STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

PROVIDENCE, Sc. **DISTRICT COURT**
SIXTH DIVISION

Charles Fogarty, Director,	:	
Department of Labor and Training	:	
	:	
v.	:	**A.A. No. 12 - 227**
	:	
Department of Labor and Training,	:	
Board of Review and	:	
Rosciti Construction Co., LLC	:	

O R D E R

This matter is before the Court pursuant to § 8-8-8.1 of the General Laws for review of the Findings & Recommendations of the Magistrate.

After a de novo review of the record, the Court finds that the Findings & Recommendations of the Magistrate are supported by the record, and are an appropriate disposition of the facts and the law applicable thereto. It is, therefore,

ORDERED, ADJUDGED AND DECREED,

that the Findings & Recommendations of the Magistrate are adopted by reference as the Decision of the Court and the decision of the Board of Review is AFFIRMED.

Entered as an Order of this Court at Providence on this 27th day of September, 2013.

By Order:

/s/
Stephen C. Waluk
Chief Clerk

Enter:

/s/
Jeanne E. LaFazia
Chief Judge

STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS
PROVIDENCE, Sc. **DISTRICT COURT**
SIXTH DIVISION

Charles J. FOGARTY, DIRECTOR, of the Department of Labor and Training	:	
v.	:	**A.A. No. 12 - 227**
Department of Labor and Training, BOARD OF REVIEW, and ROSCITI CONSTRUCTION CO., LLC	:	

F I N D I N G S & R E C O M M E N D A T I O N S

Ippolito, M. In this case the Department of Labor and Training urges that the Board of Review erred when it held that Rosciti Construction Co., LLC was not a successor employer to South Shore Utilities Contractors, Inc., even though Rosciti Construction's workforce was almost exclusively comprised of former employees of South Shore Utilities. The Board's decision reversed an earlier ruling of the Division of Taxation holding that Rosciti would be charged an unemployment tax rate largely predicated on South Shore's unemployment experience.

Jurisdiction for the judicial review of decisions of the Board of Review is

vested in the District Court by Gen. Laws 1956 § 28-44-52. This matter has been referred to me for the making of Findings and Recommendations pursuant to § 8-8-8.1 of the General Laws. For the reasons that follow, I must recommend that the decision of the Board of Review be affirmed.

I.

FACTS & TRAVEL OF THE CASE

Mr. Henry Rosciti, Jr. and Mr. Arthur Rosciti, Jr. owned a firm known as South Shore Utilities (the primary business of which was digging trenches for utility lines) operated for several years until it entered receivership in the first quarter of 2006. The receiver sold its assets and laid off its employees. At about this time, a new business was created under the rubric Rosciti Construction Co., LLC., by Messrs. Henry Rosciti, Sr. and Arthur Rosciti, Sr. (fathers of the previously named gentlemen). Its workforce — in large part — was composed of former South Shore workers.

On April 24, 2007, the Employer Tax Section of the Division of Taxation issued a determination that Rosciti Construction was a "successor employer." The determination letter did not name the "predecessor employer" whose existence it implied; neither did it provide a rationale for the ruling. It did, however, inform Rosciti of three consequences that would follow from the decision.

First, it would receive a credit for wages paid to its employees by its

(unnamed) predecessor during 2007.[1] Second, it would be assigned the experience rating of its predecessor — an ominous declaration for Rosciti since South Shore Utilities had expired in receivership after discharging its workers. Third, the Tax Division explained that if Rosciti was already an employer when it acquired its predecessor, it could pay unemployment taxes at the rate already assigned to it or the rate assigned to its predecessor; if not, it would pay its predecessor's rate. In either case the next year's rate would be calculated on the basis of the combined payroll records of Rosciti and its predecessor.

Rosciti Construction filed a timely appeal and a hearing was held by the Board of Review on October 3, 2007. The firm presented the testimony of Mr. Henry Rosciti, Sr. and a CPA, a Mr. Palumbo. Two Tax Division officials testified on behalf of the Department. Both Rosciti and the Department were represented by counsel.

For reasons undisclosed in its opinion, the decision of the Board of Review was not issued until October 11, 2012, over five years later. In that decision the following facts were found:

Testimony at the hearing established that a company known as South

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[1] This was potentially beneficial to Rosciti because unemployment taxes are not paid on all wages — merely the first $ 14,000 [at the time of these events]. So, if South Shore had paid Employee X $ 14,000, Rosciti would not have to tender more contributions. For an explanation of how this principle works in practice, see Imperial Products Co. v. Employment Security Board of Review, Department of Employment Security, 576 A.2d 1210, 1212 n. 1 (R.I. 1990).

> Shore Utilities filed for receivership in the first quarter of 2006 and subsequently laid off approximately twenty-five employees. A majority of these individuals were later hired by Rosciti Construction, the Taxpayer/Employer in this matter, under different management and control from that of South Shore. Assets of South Shore remained in control of a receiver.
>
> The Employer Tax Section determined that Rosciti was a successor employer for employment tax purposes to South Shore based solely on a "transfer" of a majority of employees to Rosciti.

Decision of Board of Review, October 11, 2012, at 1. Based on these circumstances the Board arrived at the following conclusion:

> Considering all the factors: No transfer of assets, no continuity of management or control, and the receivership status of South Shore, the Board finds that Rosciti Construction is not a successor employer under the relevant Statutes and is entitled to the new employer tax rate for employer tax purposes.

Id. On the basis of these conclusions the Department's finding (that Rosciti was a "successor employer" to South Shore) was reversed. Id., at 2.

The Department filed its appeal in this Court on November 7, 2012. Thereafter, on February 20, 2013, a conference was held by the undersigned at which a briefing schedule was set. Since then, memoranda have been received from the Department and from Rosciti Construction; the Board of Review has joined in the latter.

II.

APPLICABLE LAW

This case involves the application of the following provision of the Rhode

Island Employment Security Act, which specifically employer tax rates. General Laws 1956 § 28-43-10 provides:

> **28-43-10. Application of predecessor's payroll record to successor employer. --** (a)(1)(i) Whenever any employing unit in any manner succeeds to, or has succeeded to, or acquires, or has acquired, the organization, trade, separate establishment (provided separate payroll reports have been filed with the director for the separate establishment), or business, or substantially all the assets thereof, and whenever the successor was not prior to that acquisition an employing unit as that term is defined in § 28-42-3(16) of another which at the time of the acquisition was an employer subject to chapters 42 --44 of this title, the predecessor employing unit shall be deemed to have relinquished all rights to have its prior payroll records … used for the purpose of determining experience rates of employer contributions for that predecessor, and the director shall use those prior payroll records for the purpose of determining experience rates of employer contributions for that successor. …

As one can readily see, a business can be declared a "successor employer" if it: (a) succeeded to or acquired a business or an organization or a trade or a separate establishment; or (b) acquired substantially all of the assets of a business or trade or organization.

While subdivision (1) is stated broadly, employing various phrases to encompass many types of business transfers, they are all consistent in one respect — they all describe circumstances involving the full transfer of a commercial enterprise.

The Supreme Court has interpreted § 23-43-10 but once — in C & J Jewelry Co., Inc. v. Department of Employment and Training, Board of Review, 702 A.2d

384 (1997). In C & J Jewelry our Supreme Court, borrowing from a 1984 Minnesota case, enumerated seventeen factors to be considered in determining whether a business has, pursuant to subdivision 10(a)(1), acquired substantially all the assets of another company:

> In answering this question, other courts have looked to many factors. Chief among these considerations "are whether the purported successor purchased, leased, or assumed the (1) machinery and manufacturing equipment, (2) office equipment, (3) corporate name, (4) inventories, (5) covenant not to compete, (6) possession of premises, (7) goodwill, (8) work in progress, (9) patent rights, (10) licenses, (11) trademarks, (12) trade names, (13) technical data, (14) lists of customers, (15) sales correspondence, (16) books of accounts and/or (17) employees." Mid-America Festivals Corporation v. Commissioner of Department of Economic Security, 349 N.W.2d 270, 274 (Minn.1984).

C & J Jewelry, supra, 702 A.2d at 386. Strictly speaking, the factors enumerated in C & J Jewelry are relevant only when determining whether the successor has acquired "substantially all the assets" of its putative predecessor. Our Supreme Court has not ruled these factors material when determining whether one company has succeeded to the business or trade or organization of another.[2] And so, since

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[2] There is some indication that the C & J Jewelry's 17-factor test may come to be used for broader purposes.

The Court gave rise to this inference when it noted that C & J Jewelry "continued the same basic operations of [its predecessor]." 702 A.2d at 386. In adopting this holistic approach, the Court followed the lead of the Minnesota Court in Mid-America Festivals, supra. Although the Court applied the 17-prong test, which it had taken from an Illinois case, it stated that the core issue is whether the successor business is continuing the "fundamental character or identity of the predecessor's business." 349

the Department does not allege that Rosciti acquired "substantially all the assets" of South Shore, we will proceed under the assumption that the C & J Jewelry factors are not (at least in the form presented therein) relevant to our current inquiry.

We must also keep in mind that the Court in C & J Jewelry addressed a situation where a total replacement of one company by another was alleged. But, employer tax rates may also be affected by less-than-complete (or partial) transfers between companies, as provided in subdivision (2) of subsection 10(a):

> (2) A successor to any portion of the business of its predecessor shall have its rate determined based on its own unemployment experience combined with that portion of the predecessor's unemployment experience to the share of the trade or business transferred to the successor….

Regarding subdivision (2), I would, at this juncture, pause only to identify an issue we shall consider at length in this opinion: What does the word *portion* mean in the context of this statute — does it reference any elements of the prior firm, however small or diverse, or does it only denote a discrete or distinguishable part of the predecessor firm?

> N.W.2d at 274. This would seem to imply that the C & J Jewelry criteria may also be deemed germane to the other questions which arise under subdivision 28-43-10(a)(1) — i.e., whether one company has acquired or succeeded to the organization, trade, establishment or business of another.

III.

STANDARD OF REVIEW

The standard of review to be applied in appeals from decisions of the Board of Review is provided by Gen. Laws 1956 § 42-35-15(g), a subsection of the state Administrative Procedures Act, which provides as follows:

> **42-35-15. Judicial review of contested cases.**
> …
> (g) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings, or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
> (1) In violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority of the agency;
> (3) Made upon unlawful procedure;
> (4) Affected by other error of law;
> (5) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Thus, on questions of fact, the District Court "* * * may not substitute its judgment for that of the agency and must affirm the decision of the agency unless its findings are 'clearly erroneous.' "[3] The Court will not substitute its judgment

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[3] Guarino v. Department of Social Welfare, 122 R.I. 583, 584, 410 A.2d 425 (1980) citing Gen. Laws 1956 § 42-35-15(g)(5).

for that of the Board as to the weight of the evidence on questions of fact.[4] Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.[5]

In Harraka v. Board of Review of Department of Employment Security, 98 R.I. 197, 200, 200 A.2d 595, 597 (1964), the Supreme Court of Rhode Island recognized that a liberal interpretation should be utilized in applying the Employment Security Act:

> * * * eligibility for benefits is to be determined in the light of the expressed legislative policy that "Chapters 42 to 44, inclusive, of this title shall be construed liberally in aid of their declared purpose which declared purpose is to lighten the burden which now falls upon the unemployed worker and his family." G.L. 1956, § 28-42-73. The legislature having thus declared a policy of liberal construction, this court, in construing the act, must seek to give as broad an effect to its humanitarian purpose as it reasonably may in the circumstances. Of course, compliance with the legislative policy does not warrant an extension of eligibility by this court to any person or class of persons not intended by the legislature to share in the benefits of the act; but neither does it permit this court to enlarge the exclusionary effect of expressed restrictions on eligibility under the guise of construing such provisions of the act.

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[4] Cahoone v. Board of Review of Department of Employment Security, 104 R.I. 503, 246 A.2d 213 (1968).

[5] Cahoone, supra, n. 4, 246 A.2d at 215. See also D'Ambra v. Board of Review, Department of Employment Security, 517 A.2d 1039, 1041 (R.I. 1986).

IV.

ANALYSIS

The issue before the Court is whether the Board of Review's decision —that Rosciti Construction was not a successor employer to South Shore within the meaning of § 28-43-10 — was supported by reliable, probative, and substantial evidence in the record and whether or not it was clearly erroneous or otherwise affected by error of law. The Department has urged that this case must be decided in its favor on the basis of a single, albeit uncontested fact — that Rosciti's workforce was composed (almost totally) of former South Shore employees.

We shall begin our analysis with an exposition of the facts of this case to confirm, if we can, that the Board of Review's findings — which are accepted by the Department — are indeed well-supported by the evidence of record.[6]

A

THE FACTS OF THE CASE

At the hearing held by the Board of Review the Department of Labor and Training began its case by calling Mr. Phillip D'Ambra, Principal Revenue Agent in the Employer Tax Unit of the Division of Taxation. See Board of Review Hearing Transcript, at 3 et seq. He explained that Rosciti Construction was declared to be a partial "successor employer" to South Shore Utlities after he ran a program that

[6] See Department's Memorandum of Law, at 6.

tracks the movement of employees. Board of Review Hearing Transcript, at 4-5, 9-13, 18-19. It showed that (a) 25 of South Shore's 28 employees during the first quarter of 2006 later worked for Rosciti and (b) 95 % of the wages paid by South Shore were paid to employees who worked for Rosciti during the second quarter. Id., at 22. But, he had no knowledge of how Rosciti came to acquire South Shore's workforce. Id.

Mr. D'Ambra freely conceded that he did not perform an audit of either South Shore Utilities or Rosciti Construction. Board of Review Hearing Transcript, at 17. Also, he did not determine the principals of either company; accordingly, he did not know if there was common ownership. Id., at 18. Moreover, he had no information regarding whether Rosciti acquired the physical or intangible assets of South Shore. Id., at 21.

The Department's next witness was Mr. Ken Iavarone, Chief of the Employer Tax Section of the Division of Taxation. Board of Review Hearing Transcript, at 25 et seq. He echoed Mr. D'Ambra's testimony, making it clear that he was not asserting that South Shore and Rosciti were under the same control. Id., at 31. Most significantly, he testified that Rosciti was given a new employer contribution rate — which was 95% based on South Shore's rate — solely based on the fact that 95% of South Shore's workers migrated to Rosciti Construction. Id., at 27.

Rosciti Construction then presented the testimony of a Mr. Palumbo, a Certified Public Accountant (CPA), (whose first name is not given in the transcript). Board of Review Hearing Transcript, at 51 et seq. He testified he had been hired by South Shore's court-appointed receiver, Mr. Jonathan Savage, as a financial advisor to the receivership, with an emphasis on evaluating the assets. Id., at 52-53. He described the failure of his efforts to find assets that could be liquidated to save the firm. Id., at 53-55. As a result, he advised the receiver to cease operations. Id., at 55.

The machinery owned by South Shore was sold at auction by a Mr. Petrowsky to many parties. Board of Review Hearing Transcript, at 58-59. Regarding South Shore's workforce, he explained that they were terminated, and not in any way placed or transferred to Rosciti. Id., at 61-62.

Finally, Mr. Henry Rosciti Sr. testified. Board of Review Hearing Transcript, at 65 et seq. He gave a history of his involvement in the construction industry in Rhode Island. Id., at 66-70. He also testified that Rosciti Construction bought some pieces of equipment from the receivership at the auction. Id., at 71. He also said that his workforce was acquired through the union, and not directly from South Shore or the receiver. Id., at 74. Finally, he testified that his son and nephew, although employees of Rosciti, had no management control. Id., at 72.

B

THE BOARD OF REVIEW'S DECISION AND THE POSITIONS OF THE PARTIES.

Having assembled the facts of record, we will now enumerate the positions of the parties, as they are reflected in the decision of the Board of Review and the memoranda filed by the Department and Rosciti Construction.

1

The Board of Review's Decision.

As quoted above, supra at 4, the Board of Review rested its decision on the fact that Rosciti Construction had carried forth neither the management nor the physical assets of South Shore. It therefore found Rosciti was not a successor to South Shore.

2

The Department's Position.

In its Memorandum of Law the Department asserts — relying on subsection (2) of section 28-23-10 — that Rosciti was a partial successor to South Shore and that a partial transfer is sufficient to trigger an adjustment to a company's experience rating. See Department's Memorandum of Law, at 3-6.

The Department presents a simple legal syllogism —

It begins with a quotation from § 28-43-10(a)(2), particularly its rule that an employer's unemployment tax rate can be affected if it becomes "[a] successor to

any portion of the business of its predecessor." Department's Memorandum of Law, at 4. It then equates the transfer of employees with the transfer of a business, citing C & J Jewelry in support. Id. Next, it cites the phrase in § 28-43-35 that a transfer of a portion of a business is sufficient to trigger a rate adjustment. Finally, it cites the definition contained in subdivision 28-43-35(f)(2) for the proposition that the "trade or business" of a company can include its workforce. Id.[7]

Relying on these points of law and invoking elements of logic, the Department argues that the lack of common ownership between South Shore and Rosciti (a precondition to the invocation of section 35) does not preclude an adjustment based on other (unspecified) sections of the law — presumably subdivision 28-43-10(a)(2). Department's Memorandum of Law, at 6.

3

The Position of the Rosciti Company.

The Rosciti Construction Company has argued in its memorandum that the Department's position is without basis in law.

Rosciti begins by asserting that the facts found by the Board of Review are well-supported in the record. Employer's Memorandum of Law, at 4-5.

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[7] Although section 35 is largely irrelevant in the instant case (since the Department does not allege South Shore and Rosciti shared common ownership) the definition is — by its terms — applicable to all of Chapter 28-43.

Next, Rosciti Construction argues that a transfer of employees, without more, cannot justify an experience rating transfer. Employer's Memorandum of Law, at 5-9. In support of this argument, Rosciti proffers several subordinate points —

First, § 28-43-35 is inapplicable to the instant case because there was no assertion of common ownership. Id., at 6. Second, the employer urges that the Department's reliance on subdivision 28-43-10(a)(2) is misplaced because it, unlike subdivision 28-43-10(a)(1), contains no standard for determining whether a company is a "successor employer"; instead, it assumes such a finding has already been made — pursuant to subdivision 28-43-10(a)(1). Id., at 7. Otherwise, Rosciti argues, §§ 28-43-10(a)(1) and 28-43-35 would be rendered meaningless. Id. Third, Rosciti Construction argues that the definition of "trade or business" cannot be invoked because neither the definition nor the phrase appears in § 28-43-10. Id., at 8.[8]

[8] However, this last argument can be readily dismissed without further ado. Rosciti's position is simply wrong: first, because the definition is expressly made applicable to all of Chapter 28-43; and, second, because the phrase does indeed appear in subdivision 28-43-10(a)(2) — as quoted by Rosciti Construction on page six of its memorandum.

C

EVALUATION OF THE ISSUES

1

Successor Rates — The Prior Rhode Island Law.

Historically, the issue of whether a business should bear the burdens (and reap the benefits) of having its unemployment tax rates affected by the experience of a prior firm was considered under one section of the Employment Security Act: Gen. Laws 1956 § 28-43-10.[9] To be regarded as a "successor employer" under subdivision 10(a)(1) a company had to have acquired all of a business (that is, as a going concern) or "substantially all" of its assets. In other words, virtually the whole company had to be transferred. In its original incarnation, subdivision 10(a)(2) required a majority of the business to be transferred for the successor's tax rate to be affected.

But the legal landscape for rate issues changed in two ways in 2005 — first, subdivision 10(a)(2) was amended to allow a rate alteration when any portion of a business has been transferred[10] and second, a new section was added to the Act

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[9] Section 10 — or at least that part of it that we now know as subdivision 10(a)(1) — was first enacted in P.L. 1947, ch. 1923, art. 1, § 1 and was originally codified at P.L. 1938, ch. 284, § 5. Subdivision 10(a)(2) was first enacted in P.L. 1985, ch. 372, § 1.

[10] Previously, subdivision 10(a)(2) was limited to situations where a majority of the business was transferred. See n. 9, supra at 16.

which governs the rate implications of business transfers to an entity under common ownership or control.[11] See P.L. 2005, ch. 290, §§ 1, 2. Since the Department has not alleged common ownership between South Shore Utilities and Rosciti Construction, section 35 is largely irrelevant to the resolution of this case. And because the Department has relied on subdivision 10(a)(2) as its authority for finding that South Shore and Rosciti had a predecessor–successor relationship, we shall focus our attention there.

2

Partial Transfers of Businesses and Subdivision 28-23-10(a)(2).

Because I believe it to be essential to the proper resolution of the issue before the Court, I shall once again present subdivision 28-23-10(a)(2) — laying it out, as it were, for inspection:

> (2) A successor to any portion of the business of its predecessor shall have its rate determined based on its own unemployment experience combined with that portion of the predecessor's unemployment experience to the share of the trade or business transferred to the successor …

Now, as the Department accurately references, the term "trade or business" is defined in Gen. Laws 1956 § 28-23-35(f)(2) to include the "employer's workforce." So, let us now restate the provision, inserting "employer's workforce" where "trade or business" previously was found, as the definition would seem to authorize:

[11] This second section was codified as Gen. Laws 1956 § 28-43-35.

> (2) A successor to any portion of the business of its predecessor shall have its rate determined based on its own unemployment experience combined with that portion of the predecessor's unemployment experience to the share of the employer's workforce transferred to the successor[12] … (footnote and emphasis added)

In my view the issue to be decided in this case is whether the phrase "any portion of the business of its predecessor" in subdivision 28-43-10(a)(2) can denote a mere migration of employees or whether it means that a segment of the enterprise must also be transferred. The former, which we may designate the broader view, is espoused by the Department; the latter, which we may describe as the narrow view, was adopted by the Board of Review and is in this case embraced by Rosciti Construction. For the reasons that follow, I believe the latter more correctly reflects the intent of the General Assembly — and so I shall recommend its adoption by this Honorable Court.

3

Interpreting and Applying Subdivision 28-23-10(a)(2).

For three separate reasons I believe the narrower view is the correct interpretation. Each has its origins in the plain meaning of a single word found in subdivision 28-23-10(a)(2).

[12] Note that I have substituted the definition "employer's workforce" for "trade or business" but not for "business." I am treating them as a couplet, as they are used at the end of this paragraph and on several occasions in Gen. Laws 1956 §

a

Rosciti Construction Was Not a Successor Business to South Shore Utilities

Even as rephrased, supra at 18, subdivision 10(a)(2) can only be invoked when a portion of a business has been transferred. If this prerequisite has been satisfied, the number of employees that have transferred from the predecessor to the successor can be used as a gauge to measure the extent of the transference. But, to reiterate, a portion of the business must have been transferred.

And what makes up a business? It has been stated that a business is "everything that went to make up (the) complete and integrated employing enterprise."[13] In the case sub judice, there are no facts of record upon which we may find that Rosciti Construction was a successor to the business, the commercial enterprise, previously conducted by South Shore Utilities; the Department does not even assert that it took over any part of South Shore's ongoing business. And the record, particularly through the testimony of Mr. Palumbo, confirms this. To be blunt, according to Mr. Palumbo, South Shore had no ongoing business worth anything.

28-43-35.

[13] See Conference Resource Specialists of Arizona, Inc. v. Department of Economic Security Appeals Board, 199 Ariz. 314, 318, 18 P.3d 108, 112 (2001).

b

No Part of South Shore's Business Was Transferred to Rosciti

To fall within the ambit of subdivision 28-43-10(a)(2), the partial predecessor must have transferred a portion of its business to its successor. Perhaps because South Shore was ending as Rosciti was starting up, these circumstances give off an aura of a "handoff" of the complete business from one company to another. But according to Mr. Palumbo, South Shore did no such thing and neither did the receiver, in its stead.

c

Rosciti Did Not Acquire Any Portion of South Shore's Business

Even if we were to assume, arguendo, that Rosciti Construction, by hiring many of South Shore's employees, can be seen to have assumed a part of South Shore's business, it did not take over a portion of it, as that term is used in section 28-23-10(a)(2). Now, there is certainly no question that a large percentage of Rosciti's workers had worked for South Shore. But I don't believe that — at least in this context — the terms percentage and portion are equivalent.

These terms may be equivalent if we are referring to jelly beans in a jar or, to use a more apt comparison, a pile of gravel. Each is a whole made up of fungible parts. If we purchase a cubic yard of gravel, it matters not from which part of the pile it was drawn.

But the parts of a business are not similarly fungible. Indeed, they may serve different purposes — such as manufacturing, distribution, or retail. They are likely staffed by employees with different skills and kinds of expertise, using different sorts of equipment and machinery. And so, I believe that, as used within subdivision 28-43-10(a)(2) in the context of a commercial enterprise, the word "portion" denotes that a distinguishable part of the business was transferred from the predecessor firm to the successor.

We can see this principle in the (pertinent) definitions of "portion" found in the most commonly relied-upon dictionaries —

- from the Webster's Third New International at 1768: **3a :** a part of a whole <~s of this park are particularly well-adapted for picnic and camping purposes — *Amer. Guide Series: Md.*>
- from the Random House Webster's Unabridged Dictionary (Second Edition) at 1507: **1.** a part of any whole, either separated from or integrated with it: *I read a portion of the manuscript*.
- From the American Heritage Dictionary (5th edition) at 1373: **1.** A section or quantity within a larger thing: a part of a whole.

Note that the first two definitions contain usage examples, each of which carries implications that the "portions" being referenced constitute a cohesive unit unto themselves — i.e., (a) each part of the park best used for camping must, to be

useful, be contiguous unto itself, providing its visitors an opportunity to set up their tents and camping equipment in a sufficient area for comfort and enjoyment, and (b) the part of the manuscript which was read might have been the opening chapters or it may have consisted of a few pages here and a few pages there, but was not likely to have been made up of random sentences. And we should also note that in the final definition the word "section" is used, which carries the implication that, to be a "portion," the part must be a distinguishable from the greater whole. And so, on the basis of these references I conclude that the phrase "any portion of the business" [of the predecessor company] can only be satisfied when the part acquired is a distinguishable part, a cohesive unit, of the business.

In the real world this standard can be satisfied in a myriad of ways, too numerous to enumerate here. Hopefully, a few examples will suffice to demonstrate how the narrow reading of subdivision 28-43-10(a)(2) would play out in practice.

- A baking company with both manufacturing and retail divisions sells the latter;
- A retail chain with stores in seven states sells off its stores in three;
- A manufacturing firm which makes different kinds of appliances in different locations sells off its factories which make refrigerators but keeps all those which produce washers, dryers, and dishwashers;

If we give the word "portion" its appropriate meaning, these examples all make perfect sense. The parts of the businesses cited all possess an identifiable cohesion — by function, geographically, and by product. But under the Department's view, these samples would be rendered meaningless. Every bit of a company, its machinery, plants, the migration of any number of employees (and perhaps the remainder of the factors in the C & J Jewelry test) would be acquired with a hidden bonus — a pro rata adjustment to the buyer's contribution rate dependent on the seller's rate. And this would occur with or without a concomitant transfer of a part of the predecessor's business. In the circumstances likely to be extant, this could be disastrous.

For instance, let us assume our baking company did not sell its retail division, but just closed its shops in the face of mounting financial losses. Under the Department's interpretation, any bakery store which hired any of these workers would be liable for a pro rata unemployment tax rate adjustment. And workers who had been laid off from a failing business (which had been diminishing its workforce) would carry a particular disincentive to being hired, since the contribution rate of their former employer might well have been increasing over time as the business downsized. Indeed, they might well become unemployable. Undoubtedly, such an outcome must be viewed as anathema to the Department of Labor and Training, whose first duty is to assist our citizens in finding work —

paying out unemployment insurance is a secondary duty, to be exercised only when necessary to worthy applicants.

And because there is no floor to the application of subdivision 10(a)(2), a business could have its rate adjusted every time it hired a single new worker. This application, which might seem to be an example of *reductio ad absurdum,* is nevertheless within the Department's view of the law. This result flows as a natural consequence if the linkage between the migration of employees and the transfer of a part of a commercial enterprise is severed.

It is disappointing that although this case concerns an issue which may arise in many of our sister states, neither memorandum received by this Court references a single case from around the nation as non-binding precedent on this issue — i.e., may a business be found to be a successor business for purposes of the unemployment system where no part of its commercial enterprise was transferred only employees. I find no fault in this since my own research has revealed but one, Conference Resource Specialists of Arizona, Inc. v. Department of Economic Security Appeals Board, 199 Ariz. 314, 318, 18 P.3d 108, 112 (2001), and it may be distinguished as being based on different statutory language.[14] In Conference

[14] Where our statute references a "portion" of the business, Arizona's A.R.S. § 23-733(B) references the acquisition of "a distinct and severable portion" of an organization, trade, or business See also Arkansas' Ark. Code Ann. § 11-10-710(b)(1), which requires "a segregable and identifiable portion of the business of any employer" be transferred if a (partial) predecessor-successor relationship

Resource Specialists the Arizona Supreme Court affirmed rulings of its Tax Court and unemployment Appeals Board which held that a predecessor–successor relationship could not be found where a conference center transferred all of its employees to a new entity which would manage and operate the hotel and pay their wages with the hotel's funds. CRS, supra, 199 Ariz. at 315, 18 P.3d at 109. The Court emphasized that it was not sufficient for the new firm to succeed to just the staff, it also had to acquire part of the "organization, trade, or business." Id., at 318, at 112. As the Court commented — "The Hotel staff did not constitute 'all' of Owner's 'employment generating enterprise upon which the experience rating account was primarily established.' The staff was the 'employment' but not the enterprise that generated it." Id.

For all these reasons I find that the phrase "any portion of the business" requires that part of the commercial enterprise be transferred, not merely the

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is to be proven; quoted in Williams, Director of the Arkansas Employment Security Department v. Wayne Farms LLC, 368 Ark. 93, 99, 243 S.W.3d 316, 321 (2006).

In spite of the difference in the language employed, I do not view these statutes as inapposite to our own. The language in these statutes is, to some extent, tautological — exhibiting a "belt and suspenders" approach to draftsmanship. But the legislature, when crafting legislation, is entitled to employ redundancies to insure the intended meaning of a phrase will be grasped. But I am convinced, for the reasons stated above, that the General Assembly's use of the word "portion" conveys the same sense and meaning as these more prolix provisions — that one company cannot be determined to be even the partial successor of another under the unemployment act unless it has acquired a minimally distinguishable part of its predecessor's business.

workforce, if a partial rate revision under subdivision 28-43-10(a)(2) is to be triggered. And so in the instant case there cannot be a finding that Rosciti Construction was a partial successor to South Shore, since, according to the uncontradicted testimony, South Shore transferred no portion of its business to Rosciti.

d

RESOLUTION

And so, because the record is devoid of evidence showing that South Shore transferred any portion of its business to Rosciti, I believe the Board of Review's decision — holding that the Department did not prove that Rosciti Construction was a successor employer to South Shore Utilities — was supported by the reliable, probative and substantial evidence of record.

Pursuant to Gen. Laws 1956 § 42-35-15(g), the decision of the Board must be upheld unless it was, inter alia, contrary to law, clearly erroneous in light of the substantial evidence of record, or arbitrary or capricious. When applying this standard, the Court will not substitute its judgment for that of the Board as to the weight of the evidence on questions of fact.[15] Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a

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[15] Cahoone v. Board of Review of the Department of Employment Security, 104 R.I. 503, 246 A.2d 213 (1968).

contrary result.[16] The scope of judicial review by the Court is also limited by General Laws section 28-44-54 which, in pertinent part, provides:

> **28-44-54. Scope of judicial review – Additional Evidence – Precedence of proceedings. –** The jurisdiction of the reviewing court shall be confined to questions of law, and in the absence of fraud, the findings of fact by the board of review, if supported by substantial evidence regardless of statutory or common law rules, shall be conclusive.

However, in this case, the facts are not in dispute. The factual record is based on a stipulation worked out by the parties.

Before the Court is a simple question of law. Is Rosciti Construction's hiring of many of South Shore's former employees sufficient, per se, to support a finding that Rosciti Construction was a successor corporation to South Shore Utilities? For the many reasons stated above, I conclude it is not.

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[16] Cahoone, supra n. 15, 246 A.2d at 215. See also D'Ambra v. Board of Review, Department of Employment Security, 517 A.2d 1039, 1041 (R.I. 1986). And see Gen. Laws 1956 § 42-35-15(g), supra at 8-9 and Guarino, supra at 9, n. 3.

V.

CONCLUSION

Upon careful review of the evidence, I recommend that this Court find that the decision of the Board of Review was not affected by error of law. Gen. Laws 1956 § 42-35-15(g)(3),(4). Further, it is not clearly erroneous in view of the reliable, probative and substantial evidence on the whole record or arbitrary or capricious. Gen. Laws 1956 § 42-35-15(g)(5),(6).

Accordingly, I recommend that the decision of the Board be AFFIRMED.

/s/
Joseph P. Ippolito
MAGISTRATE

SEPTEMBER 27, 2013