

UNITED STATES OF AMERICA BEFORE
THE NATIONAL LABOR RELATIONS BOARD

In the Matter of

UGL-UNICCO SERVICE CO.,
Employer

and

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, a/w/SERVICE EMPLOYEES
INTERNATIONAL UNION,
Intervenor

Case No. 1-RC-22447

BRIEF ON BEHALF OF PETITIONER AREA TRADES COUNCIL

I. INTRODUCTION

On August 31, 2010, the NLRB invited briefs from the parties and others in connection with its August 27, 2010 decision to grant the Intervenor's request for review in the above-referenced matter. The Petitioner, Area Trades Council ("ATC"), takes no position on whether the NLRB should reconsider or

modify its decision in MV Transportation, 337 NLRB 770 (2002) to discontinue the “successor bar” doctrine. It submits, however, that if the NLRB changes the law in any material respect, it should apply such change[s] prospectively, in order to afford to those employees who initiated this process - and who have already cast ballots in a Board-conducted election – their right to choose a bargaining representative. The result of the conducted election should be determined and honored.

II. RELEVANT FACTS

The materials now before the NLRB establish the following relevant facts. The Intervenor (“Chapter 3”) was the collective bargaining representative of a unit of employees of Building Technologies, Inc. (“BTE”) and was party to a collective bargaining agreement that was to expire in April 2010. Prior to the end of that CBA, the respondent UGL-UNICCO won the service contract that had been held by BTE, and soon thereafter offered employment to a majority of members of the bargaining unit. UGL-UNICCO then began meeting with representatives of the Intervenor in order to try to reach agreement on the terms and conditions of employment for members of the unit. UGL-UNICCO agreed to assume the balance of the CBA between Chapter 3 and BTE, but thereafter the parties were unable to reach agreement on the terms of a new contract prior to its expiration.

In the meantime, members of the unit had approached the Petitioner about possible representation. At that time, there was no “successor bar” to an election petition inasmuch as the law on that topic had been unchanged since

the Board's 2002 decision in MV Transportation. An ATC representative collected authorization cards from members of the unit and submitted those cards to Region One of the NLRB along with a petition seeking an election in that unit. The Region thereafter scheduled a hearing on the petition, a development that warrants the necessary inference that the petition was supported by authorization cards from at least 30% of the unit. See NLRB Statements of Procedure, Section 101.18(a).

Chapter 3 intervened in the proceeding, participated in the NLRB hearing, was listed on the ballot that was provided to unit members in the ensuing mail-ballot election and presumably campaigned during the period leading up to the election. The ballots that were cast have since been impounded prior to being opened and counted.

III. ARGUMENT

A. The Law Regarding Application Of Changes In Decisional Law.

The ATC acknowledges that “[t]he Board's usual practice is to apply new policies and standards ‘to all pending cases in whatever stage.’” But as the Board has long noted, “[u]nder Securities & Exchange Commission v. Chenery Corp., 332 U.S. 194, 203 (1947), the propriety of retroactive application is determined by *balancing* any ill effects of retroactivity against ‘the mischief of producing a result which is contrary to a statutory design or to legal and

equitable principles.”¹ John Deklewa & Sons, 282 NLRB 1375, 1389 (1987)(citing Deluxe Metal Furniture Co., 121 NLRB 995, 1006-1007 (1958)(emphasis added). See also Dana Corporation, 351 N.L.R.B. 434 (2007) (“[T]he Board will make an exception in cases where retroactive application could, on balance, produce a result which is contrary to a statutory design or to legal and equitable principles.”)²

We note that in applying the Chenery “retroactivity doctrine,” courts have distinguished between two different scenarios:

¹ The so-called Chenery doctrine for determining whether to apply a decision retroactively was developed explicitly in the context of cases of first impression, not in the “policy oscillation” context in which cases like this arise. As the Supreme Court wrote,

Every case of first impression has a retroactive effect, whether the new principle is announced by a court or by an administrative agency. Such retroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles. If that mischief is greater than the ill effect of the retroactive application of a new standard, it is not the type of retroactivity which is condemned by law.

Chenery Corp., *supra*, 332 U.S. at 203.

² The Board has also stated that the test of whether to apply a new rule retroactively is whether doing so would result in “manifest injustice.” See SNE Enterprises, 344 N.L.R.B. 673 (2005). The substantive content of that test, however, sounds much like the John Deklewa/Deluxe Metal Furniture test. See *Id.* (“In determining whether the retroactive application of a Board rule will cause manifest injustice, the Board will consider the reliance of the parties on preexisting law, the effect of retroactivity on accomplishment of the purposes of the Act, and any particular injustice arising from retroactive application.”) See also International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL-CIO, 311 N.L.R.B. 1031(1993).

In considering whether to give retroactive application to a new rule, “the governing principle is that when there is a ‘substitution of new law for old law that was reasonably clear’, the new rule may justifiably be given prospectively-only effect in order to ‘protect the settled expectations of those who had relied on the preexisting rule.’ By contrast, retroactive effect is appropriate for “new applications of [existing] law, clarifications, and additions.”

Epilepsy Foundation v. NLRB, 268 F.3d 1095, 1102 (D.C. Cir. 2001)(ruling that NLRB erred in applying new rule retroactively, reasoning that “notions of equity and fairness, . . . militate strongly against retroactive application of the Board's substitution of new law for old law that was reasonably clear.”)(internal citations and quotations omitted). See also Verizon Tel. Cos. v. FCC, 269 F.3d 1098, 1109 (D.C. Cir 2001).³

B. Should The Board Re-Adopt The “Successor Bar” Rule, It Should Apply It Prospectively Only.

1. The Affected Employees And The ATC Reasonably Relied On The Non-Existence Of A “Successor Bar.”

As the Court noted in Epilepsy Foundation, “notions of equity and fairness, . . . militate strongly *against* retroactive application of the Board's substitution of new law for old law that was reasonably clear.” (emphasis

³ It appears that the Board has implicitly recognized the “new rule/new application of existing law” distinction. But it is less clear whether it adheres to the judicial approach, in which prospective effect is presumed in cases within the “new law for old law that was reasonably clear” category. See, e.g., SNE Enterprises, 344 N.L.R.B. 673 (2005)(“[T]he Board . . . will apply an arguably *new rule* retroactively to the parties in the case in which the *new rule* is announced and to parties in other cases pending at that time so long as this does not work a “manifest injustice.”); Wal-Mart Stores, Inc., 351 N.L.R.B. 130 (2007)(same).

added). The rule of MV Transportation [i.e., no successor bar] readily qualifies as “old law that was reasonably clear.” That rule [which ended the relatively brief 4-year lifespan of the “successor bar” doctrine⁴] was sufficiently “old” when this case arose, inasmuch as it was decided 8 years before the ATC was approached by members of the UGL/UNICCO bargaining unit in early 2010, expressing dissatisfaction with their current representative and asking ATC to represent them.⁵ And the rule that emerged from MV Transportation re-established a longstanding rule that was “reasonably clear.”⁶

⁴ The successor-bar rule as announced in St. Elizabeth Manor was that “once a successor employer's obligation to recognize an incumbent union attaches, the union is entitled to a reasonable period of time for bargaining without challenge to its majority status.” St. Elizabeth Manor, Inc., 329 N.L.R.B. 341 (2002).

⁵ The Board in MV Transportation identified the relevant policy considerations, as well as the sequence of events, this way:

For decades, with one brief and unsuccessful deviation, the Board, with court approval, balanced the competing interests involved in favor of protecting employee freedom of choice and held that employees retained their statutory right to vote following a change of employers. In 1999, however, in St. Elizabeth Manor, a divided Board abruptly--without prompting by any amendment to the statute or adverse court decision, and without inviting the views of the labor-management community--reversed course and upset this balance in favor of maintaining stability of bargaining relationships at the expense of employee freedom of choice. The Board majority justified this reversal on the ground that the Board's existing policy had not been applied in certain other circumstances, which the majority viewed as analogous.

[W]e find that the majority's reasoning in St. Elizabeth Manor was faulty and, in any event, plainly insufficient to warrant such an abrupt departure from

The ATC justifiably relied on that established and reasonably clear rule in proceeding as it did. It correctly determined, and so informed those employees, that there would be no legal barrier that would preclude them from exercising their statutory right to make a change in representation or that would preclude the ATC from helping them in that undertaking. Relying on that demonstrably correct belief, these employees signed authorization cards and the ATC prepared and filed the instant petition, then expended time and financial resources, including utilizing legal counsel for the hearing and preparation of a post-hearing brief once it learned that there was not going to be a stipulated election.

Notably, the Board in Dana Corp., 351 N.L.R.B. 434 (2007) decided to apply prospectively its decision to substantially alter the contours of the related “recognition bar.” It reasoned that its “decision mark[ed] a significant departure from preexisting law” and that the parties (and others) had acted in

longstanding Board and court precedent. Accordingly, we overrule St. Elizabeth Manor and return to *the previously well-established doctrine* that an incumbent union in a successorship situation is entitled to--and only to--a rebuttable presumption of continuing majority status, which will not serve as a bar to an otherwise valid decertification, rival union, or employer petition, or other valid challenge to the union's majority status.

337 NLRB at 770 (emphasis added).

⁶ The St. Elizabeth Manor majority did not list “lack of clarity” as among the reasons for establishing the successor bar rule. It simply balanced the substantive policy considerations differently than prior Boards had done. Indeed, the MV Transportation majority described the rule it was restoring as “a previously well-established doctrine.” See 337 NLRB at 770.

reliance on that law.” Id. It determined that prospective application was warranted because notwithstanding that it had reached a different conclusion as to what the law required, “retroactivity would produce mixed results in accomplishing the purposes of the Act, while the reliance interests of the parties and those similarly situated would be unequivocally and substantially frustrated.”

Should the Board restore the successor bar rule that briefly existed between the issuance of the St. Elizabeth Manor and MV Transportation decisions, fairness and equitable considerations support its prospective application, as these employees, and the ATC, reasonably relied on the longstanding non-existence of that rule in proceeding as they did.

2. Retroactive Application Would Frustrate Employee Free Choice.

Employee choice regarding the selection of a bargaining representative is one of the fundamental purposes of the Act. MV Transportation, supra, 337 NLRB at 772. If the Board were to re-adopt the successor bar rule as articulated in St. Elizabeth Manor, it should apply it prospectively, so as to not deprive these particular unit employees of their right to choose a bargaining representative. A legally meaningful number of the Respondent’s employees expressed their wish to change their representative by signing cards authorizing the ATC to be their representative, and then the unit as a whole was afforded the opportunity - in a Board-conducted, unchallenged mail ballot election - to decide whether to stay the course with the Intervenor or chart a

new one with the ATC. To order dismissal of the underlying petition – a result that could logically follow from giving retroactive effect to a decision reinstating a successor bar – would plainly frustrate employee freedom of choice.⁷ Compare MV Transportation, *supra*, 337 NLRB at 776. (“[T]he employees felt that the incumbent union was not effectively representing their interests with respect to their employment with the Employer. Whereas the successor bar rule would have negated the employees' ability to reject their bargaining representative, the Southern Moldings policy permits the employees to exercise their freedom of choice.”)

3. Prospective Application Would Not Produce A Result Which Is Contrary To A Statutory Design.

If the Board were to re-adopt the successor bar doctrine, presumably it would be for the same reason it did so in St. Elizabeth Manor: because it re-balanced arguably competing, but nonetheless legitimate, objectives of the NLRA so as to assign greater weight to “maintaining stability in bargaining

⁷ We do not suggest that outright dismissal of the petition would necessarily be the outcome here should the Board decide to again recognize a successor bar. Inasmuch as the factual “record” on the topics that were correctly deemed legally irrelevant at the time of the hearing consists presently of an offer of proof, it is more likely that the matter would be sent back to the Regional Director for her to develop a factual record and apply the doctrine as re-adopted or reformulated. But even if that were the outcome of retroactive application, it would still materially interfere with the affected employees’ right to choice.

relationships” than to employee choice.⁸ It certainly would not be because conduct that was once permitted has now been outlawed, or vice-versa.

Compare, e.g., International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL-CIO, 311 N.L.R.B. 1031(1993).

Prospective application of any decision reflecting a reasoned re-balancing of legitimate, albeit competing, policy objectives is fully warranted because it will not materially *subvert* the ascendant “stability of bargaining relationships” objective. See, e.g., SNE Enterprises, 344 N.L.R.B. 673 (2005) (“[I]t is employee free choice that is at issue, not the victory or loss of any particular party.”) Indeed, for all that is known at this time, the Intervenor might have received the majority of the votes case, and thus given new license – by the employees themselves - to try to reach an agreement with the Respondent over the terms of a new agreement.

⁸ See MV Transportation, supra, 337 NLRA at 772 (recognizing “the preservation of the stability of bargaining relationships” as one of the “fundamental purposes of the Act.”)

III. CONCLUSION

For the reasons set forth above, the Petitioner ATC respectfully submits that if the Board adopts a new rule of law to govern in circumstances like those present here, it should separately decide to apply that rule prospectively and to allow this lawfully-conducted Board election process to be completed.

Respectfully submitted,

For the Petitioner Area Trades Council,

By its attorneys,

/s/ James F. Lamond

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CERTIFICATE OF SERVICE

I, James F. Lamond, hereby certify that I have this day by first-class mail, postage prepaid served a copy of the foregoing Brief On Behalf Of Petitioner Area Trades Council upon Rosemary Pye, Regional Director, National Labor Relations Board, Region One, 10 Causeway Street, 6th Floor, Room 610, Boston, Massachusetts 02222-1072; Randall E. Nash, Esq., 111 Devonshire, Fifth Floor, Boston, Massachusetts 02109; and Arthur G. Telegen, Esq. Seyfarth Shaw LLP, Two Seaport Lane, Suite 300, Boston Massachusetts 02210.

Dated: November 1, 2010

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