Interpreting *NLRB v. Burns Int'l Sec. Servs., Inc.*: The Not So "Perfectly Clear" Successor Exception

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I. INTRODUCTION

A successor employer is a new employer that continues essentially the same business operations as its predecessor, using a majority of the old employer's workers.[1] A successor employer is not bound by the substantive provisions of a collective-bargaining contract negotiated by its predecessor.[2] Successor employers are generally free to set initial terms of employment for new employees.[3] However, if it is "perfectly clear" that the employer plans to retain all the employees in the unit, the employer must initially consult with the employees' bargaining representative before it fixes terms.[4] This special corollary principle, first enunciated in the Supreme Court's opinion in *NLRB v. Burns Int'l Sec. Servs., Inc.*, is often referred to as the "perfectly clear" exception.[5]

The Supreme Court's language in *Burns* gave little guidance as to the scope of the "perfectly clear" exception, however.[6] The circuits that have considered the issue are split three ways on how to properly apply the "perfectly clear" exception. The Fifth, Sixth, Seventh, and Ninth Circuits adopt the "Changing Terms Pronouncement" approach, where the "perfectly clear" exception will apply when the employer fails to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment.[7] The Second Circuit adopts an "Identical Terms Pronouncement" approach, where the important consideration is whether all of the employees have been promised re-employment on existing terms.[8] Finally, the District of Columbia Circuit adheres to the "Implied Pronouncement" approach, where the court will not apply the "perfectly clear" exception if the employer, prior to an offer of employment, has conveyed its intention to

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[1] *See, e.g.*, Canteen Corp. v. NLRB, 103 F.3d 1355, 1361 (7th Cir. 1997) (This is a general definition; the test for successorship is much more detailed).

[2] Willis, Drew and Bales, Richard A., *Narrowing Successorship: The Alter Ego Doctrine and the Role of Intent*, 8 DEPAUL BUS. & COM. L.J. 151, 152 (2010) (citing NLRB v. Burns Int'l Sec. Servs., Inc., 406 U.S. 272, 278 (1972)).

[3] *See Burns*, 406 U.S. at 294–95.

[4] *Id.*

[5] *See Canteen*, 103 F.3d at 1361.

[6] *See, e.g.*, Dupont Dow Elastomers, L.L.C. v. NLRB, 296 F.3d 495, 501 (6th Cir. 2002); *see also* Jonathan L.F. Silver, *Reflections on the Obligations of a Successor Employer*, 2 CARDOZO L. REV. 545, 558 (1980-1981); *see also* Spruce Up Corp., 209 N.L.R.B. 194, 195 (1974) ("We concede that the precise meaning and application of the Court's caveat is not easy to discern").

[7] *See, e.g., Canteen*, 103 F.3d at 1362 (citing *Spruce Up*, 209 N.L.R.B. at 195).

[8] Nazareth Reg'l High Sch. v. NLRB, 549 F.2d 873, 881 (2d Cir. 1977). The Seventh Circuit also cited with approval the rule set forth in *Nazareth Reg'l High Sch.*, yet determined that it need not confront this issue definitively. *See* U.S. Marine Corp. v. NLRB, 944 F.2d 1305, 1321 n.22 (7th Cir. 1990).

set its own terms and conditions rather than adopt those of its predecessor.[9]

This article argues that the circuits should adopt a Limited Implied Terms Pronouncement approach. This approach limits the Implied Pronouncement approach by removing from the exception any reliance on an employer misleading employees. The Limited Implied Terms Pronouncement approach also provides the best interpretation of the Supreme Court's language in *Burns*, and the National Labor Relations Board's (the "Board") interpretation in *Spruce Up*.

Part II of this article will further examine the Supreme Court's decision in *Burns*, the Board's decision in *Spruce Up*, and the significance of the two in applying the "perfectly clear" exception. Part III will examine the Changing Terms Pronouncement, Identical Terms Pronouncement, and Implied Pronouncement approaches taken by the circuits that have addressed the issue. Part IV will analyze each of these approaches and argue that the Limited Implied Terms Pronouncement is the best option for two reasons: First, it is the most consistent with the Supreme Court's language in *Burns*, and the Board's subsequent interpretation in *Spruce Up*. Second, it provides the best protection to employees while still maintaining the inherent right of successor employers to set initial terms of employment.

II. BACKGROUND

This section will examine the Supreme Court's decision in *Burns*, and the Board's decision in *Spruce Up*. The circuits that have ruled on the issue of the "perfectly clear" exception have interpreted the exception by applying the language of *Burns* and the Board's subsequent interpretation of *Burns* in *Spruce Up*.[10] As these circuits seek to apply the exception in accordance with the language of *Burns*, and the policy of the exception as set forth in *Spruce Up*, the following background information is relevant for a better understanding of the "perfectly clear" exception.

A. NLRB v. Burns Int'l Sec. Servs., Inc.

The Supreme Court determined in *Burns* that, although a successor employer is required to bargain with the incumbent union, it is not bound by the substantive provisions of the previous collective bargaining

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[9] *See* S & F Mkt. St. Healthcare L.L.C. v. NLRB, 570 F.3d 354, 358–59 (D.C. Cir. 2009).

[10] *See infra* Part III.

agreement.[11] In *Burns*, Burns International Security Services, Inc. replaced another employer, the Wackenhut Corp, which had previously provided plant protection services for the Lockheed Aircraft Service Co.[12] A few months prior to Burns' replacement of Wackenhut, a majority of the Wackenhut employees selected United Plant Guard Workers of America (UPG) as their exclusive bargaining representative.[13] Only weeks after Wackenhut and UPG entered into a three-year collective-bargaining agreement, Burns outbid Wackenhut to provide security services at Lockheed.[14] Lockheed informed Burns at a pre-bid conference that Wackenhut's guards were represented by UPG, and that there existed a collective-bargaining contract between Wackenhut and UPG.[15] When Burns began providing security services at Lockheed, it employed forty-two guards.[16] Of these, twenty-seven had been employed by Wackenhut and fifteen were transferred from other Burns locations.[17]

At the time that Burns hired the twenty-seven Wackenhut guards, it supplied each of them with membership cards of the American Federation of Guards (AFG), another union with which Burns had collective-bargaining contracts at other locations.[18] Burns also informed the former Wackenhut employees that 1) they were required to become AFG members; 2) they would not receive uniforms otherwise; and 3) Burns "could not live with" the existing contract between Wackenhut and UPG.[19] Prior to commencing operations at Lockheed, Burns recognized AFG on the theory that it had obtained a card majority.[20] UPG thereafter demanded that Burns recognize it as the bargaining representative of Burns' employees at Lockheed, and that Burns honor the collective-bargaining agreement between UPG and Wackenhut.[21] When Burns refused, UPG filed unfair labor practice charges; Burns responded by challenging the appropriateness of the bargaining unit and by denying its obligation to bargain with UPG.[22]

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[11] NLRB v. Burns Int'l Sec. Servs., Inc., 406 U.S. 272, 294–95 (1972).
[12] *Id.* at 274.
[13] *Id.*
[14] *Id.* at 275.
[15] *Id.*
[16] *Id.* at 274.
[17] *Burns*, 406 U.S. at 274.
[18] *Id.* at 275.
[19] *See id.*
[20] *Id.*
[21] *Id.* at 275–76.
[22] *Id.* at 276.

The Board found Lockheed an appropriate unit, and held that Burns violated the National Labor Relations Act (NLRA or "the Act")[23] by 1) unlawfully recognizing and assisting AFG, a rival union; 2) failing to recognize and bargain with UPG; and 3) refusing to honor the collective bargaining agreement previously negotiated between Wackenhut and UPG.[24] Burns appealed to the Second Circuit, which "accepted the Board's unit determination and enforced the Board's order as it related to the finding of unlawful assistance of a rival union and the refusal to bargain."[25] The Second Circuit also held that the Board exceeded its powers in ordering Burns to honor the Wackenhut contract.[26] The Supreme Court granted certiorari to the challenges raised by both Burns and the Board.[27]

Although determining that Burns had a duty to bargain with UPG, the Supreme Court stated that Burns was not subsequently bound to observe the substantive terms of the collective-bargaining contract negotiated between Wackenhut and UPG.[28] The Supreme Court based its decision on the express language of the NLRA, which provides that the existence of such bargaining obligation "does not compel either party to agree to a proposal or require the making of a concession."[29] As further support for this decision, the Supreme Court stated that the theory of the Act is that "free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act itself does not attempt to compel."[30] As a policy consideration for its decision, the Supreme Court determined "that holding either the union or the new employer bound to the substantive terms of an old collective-bargaining contract may result in serious inequities."[31] The court noted 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

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[23] National Labor Relations Act, 29 U.S.C. §§ 151-169 (2006).

[24] *See Burns*, 406 U.S. at 276.

[25] *Id.* at 276–77. The Second Circuit accepted the Board's order as to numbers one and two. Burns Int'l Detective Agency, Inc. v. NLRB, 441 F.2d 911, 914–15 (2d Cir. 1971), *cert. granted sub nom.*, NLRB v. Burns Int'l Sec. Servs., 404 U.S. 822 (1971).

[26] *Burns*, 441 F.2d at 915. The Second Circuit held that the Board exceeded its powers as to number three. *Id.* at 916.

[27] *Burns*, 404 U.S. at 822. Burns challenged the unit determination and the bargaining order. *Id.* The Board maintained its position that Burns was bound by the Wackenhut contract. *Id.*

[28] *See Burns*, 406 U.S. at 282.

[29] *Id.* (citing National Labor Relations Act § 8(d)).

[30] *Id.* at 282–83 (citing NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45 (1937)); *see also* NLRB v. Am. Nat'l Ins. Co., 343 U.S. 395, 401–02, (1952); Local 357, International Brotherhood of Teamsters v. NLRB, 365 U.S. 667, 676–77, (1961).

[31] *Burns*, 406 U.S. at 287.

force, work location, task assignment, and nature of supervision."[32] The Court determined that saddling an employer to terms and conditions of a prior collective bargaining agreement would make these changes impossible and would discourage the transfer of capital.[33]

The Supreme Court then set forth what would become known as the "perfectly clear" exception. In *Burns*, the Supreme Court stated that, although a successor employer is ordinarily free to set initial terms for hiring the employees of a predecessor, instances exist 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 the new employer initially consult with the employees' bargaining representative before fixing the terms of employment.[34] Although the Supreme Court established the exception, it did not apply the "perfectly clear" exception in *Burns*, but based its decision on the fact that Burns never unilaterally changed the terms and conditions of employment it had offered to potential employees after its obligation with the union became apparent.[35] The Supreme Court determined that Burns' duty to bargain with the Union did not mature until it had selected the forty-two guards that it would employ.[36] Thus, the Supreme Court affirmed the Second Circuit and held that the Board's order requiring Burns to make its employees whole for any losses suffered by reason of Burns' refusal to honor and enforce the contract between Wackenhut and UPG could not "be sustained on the grounds of Burns unilaterally changing existing terms and conditions of employment."[37]

B. Spruce Up

While the original *Spruce Up* decision was pending before the Fourth Circuit,[38] the Supreme Court decided *Burns*, and *Spruce Up* was therefore remanded to the Board for reconsideration.[39] The *Spruce Up*[40] case remains important in interpreting the "perfectly clear" exception because, while each of the three approaches seeks to apply the exception in *Burns*, each approach also seeks to apply the "perfectly clear" exception in accordance with *Spruce Up*'s interpretation of the

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[32] *Id.* at 287–88.
[33] *Id.* at 288.
[34] *Id.* at 295–96.
[35] *Id.* at 295.
[36] *See id.*
[37] *See Burns*, 406 U.S. at 295.
[38] NLRB v. Spruce Up Corp., 529 F.2d 516 (4th Cir. 1975).
[39] *See* Spruce Up Corp., 209 N.L.R.B. 194, 194 (1974).
[40] All remaining references to *"Spruce Up"* refer to the Board's decision upon remand.

exception.[41] The Board's interpretation of the *Burns* exception in *Spruce Up* significantly limited the applicability of the "perfectly clear" exception to specific conduct of the new employer.[42] In *Spruce Up*, the Board determined that a successor employer is not a "perfectly clear" successor if it announces new terms of employment prior to or simultaneously with an invitation to accept employment.[43]

The barbering at Fort Bragg, North Carolina was handled by concessionaires, periodically selected by the Fort's exchange service on the basis of competitive bids.[44] Spruce Up operated nineteen of the twenty-seven barber shops at Fort Bragg, while the remaining eight shops were operated by two other concessionaires, Roscoe and Fisher.[45] Journeymen Barbers, Hair Dressers, Cosmetologists and Proprietors' International Union of America, AFL-CIO, Local 844 ("the Union") were certified in a unit of the nineteen Spruce Up shops.[46] A few months after the Union became certified, Spruce Up was outbid by another concessionaire, Cicero Fowler, to operate the barber shops at the Fort.[47]

On February 6, 1970, upon learning that Fowler was the lowest bidder and likely to take over the operation of the Spruce Up barber shops, the Union requested Fowler to recognize and bargain with it.[48] Fowler refused, contending that at that time he had no employees, and would have no duty to bargain until he assumed operation of all the shops at Fort Bragg later in March 1970.[49] Fowler testified that, at the February 6 meeting with the Union, he told the Union representative his intention to hire all working barbers, [50] and also indicated that he would pay different commission rates to the barbers.[51]

On February 27, Fowler distributed to the barbers of all twenty-seven shops at Fort Bragg individual form letters setting forth the rates of commission he intended to pay (which were different from those paid to

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[41] *See* S & F Mkt. St. Healthcare L.L.C. v. NLRB, 570 F.3d 354, 361 (D.C. Cir. 2009) ("[T]he Board's holding achieves precisely what *Burns* and *Spruce Up* sought to avoid"); *see also* Nazareth Reg'l High Sch. v. NLRB, 549 F.2d 873, 881 (2d Cir. 1977) ("[W]e approved the position taken in *Spruce Up* by stating . . . ."); *see also* Canteen Corp. v. NLRB, 103 F.3d at 1364 (7th Cir. 1977) (stating that "Canteen gives us no new reason to question the Board's long standing position" in determining the correctness of *Spruce Up).*

[42] *Canteen*, 103 F.3d at 1362.

[43] *Spruce Up*, 209 N.L.R.B. at 195.

[44] *Id.* at 194.

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *Spruce Up*, 209 N.L.R.B. at 194.

[50] *Id.*

[51] *Id.* at 195.

the barbers by Spruce Up).[52] Fowler requested that those barbers who desired to work for Fowler on that basis return the letter with their signature.[53] On March 2, the day before Fowler was to assume operation of the Fort Bragg barbershops, a meeting was called by the Union, at which time most of the barbers from the twenty-seven shops voted not to sign the form letter, to withhold their services, and to picket the base.[54]

In *Spruce Up*, after setting forth the "perfectly clear" exception as stated in *Burns*, the Board stated that the facts of the case did not fall within the parameters of the exception.[55] The Board concluded that, although Fowler expressed a general willingness to hire the barbers formerly employed by Spruce Up at the February 6 meeting, Fowler "at the same time indicated he was going to change the commission rates."[56] In applying these facts to the *Burns* exception, the Board determined that "Fowler thereby made it clear from the outset that he intended to set his own initial terms, and that whether or not he would in fact retain the incumbent barbers would depend upon their willingness to accept those terms."[57] In support of this interpretation, the Board stated that, "[w]hen an employer who has not yet commenced operations announces new terms prior to or simultaneously with his invitation to the previous workforce to accept employment under those terms, we do not think it can fairly be said that the new employer 'plans to retain all of the employees in the unit,' as that phrase was intended by the Supreme Court."[58] The policy underlying the Board's interpretation relied upon the fact that employees may not wish to enter into an employment relationship with the new employer, as was the case in *Spruce Up*.[59]

Although the Board conceded that the precise meaning and application of the "perfectly clear" exception was not easy to discern, it determined than any contrary interpretation would be subject to abuse, and would "encourage employer action contrary to the purposes of th[e] Act."[60] For instance, the Board stated that "an employer desirous of availing itself of the *Burns* right to set initial terms would, under any contrary interpretation, have to refrain from commenting favorably at all upon employment prospects of old employees . . . ."[61] Accordingly, an

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[52] *Id.* at 194.
[53] *Id.*
[54] *Id.*
[55] *Spruce Up*, 209 N.L.R.B. at 195.
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] *See id.*
[60] *Id.*
[61] *Spruce Up*, 209 N.L.R.B. at 195.

employer would not forfeit its right to unilaterally set initial terms. The Board determined that an employer would refrain from commenting on employment prospects for fear that it would forfeit its right to unilaterally set initial terms, a right to which the Supreme Court attached great importance in *Burns*.[62]

The Board, in interpreting the *Burns* exception, stated that

> [it] should be restricted 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.[63]

Based upon this interpretation, the Board concluded that Fowler's expressions "did not operate to forfeit his right to set initial terms," and therefore found that Fowler did not violate the Act.[64]

III. THE CHANGING TERMS PRONOUNCEMENT, IDENTICAL TERMS PRONOUNCEMENT, AND IMPLIED PRONOUNCEMENT APPROACHES

In the aftermath of *Burns*, the Board and the courts of appeal have interpreted the scope and meaning of the "perfectly clear" exception;[65] the circuits are split three ways on the proper interpretation of the exception. The Fifth,[66] Sixth,[67] Seventh,[68] and Ninth[69] Circuits have adopted the "Changing Terms Pronouncement" approach. These circuits state that the "perfectly clear" exception will apply when the employer fails to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment.[70] The Second

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[62] *Id.*

[63] *Id.* (internal citation omitted).

[64] *Id.* at 195.

[65] *See, e.g.*, Canteen Corp. v. NLRB, 103 F.3d 1355, 1362 (7th Cir. 1997).

[66] *See, e.g.*, Coastal Int'l Sec. Inc. v. NLRB, 320 F. App'x 276, 285 (5th Cir. 2009).

[67] *See, e.g.*, Spitzer Akron, Inc. v. NLRB, 540 F.2d 841, 845–46 (6th Cir. 1976).

[68] *See, e.g.*, *Canteen*, 103 F.3d at 1364.

[69] *See, e.g.*, NLRB v. World Evangelism, Inc., 656 F.2d 1349, 1355 (9th Cir. 1981).

[70] *See, e.g.*, *Canteen*, 103 F.3d at 1364 ("It is clear that a majority of the Board, although questioning whether *Spruce Up* was correct in extending the 'perfectly clear' exception to situations in which the employees are misled into believing that they will be hired by the new employer, adheres to that part of the *Spruce Up* holding that applies the 'perfectly clear' exception when the employer intended from the outset to hire the employees of the predecessor employer. Canteen gives us no new reason to question the Board's long standing position"); *World Evangelism*, 656 F.2d at 1355 ("When the successor does not evince an intention to modify the pre-existing terms before expressing willingness to rehire incumbents, the employer must consult with the union before

Circuit has adopted an "Identical Terms Pronouncement" approach, where the important consideration is whether all of the employees have been promised re-employment on existing terms.[71] The District of Columbia Circuit recently set forth an "Implied Pronouncement" approach, where the court will not apply the "perfectly clear" exception if the employer, prior to an offer of employment, has conveyed its intention to set its own terms and conditions rather than adopt those of its predecessor.[72]

A. The Changing Terms Pronouncement Approach

The Fifth, Sixth, Seventh, and Ninth Circuits adhere to the Changing Terms Pronouncement approach, in which the "perfectly clear" exception will apply when the employer fails to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment.[73] For example, in 1981, the Ninth Circuit decided *NLRB v. World Evangelism, Inc.*, in which the court determined that it was "perfectly clear" that World Evangelism, Inc. (WEI) intended to retain all the previous employees at their previous jobs and was therefore a "perfectly clear" successor.[74]

In October 1978, WEI acquired the El Cortez Center.[75] Prior to WEI's acquisition, Handlery Hotels operated the center and employed five to nine engineers.[76] The engineers were represented by Operating Engineers Local 501 (Local 501) and covered by a contract, in force until 1980.[77] Shortly before the takeover, WEI opted to retain the engineers, although it did not state whether it would adopt Handlery's contract.[78] After WEI notified Local 501 that it was not a successor owner, the

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altering employment terms"); *Coastal Int'l*, 320 F. App'x at 285 ("The [successor] employer can institute its own initial terms and conditions of employment by giving the employees prior notice of its intention); *Spitzer Akron*, 540 F.2d at 843 ("The work force was hired prior to the announcement of the changes in wages and benefits; moreover such changes had not been part of the initial terms of rehiring").

[71] *See* Nazareth Reg'l High Sch. v. NLRB, 549 F.2d 873, 881 (2d Cir. 1977) ("The important consideration in determining whether it is perfectly clear that a successor intends to retain all of the employees is whether they have all been promised re-employment on the existing terms").

[72] *See* S & F Mkt. St. Healthcare L.L.C. v. NLRB, 570 F.3d 354, 360 (D.C. Cir. 2009) (The Court found S & F not to be a "perfectly clear" successor because it announced that any employment would be at will, therefore announcing a very significant change in the terms and conditions of employment).

[73] *See supra* note 70 and accompanying text.

[74] *See World Evangelism*, 656 F.2d at 1355.

[75] *Id.* at 1351.

[76] *Id.*

[77] *Id.*

[78] *Id.*

Engineers notified Local 501's business representative that they would resign unless WEI adopted Handlery's contract.[79] In response to this, WEI told Local 501 to draft a contract and return it to them, and the engineers agreed to continue working.[80]

After Local 501's business representative returned with a standard form contract, WEI expressed problems with certain provisions.[81] Local 501 promised to furnish WEI a clean copy of the contract.[82] During the next two months, WEI neither signed the contract nor communicated with Local 501.[83] In December 1978, two months after WEI's acquisition of the Center, "WEI notified Local 501 that it had not adopted Handlery's contract and did not want to sign the contract that Local 501 had tendered."[84] WEI subsequently promised interviews to the engineers for permanent jobs, suggesting that WEI considered them temporary employees.[85] WEI "paid the engineers lower than contract wages," "failed to contribute to the fringe benefit trusts," and "did not recognize nor bargain with Local 501 about these changes in the engineers' terms and conditions of employment."[86]

The Board held that WEI violated the Act "by unilaterally changing terms and conditions of employment and by withdrawing recognition from and refusing to bargain with Local 501"[87] and ordered the company to cease and desist, recognize the bargaining representative, sign the pre-existing contract, and make employees whole for wages lost due to its refusal to implement the agreement.[88]

After setting forth the "perfectly clear" exception from *Burns*, the Ninth Circuit stated that "[w]hen the successor does not evince an intention to modify the pre-existing terms before expressing willingness to rehire incumbents, the employer must consult with the union before altering employment terms."[89] Applying this principle to the facts in *World Evangelism*, the Ninth Circuit determined that "it was perfectly clear that WEI intended to retain all of Handlery's engineers at their previous jobs," and therefore "WEI was required to consult with the employees' bargaining representative before altering the terms of the

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[79] *See id.*
[80] *World Evangelism*, 656 F.2d at 1351.
[81] *Id.* at 1352.
[82] *Id.*
[83] *Id.*
[84] *See id.*
[85] *Id.*
[86] *World Evangelism*, 656 F.2d at 1352.
[87] *Id.*
[88] *Id.*
[89] *Id.* at 1355 (citing Bellingham Frozen Foods, Inc. v. NLRB, 626 F.2d 674, 678–79 (9th Cir. 1980)).

pre-existing contract."[90] In this case, "WEI admittedly paid wages to the engineers which were lower than those prescribed by Handlery's contract," and "also admittedly discontinued contributing to the employees' fringe benefit trusts."[91] The Ninth Circuit therefore held that WEI violated the Act by unilaterally altering terms and conditions of employment.[92]

Therefore, the Ninth Circuit concluded that WEI was a "perfectly clear" successor and violated the Act by unilaterally altering terms and conditions of employment.[93] The Ninth Circuit based its holding on the fact that WEI made it "perfectly clear" that it planned to retain all of the predecessor's employees and failed to state an intention to modify the pre-existing terms of employment.[94] Consequently, the Ninth Circuit granted enforcement of the Board's Order requiring WEI to cease and desist and make whole employees for wages lost due to their refusal to implement the agreement.[95]

B. The Identical Terms Pronouncement Approach

The Second Circuit follows the Identical Terms Pronouncement approach, where the important consideration is whether all of the employees have been promised re-employment on existing terms.[96] In 1977, the Second Circuit decided *Nazareth Reg'l High Sch. v. NLRB*, in which the court found that Nazareth Regional High School ("Nazareth") was not a "perfectly clear" successor.[97]

In 1973, Nazareth announced that Henry M. Hald High School Association ("Hald"), the manager for Nazareth and eight other schools in the diocese, would discontinue operating Nazareth as of August 31, 1974, and that an independent local community group would overtake Nazareth.[98] Local 1261 had a collective bargaining agreement with Hald, which expired on August 31, 1974, covering all full-time lay

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[90] *Id.* at 1355.
[91] *Id.*
[92] *World Evangelism*, 656 F.2d at 1355.
[93] *Id.*
[94] *See id.*
[95] *See id.* at 1352 (Although the Board's Order also ordered WEI to perform other affirmative action, these actions are irrelevant to WEI being a "perfectly clear" successor).
[96] *See* Nazareth Reg'l High Sch. v. NLRB, 549 F.2d 873, 881 (2d Cir. 1977) ("The important consideration in determining whether it is perfectly clear that a successor intends to retain all of the employees is whether they have all been promised re-employment on the existing terms").
[97] *Id.*
[98] *Id.* at 876.

faculty in the nine diocesan schools.[99] Local 1261 sought information from Hald and the diocese concerning the possible effects of the transfer of Nazareth to a neighborhood group on the lay faculty, but all requests were either ignored or refused.[100]

After a new board of trustees for Nazareth was formed, Local 1261 focused its attempts to gain recognition of its chairman, Thomas Keenan, and Nazareth's' principal, Brother Burke.[101] On March 25, 1974, Robert Gordon, president of Local 1261, telephoned Keenan and demanded recognition of Local 1261 as the lay faculty's bargaining representative.[102] However, Keenan told Gordon not to worry because the board of trustees intended to rehire the entire lay faculty.[103]

In April 1974, Keenan mailed letters to the lay teachers at Nazareth to gauge their interest in teaching under the new administration the following year.[104] Each teacher also received a standard employment agreement stating the terms and conditions of employment at Nazareth for the coming year.[105] Thereafter, Local 1261 filed charges against Nazareth and others, asserting that Nazareth was interfering with their employees' rights by "unilaterally altering the conditions and terms of employment."[106] Local 1261 brought further charges against the same parties which the Board consolidated on March 21, 1975, and upon issuance of a complaint by the Board's General Counsel, a hearing date was set.[107]

The Board found that Nazareth was bound to bargain with Local 1261 over the initial terms and conditions of employment because it was "perfectly clear" as of March 25, 1974, "that the new administration planned to retain all of the predecessor's employees in the unit."[108] The Board based its decision on the fact that Nazareth intended to retain the entirety of Hald's lay faculty because on that same date, Keenan told Local 1261 that it would retain all employees.[109] The Board therefore

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[99] *Id.*

[100] *Id.* at 876–77.

[101] *Id.* at 877.

[102] *Nazareth Reg'l High Sch.*, 549 F.2d at 877.

[103] *Id.* (Although Keenan contradicted Gordon's testimony, it was credited by both the ALJ and the Board).

[104] *Id.*

[105] *Id.*

[106] *Id.* at 878 (Local 1261 also filed charges related to Nazareth's refusal to recognize and bargain with the Union, and for discharging all members of the unit to defeat the local. However, these charges are not related to whether Nazareth was a "perfectly clear" successor and will therefore not be addressed).

[107] *Id.*

[108] *Nazareth Reg'l High Sch.*, 549 F.2d at 878.

[109] *Id.* at 881.

concluded that Nazareth violated the NLRA by "unilaterally establishing the initial terms of employment,"[110] and ordered Nazareth to "grant employees restitution of any wages and benefits that may have been lost because of unilateral imposition of contract terms."[111]

Nazareth petitioned the Second Circuit to set aside the Board's Order, and the Board cross-petitioned for enforcement of its Order finding Nazareth in violation of the Act.[112] The Second Circuit began its analysis by setting forth the "perfectly clear" exception from *Burns* and the interpretation of this exception by *Spruce Up*.[113] The Second Circuit then approved the position taken in *Spruce Up* by stating that it reads "the suggested exception as being limited to those situations where employees are led at the outset by the successor-employer to believe that they will have continuity of employment on pre-existing terms and as not applying where the new employer dispels any such impression prior to or simultaneously with its offer to employ the predecessor's work force."[114]

In its analysis, the Second Circuit determined that, although Nazareth "indicated at an early date an intention to retain the whole staff, it never committed itself to offering the same terms of employment."[115] The Second Circuit stated that, "[o]n the contrary, Nazareth mailed letters to most of the lay faculty in early April inquiring whether they wished to teach at Nazareth, and informing them that such employment would be on new terms."[116] Although the Second Circuit recognized that "in *Spruce Up* the successor-employer told the union that retention would be on new terms at the same time that it promised to rehire the entire unit," it also stated that *Spruce Up* "is not confined to that narrow factual situation."[117]

The Second Circuit determined that "[t]he important consideration in determining whether it is "perfectly clear" that a successor intends to retain all of the employees is whether they have all been promised re-employment on the existing terms."[118] Applying this framework, the Second Circuit found that because Nazareth had never led the lay faculty to believe that it would retain them at the existing terms, Nazareth was free to fix the initial terms of employment, and was not under a duty to

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[110] *Id.* at 878.
[111] *Id.* at 876.
[112] *Id.*
[113] *Id.* at 881.
[114] *Nazareth Reg'l High Sch.*, 549 F.2d at 881 (citing Brotherhood of Railway Clerks. v. REA Express, Inc., 523 F.2d 164 (2d Cir. 1974)).
[115] *Id.* at 881.
[116] *Id.*
[117] *Id.*
[118] *Id.*

bargain with the Union until September 1, 1974,[119] when it became clear that Hald had employed a majority of Nazareth's lay faculty during the previous year.[120] The Second Circuit continued, stating that "[a] successor-employer's right to set initial terms of employment may not be rendered nugatory solely on the basis of an expression of intention to rehire its predecessor's employees—particularly when the successor's other actions are completely inconsistent with such a statement."[121]

Therefore, the Second Circuit concluded that, because Nazareth never informed the predecessor's employees that they would be retained on existing terms, it was not "perfectly clear" that it intended to retain all of the employees.[122] Consequently, the Second Circuit denied the Board's Order compelling Nazareth "to make restitution for any wages and benefits that may have been lost as a result of its unilateral imposition of terms and conditions of employment."[123]

C. The Implied Pronouncement Approach

The District of Columbia Circuit recently created the Implied Pronouncement approach, where the court will not apply the "perfectly clear" exception if the employer, prior to an offer of employment, has conveyed its intention to set its own terms and conditions rather than adopt those of its predecessor.[124] Unlike the Changing Terms Pronouncement and Identical Terms Pronouncement Approaches, the Implied Pronouncement approach looks outside of explicit statements by the successor in applying the "perfectly clear" exception. The District of Columbia Circuit found that S & F Market Street Healthcare, L.L.C. ("S & F") was not a "perfectly clear" successor.[125]

In 2004, S & F purchased Candlewood Care Center ("Candlewood") from Covenant Care Orange, Inc. ("Covenant").[126] Covenant had collective bargaining agreements with the Service

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[119] *See id.* Nazareth began operations on September 1, 1974. *Id.* at 877. On this date, forty-nine of the fifty-five lay teachers at Nazareth had been employed during the previous Nazareth Diocesan. *Id.*

[120] *Nazareth Reg'l High Sch.*, 549 F.2d at 881.

[121] *Id.* at 881–82.

[122] *Id.* at 881.

[123] *Id.* at 882. The Second Circuit also modified the Order to compel restitution only as to wages and benefits that may have been lost by virtue of Nazareth's refusal to bargain with Local 1261 after September 1, 1974. *Id.* at 883.

[124] S & F Mkt. St. Healthcare L.L.C. v. NLRB, 570 F.3d 354, 354 (D.C. Cir. 2009) (The Court found S & F to not be a "perfectly clear" successor because it said that any employment would be at will, therefore announcing a very significant change in the terms and conditions of employment).

[125] *Id.* at 363.

[126] *Id.* at 356.

employees International Union (SEIU) and Local 434B, covering two different bargaining units at Candlewood.[127] After determining that it would need to replace the staff prior to taking over operations, S & F hired some Candlewood employees for temporary periods, up to ninety days, while recruiting new employees.[128]

In June 2004, S & F distributed employment applications to Candlewood's existing staff; a cover sheet was included which informed the employees that S & F intended to implement "significant operation changes" and that current Candlewood employees interested in positions with Candlewood would be required to submit the application for employment attached to the cover sheet.[129] The cover letter further advised that "[a]pplicants who meet the [Company's] operational needs will be interviewed," and any offer of employment "will be contingent on your passing a pre-employment physical, drug test and acceptable reference and background checks."[130] The job application also "required the applicant to affirm his or her understanding that successfully passing the tests and checks was a condition of employment, that any employment would be at will, and that S & F [could] change benefits, policies and conditions at any time."[131]

At the end of June 2004, S & F interviewed all Candlewood employees who had submitted applications.[132] In each interview, S & F informed the applicant that "any possible employment would be temporary and would last no more than 90 days."[133] Each Candlewood employee that S & F selected was sent a letter dated June 30 from S & F's director of human resources.[134] The subject line read "OFFER OF TEMPORARY EMPLOYMENT," and the letter explained that, "[a]s a temporary employee . . . you are not eligible for company benefits . . . . Other terms and conditions of your employment will be set forth in [S & F's] personnel policies and its employee handbook."[135] The letter reiterated that employment was temporary and that it would end no later than the expiration of the ninety-day period unless the employee was selected for regular employment.[136] To accept the offer, each addressee was required to sign and return the letter, and each person hired was

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127 *Id.*
128 *Id.*
129 *Id.* (emphasis omitted).
130 *S & F Mkt. St. Healthcare*, 570 F.3d at 356.
131 *Id.* (internal quotes omitted).
132 *Id.*
133 *Id.*
134 *Id.*
135 *Id.*
136 *S & F Mkt. St. Healthcare*, 570 F.3d at 356.

required to sign an "Agreement to be Bound by Alternative Dispute Resolution Policy," which provided that arbitration would be the exclusive means of resolving disputes for certain matters.[137]

S & F began operations on July 1 with approximately 120 employees, who were, for the most part, former Candlewood employees newly employed on a temporary basis.[138] Approximately twelve had not been employed by Candlewood.[139] At a staff meeting on July 9, S & F distributed employee handbooks to the temporary employees dated July 1, 2004.[140] The handbooks distributed to the temporary employees described S & F's terms and conditions of employment and did not include information about employer-provided benefits.[141] Also following the takeover, S & F made renovations to the facility, including removing a bulletin board in the employee lounge, which Candlewood had hung for use of the Union.[142]

The Union requested bargaining with S & F, to which S & F responded that it "had not yet hired a representative complement of employees."[143] The Union thereafter filed unfair labor practice charges, and the Board General Counsel issued a complaint alleging that since July 1, 2004 S & F had made unilateral changes at the former Candlewood facility by 1) removing union related materials from a bulletin board; 2) prohibiting the posting of union materials; and 3) implementing new employment policies in violation of the Act.[144]

Following a hearing, the Administrative Law Judge (ALJ) found that S & F, although a successor to Candlewood, was "not a perfectly clear successor because S & F's pre-employment communications to the Candlewood employees put them on notice that the terms and conditions of their employment would change."[145] The Board affirmed the ALJ's findings that S & F was successor to Candlewood, but went on to hold that S & F was a "perfectly clear" successor because it had "failed to clearly announce its intent to establish a new set of conditions" prior to inviting former employees to accept employment.[146] S & F petitioned

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137 *Id.*
138 *Id.*
139 *Id.*
140 *Id.* at 357.
141 *Id.*
142 *S & F Mkt. St. Healthcare*, 570 F.3d at 357.
143 *Id.*
144 *Id.*
145 *Id.* (internal quotes omitted).
146 *See id.* at 357–58.

the District of Columbia Circuit for review on the legal and factual underpinnings of the Board's determination.[147]

In concluding that the Board erred in applying the "perfectly clear" exception from *Burns*, the District of Columbia Circuit stated that, "[t]he 'perfectly clear' exception is and must remain a narrow one because it conflicts with the 'congressional policy manifest in the Act . . . to enable the parties to negotiate for any protection either deems appropriate, but to allow the balance of bargaining advantage to be set by economic power realities.'"[148] The District of Columbia Circuit identified that the Board in *Spruce Up* also "recognized the importance of the employer's right to set the initial terms and conditions of employment and the narrowness of the 'perfectly clear' exception."[149] After stating the Board's interpretation of the "perfectly clear" exception from *Spruce Up*, the District of Columbia Circuit determined that "the perfectly clear exception is intended to prevent an employer from inducing possibly adverse reliance upon the part of the employees it misled or lulled into not looking for other work."[150]

In its analysis, the District of Columbia Circuit determined that the Board's finding that "S & F had failed to announce its intent to establish new terms and conditions before it invited the former Candlewood employees to accept employment" was unsupported by substantial evidence.[151] The District of Columbia Circuit stated that, based upon the facts of the case, "no employee could have failed to understand that significant changes were afoot."[152] These changes were included in the cover letter attached to each job application and 1) told of significant operational changes; 2) identified various pre-employment and checks to be passed; and 3) explained that employment offered would be both temporary and at will.[153] In response to the Board's finding that the cover letter lacked any mention of intended changes to employees' terms and conditions, the District of Columbia Circuit stated that, per the terms provided in the cover letter, S & F was announcing significant changes in the terms and conditions of the employment that had previously been included in Candlewood's collective bargaining agreement.[154]

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[147] *Id.* at 358.

[148] *S & F Mkt. St. Healthcare*, 570 F.3d at 359 (citing NLRB v. Burns Int'l Sec. Servs., Inc., 406 U.S. 272, 288 (1972)).

[149] *Id.* at 359 (citing Spruce Up Corp., 209 N.L.R.B. 194 (1974)).

[150] *Id.* at 359.

[151] *Id.*

[152] *Id.* at 359–60.

[153] *See id.* at 360.

[154] *See S & F Mkt. St. Healthcare*, 570 F.3d at 360. By announcing that employment would be at will and that after working ninety days there was not a guarantee of being

Upon stating that the Board misread *Burns*, the District of Columbia Circuit described that the "perfectly clear" exception only applies where employees of the predecessor have been led to believe that their employment status would continue unchanged after accepting employment with the successor.[155] In *S & F Mkt. St. Healthcare*, the District of Columbia Circuit determined that S & F made every indication prior to taking over operations that it intended to institute new terms of employment.[156] The District of Columbia Circuit also stated that the Board's holding achieved precisely what *Burns* and *Spruce Up* sought to avoid; each of those cases "started from the presumption that a successor employer may set its own terms and conditions of employment and reserved the "perfectly clear" exception for cases in which employees had been misled into believing their terms and conditions would continue unchanged."[157]

Therefore, the District of Columbia Circuit concluded that it was never "perfectly clear" that S & F would retain all the employees in the unit.[158] Consequently, finding that S & F clearly announced it would retain only those employees that met certain pre-employment tests, the District of Columbia Circuit denied the Board's order requiring S & F to restore the terms and conditions of employment of its predecessor and to make its employees whole for losses.[159]

IV. ANALYSIS AND PROPOSAL

A. The Changing Terms Pronouncement Approach

Under the Changing Terms Pronouncement approach, the "perfectly clear" exception will apply when the employer fails to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment.[160] Courts that follow the changing terms pronouncement approach do so because of the protection it affords incumbent employees.[161]

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hired, and by requiring new employees to agree to its own alternative dispute resolution, S & F made it clear that the grievance mechanism the union had negotiated would no longer be available. *Id.*

155 *Id.* at 360.

156 *Id.*

157 *Id.* at 361.

158 *Id.* at 362.

159 *Id.* at 363.

160 *See supra* note 70 and accompanying text.

161 *See supra* Part III.A.

These circuits have determined that employees will forego other employment when successor employers clearly intend to hire them.[162] These circuits state that unless incumbent employees are apprised promptly of impending reductions in wages or benefits, "they may well forego the reshaping of personal affairs that necessarily would have occurred but for anticipation that successor conditions will be comparable to those in force."[163]

Despite its attempt to provide extra protection to incumbent employees, the Changing Terms Pronouncement approach is not the best interpretation of the "perfectly clear" exception for two reasons:

First, under this approach, an employer who fails to clearly announce its intent to establish new terms of employment will be determined a "perfectly clear" successor, even if that employer is in fact changing terms and conditions of employment but has failed to make this known in an explicit pronouncement to employees. An employer can communicate changing terms of employment to employees outside of making a clear pronouncement. For example, in *S & F Mkt. St. Healthcare*, the employer communicated to employees through correspondence that the terms of employment would be changing, but did not make an explicit statement to that effect.[164]

Second, such a strict rule defeats the policy underlying the "perfectly clear" exception set forth in *Spruce Up*. By merely applying the "perfectly clear" exception to employers who have failed to announce a new set of conditions, the Changing Terms Pronouncement approach fails to consider whether these employees will accept employment, and thus whether the bargaining unit represents a majority of the employees. For example, if an employer offers employment under different terms, but fails to state explicitly that it is changing any terms, the Changing Terms Pronouncement approach would deem the employer a "perfectly clear" successor. Applying this approach strictly fails to consider whether employees will seek employment, and thus whether all employees will be retained, as is the consideration in *Spruce Up*. Therefore, courts applying the Changing Terms Pronouncement approach could find that an employer must consult with the employees' bargaining representative, even when the employees do not wish to seek employment under different terms.

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[162] *See, e.g.*, Canteen Corp. v. NLRB, 103 F.3d 1355, 1364 (7th Cir. 1997).

[163] *Id.* (citing International Association of Machinists v. NLRB, 595 F.2d 664, 674–75 (D.C. Cir. 1976)).

[164] S & F Mkt. St. Healthcare L.L.C. v. NLRB, 570 F.3d 354, 360 (D.C. Cir. 2009) (changing employment terms included in cover letter with offer of employment).

B. The Identical Terms Pronouncement Approach

Under the Identical Terms Pronouncement approach, the important consideration is whether all of the employees have been promised re-employment on existing terms.[165] The Second Circuit, the only circuit following the Identical Terms Pronouncement approach, does so based upon its determination that the successor's right to set initial terms should not be limited when the successor makes an offer of employment.[166]

In support of its position, the Second Circuit states that a successor-employer's right to set the initial terms of employment may not be voided solely on the basis of an expression of the intent to rehire its predecessor's employees, "particularly when the successor's other actions are completely inconsistent with such a statement."[167] The Second Circuit has therefore determined that an offer of employment is not enough to bring a successor into the scope of the "perfectly clear" exception.

However, the Identical Terms Pronouncement approach is not the best approach for three reasons: First, it fails to provide security to the incumbent employees. Under this approach, an employer can indicate that it intends to offer employment to all of the employees in the unit, but can still set initial terms of employment if it never led the incumbent employees to believe that they would be offered employment at existing terms.[168] Without any notification of impending changes after being retained, employees will likely infer that no changes are forthcoming, and forego other employment opportunities.

Second, this approach makes the "perfectly clear" exception irrelevant, as an employer offering employment and refraining from communicating any change in employment terms is the type of employer the *Burns* Court intended when it created the exception. When an employer makes an offer of employment and fails to communicate any changes in the terms of employment, it is "perfectly clear" that the employer plans to retain all of the employees. Further, if an employer could escape being a "perfectly clear" successor merely by refraining from offering employment on identical terms, then there would be no reason for the exception, as it would therefore not be clear until the employer began operations whether it had a duty to bargain with a union.

Third, the Identical Terms Pronouncement approach places misguided reliance on part of the interpretation of the "perfectly clear"

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[165] *See supra* note 71 and accompanying text.
[166] Nazareth Reg'l High Sch. v. NLRB, 549 F.2d 873, 881–82 (2d Cir. 1977).
[167] *Id.* at 881–82.
[168] *See id.* at 881.

exception from *Spruce Up*: that the exception applies only to cases where the successor has led the predecessor's employees to believe their employment would remain unchanged after accepting employment.[169] Not only does a clear majority of the Board question the correctness of "extending the 'perfectly clear' exception to situations in which employees are misled into believing that they will be hired by the new employer,"[170] but this part of the interpretation does not coincide with the language of *Burns* or the policy of the exception.[171]

Accordingly, the Identical Terms Pronouncement approach is not the best interpretation of the "perfectly clear" exception because it does not provide protection to incumbent employees who likely will place reliance on the offer of employment. Also, allowing an employer to set initial terms because it refrained from offering employment on identical terms would make the "perfectly clear" exception irrelevant, as employers would not be able to avoid being a "perfectly clear" successor by not informing employees of the terms of their employment. Further, by applying part of the *Spruce Up* interpretation that no longer has a clear majority of support and contradicts the policy of the exception, the Identical Terms Pronouncement approach is not the best approach.

C. The Implied Pronouncement Approach

Under the Implied Pronouncement approach, courts will not apply the "perfectly clear" exception if the employer, prior to an offer of employment, has conveyed its intention to set its own terms and conditions rather than adopt those of its predecessor.[172] The District of Columbia Circuit, the lone circuit that applies the Implied Pronouncement approach, does so based upon its interpretation of *Burns* and *Spruce Up*.[173]

The District of Columbia Circuit stated that both *Burns* and *Spruce Up* "started from the presumption that a successor employer may set its own terms and conditions of employment," and reserved the exception for cases in which "employees had been misled into believing their terms and conditions would continue unchanged."[174]

However, the Implied Pronouncement approach is not the best approach because of its reliance on part one of the *Spruce Up*

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[169] *See id.*

[170] *See* Canteen Corp. v. NLRB, 103 F.3d 1355, 1364 (7th Cir. 1997).

[171] Whether an employer misled employees does not have a bearing on whether an employer is a "perfectly clear" successor. *Id.* The policy underlying the exception is based upon whether a new employer offers new terms of employment. *Id.*

[172] *See supra* note 72 and accompanying text.

[173] S & F Mkt. St. Healthcare L.L.C. v. NLRB, 570 F.3d 354 (D.C. Cir. 2009).

[174] *See id.* at 361.

interpretation: that the exception applies only to cases where the successor has led the predecessor's employees to believe their employment would remain unchanged after accepting employment.[175] Not only does a clear majority of the Board question the correctness of "extending the 'perfectly clear' exception to situations in which employees are misled into believing that they will be hired by the new employer,"[176] but this part of the interpretation does not coincide with the language of *Burns* or the policy of the exception.[177] Whether an employer "misleads" employees into believing that they will have employment on then existing terms does not establish whether an employer has made it "perfectly clear" that it will retain all of its predecessor's employees, or whether the employees will accept employment.

D. Proposal: The Limited Implied Pronouncement Approach

This article argues that the circuits should adopt the following rule: the "Limited Implied Pronouncement Approach."

Although a successor employer 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 it initially consult with the employees' bargaining representative before it fixes terms. A successor employer is a "perfectly clear" successor if it fails to clearly communicate to employees prior to an offer of employment, or in a prompt manner subsequent to an offer of employment, that the terms and conditions of employment that existed under the prior collective bargaining agreement would be changed by the new employer.[178] An employer does not need to convey an intent to

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[175] *See id.*

[176] *See* Canteen Corp. v. NLRB, 103 F.3d 1355, 1364 (7th Cir. 1997).

[177] *See supra* note 171 and accompanying text.

[178] By including that employers may *promptly* inform employees of subsequent changes, this test provides protection to an employer who may informally state the intent to rehire all employees before any communication is conveyed regarding changing terms of employment. This situation presented itself in *Nazareth Reg'l High Sch.*, where the Board originally determined that Nazareth was a "perfectly clear" successor because it had conveyed an intention to rehire all employees without simultaneously stating that it was changing terms. Nazareth Reg'l High Sch. v. NLRB, 549 F.2d 873, 881 (2d Cir. 1977). Determining that an employer is a "perfectly clear" successor under such a strict rule defeats the policy underlying the exception. For instance, an employer may refrain from commenting favorably regarding the employment prospects of old employees for fear it would forfeit its right to unilaterally set initial terms, a right to which the Supreme Court attached great importance in *Burns*. *See supra* note 62 and accompanying text.

change all previous terms, but it will be sufficient to convey that it intends to change some terms.[179]

Based upon the shortcomings of the Changing Terms Pronouncement, Identical Terms Pronouncement, and Implied Pronouncement approach, the circuits should adopt a limited version of the Implied Pronouncement approach for two reasons:

First, the Limited Implied Pronouncement Approach is the most consistent with the Supreme Court's language in *Burns* and the Board's subsequent interpretation in *Spruce Up*. The element of the "perfectly clear" interpretation set forth in *Spruce Up* related to misleading employees[180] should not be considered when applying the "perfectly clear" exception because making a determination of whether employees were misled does not establish whether an employer is a "perfectly clear" successor; it also does not establish whether an employer has offered employment or whether the employees plan to seek employment. Further, applying the proposed rule, the Limited Implied Pronouncement approach, would find an employer to be a "perfectly clear" successor when it has failed to convey changes in employment, i.e. misled employees that there would be no changes in employment, therefore making this element unnecessary.

Second, the Limited Implied Pronouncement approach provides the best protection to employees while still maintaining the inherent right of successor employers to set initial terms of employment. The Limited Implied Pronouncement approach requires employers to communicate changes to employees in a prompt manner, thereby providing protection to employees who may place reliance on an offer of employment as being on the same terms.[181] This approach also prevents creating a disincentive for the successor to comment favorably on the employment prospects of the predecessor's employees, as commenting favorably can

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[179] Although a trivial change in employment terms may not suffice, the change in employment conditions does not need to involve "core" terms. For example, in *S & F Mkt. St. Healthcare*, the District of Columbia Circuit determined that "there is no requirement in *Burns* or *Spruce Up* that the intended change[s] involve 'core' terms." S & F Mkt. St. Healthcare L.L.C. v. NLRB, 570 F.3d 354, 361 (D.C. Cir. 2009).

[180] *See* Spruce Up Corp., 209 N.L.R.B. 194, 195 (1974) (stating that "the caveat in *Burns* should be restricted 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.") Note that each approach references this section from *Spruce Up*. *See infra* Part IV.

[181] *See, e.g.*, *Canteen*, 103 F.3d at 1364.

be followed by prompt notification of changing terms of employment.[182] Further, the Limited Implied Pronouncement approach enables the employer to set the initial terms and conditions of employment, a right recognized as important by both *Burns* and *Spruce Up*.[183] Therefore, even if an employer makes an offer of employment, it will not forfeit its right to set initial terms if it thereafter promptly communicates that it intends to change terms of employment.

V. CONCLUSION

The circuits are split three ways on the proper interpretation of the "perfectly clear" exception. The Fifth, Sixth, Seventh, and Ninth Circuits have adopted the "Changing Terms Pronouncement" approach. These circuits state that the "perfectly clear" exception will apply when the employer fails to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment.[184] The Second Circuit has adopted an "Identical Terms Pronouncement" approach, where the important consideration is whether all of the employees have been promised re-employment on existing terms.[185] The District of Columbia Circuit recently set forth an "Implied Pronouncement" approach, where the court will not apply the "perfectly clear" exception if the employer, prior to an offer of employment, has conveyed its intention to set its own terms and conditions rather than adopt those of its predecessor.[186]

This article argues that the circuits should adopt a Limited Implied Pronouncement approach. The Limited Implied Pronouncement approach has two benefits over the approaches taken by the circuits which have addressed the issue. First, this approach removes from consideration an element of the *Spruce Up* interpretation that is irrelevant and unnecessary. Second, this approach provides the best protection to both the successor employer and the predecessor's employees.

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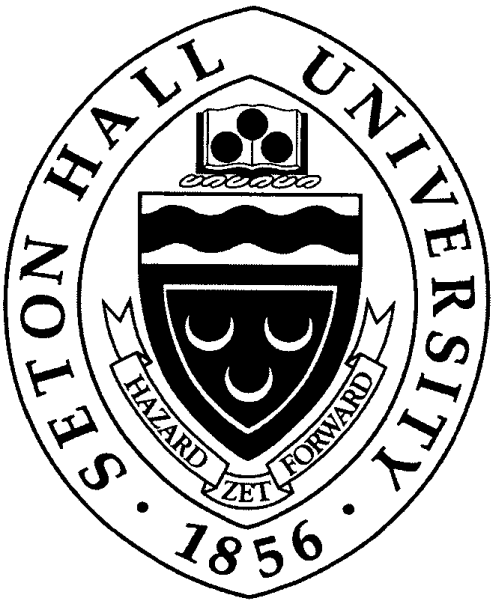
[182] *See supra* note 178 and accompanying text.

[183] *See supra* note 70 and accompanying text.

[184] *See supra* note 71 and accompanying text.

[185] *See supra* note 72 and accompanying text.

[186] *See* S & F Mkt. St. Healthcare L.L.C. v. NLRB, 570 F.3d 354, 354 (D.C. Cir. 2009). The Court found S & F not to be a "perfectly clear" successor because it announced that any employment would be at will, therefore announcing a very significant change in the terms and conditions of employment. *Id.*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