

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

UGL-UNICCO SERVICE CO.,  
Employer,

and

1-RC-22447

AREA TRADES COUNCIL, *et al.*,  
Petitioner,

and

FIREMEN AND OILERS CHAPTER 3,  
LOCAL 615, SEIU,  
Intervenor.

GROCERY HAULERS, INC.,  
Employer,

and

3-RC-11944

TEAMSTERS LOCAL 294,  
Petitioner,

and

BAKERY, CONFECTIONERY,  
TOBACCO WORKERS AND GRAIN  
MILLERS INTERNATIONAL  
UNION LOCAL 50, AFL-CIO,  
Intervenor.

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND  
CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE*

The American Federation of Labor and Congress of Industrial Organizations on behalf of its affiliated national and international labor organizations files this brief in response to the request of the National Labor Relations Board for amicus briefs

addressing whether the Board should overrule *MV Transportation*, 337 NLRB 770 (2002), and return to the successor bar rule set forth in *St. Elizabeth Manor, Inc.*, 329 NLRB 341 (1999). For the reasons stated here, we urge the Board to return to the successor bar rule set forth in *St. Elizabeth Manor* as the rule which best effectuates employees' choice of bargaining representative in the successorship situation.

## INTRODUCTION

The Supreme Court and the Board have long recognized that “a bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed.” *Frank Bros. Co. v. NLRB*, 321 U.S. 702, 705 (1944). For this reason, federal labor law temporarily insulates unions from challenges to their majority status in a broad variety of bargaining contexts. Providing an insulated period promotes collective bargaining, and, by creating the conditions necessary for the employees' chosen representative to effectively provide representation, effectuates employee choice.

In the successor context, an election bar is required principally because the Board has adopted a rule that allows virtually all successors to unilaterally change the terms of employment and thereby undermine the status of the employees' chosen representative before bargaining even begins. The Supreme Court has held that where “it is perfectly clear that the new employer plans to retain all of the employees in the unit” it must “initially consult with the employees' bargaining representative before he fixes terms.” *NLRB v. Burns Int'l Sec. Servs.*, 406 U.S. 272, 294-95 (1972). But the Board has severely

limited the effect of the Supreme Court’s ruling by holding that the “perfectly clear successor” doctrine applies only where the employer “misle[ads] employees into believing they would all be retained without change in their wages, hours, or conditions of employment or . . . fail[s] to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment.” *Spruce Up Corp.*, 209 NLRB 194, 195 (1974). As a result of the Board’s narrow interpretation of *Burns*, in the overwhelming majority of successorship cases the employer is permitted to unilaterally implement initial terms.

Against that background, in *St. Elizabeth Manor*, the Board adopted a rule that creates an insulated period during which an incumbent union’s bargaining relationship with a successor employer is given a “fair chance to succeed.” *Frank Bros. Co.*, 321 U.S. at 705. The *St. Elizabeth Manor* rule, like other similar rules providing insulated periods for bargaining, promotes both collective bargaining and employee choice.

In contrast, under *MV Transportation*, a union attempting to negotiate a first collective bargaining agreement with a successor employer faces an immediate threat of losing its representative status. Not surprisingly, this threat distorts the bargaining incentives, encouraging both the employer and the union to engage in uncooperative behavior that is costly to the parties and burdensome to the collective bargaining process. By so doing, the rule adopted in *MV Transportation* undermines the employees’ choice of representative during the particularly vulnerable period of transition between employers. The Board should, therefore, return to the successorship bargaining rule

adopted in *St. Elizabeth Manor*.

## ARGUMENT

### I. AN INSULATED PERIOD FOR BARGAINING FOSTERS THE ESTABLISHMENT OF A CONSTRUCTIVE COLLECTIVE BARGAINING RELATIONSHIP.

The Board has long recognized that the establishment of an effective collective bargaining relationship is facilitated by providing a period of guaranteed stability in the identity of the bargaining parties. The reasons for this are common-sensical.

In the first place, it is difficult for a union to negotiate a first collective bargaining agreement if it is distracted by the need to ensure its continued representative status. Inevitably, the union's negotiations with the employer will be affected by the union's organizing efforts to the detriment of the bargaining process.

Permitting challenges to the union's status during bargaining also encourages uncooperative behavior on the part of the employer. As the Supreme Court has noted, "[i]t is scarcely conducive to bargaining in good faith for an employer to know that, if he dillydallies or subtly undermines, union strength may erode and thereby relieve him of his statutory duties at any time, while if he works conscientiously toward agreement, the rank and file may, at the last moment, repudiate their agent." *Brooks v. NLRB*, 348 U.S. 96, 100 (1954).

Collective bargaining requires cooperative behavior by the parties toward the goal of reaching agreement. Such cooperation can occur only if the parties are secure in the fact that their relationship will last long enough for their immediate cooperation to render

long-term returns. Absent such security, incentives to act opportunistically in the short term tend to prevail. Recognizing this self-evident proposition, the federal labor law generally protects unions from challenges to their majority status for some reasonable period of bargaining. *See, e.g., Brooks*, 348 U.S. at 104 (affirming Board’s use of the certification bar); *Frank Bros. Co.*, 321 U.S. at 704 (affirming Board’s use of remedial bargaining orders); *Keller Plastics Eastern, Inc.*, 157 NLRB 583, 587 (1966) (adopting voluntary recognition bar).

Bargaining in a successorship context is similar to bargaining in an initial recognition context in that the successor employer and the incumbent union are beginning a new bargaining relationship in which unfamiliarity and distrust are likely to be high and reserves of goodwill tend to be low or nonexistent. Further complicating bargaining in the successorship context is the fact that in most circumstances the new employer may unilaterally establish new terms and conditions of employment. Such “unilateral action minimizes the influence of organized bargaining” and “emphasiz[es] to the employees that there is no necessity for a collective bargaining agent.” *May Stores Co. v. NLRB*, 326 U.S. 376, 385 (1945). For these reasons, as in the initial recognition context, collective bargaining in the successor context “can succeed . . . and the policies of the Act can thereby be effectuated, only if the parties can normally rely on the continuing representative status of the lawfully recognized union for a reasonable period of time.” *Keller Plastics*, 157 NLRB at 587.<sup>1</sup>

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<sup>1</sup> The calculus is different where the employer is a “perfectly clear successor” who

Accordingly, the Board in *St. Elizabeth Manor* correctly concluded that there is “no reason in law or logic why a bargaining representative’s status . . . should not be given at least as much protection” in a successor bargaining situation as in other initial collective bargaining situations. 329 NLRB at 344.

II. AN INSULATED PERIOD FOR BARGAINING FURTHERS EMPLOYEE CHOICE BY CREATING THE CONDITIONS NECESSARY FOR THE EMPLOYEES’ CHOSEN REPRESENTATIVE TO PERFORM EFFECTIVELY.

Furthering employee choice with regard to selecting a bargaining representative requires more than simply providing a formal occasion for registering that choice. Effectuating employee choice is equally important and that requires providing the chosen representative with an opportunity to carry out its assigned role on behalf of the employees. Providing a reasonable insulated period for bargaining in the successorship context effectuates the “desire to be represented by the Union initially expressed by a majority of the employees,” *Vincent Industrial Plastics, Inc.*, 336 NLRB 697, 698 (2001), by “protect[ing] the newly established bargaining relationship *and* the previously expressed majority choice” of the employees, *St. Elizabeth*, 329 NLRB at 345 (emphasis added).

The *MV Transportation* majority argued that a successor bar inhibits free choice by pointing to the hypothetical situation of a successor recognizing an incumbent union near

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must “initially consult with the employees’ bargaining representative before he fixes terms.” *Burns*, 406 U.S. at 294-95. That being so, the Board could greatly alleviate the difficulty of bargaining in successorship situations by abandoning the narrow definition of “perfectly clear successor” it adopted in *Spruce Up*, 209 NLRB at 195.

the end of, but prior to the open period in, the union's collective bargaining agreement with the predecessor employer. 337 NLRB at 773. In such a scenario, the *MV Transportation* majority posited, the combination of the previous contract bar, the successor bar, and a new contract bar, could deprive employees of an opportunity to exercise choice for as long as six years. As the dissenting opinion in *MV Transportation* noted, there are mechanisms for addressing such eventualities that do not involve gutting bargaining protections in all successor situations. *Id.* at 782 n. 16.

The principle of free choice is adequately served by providing that "employees, at reasonable times, [have an opportunity] to change their bargaining representative, if that is their desire." *Direct Press Modern Litho, Inc.*, 328 NLRB 860, 860 (1999). Given the rule that collective bargaining agreements can bar elections for no longer than three years, in most successorship situations, the employees will have had a reasonably recent opportunity to change representatives, rendering a new open period unnecessary. *Cf. Burns*, 406 U.S. at 279 ("[A] mere change of employers or of ownership is not such an 'unusual circumstance' as to affect the force of the Board's certification"). In those situations, applying the successor bar promotes collective bargaining while not impinging upon employee choice any more than does the contract bar itself.

We recognize that, on occasion, the change in employers will come at a time when the employees have been barred from exercising choice for a relatively lengthy period of time and in that event the goals of industrial peace and employee choice would be in tension. In such a situation, the Board could relieve the tension by providing an

additional opportunity for the employees to change representatives.

In framing any rule providing an additional opportunity for employees to change representatives in the successorship context, the Board should take care to minimize interference with the collective bargaining process. In particular, the Board should take care that the rule not create an opportunity for the successor employer to disrupt the bargaining process. *See Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 790 (1996) (“The Board is . . . entitled to suspicion when faced with an employer’s benevolence as its workers’ champion against their certified union. . . . There is nothing unreasonable in giving a short leash to the employer as vindicator of its employees’ organizational freedom.”). This risk is especially high because existing Board doctrine permits most successors to unilaterally implement initial terms of employment, thereby undermining the employees’ chosen bargaining representative before negotiations even begin. *See Spruce Up*, 209 NLRB at 195.

#### CONCLUSION

The Board should return to the successor bar set forth in *St. Elizabeth Manor* and insulate for a reasonable period of time the successor bargaining relationship.

Respectfully submitted,

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