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Subject:	SEIU Local 32BJ (Westmoreland Protection Agency, Inc.), Case 12-CB-314929, Advice Closing Email
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This case was submitted to Advice concerning whether Local 32BJ, Service Employees International Union (the Union) restrained or coerced employees in violation of Section 8(b)(1)(A) of the Act by (a) negotiating and executing a pre-hire labor peace agreement (the Agreement) with Westmoreland Protection Agency, Inc. (WPA), a new contractor that was awarded a county contract to supply security officers for certain public facilities, and/or (b) demanding arbitration under that Agreement. We conclude that those actions did not violate Section 8(b)(1)(A) because WPA was a "perfectly clear" successor with whom the Union could lawfully engage over terms and conditions prior to hiring of the workforce.

Since 2021, the Union has represented security officers employed by Allied Universal Security Services (Allied) who worked at certain public facilities in Broward County, Florida, known as "Group 1" sites. The Union entered into a master collective-bargaining agreement, the "Miami Security Contractors Agreement" effective January 1, 2022 to December 31, 2024, with industry employers that included the Allied unit. The agreement, in relevant part, required an hourly wage and supplemental health care benefit contribution consistent with the Broward County Living Wage Ordinance and contained a most favored nations clause entitling signatory employers to more favorable terms and conditions should the Union enter into an agreement with another employer with such terms. Allied employed about 120 to 150 security officers to service its Group 1 contract. Prior to the instant dispute, WPA employed about 59 security officers assigned to Broward County parks, library and human services departments (Groups 2 & 3).[1] WPA's security officers were unrepresented.

In around November 2022, WPA was awarded, pending approval by the Broward County Commission, the Group 1 work formerly performed by Allied. (Worksites categorized as Groups 2 and 3, which WPA had serviced up until this point, were awarded to other contractors.) On November 15, 2022, the Broward County Commission held a public meeting at which the Union and its members protested against awarding WPA the Group 1 work. The Commission's vote on the Group 1 contract was ultimately scheduled for December 13, 2022. On December 8, 2022, WPA met with the Union. Although WPA refused to agree to the terms of the Allied collective-bargaining agreement, it indicated its willingness to negotiate a collective-bargaining agreement once it was awarded the Group 1 contract and the workforce had been hired. The Union asserts that WPA agreed to hire all the former Allied employees at this meeting. Based on this understanding, the Union agreed to remain neutral regarding the award of the Group 1 contract before the Commission, which is memorialized in the Agreement signed that day. In addition to providing for recognition of the Union if WPA is awarded the Group 1 work and binding arbitration over disputes concerning interpretation or application of the Agreement, it states, in relevant part:

> 3. The Employer agrees, if it is awarded [Group 1] work . . . to: (1) hire as many incumbent employees who are interested in remaining in Group 1 as it can; and (2) transfer as many

current Group 2 and Group 3 employees who are interested in transferring to Group 1 as it can. The Employer agrees to reach agreement with the Union on a process for selecting employees if there are more total interested employees than job openings in Group 1, prioritizing seniority.

4. The Employer agrees, where it is awarded [Group 1] work . . . that it will quickly meet with the Union to finalize a CBA covering the Group 1 employees. This CBA will contain all minimum economic standards currently contained in the Union's CBA with Allied Universal for Group 1 work and all economic and non-economic items covered by the Union's "most favored nation's clause" contained in all its industry CBAs, including wages covered by the Broward County Living Wage Ordinance, the Union's health insurance plan(s), and minimum paid time off provided to covered employees. The CBA will also contain those non-economic items not covered by the "most favored nation's clause" to be negotiated by the Employer and the Union after the Employer is awarded the bid(s).

Shortly after the Agreement was signed, a WPA lobbyist stated during a Broward County Commission meeting that WPA had signed the Agreement and would do everything possible to retain employees and make sure employees continued to earn a living wage and stayed on their healthcare. On December 13, 2022, the County Commission approved the award of the Group 1 contract to WPA. WPA also continued to service the health and human services sites.[2] On January 11, 2023, WPA emailed the Union that the hiring process was underway and it "will be offering employment to incumbent security officers who are employed by Allied." WPA attached a copy of its employee handbook and a summary of WPA benefits, which were described as "the initial employment terms and conditions that we will use as a starting point." Some terms differed from Allied's collective-bargaining agreement. In particular, holiday pay was less generous and employees viewed the health plan as inferior to Allied's. The Union objected to the imposition of these terms as inconsistent with the Agreement and demanded arbitration.[3] WPA took the position that the Agreement violated the Act and continued to hire under its own initial terms.

By March 1, 2023, the Employer had hired a substantial and representative complement of employees. As of that date, a slim majority of the workforce (76 of 146 employees) consisted of former Allied guards.[4] Following a September 2023 arbitral decision finding that WPA violated Section 4 of the Agreement by rejecting certain contractual terms from the Allied CBA at the bargaining table, the parties eventually executed a collective-bargaining agreement effective from January 15, 2024 to December 31, 2024. A decertification petition, filed in June 2023, is still pending before the Region.

We conclude that WPA is a "perfectly clear" successor and therefore its negotiation of the pre-hire Agreement as well as demands for arbitration under its terms were lawful.

An employer becomes a perfectly clear successor when it states its intent to retain the predecessor employees but does not mention its intent to change terms and conditions of employment. *See Canteen Co*., 317 NLRB 1052, 1053 (1995) (explaining that an employer need not make

unconditional offers of employment to employees before becoming a perfectly clear successor; any employer who is silent about terms and conditions of employment when it stated its intent to retain predecessor employees is a perfectly clear successor), *enforced*, 103 F.3d 1355 (7th Cir. 1997). A plan to retain enough predecessor employees such that they would be expected to comprise a majority of the workforce is sufficient to establish an intent to retain. *See Adams & Assoc., Inc.*, 363 NLRB 1923, 1925 (2016) (finding perfectly clear successorship status notwithstanding that successor planned a smaller workforce and therefore would not retain all predecessor employees), *enforced*, 871 F.3d 358 (5th Cir. 2017). In assessing an employer's intentions with regard to workforce retention and establishment of initial terms, the Board considers statements made to employees directly or through their bargaining representative. *See Elf Atochem North America, Inc.*, 339 NLRB 796, 796 n.3 (2003) (noting that in perfectly clear successor cases, communicating with the union is regarded as communicating to employees through their representative). A perfectly clear successor's bargaining obligation arises on the date it states its intent to hire the predecessor employees without clarifying its intent to hire those employees on different terms. It may not wait to bargain until after the union's majority status is established through the hiring process. *See Dupont Dow Elastomers LLC*, 332 NLRB 1071, 1072, 1075 (2000) (holding that perfectly clear successor unlawfully refused to recognize and bargain from date it committed to hire predecessor employees without any deleterious changes to employment terms until date union reached majority status), *enforced*, 296 F.3d 495 (6th Cir. 2002).

We find that WPA was a perfectly clear successor based on the commitments it made on December 8, which were reinforced by the statements its lobbyist made to the County Commission shortly thereafter. The Union asserts that WPA agreed to hire all of the Allied employees at the December 8 meeting, without mentioning any new employment terms and conditions. While the terms of the Agreement are not so straightforward, we nonetheless find that paragraph 3 of the Agreement represents a commitment to retain a sufficient number of Allied employees such that they would comprise a majority of the new workforce under the particular circumstances of this case. That paragraph provides that WPA would hire as many Allied employees who are interested in remaining at Group 1 jobsites while also transferring its own employees currently working at Group 2 and 3 sites to Group 1 jobs. It further provides that if interested employees outnumber job openings, the parties would reach agreement for a selection process, prioritizing seniority. Given that Allied's Group 1 workforce (about 120 to 150 employees) was considerably larger than WPA's workforce at the Group 2 and 3 sites combined (about 59 employees), one would expect the Union to achieve majority status in the new workforce (representative complement of 146 guards, full complement of 155 guards) even if all of the Group 2 and 3 employees had greater seniority than the predecessor employees. Indeed, these hiring assurances were instrumental to securing the Union's neutrality before the County Commission and finalizing WPA's award of the Group 1 contract. To be sure, the predecessor employees only ended up comprising a slim majority of the representative complement, which is not typically the case when an employer is a perfectly clear successor. However, the relatively low retention of predecessor employees likely reflects the fact that employees were dissatisfied with the inferior terms WPA was offering job seekers; thus, it does nothing to undermine the strength of WPA's hiring assurances in the Agreement. Furthermore, we find that paragraph 4 did not announce any changes to working conditions. Rather, it merely provided assurances as to what

terms would be included an *eventual* CBA and did not speak to *initial* terms. In addition, it guaranteed that certain economic and non-economic terms would match what was offered by Allied (including any terms subject to the most favored nation's clause in Allied's CBA).[5] Moreover, to the extent the Agreement provided that some non-economic terms would need to be negotiated, this would not undercut a finding that the perfectly clear caveat applies. *See Road & Rail Services*, 348 NLRB 1160, 1161 (2006) (finding employer to be a perfectly clear successor notwithstanding that it indicated a desire to make some changes to the existing employment terms where it repeatedly made clear that it would negotiate any such changes with the union).

Moreover, the statements made by WPA's lobbyist before the County Commission shortly thereafter reinforce that WPA planned to retain Allied's employees—or at least gave the Union that impression to secure its neutrality before the County Commission. The lobbyist committed that WPA would do everything possible to retain employees, ensure continuance of a living wage, and allow employees to stay on their healthcare. Here again, the agent's statements conveyed a pledge to retain Allied's workforce and failed to announce any different terms. Indeed, the lobbyist gave assurances that employees' existing terms would be honored. Considering that there are multiple bases to establish perfectly clear successorship in December, WPA's January 11th assertion of new terms clearly came too late to prevent application of this doctrine.[6]

Since WPA was a perfectly clear successor, it follows that the Union's entering into the Agreement did not constitute unlawful acceptance of assistance and that the Union was entitled to enforce that Agreement through arbitration. The Board considered this issue in *Road & Rail*, 348 NLRB at 1160, a case involving an employer that took over a contract to clean rail cars from a predecessor contractor. Having announced its intent to staff its operations with predecessor employees without invoking its right to unilaterally establish initial terms, the employer proceeded to negotiate a full collective-bargaining agreement that became effective upon commencement of operations. *Id*. at 1160-61. Although the labor contract was executed prior to the employer extending offers of employment, the Board concluded that the employer had not violated Section 8(a)(2) by recognizing and bargaining with the union prior to hiring employees and commencing operations precisely because the "perfectly clear" caveat applied. *Id*. at 1160-61.

Applying *Road & Rail* to the instant case, the Union's entering into the Agreement, which established certain economic and non-economic terms that would prevail in an eventual CBA, did not constitute unlawful assistance or acceptance thereof because WPA was a perfectly clear successor that took advantage of the "elemental purpose of the caveat: to provide for a discussion between a successor employer and the employees' representative when it is the successor's announced plan to retain the unit employees." *Id*. at 1163. To be sure, *Road & Rail* mentioned the absence of any evidence of loss of the union's majority status in finding no violation, *id*. at 1160, 1162 n.11, and here WPA asserts that Allied employees fell below 50 percent shortly after a representative complement was reached. However, Advice has applied *Road & Rail* in comparable circumstances, concluding that a union's majority loss after the employer became a successor did not affect its perfectly clear status or give rise to a Section 8(a)(2) violation. *See Central Parking Systems, Inc.,* Case 21-CA-37718, Significant Advice Memorandum dated Jan. 18, 2008 (finding perfectly clear successor did not

provide unlawful assistance notwithstanding that union lost majority support during the term of the post-transition labor agreement). Particularly here, where WPA's unilateral imposition of initial terms likely contributed to the lower retention of Allied employees, it would undermine the purpose of the caveat to find that a post hoc loss of majority retroactively nullifies the legitimacy of negotiations undertaken by a perfectly clear successor. *See First Student Inc.*, 366 NLRB No. 13, slip op. at 3 (2018) (while perfectly clear successor need not adopt predecessor's collective-bargaining agreement, it must maintain the status quo conditions until it bargains to agreement or impasse over a new contract).

For these reasons, we reject WPA's argument that the Agreement is unlawful under the principles set forth in *Dana Corp*., 356 NLRB 256 (2010), *review denied sub nom. Montague v. NLRB*, 698 F.3d 307 (6th Cir. 2012). There the Board held that an employer and a union may pre-negotiate a framework for future collective bargaining at a time when the union does not yet represent a majority of the employer's employees without rendering unlawful assistance. *Id.* at 261-62. Since *Dana* did not involve a perfectly clear successor, *Road & Rail* is the controlling precedent in this case.

Accordingly, the Region should dismiss the charge, absent withdrawal.

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[1] It is unclear why the master agreement defines the Allied unit as including Broward County libraries and parks notwithstanding that WPA provided security officers for those jobsites at the time the County rebid its contracts in late 2022.

[2] It is unclear whether the health and human services sites were included in the Group 1 contract.

[3] The Union did not file a charge alleging that WPA unlawfully imposed initial terms without bargaining.

[4] It does not appear that the security officers servicing the health and human services facilities were counted as part of this complement, likely because these positions were not part of the historical unit. Even assuming they were counted, and improperly so, correcting this error would only serve to bolster the finding that predecessor employees comprised a majority of the complement.

[5] Given these affirmative assurances, this case is distinguishable from *Banknote Corp. of America*, 315 NLRB 1041, 1043 (1994), *enforced*, 84 F.3d 637 (2d Cir. 1996), where the Board rejected a perfectly clear successorship finding because the employer expressed its refusal to be bound by the predecessor collective-bargaining agreement simultaneously with its promise to retain, which the Board construed as notice that it would institute new terms.

[6] That Allied had voluntarily recognized the Union without following the *Dana* procedure provided for under the Board's then-applicable regulations does not affect this analysis given that no decertification petition was filed while Allied was the employer. *See* 29 C.F.R. § 103.21 (effective July 31, 2020 to Sept. 30, 2024); Representation—Case Procedures: Election Bars; Proof of Majority Support in Construction Industry Collective-Bargaining Relationships, 89 Fed. Reg. 62,952 (Aug. 1,

2024) (to be codified at 29 C.F.R. § 103.21).

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