

Client Alert

A report
for clients
and friends
of the Firm **March 2007**

Despite Good Intentions, “Technical” Violation of WARN Act Triggers Liability

Ownership had alerted its workforce of an asset sale agreement, the successor corporation had invited employees to apply for jobs and, ultimately, only 40 employees did not obtain employment with the new entity. This does not sound like a scenario that would trigger liability under the Worker Adjustment and Retraining Notification Act of 1988 (“WARN”). But it did exactly that because there was a gap – here only eight days, but the actual length of time is irrelevant – between when the prior employer terminated all of its employees and when the asset sale closed. *Phason v. Meridian Rail Corp.*, No. 06-2842, 2007 WL 764250 (7th Cir. March 15, 2007).

In mid-December of 2003, Meridian Rail Corp. (“Meridian”) reached a “handshake” agreement with NAE Nortrak, Inc. (“Nortrak”) to sell its assets in Chicago Heights, Illinois. Nortrak invited Meridian employees to apply for jobs as it planned to continue running the Meridian operations in Chicago Heights. Approximately two weeks later, on December 31, 2003, Meridian announced that it was closing its operations effective immediately and told its employees that they were invited to apply for jobs with Nortrak. On January 8, 2004, the asset sale closed and, ultimately, Nortrak hired all but 40 of the Meridian employees at the plant. Plaintiff Robert Phason (“Phason”) and others sued Meridian for a violation of the WARN Act. Under the Act, an employer of at least 100 employees must give at least 60-days notice prior to a plant closing or mass layoff if 50 or more workers are affected. 29 U.S.C. §§ 2101-2102.

Meridian argued that there was no WARN Act violation because fewer than 50 Meridian employees ended up without jobs with Nortrak. *See* 29 U.S.C. § 2101. The District Court agreed with Meridian and dismissed the Complaint.

The Seventh Circuit disagreed and reversed the dismissal based on a literal reading of the statute. Judge Easterbrook began by noting that WARN applies to sellers once they sell their operations. 29 U.S.C. § 2101(b)(1) (“any person who is an employee of the seller . . . as of the effective date of the sale shall be considered an employee of the purchaser immediately after the effective date of the sale”). Notwithstanding the mid-December “handshake” agreement of Meridian to sell the assets of its Chicago Heights operations to Nortrak, there was an employment loss on December 31, 2003, as no sale occurred until the closing of the deal on January 8, 2004. As the employment loss occurred without the requisite 60-days notice, there was WARN Act liability. The fact that Nortrak gave many of the terminated employees of Meridian jobs was deemed irrelevant.

The Seventh Circuit acknowledged that had the asset sale closed just over one week earlier there would be no WARN Act liability. However, Judge Easterbrook provided two reasons for enforcing a literal reading of the statute. First, a deal is not done, until it officially closes. Thus, while the lapse in employment here was only eight days:

many a “done deal” turns out not to be “done” at all. . . . The WARN Act does not require employees to take business risks; employees’ entitlements depend on events as they are, rather than as employers hope they will turn out.

Second, WARN is a statute of arbitrary bright lines and the Congressional intent of the statute was that these bright lines would make the statute easier to administer. For example, the statute only applies to employers with 100 or more employees (not 99); an “employment loss” only occurs when 50 or more

workers (not 49) lose their jobs; and §2106(a)(6)(c) requires a reduction in hours of work of more than 50 percent (not 49 percent) during each month of any six month (not five month) period. Judge Easterbrook concluded that “these bright lines must be enforced consistently or they won’t work.”

Accordingly, the Seventh Circuit reversed the District Court’s judgment, and instructed it to award damages for a violation of WARN under § 2104(a) and to review again the issue of whether the class should be certified.

EDITORS’ NOTE:

When a company contemplates the sale of its business, it should consult with legal counsel to ensure compliance with the provisions of the WARN Act. As this case shows, the WARN Act is a strictly interpreted statute, and good intentions will not protect a company from WARN Act liability.

**NEW YORK • LOS ANGELES • WASHINGTON
BOSTON • BOCA RATON • NEWARK
NEW ORLEANS • PARIS**

Client Alert

Proskauer’s nearly 175 Labor and Employment lawyers are capable of addressing the most complex and challenging labor and employment law issues faced by employers. For more information about this practice area, contact:

Newark

John P. Barry
973.274.6081 – jbarry@proskauer.com

Harris S. Freier
973.274.3295 – hfreier@proskauer.com

New York

Gregory I. Rasin
212.969.3940 – grasin@proskauer.com

Washington, DC

Lawrence Z. Lorber
202.416.6891 – llorber@proskauer.com

Los Angeles

Anthony J. Oncidi
310.284.5690 – aoncidi@proskauer.com

Boca Raton

Allan H. Weitzman
561.995.4760 – aweitzman@proskauer.com

New Orleans

René E. Thorne
504.310.4090 – rthorne@proskauer.com

Boston

Mark W. Batten
617.526.9850 – mbatten@proskauer.com

Proskauer Rose is an international law firm that handles a full spectrum of legal issues worldwide.

You can also visit our Website at **www.proskauer.com**

This publication is a service to our clients and friends. It is designed only to give general information on the developments actually covered. It is not intended to be a comprehensive summary of recent developments in the law, treat exhaustively the subjects covered, provide legal advice or render a legal opinion.

© 2007 PROSKAUER ROSE LLP. All rights reserved. Attorney Advertising.