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Supreme Court Remands NLRB Successor Bar Case, Signaling Potential Changes to Board Deference Doctrine

Labor Relations Update on **December 20, 2024**

On December 16, 2024, the U.S. Supreme Court vacated a D.C. Circuit opinion in *Hosp. Menonita de Guayama, Inc. v. Nat'l Lab. Rels. Bd.*, 94 F.4th 1 (D.C. Cir. 2024) that upheld a decision by the National Labor Relations Board ("NLRB" or "Board") on the successor-bar doctrine, which precludes a new employer from withdrawing recognition from an incumbent union for at least six months after that employer assumes control from its predecessor. In remanding the case to the D.C. Circuit, the Supreme Court stressed it was doing so "for further consideration in light of" its recent landmark decision in *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024).

As we recently outlined here, *Loper Bright* overturned the 40-year-old *Chevron* doctrine, which required courts to defer to a federal administrative agency's reasonable interpretation of ambiguous statutes — and now requires courts to apply their own construction of the law.

Critically, the Supreme Court's decision to remand the case to the D.C. Circuit — which has jurisdiction over all appeals of NLRB decisions — could have implications far beyond the Board's successor-bar doctrine because its *Loper Bright* instruction to the D.C. Circuit may foreshadow future, sweeping changes to policy under the National Labor Relations Act ("NLRA" or "Act"). Specifically, it may portend a future review of other cases — including other Supreme Court decisions — predating *Chevron* that specifically instruct courts to defer to the NLRB when interpreting the NLRA.

Background

In June 2022, a divided NLRB held that a Puerto Rico hospital violated the NLRA by withdrawing recognition from an incumbent union representing health care employees that it inherited after acquiring the hospital. The NLRB held that the hospital violated the successor-bar doctrine because over the five months after the acquisition it declined to bargain in good faith with the union, which represented five bargaining units. The hospital then withdrew recognition from the union, which filed unfair labor practice charges with the NLRB.

In adopting an administrative law judge's findings and conclusions, the NLRB majority held that the hospital violated the successor-bar doctrine, which holds that an incumbent union is entitled to represent the employees in collective bargaining with their new employer for a reasonable period of time, i.e., between 6 months to 1 year, without challenge to its representative status.

In doing so, the NLRB majority reasoned that this successor-bar doctrine, from a 2011 NLRB decision, was a permissible interpretation of the NLRA that struck a reasonable balance between the "successor employer's and the employees' interests". That is because, according to the NLRB majority, the successor-bar doctrine protects collective bargaining during a vulnerable time for incumbent unions after a change in employer through an acquisition. The NLRB majority added that the successor-bar doctrine was appropriate because "the explicit policy of the National Labor Relations Act is to *promote* collective bargaining."

In dissent, former NLRB Member John Ring criticized this precedent and advocated returning to a 2002 NLRB decision, *In Re Mv Transp.*, 337 NLRB 770 (2002), which held that an incumbent union in a successorship case is "entitled to—and only to—a rebuttable presumption of continuing majority status, which will not serve as a bar to an otherwise valid decertification, rival union, or employer petition, or other valid challenge to the union's majority status."

Ring's dissent also emphasized that the successor-bar doctrine upheld by the NLRB majority "cannot be reconciled with the rationale of the Supreme Court's decisions in [*N.L.R.B. v. Burns Int'l Sec. Servs., Inc.*, 406 U.S. 272 (1972)] and [*Fall River Dyeing & Finishing Corp. v. N.L.R.B.*, 482 U.S. 27 (1987)]", which addressed successorship issues under the NLRA. Ring asserted that the NLRB should return to *In Re Mv Transp.* because it "would realign Board law with Supreme Court precedent and strike a proper balance between labor-relations stability and the right of employees freely to choose whether to be represented by a labor organization and, if so, which one, which is guaranteed them by Section 7 of the Act."

D.C. Circuit Decision

In February 2024, the D.C. Circuit upheld the NLRB majority's decision and declined the hospital's request to overturn the successor-bar doctrine in the 2011 Board decision. The D.C. Circuit held that "the Board's application of the successor bar rule was consistent with established Board precedent, permissible, and reasonable" and the ALJ's findings were rooted in "substantial evidence."

Citing precedent where the Supreme Court and lower courts have deferred to NLRB precedent, the D.C. Circuit rejected the hospital's dual argument that the Board's successor-bar doctrine was "unworthy of the deference normally afforded Board decisions, both because the Board precedent supporting the rule is fragile and because the successor bar rule contravenes Section 7 of the NLRA as well as the Supreme Court's decisions."

In so doing, the D.C. Circuit cited *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016), where the Supreme Court held that "[a]gencies are free to change their existing policies as long as they provide a reasoned explanation for the change." The D.C. Circuit rejected the hospital's argument that the NLRB's current successor-bar doctrine was improper under the NLRA because "the Board acted reasonably" and "our normal deference to reasoned Board policy choices applies."

In a concurring opinion, D.C. Circuit Judge Gregory Katsas relied on *Chevron* in upholding the NLRB's decision. Judge Katsas noted that the Board "could reasonably conclude that its current successor bar … does not by itself frustrate employees' section 7 rights … [a]ccordingly, I agree with my colleagues … that the current successor bar 'is within the scope of reasoned interpretation and thus subject to judicial deference under *Chevron*.'"

Judge Katsas concluded that he took "no position on whether the bar would survive under *de novo* review in a post-*Chevron* world."

Takeaways

A key question in the aftermath of the *Loper Bright* decision—which eliminated *Chevron* deference—has been the impact on judicial interpretation of NLRB decisions interpreting ambiguous statutory questions. Just days after *Loper Bright*, the D.C. Circuit, in *Hosp. de la Concepcion v. Nat'l Lab. Rels. Bd.*, 106 F.4th 69 (D.C. Cir. 2024), which we covered here, reaffirmed the "very high degree of deference" it would grant the NLRB.

However, in light of the Supreme Court's vacatur and remand in *Hosp. Menonita de Guayama*, the D.C. Circuit—which has jurisdiction over every NLRB decision—likely will be compelled to revisit this question, and it may reach a different conclusion. Ultimately, the Supreme Court may have to directly answer the question of the level deference afforded to NLRB decisions in light of *Loper Bright*.

If the existing deferential standard that courts now provide NLRB decisions is meaningfully reduced, then this would have a stark impact on how Board cases are litigated, such that parties may proceed to court more frequently to overturn agency decisions with which they disagree.

We will monitor the D.C. Circuit's eventual decision in *Hosp. Menonita de Guayama*—and rulings from other federal appellate courts addressing what degree of deference, if any, the NLRB should receive post-*Chevron*—as well as Board actions to see how *Loper Bright* ultimately shapes federal labor law.

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