

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

UGL-UNNICO SERVICE COMPANY  
Employer

and

Case 1-RC-22447

AREA TRADES COUNCIL a/w  
INTERNATIONAL UNION OF  
OPERATING ENGINEERS LOCAL 877,  
INTERNATIONAL BROTHERHOOD OF  
ELECTRICAL WORKERS LOCAL 103,  
NEW ENGLAND JOINT COUNCIL OF  
CARPENTERS LOCAL 51, PLUMBERS  
AND GASFITTERS UNION (UA) LOCAL  
12, AND THE PAINTERS AND ALLIED  
TRADES COUNCIL DISTRICT NO. 35  
Petitioner

and

FIREMEN AND OILERS CHAPTER 3,  
LOCAL 615, SERVICE EMPLOYEES  
INTERNATIONAL UNION  
Intervenor

GROCERY HAULERS, INC.  
Employer

and

Case 3-RC-11944

TEAMSTERS LOCAL 294, INTERNATIONAL  
BROTHERHOOD OF TEAMSTERS  
Petitioner

and

BAKERY, CONFECTIONARY,  
TOBACCO WORKERS' AND GRAIN MILLERS,  
INTERNATIONAL UNION, LOCAL 50  
Intervenor

**BRIEF OF AMICUS CURIAE**  
**COUNCIL ON LABOR LAW EQUALITY**

The Council on Labor Law Equality (“COLLE”) files this *amicus curiae* brief in response to the Board’s invitation to file briefs in Case Nos. 1-RC-22447 and 3-RC-11944. Specifically, the Board has asked (1) whether the Board should reconsider or modify its decision in *MV Transportation*, 337 NLRB 770 (2002), and (2) how should the Board treat the “perfectly clear” successor situation, as defined by *NLRB v. Burns Security Services*, 406 U.S. 272, 294-95 (1972), and subsequent Board decisions.

COLLE respectfully submits that *MV Transportation* should not be reconsidered or modified, and the rebuttable presumption of majority status should apply equally in a “perfectly clear” successor situation. Successorship law can be an important, and sometimes determinative, factor in mergers and acquisitions in today’s economy. A failing business may need a “white knight” investor or merger partner in order to survive, but the barriers to change erected through the development of the law of successorship and “perfectly clear” successor status often discourage investors or merger partners who fear that the law will prevent them from implementing the changes necessary to restructure the business.

A “successor bar” would present another potential obstacle to implementing changes in the status quo. This does not mean that the incumbent union must be decertified or replaced by a rival union in order for the business to be transformed and survive, but it is important that employees be afforded an opportunity to select a bargaining representative who will help them succeed in the restructured enterprise (we note that the cases at issue here involve rival union petitions, not decertification petitions). In some cases, the incumbent union will be a constructive partner in the restructuring or merger process. In other cases, however, the politics

of the incumbent union may be a practical impediment to implementing the changes necessary to transform the business. COLLE submits that an election should be permitted in these situations.

### **STATEMENT OF COLLE'S MEMBERSHIP AND INTEREST**

COLLE is a national association of employers that was formed to comment on, and assist in, the interpretation of the law under the National Labor Relations Act (“NLRA” or the “Act”). COLLE’s single purpose is to follow the activities of the National Labor Relations Board and the courts as they relate to the NLRA. Through the filing of *amicus* briefs and other forms of participation, COLLE provides a specialized and continuing business community effort to maintain a balanced approach – in the formulation and interpretation of national labor policy – to issues that affect a broad cross-section of industry. COLLE has participated as *amicus curiae* in numerous cases before the NLRB.

### **SUMMARY OF THE CASES AT ISSUE**

In *UGL-UNICCO Service Corp.*, Case 1-RC-22447, the Board granted an incumbent union’s request for review of the Regional Director’s decision to process a rival union petition approximately one month after a successor employer commenced operations. Similarly, in *Grocery Haulers Inc.*, Case 3-RC-11944, the Board granted review to consider whether the Regional Director abused her discretion by reinstating a rival union’s allegedly untimely representation petition following a “perfectly clear” successor transaction. Both cases involve the larger issue of whether the Board should re-impose a “successor bar,” under the rationale of *St. Elizabeth Manor, Inc.*, 329 NLRB 341 (1999), which would automatically prohibit, for a “reasonable period” of time, any decertification petition, rival union petition, or lawful employer petition following a successorship transaction.

## ARGUMENT

### **I. The Board Should Adhere to Its Decision in *MV Transportation*.**

#### A. *MV Transportation* Appropriately Balances the Goals of Promoting Labor Relations Stability and Protecting Employees' Freedom to Select a Bargaining Representative.

*MV Transportation* reflects a sound policy judgment articulated by the Board thirty-five years ago in *Southern Moldings Inc.*, 219 NLRB 119 (1975). The Board's decision in *Southern Moldings*, issued just three years after the Supreme Court's seminal decision in *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), recognized that a union in a successorship situation is entitled to a *rebuttable* presumption of continuing majority status. The Board held that there is no bar to a decertification petition or a rival union petition if the successor, as is its right, does not agree to assume the predecessor's collective bargaining agreement. *Southern Moldings*, 219 NLRB at 119-20. *Southern Moldings* remained the law until the Board created a "successor bar" in *St. Elizabeth Manor, Inc.*, 329 NLRB 341 (1999). Then, three years later, the Board in *MV Transportation* restored the rule of *Southern Moldings* and held that there is no bar to challenging a union's presumption of majority status in a successorship situation.

The rule of *Southern Moldings* and *MV Transportation* sensibly balances the Act's two competing policy objectives: (1) promoting stability in collective bargaining relationships in order to foster industrial peace, and (2) protecting employee free choice in the selection of their bargaining representative. The rebuttable presumption of majority status promotes labor relations stability by recognizing that "the successor employer's obligation to bargain with the incumbent union *continues indefinitely*, unless and until the employees exercise their right to remove or replace the union . . . ." *MV Transportation*, 337 NLRB at 774 (emphasis added). By contrast, the successor bar established in *St. Elizabeth Manor* could perpetuate instability if a

majority of the employees no longer wish to be represented by the incumbent union. As the Board observed in *MV Transportation*:

In reality, if a large percentage (or majority) of the employees support a petition to decertify or change the bargaining representative, the situation has reached maximum instability, and to fail to resolve the issue with a Board-conducted election simply aggravates the instability further.

*MV Transportation*, 337 NLRB at 774.

Thus, the rule of *Southern Moldings* and *MV Transportation* promotes industrial stability while at the same time protecting employees' freedom to select their bargaining representative. If the employees do not believe the incumbent union is representing them well, they are free to file a decertification petition or support representation by another union. Or, if the employees wish to withhold judgment during the transition to their new employer, "they can simply refrain from filing a decertification petition or supporting a rival union." *Id.* at 773. Either way, the choice is left to the employees, who have "firsthand knowledge of, and experience with, the union's ability, attentiveness and performance." *Id.* (quoting *St. Elizabeth Manor*, 329 NLRB at 349 (dissenting opinion)).

*MV Transportation* also appropriately distinguishes a successor bar from the recognition or certification bar. In the context of an initial recognition or certification, a bar is imposed *immediately after* a demonstration of majority support for the union (*i.e.*, a showing of authorization cards or a Board election). See *MGM Grand Hotel, Inc.*, 329 NLRB 464, 466 (1999) (explaining that a prerequisite for voluntary recognition is a valid "demonstration of majority support" by the union); *Centr-O-Case & Eng'g Co.*, 100 NLRB 1507, 1508 (1952) ("A Board certification has thus been held to identify the statutory bargaining agent with certainty and finality . . . as to its majority status . . ."). In the successorship situation, by contrast, there is no actual demonstration of majority support. Decades may have passed since the union's

majority support was established through voluntary recognition or a Board election. Thus, while it is technically true that a successorship situation resembles an initial recognition or certification in that the parties are “embarking on a new relationship,” *St. Elizabeth Manor*, 329 NLRB at 343, the critical distinction is that there typically has not been any recent demonstration of majority support in a successorship situation. Thus, “[w]hile the relationship between employees and employer is a new one, the relationship between employees and union is one of long standing.” *MV Transportation*, 337 NLRB at 774 (quoting *Landmark Int’l Trucks v. NLRB*, 699 F.2d 815, 818 (6th Cir. 1983)).

For all of these reasons, the balance struck by the Board in *Southern Moldings* and *MV Transportation* is a sound one, and it is one that accounts for the significant differences between a successorship situation and an initial recognition or certification.

B. A Successor Bar Is Inconsistent with the Supreme Court’s Decisions in *Burns* and *Fall River Dyeing*.

Application of a “successor bar” is contrary to the Supreme Court’s decisions in *Burns* and *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987). While the Court in both cases held that a union in a successorship situation is entitled to a continuing presumption of majority status, the Court clearly believed that the presumption was not irrebuttable. In *Burns*, the Court expressly noted the Board’s prior precedent holding that a successor employer who does not assume the predecessor’s collective bargaining agreement is permitted to raise a good faith doubt as to the union’s majority status as a defense to a refusal to bargain charge. See *Burns*, 406 U.S. at 290, n.12 (citing *Randolph Rubber Co.*, 152 NLRB 496 (1965), and *Mitchell Standard Corp.*, 140 NLRB 496 (1963)).

In *Fall River Dyeing*, the Court recognized that a union needs a continuing presumption of majority status during the “unsettling transition period” following a successorship transaction,

but the Court clearly did *not* believe that the presumption would be irrebuttable during that transition period. Indeed, the Court noted that during negotiations with the incumbent union, the successor employer “may lawfully withdraw from negotiation *at any time following recognition* if it can show that the union had in fact lost its majority status ....” *Fall River Dyeing*, 482 U.S. at 41, n.8 (quoting *Harley-Davidson Transp. Co.*, 273 NLRB 1531 (1985)). The Court also noted that the successor employer may petition the Board for an election during that period of time. *Id.* (citing *NLRB v. Fin. Inst. Emps.*, 472 U.S. 192, 198 (1986); *Brooks v. NLRB*, 348 U.S. 96, 101 (1954)). In addition to the employer’s ability to challenge the incumbent union’s majority status in a successorship situation, the Court in *Fall River Dyeing* noted that employees “are not powerless to reject a union that they believe no longer commands their support.” *Id.* at 50, n.16 (citing *NLRB v. Fin. Inst. Emps.*, 472 U.S. at 198).

Thus, application of a “successor bar” would be contrary to the Supreme Court’s expectations when it developed the law of successorship in *Burns* and *Fall River Dyeing*. The Court’s explicit expectations cannot be dismissed, as they were in *St. Elizabeth Manor*, as being “neither necessary to the Court’s ultimate decision” or “simply a reflection of Board law at the time.” *St. Elizabeth Manor*, 329 NLRB at 344, n.7. The Court in *Fall River Dyeing* held that the policy of industrial stability is served by affording the incumbent union with a presumption of majority status, even when the union had not been recently certified, but the clear premise of the Court’s holding was that the presumption of majority status would be *rebuttable*.

C. Current Economic Trends Do Not Warrant a Reversal of Precedent to Establish a Successor Bar.

Reversing the Board’s longstanding precedent in *Southern Moldings* and *MV Transportation*, and bucking the premise of the Supreme Court’s decisions in *Burns* and *Fall River Dyeing*, cannot be justified based on statistics concerning the increasing number of

mergers and acquisitions in the national economy. *See MV Transportation*, 337 NLRB at 777 (dissenting opinion). To the contrary, the expansion of merger and acquisition activity over the past few decades is all the more reason to permit employees to adapt to the changed employment relationship, and to determine whether their incumbent bargaining representative serves their interests in that new working environment.

Mergers and acquisitions frequently occur when the existing business is failing or cannot compete effectively on its own. The incidence of failing businesses is especially prevalent in the manufacturing sector. In the past ten years, the United States has lost 57,000 manufacturing facilities and six million manufacturing jobs – two million of those in just the past two years.<sup>1</sup> In many cases, these businesses have mature collective bargaining agreements, with compensation packages and work rules that were negotiated in the context of a more insular national economy, rather than the current era of intense worldwide competition. Furthermore, these businesses often support sizeable retiree populations who receive generous pension and retiree health benefits – in many cases, the active employee population is only a small fraction of the retiree population.

These failing businesses may be purchased by private equity funds or other businesses or investors who wish to transform the business into a successful and sustainable enterprise, but they can do so only by implementing significant changes in wages, benefits, and other terms and conditions of employment. Frequently, an investor's decision to risk its capital in order to restructure such a business will depend on its ability to alter substantially the terms of the existing collective bargaining agreement. *See Burns*, 406 U.S. at 287-88 (“A potential employer may be willing to take over a moribund business only if he can make changes in corporate

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<sup>1</sup> *See* Testimony of Robert Baugh, Executive Director of the AFL-CIO Industrial Union Council, Before the House Committee on Oversight and Reform Subcommittee on National Security and Foreign Affairs (September 22, 2010).

structure, composition of the labor force, work location, task assignment, and nature of supervision.”). Indeed, this was precisely the situation presented in *Fall River Dyeing*, where the business had all but collapsed due to “adverse economic conditions and foreign competition” prior to the successor employer’s investment in the enterprise with the goal of “resurrect[ing] the business.” *Fall River Dyeing*, 482 U.S. at 30-31.

COLLE’s members have experience with these types of major successorship transactions. In some cases, the incumbent union is able to adapt to the successor employer’s plan to become “more efficient, adaptable, and expedient” and can develop a successful collective bargaining relationship with the successor. *See MV Transportation*, 337 NLRB at 780 (dissenting opinion). But in other cases, the politics of the existing collective bargaining relationship may not be compatible with such radical change, even when it is necessary to save the business. *See, e.g.,* Ted Evanoff, *Battle over: GM plant will be shuttered*, *The Indianapolis Star*, pg. A1 (Sept. 28, 2010) (reporting that General Motors plant in Indianapolis, employing approximately 650 production workers, will close after local union opposed changes sought by the only prospective purchaser, due to the union’s concerns over a potential “domino effect” on wage and benefit levels elsewhere).

A successor bar also may present an obstacle to realizing the efficiencies expected in a merger transaction. For instance, there are instances in which the same classifications of employees at the merging companies are represented by two different unions. In these situations, it may be necessary to hold an election soon after the transaction in order to determine which union will represent the employees in a combined bargaining unit. Until the employees are combined into a single bargaining unit with a common bargaining representative, it may be

impossible to manage the two groups as one and realize the efficiencies expected from the merger transaction.

Thus, a successor bar may present an obstacle to mergers or acquisitions of business that are otherwise likely to fail without the transaction. A potential merger partner or “white knight” investor may be unwilling to invest capital in the enterprise without some assurance that the law will not prevent the new employer from combining or reorganizing the workforce, implementing changes in terms and conditions of employment, and dealing with the employees’ collective bargaining representative in a constructive manner that is consistent with the new method of operation.

## **II. The Board Should Apply *MV Transportation* in “Perfectly Clear” Successor Situations.**

The rule of *Southern Moldings* and *MV Transportation* should be applied in “perfectly clear” successor situations. The Supreme Court in *Burns* and *Fall River Dyeing* articulated the “perfectly clear” successor exception to the normal rule that a successor employer is ordinarily free to set new initial terms and conditions of employment. *See Fall River Dyeing*, 482 U.S. at 47, n.14; *Burns*, 406 U.S. at 294-95. However, the Court in both cases contemplated that the incumbent union’s presumption of majority status could be challenged by the employees or the employer. *See Fall River Dyeing*, 482 U.S. at 41, n.8 & 50, n.16; *Burns*, 406 U.S. at 290, n.12. There is no indication in either case that the presumption would be any less rebuttable in a “perfectly clear” successor situation than in an ordinary successor situation.

In many cases, a successor employer who intends to implement significant changes in terms and conditions of employment as part of the transaction may unwittingly be deemed to have waived that right because of the highly technical law concerning the application of the “perfectly clear” successor exception. *See, e.g., DuPont Dow Elastomers LLC*, 332 NLRB 1071,

1073-75 (2000); *Canteen Co.*, 317 NLRB 1052, 1052-54 (1995). By imposing an election bar in these situations, as well as “perfectly clear” successor status, the Board may make it even more difficult for the successor employer to negotiate the changes necessary to restructure the business as a going concern. Therefore, COLLE submits that the law regarding “perfectly clear” successor status should be clarified, and the legal differences should be minimized rather than exaggerated.

### CONCLUSION

In sum, COLLE urges the Board to adhere to its longstanding precedent in *Southern Moldings* and *MV Transportation*, and to apply that precedent in “perfectly clear” successor situations as well as in the ordinary successorship context. This precedent sensibly balances the Act’s goals of industrial stability and employee freedom of choice in selecting their collective bargaining representative. Furthermore, this precedent is fully consistent with the Supreme Court’s decisions in *Burns* and *Fall River Dyeing*, and it best promotes the investment of capital and the restructuring businesses to meet the challenges of the modern economy.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I certify that on November 1, 2010, a true and accurate copy of the foregoing Brief of *Amicus Curiae* Council on Labor Law Equality was served by e-mail on the following:

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I further certify that on November 1, 2010, after contacting the following representatives by phone, I caused a true and accurate copy of the foregoing Brief of *Amicus Curiae* Council on Labor Law Equality to be served by overnight mail on the following:

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