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617.523.6150

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973.824.3225

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412.471.0690

www.seiu32bj.org

September 28, 2021

Chairperson Rep. David Cicilline
House Subcommittee on Antitrust, Commercial, and Administrative Law
2141 Rayburn House Office Building
Washington, D.C. 20515

Re: Testimony submitted to the Subcommittee on Antitrust, Commercial, and Administrative Law; Reviving Competition, Part 4: 21st Century Antitrust Reforms and the American Worker

Dear Chairperson Cicilline,

32BJ SEIU is the largest building service worker union in the country with approximately 165,000 members in 11 states and Washington D.C. We write to urge the House Judiciary Committee to pursue legislation that addresses the various sorts of anti-competitive practices that are harming American workers, consumers, and businesses. We wish to highlight the issue of no-poach/no-hire agreements in the building services sector. This sector includes workers employed as doorpersons, concierge, cleaners, security officers, and other building maintenance workers. These workers may be employed directly by the commercial or residential building owner ("in-house" employment) or may be employed by building service contracting companies ("contracted out" employment). No-poach/no-hire agreements come into play when a building owner or manager seek to terminate a building service contractor. These agreements prohibit the building owner from hiring the incumbent workers directly or from reemploying them at the building through a successor contractor unless the building pays substantial damages to the incumbent contractor. No-poach/no-hire agreements in building service harm the employees and the building owners, residents and tenants while stifling competition.

Generally, when a contractor loses work, workers seek to remain at the same place of employment where they have transportation to work, have a suitable shift, are familiar with their coworkers and tenants and know the peculiarities of the building. Generally, buildings want to retain the experienced, reliable and trusted workers who have often developed a personal relationship with the residents/tenants. In Eastern Essential Services, 363 NLRB No. 176, slip op. (2006), Jeffrey Edelstein, a consultant with 45 years for experience in the field of janitorial services , testified that a new cleaning contractor would want to hire the incumbent employees. Such reasons include (a) the benefit of having an experienced work crew familiar with the building and its tenants already at the site ready to begin work immediately (b) the belief that a crew of long tenure is honest and trustworthy (c) the benefit of having a system in place to transport the workers to the building, and (d) the benefit of not

having the additional expense of training and doing background checks for new employees.

Case law supports the logic of hiring the incumbents. The employer in *Systems Management,* 292 NLRB at 1096, *enf'd in relevant part* 901 F.2d 297 (3rd Cir. 1990), conceded "the objective advantage of retaining predecessor employees particularly because of their familiarity with the building which was a totally new account." In *Pressroom Cleaners,* the employer admitted that it normally hires the predecessor's employees and it would have been "easier" to do so. 361 NLRB at 29.

A no-poach/no-hire incentivizes the building owner to deny employment to these workers to avoid paying damages to the incumbent contractor. For example, Planned Companies, a subsidiary of the publically traded, multi-national corporation First Service, is a dominant residential building service contractor in New Jersey. Planned includes a no-poach/no-hire agreement in its service contracts with its building owners and building management companies, which it calls a "restrictive covenant." This restrictive covenant requires a building to pay Planned three months of salary for each Planned employee who works at the building, whether as an in-house or contracted out employee. Remarkably, this restriction continues for six months after Planned's contract terminates. As a result, building managers face a difficult choice if they wish to terminate Planned. The building must either lose its entire staff or pay Planned a ransom. Some buildings are no doubt discouraged from terminating Planned.

First, Planned's restrictive covenant discourages competition among contractors. Even if a building wishes to terminate Planned, it may be decide not to face the choice of losing its staff or paying damages to Planned. Limiting competition clearly harms the building owners/managers.

Second, workers are harmed by no-poach agreements. Workers' ability to switch employers and leave dangerous, discriminatory or low paying jobs is diminished. These agreements are particularly insidious because workers lose their ability to choose employers and seek higher wages even though they are not a party to the contract. They may not even know of the no-poach/no-hire agreement prior to accepting a position. Since the industry is dominated by contracted out employment, no-poach/no-hire can workers their long-term, stable employment.

Employers often defend non-compete clauses claiming that the worker freely chose to accept the clause. Supposedly employees could negotiate to avoid non-compete clauses. However, this is not possible for a no-poach agreement that is entered into between employers where employees are unaware of it.

For example, a residential building at 1111 River Road in Edgewater, N.J., switched security officer contractors from Planned Security Services, a division of Planned Companies, to Adamas Building Services. As is Adamas' normal procedure, it asked the property manager if there were any incumbent employees that Adamas should hire. At first, the property manager indicated it wanted two of the five officers to continue working at the property. But then the manager realized that hiring those two would expose the building to a claim by Planned under its restrictive covenant. So the building gave up having two experienced, good security officers, and those officers lost their jobs---all due to the mere presence of the restrictive covenant in Planned's contract with the building.

In another example, a residential condominium board in New York City chose to terminate its contract

with Planned in 2020 and directly employ the service staff. However, the board decided it could hire only some but not all of the incumbent workers because of the cost of the restrictive covenant.

A restrictive covenant in building service contracts suppresses wages. A restrictive covenant, such as Planned's, is a disincentive for a building owner to either bring the work in-house or to bring in another contractor if it is dissatisfied with Planned and wants to retain much or all of its incumbent workforce. This disincentive reduces competition among potential employers for the workers. Reduced competition among employers removes upward pressure on wages, leaving them with lower wages than they would be without the covenant. In particular, the covenant makes it less likely that work will go in-house. Yet, in-house workers generally make considerably more than contracted out employees. Buildings might be willing to eliminate Planned's overhead and share some of the savings as higher salaries/benefits, but the covenant imposes an extra cost that interferes with such a choice.

Finally, many cities and states have adopted worker retention laws in order to preserve and protect the stability of the labor and product markets when building service contracts turn over. These laws, which cover more than 25 jurisdictions across the country, create job stability and security for workers as well as ensuring clients uninterrupted service by experienced workers. But Planned's no-poach/no-hire clauses in its building service contracts undermine state and local laws since it is impossible for a building to retain the existing workforce when a change in contractor occurs.

We recognize that the Justice Department has pledged to criminally prosecute naked no-poach agreements and has issued specific anti-trust guidance for human resource professionals. However, these actions have not dissuaded certain employers such as Planned Companies from obtaining and maintaining no-poach/no-hire agreements as the Justice Department must spend substantial time and resources showing that the no-poach agreement does not meet the rule of reason test. Congress should specifically address no-poach agreements such as Planned's restrictive covenant and so do away with employers' reasonable beliefs that they are unlikely to face enforcement action when they use no-poach agreements. A belt and suspenders approach to enforcement may be what it takes to get recalcitrant employers to cease using no-poach/no-hire agreements.

Respectfully submitted,

Kyle Bragg
President, Service Employees International Local 32BJ