constitute recognition. Premature recognition can be unlawful 8(a)(2) employer assistance and a union violation of 8(b)(1)(A). Recognition and bargaining that violates 8(a)(2) taints an agreement that is the product of that unlawful assistance. An agreement that is the product of an unlawful relationship would not be enforceable under Section 301 and in some circumstances might even subject parties to antitrust scrutiny. On the other hand, *Burns* seems to say that a bargaining obligation may attach even before an assets sale is concluded, when it is "perfectly clear" that an assets purchaser intends to hire all or a majority of the seller's employees. However, this prospective purchaser is trying to decide whether or not to purchase the assets at all, and to risk its investment, and therefore may not be in a position to express unqualifiedly its intention to take all or a majority of the seller's employees as contemplated by *Burns*.

### III. Pragmatic Solutions: What's a Buyer to Do?

A number of approaches are used to deal with these recognitional problems and uncertainties. A stock purchase, in which the business entity survives, normally circumvents the problem because a stock transfer passes union representation and the collective bargaining agreement to a new set of stock owners.[11]

In an assets sale, a purchaser and the seller's union typically meet and discuss the prospective transaction with the express understanding that such discussions are "preliminary" and do not constitute "recognition" or "bargaining." Instead, discussions are "exploratory." The purchaser may be afraid to indicate its intention to hire all or a majority of the seller's employees for fear of prematurely triggering recognition and a bargaining obligation, after which it might not be free to unilaterally set its own initial terms. To protect its options in the absence of an enforceable agreement, the purchaser is likely to reserve its "*Spruce Up*" right to set initial terms.[12] Some general "understanding" may be reached but may not be enforceable under Section 301, hardly a "deal," if not binding on the union and perhaps even unlawful, that encourages a purchaser to risk its capital and which certainly does not reduce labor cost contingencies that may make the acquisition less unattractive.

Some asset purchasers, on the other hand, simply announce their intention early to take all or a majority of seller's employees and then proceed to an agreement in reliance on the, hopefully, saving language of *Burns*; that is, relying on the attachment of a pre-sale bargaining obligation once it has "clearly" expressed its hiring intentions.

Another course is for the seller, which has the bargaining relationship with the union, to negotiate amendments to its own agreement, in effect negotiating on the purchaser's behalf for terms acceptable to the purchaser and which will facilitate the sale. A resulting amended agreement is one to which the purchaser may then "succeed," a lawfully-bargained agreement enforceable under § 301. However, sellers and purchasers may not wish to risk potential "joint employer" involvement in each other's labor affairs and negotiations, even though it may be in their interest to do so.

Sometimes, especially in bankruptcy Chapter 11 and 363 sales, purchasers may condition their bidding upon union acceptance of contract modifications or removal under Bankruptcy Code of objectionable contract provisions such as successorship requirements.[13] Of course, a purchaser without an agreement also is without contractual no-strike protections when the sale takes effect.

Often, as a practical matter, buyers and unions simply ignore all of the legalese and NLRA niceties altogether and sit down and hammer out new mutually acceptable terms. In the absence of clear guidance from the NLRB, should those "pragmatic" parties be concerned? Looking back over the relevant converging background principles, perhaps not, but clear guidance is lacking.

### IV. Balancing Concerns

Certain elements of the union/purchaser dealings posed must be kept in mind. There is no question that the union is the exclusive representative of the seller's bargaining unit employees. There is no pending decertification or rumor that employees are seeking to displace their union. In fact, most of the seller's employees may be dues paying union members anyway. There is no rival union on the scene. There is no question about employee "representative complement" or whether the facility is engaged in "normal business operations." A collective bargaining agreement with the seller is in effect. If there is a successors clause, it is likely that the seller would insist that the existing contract and union representation pass to the assets purchaser in any event.[14] It is unlikely that the seller would expose itself to liability for failing to require contractually mandated succession.[15]

How can it be said that purchaser recognition is premature when the union already represents the seller's employees? There is no waiting period needed to see if the union can establish its majority. This is not a "pre-hire" agreement in an 8(f) sense where there is no defined bargaining unit or bargaining unit employees. To be sure, the prospective asset purchaser, like the stock purchaser is new to the scene, but no one argues that prospective stock purchasers cannot negotiate with the union for an agreement that will bind the corporate entity that the stock purchaser will own.

What does the language of *Burns* mean? Does it not mean that a bargaining *obligation* can arise even before a sale is complete, when a purchaser indicates that it intends to take all or a majority of the seller's bargaining unit employees? In this context *Connell Construction* should not be a concern either. The union there was attempting to force a bargaining relationship upon an unwilling construction manager that had no employees and intended to hire none. There was no bargaining unit already represented by the union. Who is to say that a contract hammered out by the asset purchaser and a labor organization which already represents them is not a Section 301 enforceable agreement? No such case has been found. The legitimacy of such an agreement would seem even clearer where an agreement between the purchaser and a seller's union is conditioned upon completion of the sale, i.e., a "condition subsequent." *Kroger* establishment of majority status should not be a problem either. *Kroger* was not a sale situation and applied to new stores where, unlike here, the union had to first establish its majority status.

Much is made of *Majestic Weaving*, *supra*, which some say encumbers pre-sale negotiations between a union and a prospective assets purchaser. *Majestic Weaving*, however, was not a sale of business assets in which employees already were represented by a union. Rather the union organized employees with Majestic's unlawful 8(a)(2) assistance. The contract was invalid *ab initio*, and "the fact that [the employer] conditioned the actual signing of a contract with [the union] on the latter achieving a majority at the 'conclusion' of negotiations is immaterial."[16] *Majestic Weaving* followed the Supreme Court's 1961 *Bernhard-Altmann* decision. There, as in *Majestic Weaving*, the employer recognized, bargained and signed a contract with a union which, as it turned out, did not represent an employee majority at that time. The key in *Bernhard-Altmann* was to avoid invasion of the guaranteed right of employees to choose their own representative. It did not matter that recognition was in good faith or that the union later attained majority status.

*Majestic Weaving* and *Bernhard-Altmann* have no bearing on the union/purchaser situation discussed here, in which there is no question concerning the union's status as the exclusive representative of the seller's employees in an appropriate bargaining unit, and where logically it cannot be said that there is unlawful purchaser assistance to the incumbent union in attaining its majority status. *Majestic Weaving* and *Bernhard-Altmann* are simply not impediments to pre-sale discussions between a prospective purchaser and an incumbent union, and where there is no invasion of employee self-determination rights.

### V. Recent Board Guidance?

The Board recently decided a case that provides some insights into its thinking but, despite a correct result, fails to take the issue of voluntary purchaser/union negotiations head-on and thus does as much to perpetuate confusion as to dispel it. The case is *Road & Rail Servs., Inc.*, and was decided by Chairman Batista, Members Schaumber and Walsh, with the Chairman dissenting in part.[17]

*Road & Rail* was awarded rail car cleaning contracts and concluded an agreement with the union representing a previous contractor's employees before any of those employees were hired and before commencing contract performance. The Board panel majority dismissed 8(a)(2) and (3) allegations because *Road & Rail*, had made it "perfectly clear" that it intended to hire the predecessor employer's unionized workforce before recognizing the union and concluding an agreement. The majority affirmed the ALJ's determination that *Road & Rail* "was a 'perfectly clear' successor within the meaning of *NLRB v. Burns Int'l Sec. Servs.*, and subsequent Board precedent."[18] The result was strongly influenced because *Road & Rail* "gave no indication that it planned to unilaterally set new terms and conditions of employment" and instead "acknowledged an obligation to recognize the Union and emphasized its desire to quickly reach a mutually acceptable agreement on terms and conditions of employment."

In partial dissent, Chairman Battista concluded that *Road & Rail* was not a "perfectly clear" successor because, before hiring employees, it had indicated a desire to negotiate a new collective bargaining agreement, which the Chairman equated with a "*Spruce Up*" intention to set its own initial terms, thus leaving in doubt whether an employee majority would be hired. All of the Members accepted the proposition that, consistent with *Burns* recognition, bargaining may occur before employees are hired. Where they differed was over whether the employer's expressed intention to negotiate a new agreement equated with a desire to set its own initial terms, foreclosing a "perfectly clear" successorship because recognition was granted while composition of the new workforce was still in doubt. In other words, the focus of all three Members was on a literal reading of *Burns* and the particular moment in time when an incumbent union and a putative successor are privileged to consummate a bargaining relationship and an agreement.

Quite arguably, it might have been better if the Board had been focused on a broader more constructive analysis of the parties' good faith practical problem, without such narrow emphasis on satisfaction of the "perfectly clear" language of *Burns*. It would have been more helpful for the Board to do what it may do some day and that is reexamine the fundamental purposes of 8(a)(2). It is difficult to imagine how this willing employer, *Road & Rail*, could be said to have accorded unlawful assistance to the incumbent union that already was a party to a collective bargaining agreement covering the very same employees on whose behalf it was speaking to the purchaser. With the employer and the union willing to negotiate in such circumstances and where jobs are likely to be saved, why should the Board get tangled up in a chicken-and-egg analysis of whether recognition and an agreement are foreclosed because the employer might have been harboring some desire to set initial employment terms. The focus instead could have been on how the voluntary conclusion of such an agreement was likely to ensure hiring of the union-represented employees, thus contributing to the certainty of union majority status. It is hard for me to see how this would undermine the Act's policies.

### VI. Isn't There a Better Way?

What is needed is better guidance. What is needed is for the full Board to take this transaction-related recognition problem head on. The Supreme Court has cautioned against encumbering business transfers. *Burns* stressed that holding a new employer bound by the substantive terms of the pre-existing collective-bargaining agreement might inhibit the free-transfer of capital, and that new employers must be free to make substantial changes in the operations of the enterprise. *Burns* emphasized that a potential employer may be willing to take over a moribund business only if it can make changes in corporate structure, composition of the labor force and nature of supervision.[19]

*Burns*, however, dealt with the *obligation* of a transferee to bargain with a transferor's union. *Burns* did not deal with the *rights* of a willing prospective purchaser and willing incumbent union representing a seller's employees to negotiate a new agreement that is good for the represented employees and the union, good for the purchaser, good for the seller, and good for the economy because it promotes stability, continuity and labor peace. This is a quite different setting from *Burns*, and there is no requirement that in this context the analysis must turn on whether and precisely when a prospective purchaser indicates a "clear intention" to hire all or a majority of a seller's employees. Instead, the focus in this setting should be on the legislative purposes behind Section 8(a)(2) and an analysis of when *mutual* assistance that benefits all concerned is not *unlawful* assistance.

Such clarification by the Board would be welcome and would help to facilitate important business transfers that can benefit the parties and the public. This would be a logical extension of *Burns* and would assist parties to sale transactions to focus on preservation, often survival, of the business, and on direct and timely mutual dealings and understandings rather than on tedious mating dances in which cautious parties must engage today.

There is room, too, for the General Counsel to do his part. Just as in the past, the General Counsel should consider providing his own guidance. Everyone knows that General Counsels look for cases to present to the Board. For all I know, *Road & Rail* may have been such a test case. If it was, however, counsel for the General Counsel could have made broader policy based arguments, or even presented arguments in the alternative, rather than simply arguing for a violation, in order that the Board might have had the benefit of the General Counsel's thinking. The General Counsel, too, wears a policy hat and, as in the past, is free to argue for constructive changes in Board policy.

In the meantime, the General Counsel could consider publishing a guidance memorandum, without waiting for the perfect case. Guidance memoranda have been issued by General Counsels in the past and have been helpful—guidance on important factors to be investigated, when complaints will or will not be issued, how cases such as *Road & Rail* should be read, and so forth. Such guidance would be welcome and would help to eliminate many of the uncertainties and risks that transactional parties face today. This developing labor law subject deserves attention as one of the most important subjects since *Burns*, which itself was the single most significant and consequential labor case in my years at the Board and in practice.

### Endnotes

1 In *NLRB v. Burns Int'l Sec. Servs., Inc.*, the Supreme Court determined that in some business transfers, a transferee whose workforce majority is comprised of union-represented employees of the transferor has an obligation to recognize and bargain with the union but is not bound to assume the transferor's labor agreement. 406 U.S. 272 (1972),

2 Connell Constr. Co. v. Plumbers & Steamfitters Local Union 100, 421 U.S. 616 (1975).

3 "It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement…." 29 U.S.C. § 158(f).

4 "It shall be an unfair labor practice for an employer—to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it…." 29 U.S.C. § 158(a)(2).

5 Int'l Ladies' Garment Workers Union (Bernhard-Altmann Texas Corp.) v. NLRB, 366 U.S. 731 (1961).

6 Div. of Advice Memorandum, Secure Trans LLC, March 17, 2005; *see* Int'l Union of Operating Eng'rs Local 150 v. NLRB, 361 F.3d 395, 400 (7th Cir. 2004), *enforcing,* 339 N.L.R.B. 221 (2003) (citing Lyon & Ryan Ford, 246 N.L.R.B. 1, 4 (1979), *enforced*, 647 F2d 745 (7th Cir. 1981)).

7 *Crown Cork & Seal Co.*, 182 N.L.R.B. 657 (1970); *Herman Bros., Inc.,* 264 N.L.R.B. 439 (1982); *Grocery Haulers, Inc.*, 315 N.L.R.B. 1312 (1995); *Gen. Extrusion Co.,* 121 N.L.R.B. 1165 (1958) (establishing that a contract will bar an election only if at least 30 percent of the complement was employed at the time the contract was executed *and* 50 percent of the job classifications were in existence at the time the contract was executed).

8 *Majestic Weaving Co.,* 147 N.L.R.B. 859 (1964).

9 *Houston Div. of the Kroger Co.,* 219 N.L.R.B. 388 (1975), *on remand from,* 510 F.2d 802 (D.C. Cir. 1975).

10 In *Burns*, the Supreme Court stated that although a successor "is ordinarily free to set initial terms on which it will hire the employees of a predecessor, there will be 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 appropriate to have him initially consult with the employees' bargaining representative before he fixes terms." 406 U.S. at 294-95.

11 *See Children's Hosp. of San Francisco*, 312 N.L.R.B. 920, 927 (1993), *aff'd*, 87 F.3d 304 (9th Cir. 1996).

12 As further explicated by the Board, the "perfectly clear" caveat, while restrictive, should apply "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… *has failed*

*to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment." Spruce Up Corp.*, 209 N.L.R.B. 194, 195 (1974), *enforced*, 529 F.2d 516 (4th Cir. 1975) (emphasis added).

13 Section 1113 of the Bankruptcy Code provides for rejection of bargaining agreements and Section (e) of that Section provides for emergency modification. 11 U.S.C. § 1113(e).

14 The Board has no problem with a union and an employer imposing union representation prospectively upon purchasers. That subject was dealt with in *Lone Star Steel* where the Board concluded, with court approval, that successorship language constitutes a mandatory subject of bargaining as a sale "vitally affects" unionized employees. *United Mine Workers*, 231 N.L.R.B. 573 (1977), *aff'd in relevant part sub nom., Lone Star Steel Co. v. NLRB*, 639 F.2d 545 (10th Cir. 1980). To be sure, a prospective *Lone Star* purchaser and the prospective purchaser, like Company A, are strangers to the seller's union. However, in both cases there is no question concerning union representation with respect to the seller's employees. And, with or without contractual successorship language, certainly a sale of assets "vitally affects" bargaining unit employees.

15 *See* Howard Johnson Co. v. Detroit Local Joint Executive Bd., Hotel & Rest. Employees & Bartenders Int'l Union, 417 U.S. 249 (1974).

16 147 N.L.R.B. at 860.

17 348 N.L.R.B. No. 77 (Nov. 30, 2006).

18 406 U.S. 272 (1972).

19 406 U.S. at 287-288.