Bloch #2

IN THE MATTER OF ARBITRATION BETWEEN:

Employer

AND

Union

FACTS

On February 16, 1993, the Employer notified all Catering Division employees of its intent to "sell some or all of our kitchens, food running operations and cafeterias." To this end, the Employer retained Company 1 which, in April of 1993, distributed a Memorandum describing the general attributes of the "Catering Division". Described in the Memorandum were the 14 locations to be sold.[1]

Subsequently, contracts were negotiated to sell the flight kitchen assets to two existing airline caterers, Company 2 and Company 3. These same companies were contracted to supply the catering services at the Employer's locations.

Ultimately, the Union grieved, claiming the Employer had violated the successorship provision of the 1989-1994 Food Services Agreement. Article III-B states:

> It is further understood and agreed that all provisions of this Agreement shall be binding upon the successors or assigns of the Employer for the duration of this Agreement....

The Union also says the Employer violated the subcontracting prohibition of the Agreement, contained in Article II-C, which states, in relevant part:

> It is understood that the Employer reserves the right to continue to contract out the types of work heretofore customarily contracted out or to contract out any work when its

[1] The Employer's kitchen in Country 1 was to be sold separately as well.

> facilities or personnel are not sufficient or available. The Employer reserves the right to contract out other work but if such work comes within the scope of this Agreement, notice will be served on the Union before such contracting takes place....

As a general matter, the facts of this case are not disputed. The proposed sale, to be consummated in December of 1993, will affect more than 5000 employees. Neither Company 2 nor Company 3 is required, under the contract with Employer, to assume the Food Services Agreement as a condition of the transactions.

ISSUE

Does the Employer's proposed sale of the food kitchens violate the parties' Collective Bargaining Agreement?

UNION POSITION

The Union observes that the Food Service division has always been operationally distinct from the rest of the operations, with entirely separate management and a separate collective bargaining agreement. Employees have no right to cross bid or to transfer to other parts of Employer operations. Under the circumstances, including the fact that the two purchasers will continue to operate in the same facilities in most locations and will continue to provide the same food services to Employer and to others, they should properly be regarded as Article III-B successors to the Employer.

Moreover, even assuming subcontracting of a small portion of the unit would not violate the contract, this transaction, involving, as it does, the overwhelming part of the entire operation, should not properly be regarded as allowable subcontracting under Article II-C.

MANAGEMENT POSITION

The Employer denies that Company 2 and Company 3 are "successors or assigns of the Employer" within the meaning of Article III-B. That clause would only come into play, says the Employer, in the context of a corporate successor to the airline as a whole. The Employer's past practice has been that of entering into identical flight kitchen transactions-in other cities without requiring such purchasers to assume the agreement under Article III-B. Even assuming Company 2 and Company 3 are successors, says the Employer, this "passive" successorship does not obligate the Employer to condition a sale of the Employer's assets on the purchasers' assumption of the Agreement.

Additionally, the Employer argues that it has the right under Article II-C of the agreement to contract out the work and to furlough the employees at issue. Because it is the contracting out and not the sale of assets that has the adverse impact on Union represented employees, says the Employer, the Union is not entitled to any remedy. Alternatively, if the union is entitled to a remedy, it must be limited to damages rather than an order prohibiting the Employer from selling the assets. Any remedy, says the Employer, must be limited in duration to November 30, 1994, the amendable date of the Food Service Agreement.

ANALYSIS

The Employer catering division handles menu planning and service design for all of the Employer's flights. Additionally, it oversees the Employer's contract caterers at some 150 locations, as well as operating the Employer's own flight kitchens at 15 additional locations. Beyond this, the division operates four employee cafeterias and oversees financial administration of the catering operation, aircraft removable equipment management, "1200 Shop" Retail

Operations, Wholesale Operation to Employer's Mainliner Club Logistics Management for all Employer-Owned catering products and materials, and duty-free distribution and provisioning.[2] At most Employer domestic stations, catering services are contracted out. In-Flight catering services are also contracted out at certain foreign stations. This case, however, concerns Employer's plans to sell virtually all remaining facilities at fourteen domestic stations.

In the early part of 1993, the Employer met with its three principal Unions to discuss certain cost reduction programs. These efforts were unproductive and, thereafter, on February 18, 1993, the Employer announced to its employees that it had retained an investment banking firm to "sell some or all of our kitchens, food running operations and cafeterias." A sales agreement was executed with Company 2 on or about September 13, 1993, Company 2 agreeing to purchase assets associated with flight kitchens in 13 of the 14 domestic locations. In October 1993, the Employer finalized an agreement with Company 3 for the remaining facility. As a general matter, in both these transactions, the Employer agreed to sell the assets associated with the flight kitchens and to sublease or assign various leasehold interests. In both cases, the purchasers are to be retained as contractors to provide precisely the same services to Employer that the Employer had previously been providing for itself. Both Company 2 & Company 3 have agreed to interview current employees for potential employment. Neither company, however, is obligated to hire the employees.

In March 1993, the Union responded to the Employer's notification of the impending sale. Initially, its questions and objections concerned the continuing vitality of certain protection letters. That issue was subsequently settled. But in September 1993, the union raised the Article III-B questions presented here:

[2] Management brief, p. 11

> I am writing this letter to state the position of the Union with regard to any such sale. As you are no doubt aware, the current Food Services Agreement between the Employer and the Union provides that the agreement is binding upon successors and assigns of the Employer. That provision would make the agreement binding on the third party to whom the kitchens are sold.
>
> We will need assurances from the Employer that a written provision has been made with the potential purchasers of the kitchens that the collective bargaining agreement will be assumed by that purchaser upon the sale. That assurance must be provided before the consummation of the sale.[3]

Thereafter, the parties submitted the matter to this expedited arbitration procedure.[4]

The Employer denies that Company 2 and Company 3 should be considered "successors or assigns of the Employer" within the meaning of Article III-B.

> "Both the language of the clause, which can only be construed to mean a corporate successor to the Employer as a whole, and the Employer's past practice of entering into identical flight kitchen transactions in other cities without requiring such purchasers to assume the agreement under Article III-B," says the Employer, "refute the Union's argument."[5]

The underlying purpose of the successors and assigns clause is to protect employees, extending the coverage of the collective bargaining agreement for its duration so that the coverage may not be cut short by transferring ownership of the Employer. The contract language itself is notably cryptic. In Article III (B), the Employer agrees that successors are to be bound by the labor contract. Unless one is to conclude that these words are meaningless[6], the only possible meaning is that the Employer will assume a contractual obligation, and attendant liability, for ensuring continuation of the contract terms of employment vis-a-vis a successor. The Employer acknowledges it would be bound by this language if all assets were sold. The question, then, is

[3] September 1, 1993 letter from Union Counsel to the Employer.
[4] The parties met for a hearing on November 16. The Panel Members met in Executive Session on November 22. An Award denying the grievance was issued at that time. This Opinion followed.
[5] Employer brief, page 27.
[6] See note 19 infra.

whether the clause should apply to this transaction, one that is clearly less than the entire bulk of corporate assets.[7] Specifically, the issue is whether, in terms of Article III-B, the purchasers are "successors." As indicated above, the Employer says that the term means corporate successors to Employer, Inc. as a whole, arguing that the language cannot be applied in this instance to a transaction involving only part of the business.

Labor Law and Corporate Law give different meanings to the term "successor". In Corporate Law, the term refers to a surviving firm that acquires control of a business either through the sale of stock, a merger, or a sale of assets. In Labor Law, on the other hand, "successor" has a variety of meanings involving two major elements: The "duty to bargain" and the concept of "substantial continuity."[8] In terms of claims concerning a successor's duty to bargain under the NLRA, courts will look to, among other things, the populace of "predecessor workers" that ends up working for the successor.[9] In terms of the enforcement of claims under the collective bargaining agreement, including liability of the seller[10], there will be a more generalized inquiry as to whether, for purposes of ascertaining the existence of a "successor", there has been a substantial continuity of the enterprise.

---

[7] The concept of selling less than the full Company, while extending certain employee protections, is by no means unknown to these parties. For example, a letter from December 23, 1991, consists of a range of employee protections (not including extension of the collective agreement) applicable in the case of the disposition of certain Employer assets. Paragraph E of that agreement sets up certain furlough protections in the event "The Employer sells transfers or disposes of assets which, net of asset purchases or acquisitions during the same twelve month period, constitute twenty-five percent or more of the value of the assets of the Employer…"

[8] See, generally, Rock and Wachter, "Labor Law Successorship: A Corporate Law Approach" 92 Mich L.R., 2, 203-260. (1993).

[9] See, for example, Wiley and Sons v. Livingston, 376 U.S. 543 (1964); NLRB v. Burns International Security Service Inc., 406 U.S. 272 (1972); Howard Johnson Co. v. Detroit Joint Board, 417 U.S. 249 (1974); Fall River Dyeing and Finishing Corp. v. NLRB, 482 U.S. 27 (1987) 107 S. Ct. 2225 (1987).

[10] From a legal standpoint, in assessing Employer's obligations, an important distinction is required: Many of the cases cited by the parties deal with the question of a successor's liability, often in the context of its duty to bargain with the union. Those cases, generally involving issues arising under the National Labor Relations Act, are not germane. The question here concerns the liability of Employer as a predecessor party. That issue is properly resolved by a careful review of Employer's contractual commitment to the union.

Some guidance[11] with respect to the question of "successorship" is found in the context of the National Labor Relations Act as interpreted by the NLRB and the courts. As a general matter, the cases are notably fact specific, with the triers of fact reviewing the "totality of the circumstances." The courts and the Board measure substantial continuity of operations by reviewing the extent to which the purchaser has "acquired substantial assets of its predecessor and continued, without interruption or substantial change, the predecessor's business operations."[12] In Fall River Dyeing[13], the Supreme Court stated:

> In Burns [N.L.R.B. v. Burns International Security Services Inc., 406 U.S. 272 (1972)] we approved the approach taken by the Board and accepted by the courts with respect to determining whether a new Employer was indeed the successor to the old....
> This approach which is primarily factual in nature and is based upon the totality of the circumstances of a given situation, requires that the Board focus on whether the new Employer has "acquired substantial assets of its predecessor and continued, without interruption or substantial change, the predecessor's business operations."... Hence, the focus is on whether there is "substantial continuity" between the enterprises.
>
> Under this approach, the Board examines a number of factors: Whether the business of both employers is essentially the same; whether the employees of the new Employer are doing the same jobs in the same working conditions under the same supervisors and whether the new entity has the production process, produces the same products, and basically has the same body of customers. (See Burns, 406 U.S.., at 280 n.4 Aircraft Magnesium, a division of Grico Corp., 265 N.L.R.B. 1344, 1345 (1982, enf'd 730 F.2d 767 (CA9 1984); Premium Food, Inc., 260 N.L.R.B. 708, 714 (1982), enf.d 709 F.2d 623 (CA9 1983).[14]

---

[11] The term "guidance" may be a bit optimistic. Rock and Wachter observe:
Courts have struggled repeatedly to define the legal obligations of the buyer of a business that has unionized workers. This is the domain of the "labor law successorship doctrine." Beginning with John Wiley & Sons, Inc. v. Livingston in 1964, the Supreme Court has addressed the issue five times over the ensuing years. The National Labor Relations Board (the Board) and the lower courts have decided countless successorship cases. Despite or perhaps because of this constant attention, many commentators have argued that the doctrine - with its distinction among mergers, stock sales, asset sales, and shifts with its distinction among mergers, stock sales, asset sales, and shifts of work - is confusing, formalistic, and arbitrary. (See n.10, supra, at p 9.)

[12] Golden State Bottling Employer v. NLRB, 414 U.S. 168,184(1973).

[13] 482 U.S. 27 (1987).

[14] Id, at 31.

One turns, then, to the specific facts of this case. On the one hand, as the union notes, the food service employees have always been operationally distinct from the rest of the operations. The catering division's management is separate from the rest of the airline. The kitchen work is performed in facilities that are distinct from flight operations. Food service employees are part of a separate craft that have been covered by a wholly separate bargaining agreement. The agreement provides no right to covered employees to cross bid or to transfer to other parts of Employer operations.[15]

Moreover, this is a large transaction. Involved in the sale is virtually the entire remainder of the food services division. The offering by the sales agent describes the facilities available as "the division's seventeen US flight kitchens" ranking "among the largest in-flight airline caterers in the Country" and employing in excess of 5,500 people. From a "successorship" standpoint, it is anticipated that the acquirer of the catering division would enter into a services contract with the Employer to supply more than 135,000 meals per day to over 1500 daily flights for the Employer. Eighty-six percent of the catering division's 1993 services are provided to the Employer, with the balance being sold to other airlines. This relationship would continue.

Yet, while this transaction is by no means insignificant, one may not conclude that the parties to this agreement intended this tale to wag this dog. Assuming, as one does, that Article.III-B requires the Employer to secure successor compliance[16] or, in the alternative, be liable for the

---

[15] Union Petition for Review and Decision, p.3-4.

[16] The assumption here is that the Employer would, in fact, be liable for the failure to require a successor to assume the terms of the contract. The Board hereby rejects, emphatically, the Employer's proposed distinction between "active" and "passive" successorship clauses. While some arbitrators have concluded that in the absence of explicit language specifying a duty upon a predecessor to obtain the successor's assumption, the clause is merely a recitation that successors are to be bound; this serves only to read out of the contract a clear and highly significant obligation. The opinions that sanction that type of devitalization are, we conclude, thinly-reasoned and ultimately unpersuasive. To hold, as some arbitrators have, that the failure to specify an explicit procedure required to avoid a breach or, alternatively, to have failed to explicitly outline the breaching party's liability in the event of a breach, somehow voids the language, is sophistry. Among other things, cast in this manner, the language differs in no meaningful way from virtually every other clause of the collective bargaining agreement. Indeed, it is more often the exception that

failure to do so, then absent any definitional boundary, the core question is whether any transaction, no matter how small, would suffice or whether, as the Employer argues, the protection was really intended to apply to the sale or disposition of the entire airline.

In this case, having carefully reviewed the Agreement and its history, the Board finds there was no violation of Article III-B. That the catering division stands as a discrete section of the Employer, including its own labor agreement, does not require the conclusion that the parties intended the successors and assigns clause to apply when that division, or most of it, was sold. One notes, among other things, that when the parties wished to draw such boundaries, they knew how to do so. In the contractual side letter (see n.9, supra), the parties established a twenty-five percent threshold below which no protections would be triggered. On the basis of this record, the Board cannot conclude that the "successors" language of Article III (B) was intended by the parties to necessarily apply to any portion of the airline that might be divested.

The union cites a variety of cases that, among other things, reject the "active-passive" construct, (as does this Board), and that find liability on the part of a predecessor company. Significantly, however, those cases involved the sale of an entire facility. In Glassworkers v. Owens-Illinois[17], the seller of a manufacturing facility was held to have breached a successorship clause when it failed to require the purchaser to adopt the collective bargaining agreement. However, on the block in that case was the entire Glassboro Metal Closure Plant. In In re Boardman Company[18] the Boardman Company entered into a sales contract with Wichita Steel Fabricators, Inc.

---

parties will set forth in black and white the precise damages or other remedy in case of a violation. And, as indicated above, the result is to flatly read language out of the collective bargaining agreement, a result to be avoided whenever possible.

[17] 136 LRRM 2397 (D.N.J. 1991).

[18] 91 LA 489 (1988).

wherein the bulk of its Oklahoma City assets were sold to a wholly- owned subsidiary of the purchasers.[19] Similarly, in Zady Natey Inc. v. UFCW, Local 27[20] the seller entered into an agreement with the buyer to transfer assets.[21] There, an arbitrator concluded that the purchaser was, in fact, a "successor" and the court, upon review, upheld those findings. Here, again, however, there was no question of selling a discrete portion of the enterprise.[22]

It may be that, at some point, the sale of a discrete, separable portion of a company may give rise to a "successorship" situation that invokes the anticipated protection of the labor agreement and continuing liability of the predecessor. But if one is to infer such intent, it must be from language that is considerably more specific than appears in the current agreement. It is difficult to conclude that the catering groups that purchased the pieces of the food operation should properly be seen as having stepped into-the continuing business of the Employer. Surely, in terms of the Supreme Court's approach, one cannot readily conclude that the catering businesses will continue "without interruption or substantial change, the predecessor's business operations."[23] The most that may be said is that the catering people will continue a relatively small portion of the predecessor's operations. Without foreclosing the possibility that this might, in the appropriate case, give rise to the type of liability here suggested by the union, we cannot find that this was a scenario contemplated by the drafters of Article III-B.

[19] Excluded from the sale were all cash on hand or in the bank, tax refund claims, accounts and notes receivable, as well as the defined benefit pension plan and profit sharing plan.

[20] 143 LRRM 2425.

[21] As the court noted, in the course of the negotiations that brought about the sale, a stock purchase was considered, but ultimately, "for tax reasons," the purchaser insisted on and achieved, an Assets Purchase Agreement.

[22] Nor did the cases of Schneier's Finer Foods, 72 LA 88 (1979) or Marley - Wvlain Employer, 88 LA 978 (1987) also cited by the union, involve a partial transfer.

[23] Fall River Dyeing, supra, n. 14.

Article II-C

The union concedes that, under normal circumstances, particularly in light of a consistent string of arbitration decisions it could not successfully challenge the Employer's decision to subcontract the work at issue. Unquestionably, catering work is, in terms of Article II (C) "customarily contracted out". As observed above, the Employer contracts out such services at the majority of its domestic and foreign locations.

But it is the size, scope and scale of this decision, says the union, which requires a contrary decision. The union cites New Britain Machine Company[24] wherein Arbitrator Wallen held:

> The basic purposes of collective labor agreements are well known. One is to fix wages, hours and working conditions for employees whom they cover. Another is to provide the employees with a measure of job security through rules governing layoffs, rehiring and transfers. Job security is an inherent element of the labor contract, a part of its very being. If wages is the heart of the labor agreement, job security may be considered its soul. Those eligible to share in the degree of job security the contract affords are those to whom the contract applies...
>
> The transfer of work customarily performed by employees in the bargaining unit to others outside the unit must therefore be regarded as an attack on the job security of the employees whom the agreement covers and therefore on one of the contract's basic purposes.
>
> The Company urged that the clause governing rights of management justified its action in transferring work customarily performed by watchmen to other workers outside the unit. The management clause is designed to give management the freedom to conduct its affairs in the interest of efficient production but this right may be exercised only within the framework of the limitations imposed by the contract. That clause cannot be utilized as carte blanche to defeat one of the basic aims of the contract.
>
> If one of the purposes of the contract as a whole, and of the seniority provisions in particular, is to assure the bargaining unit employees a measure of job security then such security would be meaningless if the Company's view in this case were to prevail. For it would mean that without regard to prior custom or practice as to the assignment of work, the Company would continuously narrow the area of available job opportunities with

[24] 8LA 720 (1947).

> which the seniority clause functions by transferring duties performed by bargaining unit employees to employees not covered by the agreement.
> Not only the seniority clause but the entire agreement could thus be vitiated. (At 722.)

Several observations are in order, however. First, factually, this case may be distinguished. The Employer will continue to employ certain cooks and food service employees at certain stations and will also continue to employ similarly-situated workers at four employee cafeterias it operates. Thus, while the unit has been massively diminished, it has not been fully discontinued. More significantly, unlike the New Britain case, this is an instance where the parties have specifically negotiated a notably broad provision directed to the precise sub-contracting question, complete with language applicable to the type of work that has - "customarily been contracted" as well as to that which has not. The language, we conclude, is sufficiently broad to encompass the particular actions here contested.

As in the case of a successorship issue, the facts of any given situation are critical. In deciding this case, the Board has placed heavy reliance on these particular facts and concludes, for the reasons set forth above that, whether considered in light of Article III-B or II-C; they do not amount to a violation of the collective bargaining agreement. For these reasons, the grievance will be denied.

AWARD

The grievance is denied.