In the

United States Court of Appeals

For the Seventh Circuit

No. 71-1354

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

BACHRODT CHEVROLET CO.,

Respondent.

PETITION FOR REHEARING IN BANC

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Bachrodt Chevrolet Co., Respondent, respectfully Petitions this Court to grant a rehearing in banc in the above-entitled cause and to set aside and vacate the Decision and Opinion dated September 13, 1972.

As grounds for this Petition, we earnestly contend that this Honorable Court overlooked or misapprehended certain points of the original Abstract and Briefs, and specifically misinterpreted the case of *NLRB* v. *Burns International Security Services, Inc.*, 40 U.S.L.W. 4499, decided on May 15, 1972, by the United States Supreme Court.

This Court accurately stated the facts and issues on pages 2-5 of its Opinion, with two exceptions, which we quote as follows: (1) (p. 3) ". . . the trial examiner correctly found that on November 10 Bachrodt *'took over* and *operated* Zimmerman's old body shop *as an integral part of its operation,* and that the bodymen working in the shop were among its employees'."; (2) (p. 4), (referring to the November 7 union letter) "Counsel for Bachrodt replied, stating that the company *refused to negotiate* with the union." (Emphasis added)

I.

The Court, on page 5, recites: "A mere change in ownership of the employing enterprise does not, by itself, relieve the new employer of bargaining with the existing representative of those employees who continue to be employed by the enterprise after the changeover.", and cites the *Burns* case, supra, final determination of which by the United States Supreme Court delayed the decision in the instant case and prompted the submission of Supplemental Briefs herein. Such reliance on the *Burns* outcome as to the "duty to bargain" ignores the factual distinctions between the two cases, as painstakingly pointed out in Bachrodt's initial and supplemental Briefs before this Honorable Court. The "broad brush" implication that *Burns* requires every new employer to bargain with any union that purports to represent the employees of the old employer at the time of takeover, without regard to *how, when* and *whether* such union purportedly came to represent such employees, cannot stand. It obliterates, among other considerations, the concept of "good faith doubt".

Before proceeding to a discussion of that concept and its application herein, we are compelled to point to an inconsistency on page 6 of this Court's Opinion. After stating as a fact that Bachrodt "took over" 22 of 24 employees in the alleged bargaining unit, the Court asserts, ". . . there can be no question that in the context of labor law, Bachrodt is a successor employer." Then this Court asserts that Bachrodt's status as such was unaffected by the contemplated transfer of the body shop (and thus six of the employees purportedly represented by the union), which transfer actually occurred within five days after the dealership takeover by Bachrodt. This Court indicates that such transfer merely changed the ratio alleged to be represented by the union from 22/24ths to 16/24ths. However, mere cognizance of changes in the mathematical ratio effected by the transfer of the body shop operation overlooks the impact of such transfer upon the good faith doubts Bachrodt management harbored regarding the union's actual representation of a majority of the 16 remaining employees. That doubt could only have been strengthened by the knowledge of Bachrodt management that at least one-fourth (as it turned out, closer to one-third) of those employees offered employment when Bachrodt took over on November 10 would promptly be transferred to another owner. In its Majority Opinion, this Court *recognized* the *fact* of the pending transfer of the body shop, but *ignored* the *impact* thereof, upon Bachrodt's other preexisting good faith doubt regarding its duty to bargain.

II.

This Court's Majority Opinion states:

> "To be sure, dicta in *Burns* indicates that a good faith doubt could not have been claimed in the face of a recent Board certification. But that is not to say that *Burns* also supports the obverse. Lack of certification does not by itself sustain a finding of a good faith doubt."

Indeed, Bachrodt does not allege that lack of certification by itself sustains a finding of a good faith doubt. But, such lack of certification, combined with (a) remoteness and informality of election; (b) 100% turnover; (c) remoteness of most recent contract; (d) no check-off; and (e) imminent transfer to new ownership of approximately one-third of the purported bargaining unit—certainly justifies a good faith doubt.

It is not necessary that we contend that *Burns* "supports the obverse" as indicated by the following complete quotation from Mr. Justice White's Opinion:

> "In an *election held but a few months before* the union had been designated bargaining agent for the employees in the unit and a majority of these employees had been hired by Burns for work in an identical unit, it is undisputed that Burns knew all the relevant facts in this regard and was aware of the *certification* and of the existence of a collective-bargaining contract. In these circumstances, it was not unreasonable for the Board to conclude that the union *certified* to represent all employees in the unit still represented a majority of the employees and that Burns could not reasonably have entertained a good-faith doubt about that fact. Burns' obligation to bargain with the union over terms and conditions of employment stems from its hiring of Wackenhut's

employees and from the *recent election* and *board certification.*" (Emphasis added)

The Majority, at the conclusion of Part II of its Opinion, states:

> "Finally, the company did not indicate a good faith doubt in its response to the union's demand that Bachrodt honor the agreement. It said only that it had no obligation to bargain because of the purchase of some of Zimmerman's assets and that it had no 'knowledge' that the union represented a majority of the employees. That position is not tantamount to a good faith doubt."

Paraphrasing this statement by the majority, we question how more emphatically Bachrodt could have indicated a good faith doubt to the union's demand that Bachrodt honor the agreement than to state that it had no "knowledge" that the union represented a majority.

Furthermore, this Honorable Court goes on to hold, under Part III, squarely under the *Burns* doctrine, that Bachrodt *did not* have to *honor and abide by* the terms of the former employer's agreement. In its November 10 reply to the union, Counsel for Bachrodt was required to interpret and anticipate whether the law required that Bachrodt honor the old agreement. Had Bachrodt's Counsel capitulated to the union's demand, it would wrongly have anticipated the status of the law as ultimately enunciated by the Supreme Court in the *Burns* decision. With the law in this state of flux, is Bachrodt now to be penalized for accepting its Counsel's opinion and advice? Quite aside from all the other elements upon which Bachrodt reasonably could have entertained a good faith doubt, we have its reaction and response to a demand by the union that, as it turns out under *Burns*, Bachrodt had no obligation to meet.

III and IV.

The Majority's Opinion is totally inconsistent. In one enunciation the Court holds that Bachrodt does *not* have to abide by the previous agreement and does *not* have to grant restitution for its failure to do so; and in its next breath this Court holds that Bachrodt's unilateral alterations in working conditions of its employees is an unfair labor practice and that it *does* have to make restitution for any benefits which may have been lost by any such changes.

The Majority states that the latter holding is supportable "under the tests of *Burns*".

We wholeheartedly disagree. We concur in Judge Stevens' dissent in which it is pointed out that the Majority Opinion does not give proper effect to the underlying rational of *Burns*.

Burns does not support the Majority Opinion, and we quote from Judge Stevens' reference to the *Burns* opinion:

> "As in *Burns*, it was not clear until after Bachrodt hired his full compliment of employees that he had a duty to bargain with the union. Accordingly, the Court's language squarely fits this case:
>
> > 'It is difficult to understand how Burns could be said to have changed unilaterally any pre-existing term or condition of employment without bargaining when it had no previous relationship whatsoever to the bargaining unit and, prior to July 1, no outstanding terms and conditions of employment from which a change could be inferred. The terms on which Burns hired employees for service after July 1 may have differed from the terms extended by Wackenhut and required by the collective-bargaining con-

> tract, but it does not follow that Burns changed its terms and conditions of employment when it specified the initial basis on which employees were hired on July 1.' "

The Majority Opinion admits in its next-to-last paragraph that:

> "At first blush it might seem that this determination is tantamount to a requirement that Bachrodt honor the existing collective bargaining agreement and that the same relief is being afforded by indirection that *Burns* directly forecloses."

The Majority Opinion *does* attempt to do by indirection that which *Burns* directly prohibits.

Judge Stevens, in his dissent states:

> "As a practical matter I wonder how much difference there is between a holding that a new owner is bound by the terms of the old contract, and a holding that he is bound only until he has bargained to impasse with the union."

The Majority's Opinion discourages the transfer of capital and encourages the new purchaser to discharge all his predecessor's employees and start anew. The Majority discourages job security and in effect suggests that the new purchaser can proceed without possibility of penalty as long as he hires all new employees. This ruling hardly encourages economic stability.

Burns did not hold that the new employer must bargain to an impasse before he can make any unilateral changes. How long must a new employer bargain before reaching such an impasse that he may make unilateral changes in working conditions without committing an unfair labor practice?

This Court points out that a successor employer generally can set the initial terms upon which rehiring is conditioned since prior to the rehiring of a substantial portion of his predecessor's employees there is no duty to bargain. This was squarely the holding in *Burns*. The only instance in which the duty to bargain may precede the formal rehiring is where, as *Burns* states:

> "It is clear that the new employer plans to rehire *all* of the employees in the unit and it will be appropriate to have him initially consult with the bargaining representative before fixing the terms." (Emphasis added)

Then the Majority points out that the facts in the Bachrodt situation bring it within the exception recited in the *Burns* dictum. We maintain, along with the Dissenting Opinion, that it did not.

We trust that this Honorable Court was not persuaded by the statement of General Counsel in the Supplemental Brief that Bachrodt's changes were either improvements or not implemented and therefore "would not obligate the company to make any restitution." Such an argument by General Counsel reminds one of the now famous lyric of "nanny" Mary Poppins: "A spoonful of sugar helps the medicine go down!"

* * *

On August 29, 1972, the Circuit Court of Appeals for the Sixth Circuit in the case of *NLRB* v. *Wayne Convalescent Center,* 81 LRRM 2129, 69 LC 12,977, reached a conclusion diametrically opposed to that enunciated in the Majority Opinion here. The *Wayne Convalescent Center* case involved a successor employer which acquired a

nursing home from a predecessor. The Board had held that the new employer was obliged to bargain with the union representing employees of the predecessor employer. However, the Circuit Court of Appeals reversed the Labor Board and held that a successor employer did not violate Section 8(a)(5) of the Labor Management Relations Act when it unilaterally changed terms and conditions of employment without consultation or negotiation with the union that represented predecessor's employees. The Court held that the successor employer was free to establish initial terms of employment and, most importantly, ruled that unilateral changes shall remain in effect but shall be subject to future bargaining. The Court says at 81 LRRM 2131:

> "The successor employer must be allowed to be free to establish its initial terms of employment of the predecessor's employees. To hold otherwise would make necessary changes in the conditions of employment nearly impossible without lengthy bargaining, and further inhibit a potential successor's desire to acquire an unsuccessful business. The Board therefore cannot rely on the unilateral changes in conditions of employment made by Wayne to find a refusal to bargain, and a violation of the Act."

CONCLUSION.

For the reasons enumerated, this Honorable Court should grant this *Petition for Rehearing In Banc* pursuant to Rule 35 of the Rules of Appellate Procedure. The Majority Opinion has erroneously interpreted and implemented the recent *Burns* decision of the U. S. Supreme Court and conflicts with the decision rendered on August 29, 1972, by another U. S. Circuit Court of Appeals namely, that for the 6th Circuit, in *NLRB* v. *Wayne Convalescent Center,* 69 LC ¶12,977 LRRM 2129. This rehearing in banc is essential to secure uniformity of decisions, to avoid the necessity of filing a Writ of Certiorari to the Supreme Court of the United States and because the proceeding herein involves questions of exceptional importance.

Respectfully submitted,

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