

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

UGL-UNICCO 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, CONFECTIONERY,
TOBACCO WORKERS' AND GRAIN MILLERS,
INTERNATIONAL UNION, LOCAL 50
Intervenor

**AMICUS BRIEF
OF THE NATIONAL RIGHT TO WORK
LEGAL DEFENSE AND EDUCATION FOUNDATION**

Raymond J. LaJeunesse, Jr.
Vice President & Legal Director
rjl@nrtw.org
John C. Scully
Staff Attorney
jcs@nrtw.org
National Right to Work Legal
Defense Foundation, Inc.
8001 Braddock Road
Suite 600
Springfield, VA 22160
(703) 321-8510
Attorneys for *Amicus Curiae*
National Right to Work Legal
Defense Foundation, Inc.

INTEREST OF THE *AMICUS CURIAE*

The National Right to Work Legal Defense and Education Foundation is a non-profit, charitable organization that provides free legal assistance to individuals who, as a consequence of compulsory unionism, have suffered violations of their right to work; their freedoms of association, speech, and religion; their right to due process of law; and other fundamental liberties and rights guaranteed by the Constitution and laws of the United States and of the several states.

Attorneys provided by the Foundation have represented numerous individuals before the National Labor Relations Board and in the courts, including in such landmark cases as *Air Line Pilots Ass'n v. Miller*, 523 U.S. 866 (1998); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991); *Communications Workers of America v. Beck*, 487 U.S. 735 (1988); *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986); *Ellis v. Railway Clerks*, 466 U.S. 435 (1984); *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977); and *Dana Corp.*, 351 N.L.R.B. 534 (2007). At any given time, in hundreds of cases throughout the country, the Foundation is aiding individuals who seek to limit their forced association with unions and their financial payments to those unions.

Amicus Foundation believes that anytime individuals are forced to join, be represented by, or support a labor union against their will, that compulsion impacts upon their constitutional rights. The impact is even more egregious if employees are forced to be represented by a labor union when there is a “successor” employer and the labor union no longer has majority support. In light of the above, the Foundation submits this brief to highlight the importance of allowing employee free choice through secret-ballot elections in employer-successor situations.

**NATIONAL LABOR POLICY ALLOWS
EMPLOYEES OF “SUCCESSOR” EMPLOYERS
A SECRET-BALLOT ELECTION TO
ESTABLISH CONTINUING UNION MAJORITY STATUS**

At its inception, the U.S. Supreme Court created the so-called “successor” employer doctrine with the goal of protecting employees. *John Wiley & Sons v. Livingston*, 376 U.S. 543, 549 (1964) (“national labor policy . . . require[s] . . . protection to the employees from a sudden change in the employment relationship”). Shortly thereafter, the Board converted the doctrine to protect incumbent unions and their compulsory unionism clauses whenever union-organized employers sold their businesses to non-union entities. In *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972), this administrative hijacking was annulled. There, the attempt to straight-jacket Burns and the predecessor’s former employees it had hired into the unexpired, but not assumed, monopoly bargaining contract was unanimously rejected by the Court.

Under current Board law in employer-successor situations, employees’ rights to freely choose or reject a union as their monopoly bargaining agent are already severely restricted. If there is a contract or a certification within one year of the transfer of ownership, that artificially bars a determination of the unions’ support among the successor’s employees. Even if there is no contract or certification, the union recognized by the seller has a rebuttable presumption of majority support. *Celanese Corp. of America*, 95 N.L.R.B. 664, 672 (1951); accord *Mathews Readymix, Inc. v. NLRB*, 165 F.3d 74, 77 (D.C. Cir. 1999).

Now, rather than working to increase employee free choice, the new Board majority proposes a further restriction on employee rights with a return to the discredited past, by erecting a conclusive presumption of law that any union continues to have

majority support among the successor's workforce in all transfer of ownership circumstances. This proposed presumption would be irrebuttable, with no allowance for "unusual circumstances" or recognition of employees' actual wishes.

This proposed irrebuttable presumption rests implausibly upon unproveable inferences that cannot support its wholly artificial, yet sweeping evidentiary barrier. Logically ludicrous, this presumption is unsupported. *Cf. NLRB v. Baptist Hosp., Inc.*, 442 U.S. 773, 785-6 (1979) (Board's sweeping presumption protecting union solicitation in all but immediate patient care areas held irrational). The underlying presumption rests on the illogical rationale that a union continues to have majority status even in the face of employee disaffections that commonly occur on both sides of a transfer of ownership.

Thus, under the proposed presumption, no-strike votes, petitions to deauthorize forced dues, employee decertification petitions, union membership resignations, and recanted union bargaining authorization cards are all deemed inconsequential. Similarly, employer polling data showing employee dissatisfaction is ignored. Even union membership is not an accurate gauge of union support. *Precision Authorized Air Conditioning Co. v. NLRB*, 606 F.2d 899, 906 (9th Cir. 1979).

The proposed overruling of *M.V. Transportation*, 337 N.L.R.B. 770 (2002), would effectively overrule the many decisions that weighed such factors to determine actual representation status in "successor" cases. *See, e.g., Mitchell Standard Corp.*, 140 N.L.R.B. 496, 499-500 (1963) (lack of recent certification); *Randolph Rubber Co., Inc.*, 152 N.L.R.B. 496, 499) (new check-off authorization cards additional basis for majority status); *Southland Mfg. Co.*, 186 N.L.R.B. 792 (1970) (new election held where no

affirmative evidence of union support among successor's employees); *Emerson Electric Co.*, 176 N.L.R.B. 744 (1969) (same).

The National Labor Relations Act's text denies the Board delegated authority to impose on all employees of a "successor" employer undemocratic monopoly union representation, and forced union subsidization where the predecessor's contract included a compulsory unionism clause. The Act's transcendent policy is that "employees not have union representation forced upon them, when, by exercise of their free will, they might choose otherwise." *NLRB v. Marion Rohr Corp.*, 714 F.2d 228, 230 (2d Cir. 1983). In all representation matters, the most reliable indicator of contemporaneous Section 9(a) majority status is a Board conducted secret-ballot election. The duty to bargain arises only after a certification election, absent unfair labor practices. *Gissel Packing Co. v. NLRB*, 395 U.S. 575 (1969). This settled principle cannot legally be denied to employees in a successor's unit based on an irrational "irrebuttable presumption."

This union dues collection contrivance contravenes the long-settled Board evidentiary rule that the General Counsel and unions have the ultimate burden of proving a union's majority status in an appropriate unit. *Stoner Rubber Co.*, 125 N.L.R.B. 1440, 1445 (1959) (Board-conducted election is best source of evidence to meet this burden). Moreover, Board adjudication cannot legally abrogate section 7(c) of the Federal Administrative Procedure Act, 5 U.S.C. § 557(c), which imposes the burden of proof upon federal agencies, *Maine v. United States Department of Labor*, 669 F.2d 827 (1st Cir. 1982).

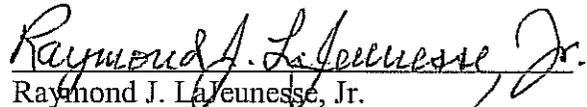
The Board majority deceptively intones the "promotion of stability" in forced bargaining relationships without mentioning the Act's paramount policy of promoting the

free, uncoerced choice of employees to select or reject union representation. Section 1 of the Act, entitled "Findings and Declaration of policy," is silent on "stability" in bargaining relationships. The Board majority appears to be purposely oblivious to what Section 1 does endow: "the exercise by workers of full freedom of association, self organization, and designation of representatives of their own choosing." Congress structured the Act to make employee free choice and free collective bargaining between union and employers the basis for stability in labor relations, not the other way around as the Board majority would have it. A solid foundation for stability in terms of employee wishes, going forward, is a secret-ballot election for eligible employees hired by the "successor" employer. Otherwise, the impressionistic label "successor" will be extended well beyond its original meaning into another device for the present Board majority to suffocate free employee choice.

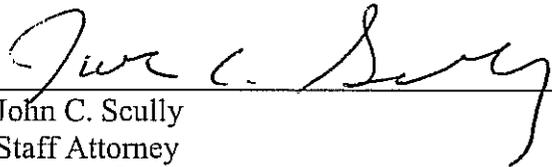
CONCLUSION

For the above-stated reasons, the Board should guarantee employee free choice in successor-employer situations and not empower unions at the expense of employee free choice. *M.V. Transportation* should not be overruled.

Respectfully submitted,



Raymond J. LeJeunesse, Jr.
Vice President & Legal Director
National Right to Work Legal
Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, VA 22160
(703) 321-8510
rjl@nrtw.org



John C. Scully
Staff Attorney
National Right to Work Legal
Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, VA 22160
(703) 321-8510
ics@nrtw.org

Attorneys for *Amicus Curiae*
National Right to Work Legal
Defense Foundation, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was e-mailed on
November 1, 2010, to:

James Canavan, UGL-UNICCO Service Company
JCanavan@ugl-unicco.com

Arthur Telegen, Seyfarth Shaw LLP
atelegen@seyfarth.com

William Corley, Area Trades Council AW IUOE Local 877, IBEW Local 10
williamtcorley@aol.com

James F. Lamond, McDonald Lamond & Canzonen
jlamond@masslaborlawyers.com

Edmund Gabriel, Firemen and Oilers Chapter 3, Local 615, SEIU
Local3Ike@Verizon.net

Edwin D. Hill, IBEW AF c/o
Ed_Mings@IBEW.org

Judith A. Scott, General Counsel, SEIU
Judy.Scott@SEIU.org

NLRB Region 1 – Boston, MA
Region1@nlrb.gov

Steven S. Goodman, Esq., Jackson Lewis LLP
goodmans@jacksonlewis.com

Jay Sabin, Esq.
J.Sabin@groceryhaulers.com

Bruce C. Bramley, Pozefsky Bramley & Murphy
BBramley@pbmlaw.net

NLRB Region 3 – Buffalo, NY
Rhonda.Ley@nlrb.gov

and faxed with a phone call on November 1, 2010, to:

Randall E. Nash
Fax: 617-742-5511

Louie Nikolaidis, Esq., Lewis, Clifton & Nikolaidis, PC
Fax: 212-419-1510

A handwritten signature in black ink, appearing to read "John C. Scully", written in a cursive style.

John C. Scully