UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

UGL-UNICCO SERVICE COMPANY,
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

Case No. 1-RC-22447

-and-

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

GROCERY HAULERS, INC.
Employer

-and-

TEAMSTERS LOCAL 294, INTERNATIONAL BROTHERHOOD OF TEAMSTERS
Petitioner

Case No. 3-RC-11944

-and-

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

BRIEF OF AMICUS CURIAE
SEIU UNITED LONG TERM CARE WORKERS, LOCAL 6434

Respectfully submitted by:

Eileen Goldsmith
Jennifer Sung
Altshuler Berzon LLP
177 Post St., Suite 300
San Francisco, CA 94108
(415) 421-7151
(415) 362-8064 (fax)

Dated: November 1, 2010

TABLE OF CONTENTS

INTEREST OF AMICUS CURIAE ULTCW 1

INTRODUCTION 1

ARGUMENT 5

I. The Disruption Caused by the Successor Employer's Right to Set Terms and Conditions of Employment Unilaterally Requires the Successorship Bar to be Reinstated 5

A. A Protected Period for Collective Bargaining Has Long Been Recognized as Necessary When an Employer Has Made Unilateral Changes to the Terms And Conditions of Employment 5

B. Although Successor Employers Are Legally Privileged to Change The Terms and Conditions of Work Unilaterally, Those Changes Have the Same Effects on the Workforce in Successorships as They Have in the Unfair Labor Practice Context 9

C. ULTCW's Experience Underscores That Reinstating the Successorship Bar is Necessary to Counterbalance the Effects of the Transition on the Workforce 13

D. *MV Transportation*'s Arguments for Eliminating the Successorship Bar Cannot Withstand Scrutiny 20

II. A Successorship Bar Should Apply Equally to "Perfectly Clear" Successors as Well as Ordinary *Burns* Successors 24

A. The *St. Elizabeth Manor* Successorship Bar Should Be Applied Uniformly to All Successorship Situations, Including All "Perfectly Clear" Successor Scenarios 25

1. The Board Has Narrowed the Definition of "Perfectly Clear" Successor From That Articulated by the Supreme Court in *Burns* 26

2. The Misleading or Vague "Perfectly Clear" Successor 29

3. The "Perfectly Clear" Successor Who Agrees to Bargain Before Setting Initial Terms and Conditions of Employment . . . 32

B. A Uniform Successorship Bar For All Successorship Situations Would Minimize Litigation and Discourage Improper Incentives 34

CONCLUSION 35

TABLE OF AUTHORITIES

FEDERAL CASES

A&C Healthcare
354 NLRB No. 33 (2009) 30

Americare Pine Lodge Nursing
325 NLRB 98 (1997) 7

Appalachian Shale Products
121 NLRB 1160 (1958) 34

Brooks v. NLRB
348 U.S. 96 (1954) . . . . . *passim*

Canteen Co.
317 NLRB 1052 (1995) 28

Fall River Dyeing & Finishing Corp. v. NLRB
482 U.S. 27 (1987) . . . . . *passim*

Franks Brothers Co. v. NLRB
321 U.S. 702 (1944) 22

Fremont Ford
289 NLRB 1290 (1988) 28, 30

General Cable Corp.
139 NLRB 1123 (1962) 5, 21

International Association of Machinists v. NLRB
311 U.S. 72 (1940) 7

Intermountain Rural Electric Association
305 NLRB 783 (1991) 9

Keller Plastics Eastern, Inc.
157 NLRB 583 (1966) 3, 21, 23

Landmark International Trucks, Inc. v. NLRB
699 F.2d 815 (6th Cir. 1983) 20

Leatherback Industrial, Inc.
1999 WL 33453700 (1999) 8

Lee Lumber & Building Material Corp. ("Lee Lumber I")
322 NLRB 175 (1996) . . . . . *passim*

Lee Lumber and Building Material Corp. v. NLRB ("Lee Lumber II")
117 F.3d 1454 (D.C. Cir. 1997) 5, 12, 22

Lee Lumber & Building Material Corp. ("Lee Lumber III")
334 NLRB 399 (2001) . . . . . *passim*

In re Lexus of Concord, Inc.
330 NLRB 1409 (2000) 8

MV Transportation, Inc.
337 NLRB 770 (2002) . . . . . *passim*

McClatchy Newspapers, Inc.
321 NLRB 1386 (1996) 6, 12

Metropolitan Mayaguez, Inc. d/b/a Hospital Pavia Perea
352 NLRB 418 (2008) 28, 30

Midland National Life Insurance Co.
263 NLRB 127 (1982) 4, 34

NLRB v. Burns Security Services
406 U.S. 272 (1972) . . . . . *passim*

NLRB v. Katz
369 U.S. 736 (1962) 7, 12

NLRB v. Pennsylvania Greyhound Lines, Inc.
303 U.S. 261 (1938) 7

Planned Building Services
347 NLRB 670 (2006) 33

Poole Foundry & Machine Co.
95 NLRB 34 (1951) 12

Powell Electric Manufacturing Co.
287 NLRB 969 (1987) 8

Road & Rail Services, Inc.
348 NLRB 1160 (2006) 20, 28, 33

Rosdev Hospitality
349 NLRB 202 (2007) 28

S&F Market Street Healthcare LLC d/b/a Windsor Convalescent Center ("Windsor I")
315 NLRB 975 (2007) . . . . . *passim*

S & F Market Street Healthcare LLC, d/b/a Windsor Convalescent Healthcare of Long Beach v. NLRB ("Windsor II")
530 F.3d 354 (D.C. Cir. 2009) 14, 15, 28

Southern Moldings
219 NLRB 119 (1975) 20

Spruce Up Corp.
209 NLRB 194 (1974) . . . . . *passim*

St. Elizabeth Manor
329 NLRB 341 (1999) . . . . . *passim*

Texas & N.O.R. Co. v. Brotherhood of Railway Clerks
281 U.S. 548 (1930) 7

Waddell Engineering Co.
305 NLRB 279 (1991) 12

FEDERAL STATUTES

29 U.S.C. §151, §157, §158(a)(1) 35

MISCELLANEOUS

David C. Grabowski & David G. Stevenson, *Ownership Conversions and Nursing Home Performance*, 43 Health Services Research 1184,1184-1203 (2008) 13

Julia Shaw Holmes, *The Effects of Ownership and Ownership Change on Nursing Home Industry Costs*, 31 Health Services Research 325, 335 (1996) 13

Nicholas G. Castle, *Nursing Home Closures, Changes in Ownership, and Competition*, 42 13

NLRB Rep. Casehandling Manual §11730.3(b) 31

INTEREST OF AMICUS CURIAE ULTCW

SEIU United Long Term Care Workers Union, Local 6434 ("ULTCW") is a union of approximately 190,000 long-term care workers based in Los Angeles, California. ULTCW's members include approximately 3,500 workers at more than 60 nursing homes. ULTCW's nursing home members have ample experience with the stresses caused by the frequent transitions from one operator to another that characterize the nursing home industry. Often, nursing home successors seize the opportunity to roll back years of contract gains, exacerbating the employee fear, anxiety, and frustration already inherent in such transitions. And, in some cases, the successors exploit this fear and frustration by instigating challenges to ULTCW's majority status before good faith bargaining has occurred. Accordingly, ULTCW and the workers it represents have a significant interest in the issues raised by these cases and welcome the Board's invitation to file amicus briefs.

INTRODUCTION

In 2002, a divided Board overruled *St. Elizabeth Manor*, 329 NLRB 341 (1999), after less than three years. That 2002 decision, *MV Transportation, Inc.*, 337 NLRB 770 (2002), eliminated the "successorship bar," which precluded challenges to an incumbent union's representative status for a "reasonable period of bargaining" following a transition to a new employer. *St. Elizabeth Manor*, 329 NLRB at 344. The experiment undertaken by the Board in *MV Transportation* has proven to be a failure, undermining, not promoting, the purposes of labor peace and employee free choice underlying the National Labor Relations Act ("the Act"). Accordingly, the Board should overrule *MV Transportation* and reinstate the successorship bar of *St. Elizabeth Manor*, in all successorship scenarios.

The current law of successorship privileges all successor employers to refuse to bargain with the incumbent union and instead establish initial terms and conditions of work unilaterally, even if this involves abrogating an existing collective bargaining agreement (and sometimes years or decades of contract gains) and direct dealing with individual employees. *See Spruce Up Corp.*, 209 NLRB 194, 195 (1974). In any other context, such conduct would constitute an egregious violation of the duty to bargain in good faith; in the successorship context, however, it is the legally-privileged norm. As the Board correctly recognized in *St. Elizabeth Manor*, the employer's decision to make initial changes in the terms and conditions of work unilaterally is inherently destabilizing to the collective bargaining relationship between the new employer and the incumbent union (just as unilateral changes and direct dealing are destabilizing in established bargaining relationships), and thus undermines the relationship between employees and their union. 329 NLRB at 342-44. The union's loss of support in this context, if any, is traceable to this employer conduct and its predictable effects, and an election petition that emerges from this environment cannot be presumed to reflect employees' true preferences regarding their representation. In eliminating the successorship bar, *MV Transportation* purported to elevate the Act's interest in employee choice above its interest in industrial peace. But by failing to understand or examine the dynamics inherent in employer transitions, it sacrificed both interests.

Practically speaking, it makes little difference to employees that the successor employer's conduct is not unlawful. All that employees see is that their union is powerless to enforce an existing collective bargaining agreement or prevent the rollback of years of contract gains. Against the backdrop of such turmoil, then, it is hardly surprising that successorships are often marked by decertification petitions, rival union election petitions, and attempted withdrawals of

recognition. This has been ULTCW's experience in the nursing home industry, which is marked by frequent turnover of small facilities. In just the last four years, at least eleven ULTCW-signatory nursing homes changed hands, six of them more than once; and in these facilities alone, ULTCW has fought two decertification petitions and one attempted withdrawal of recognition. As we detail below, these challenges to ULTCW's majority status can fairly be traced to the turmoil that accompanies employer transitions in the legal environment that allows successors to refuse to bargain, make unilateral changes, and engage in direct dealing when setting the initial terms and conditions of work.

Much as the Board compels employers who makes *un*lawful unilateral changes to bargain in good faith with the union for an insulated period, in order to be certain that any potential loss of union support is not tainted by the employer's conduct (whether the employer acted in good faith or in bad faith), *see Lee Lumber & Building Material Corp.*, 334 NLRB 399 (2001) ("*Lee Lumber III*"), so too should the Board impose an insulated period for bargaining in successorship situations, where the employer makes undistinguishable unilateral changes that are equally damaging to the employees' relationship with their union. In the successorship context, just as in every other context in which the employer has a duty to bargain with the union in good faith, "such negotiations 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 Eastern, Inc.*, 157 NLRB 583, 587 (1966). The *St. Elizabeth Manor* successorship bar should be reinstated to permit *all* nascent bargaining relationships a reasonable chance to succeed, and thereby to ensure that challenges to

a union's representative status are not tainted by the dynamics inherent in the transition to the new employer.

As for the Board's second question in its invitation to file briefs, there is no substantive difference between "ordinary" and "perfectly clear" successors (as defined in the Board's existing cases) for purposes of determining whether to reinstate the successorship bar. Under current case law, a "perfectly clear" successor is one who initially agrees to bargain with the incumbent union before setting new terms and conditions of work, or who conceals from employees its true intent to do so. *Spruce Up*, 209 NLRB at 195. The differences between these kinds of successors and "ordinary" successors who, under *Spruce Up*, openly announce new terms and conditions of work upon assuming control, are differences of degree rather than of kind. All of these kinds of successors engage in conduct that is inherently destabilizing to the existing relationship between the incumbent union and the employees; even the employer who agrees to bargain with the union before setting initial terms and conditions of work is not bound by the predecessor's collective bargaining agreement, and the incumbent union must commence bargaining with that new employer immediately upon deciding to retain the predecessor workforce.

It is the NLRB's responsibility to ensure that its internal procedures are consistent with the Act's animating public policies of industrial peace and employee choice, and to recalibrate those procedures when necessary in light of experience. In particular, the Board must not be, and has never considered itself to be, shackled to old procedures when those procedures prove unworkable or "hinder the goals of the Act." *Midland Nat'l Life Ins. Co.*, 263 NLRB 127, 132 (1982) (overturning prior rule regarding misleading campaign statements in light of cumulative

experience applying that rule); *see also General Cable Corp.*, 139 NLRB 1123, 1125-27 (1962) (extending contract bar from two years to three years in response to economic trends). Because the *MV Transportation* rule has proven so detrimental to the public interest in industrial stability, and because the successorship bar of *St. Elizabeth Manor* both furthers that policy goal and is consistent with the public interest in employee free choice of their representatives, *MV Transportation* should be overruled.

ARGUMENT

I. The Disruption Caused by the Successor Employer's Right to Set Terms and Conditions of Employment Unilaterally Requires the Successorship Bar to be Reinstated.

A. A Protected Period for Collective Bargaining Has Long Been Recognized as Necessary When an Employer Has Made Unilateral Changes to the Terms and Conditions of Employment.

"[W]hen a bargaining relationship has been initially established, or has been restored after being broken, it must be given a reasonable time to work and a fair chance to succeed before an employer may question the union's representative status." *Lee Lumber & Building Material Corp.* ("*Lee Lumber I*"), 322 NLRB 175, 178 (1996), *aff'd. in relevant part by* 117 F.3d 1454 (D.C. Cir. 1997). This rationale is the "common thread" that runs through all of the Board's decisions concerning situations in which challenges to a union's majority status are barred until the union and employer have engaged in good faith bargaining for a certain period of time, *id.*, and it is "particularly pertinent in the successorship situation," *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 39 (1987), where the bargaining relationship is both new *and* broken.

As the Supreme Court has observed, in successorship situations, the union "has no formal and established bargaining relationship with the new employer, is uncertain about the new employer's plans, and cannot be sure if or when the new employer must bargain with it." *Fall River*, 482 U.S. at 39. Moreover, under current law, the new employer "is ordinarily free to set initial terms on which it will hire the employees of a predecessor, and it is not bound by the substantive provisions of the predecessor's collective-bargaining agreement"; instead, the new employer may abrogate any existing collective bargaining agreement, fire employees at will, and refuse to bargain with the pre-existing union regarding the employees' initial terms and conditions of employment. *Id.* at 40-41; *see also NLRB v. Burns Security Services*, 406 U.S. 272 (1972). Even where it is clear that the new employer intends to hire the majority of its employees from its predecessor's workforce, current Board doctrine privileges any successor employer to unilaterally change the employees' terms and conditions of employment and deal with employees directly before ever negotiating with the incumbent union. *See Spruce Up Corp.*, 209 NLRB 194 (1974).

Under any other circumstances, the very same employer actions that are held privileged in *Burns* and *Spruce Up* would be considered egregious violations of the duty to bargain that are "inherently destructive of the fundamental principles of collective bargaining." *McClatchy Newspapers, Inc.*, 321 NLRB 1386, 1390 (1996). An employer's refusal to bargain "is not a mere technical infraction. It is a most serious violation that 'strikes at the heart of the Union's legitimate role as representative of the employees.'" *Lee Lumber I*, 322 NLRB at 177 (quoting *Midway Golden Dawn*, 293 NLRB 152, 152 fn. 2 (1989)). *See also Lee Lumber III*, 334 NLRB at 401 ("[A] failure or refusal to recognize or bargain with an incumbent union is 'a particularly

egregious kind of Section 8(a)(5) violation.'"). Additionally, an employer's unilateral change in conditions of employment "is a circumvention of the duty to negotiate which frustrates the objections of [section] 8(a)(5) much as does a flat refusal." *NLRB v. Katz*, 369 U.S. 736, 743 (1962). Likewise, "direct dealing, by its very nature, improperly affects the bargaining relationship." *Americare Pine Lodge Nursing*, 325 NLRB 98, 99 (1997).

In the unfair labor practice context, when the Board finds that an employer has refused to bargain, made unilateral changes, or engaged in direct dealing, the Board presumes that a loss of union support following these events is "tainted," and therefore bars any challenge to the union's representation status until the damage is remedied by a reasonable period of good faith bargaining. *See Lee Lumber III*, 334 NLRB at 399. As the Board has explained:

> '[E]mployees join unions in order to secure collective bargaining. Whether or not the employer bargains with a union chosen by his employees is normally decisive of its ability to secure and retain its members. Consequently, the result of an unremedied refusal to bargain with a union, standing alone, is to discredit the organization in the eyes of the employees, to drive them to a second choice, or to persuade them to abandon collective bargaining altogether.'

Lee Lumber I, 322 NLRB at 177 (quoting *Karp Metal Products*, 51 NLRB 621, 624 (1943)). "This fact is readily verifiable by common experience and has repeatedly been recognized by the Supreme Court." *Lee Lumber I*, 322 NLRB at 177 (citing *Int'l Ass'n of Machinists v. NLRB*, 311 U.S. 72, 82 (1940); *NLRB v. Pennsylvania Greyhound Lines, Inc.*, 303 U.S. 261, 271 (1938); *cf. Texas & N.O.R. Co. v. Bhd. of Railway Clerks*, 281 U.S. 548, 568-69 (1930)). Because the negative impact of the employer's failure to bargain on the employees' support for the union is so predictable, that employer conduct is "*presumed* to [have] cause[d] any employee disaffection from the union that ar[ose] during the course of the employer's unlawful conduct." *Lee Lumber*

III, 334 NLRB at 399 (emphasis in original). This presumption of "taint" is equally applicable where an employer makes significant unilateral changes or engages in substantial direct dealing, because "[a]n employer's action taken unilaterally rather than in consultation with the employees' bargaining representative shows that representative to be ineffectual, a showing that can be a precursor to the employees' attempt to 'get rid of the Union.'" *Powell Elec. Mfg. Co.*, 287 NLRB 969, 976 (1987) (presuming unilateral changes caused loss of support).[1]

"Absent unusual circumstances, the presumption [of taint] can be rebutted only if the employer can show that the disaffection arose after it resumed recognizing the union and bargained for a reasonable period of time, without committing further unfair labor practices that would adversely affect the bargaining." *Lee Lumber III*, 334 NLRB at 399 (footnotes omitted). That is, the union's representation status cannot be challenged until the employer and union have cleared the "atmosphere of unremedied unfair labor practices that undermine employees' support for the union" by bargaining in good faith for a reasonable period of time. *Id.* "The Board has long held that when such unfair labor practices have been committed, the lingering effects of the unlawful conduct must be effectively eliminated before employees can exercise *free* choice." *Id.* at 402 (emphasis in original). "In determining what constitutes a 'reasonable period of time for bargaining,' the proper focus is on the need to give unions a fair chance to succeed in contract negotiations before their representative status can be challenged. This approach . . . is consistent with the central purposes of the Act, which are to encourage the practice of collective bargaining

---

[1] *See also In re Lexus of Concord, Inc.*, 330 NLRB 1409, 1416 (2000) (a unilateral change "has the tendency to cause disaffection with the union and induce employee determination to decertify the Union"); *Leatherback Indus., Inc.*, 1999 WL 33453700 (1999) (presuming loss of support tainted by direct dealing) (citing *Detroit Edison Co.*, 310 NLRB 564 (1993)).

and to protect the right of employees to freely choose or reject a bargaining representative." *Id*. at 399.

B. Although Successor Employers Are Legally Privileged to Change the Terms and Conditions of Work Unilaterally, Those Changes Have the Same Effects on the Workforce in Successorships as They Have in the Unfair Labor Practice Context.

The reasons for presuming that a decrease in union support is tainted, and consequently for barring challenges to the union's representation status until the parties have bargained in good faith for a reasonable period, apply to successorships with equal, if not greater, force. As discussed above, a successor employer is free to abrogate the predecessor's collective bargaining agreement, set terms and conditions of employment unilaterally, and deal directly with workers. *Burns*, 406 U.S. at 281-82; *Spruce Up*, 209 NLRB 194. Because these legal rules "make it difficult for unions to protect employee interests in the context of successorship," it is reasonable to presume that a decline in support for the union is "a function of the successorship itself," rather than a reflection of pre-existing dissatisfaction with the incumbent union. *MV Transportation*, 337 NLRB at 781 (Mem. Liebman, dissenting). For this reason, a bar on challenges to the union's majority status until the parties have bargained in good faith for a reasonable period after the transition in employers furthers the Act's interests in industrial stability and truly free employee choice.

Just as in any other circumstance where the employer refuses to bargain with the union (for whatever reason), the result of that refusal to bargain is to "place the Union at a serious bargaining disadvantage in terms of maintaining the support and trust of the employees" and "to undercut the Union's authority at the bargaining table." *Intermountain Rural Electric Ass'n*, 305

NLRB 783, 789 (1991). Worse yet, the successorship legal rules deprive the union of the tools it would normally wield to affect the employees' new employment terms, such as binding arbitration, economic weapons, or the collective bargaining process itself. This tying of the union's hands inevitably makes the union, through no fault of its own, appear to employees as unresponsive, weak, or ineffectual.

Indeed, under these circumstances, employees are likely to question not only their representative, but also whether the exercise of their collective bargaining rights is worthwhile at all. Employees organize and choose union representation in order to secure the right to collective bargaining. This right is both an affirmative right to negotiate with the employer, as well as a protection against unilateral changes and direct dealing by the employer. Yet successorship law gives the new employer free rein to abrogate a collective bargaining agreement and set initial employment terms unilaterally. In doing so, the successor employer may roll back bargained-for rights and benefits – even though, by definition, everything else about the employees' workplace remains the same: the majority of employees are the same, the nature of the business and operations are the same, the employees are represented by the same union, and they have not repudiated that choice or waived their right to collectively bargain.[2] Under these circumstances, employees are likely to conclude that the rights supposedly guaranteed by the Act are in fact subordinate to "the vagaries of an enterprise's transformation." *Fall River,* 482 U.S. at 39-40. Naturally, when "employees find themselves in essentially the same jobs after the employer

---

[2] *See Fall River*, 482 U.S. at 43 (under "substantial continuity" test for determining whether new employer is a "successor," "the Board keeps in mind the question whether 'those employees who have been retained will understandably view their job situations as essentially unaltered'" (citation omitted)).

transition," yet "their legitimate expectations in continued representation by their union are thwarted, their dissatisfaction may lead to labor unrest." *Id.* at 43-44.

Requiring the parties to bargain in good faith for a reasonable period of time before the union's majority status may be challenged is therefore necessary to mitigate the substantial damage that the successorship transition causes to the union's relationship with its members and the collective bargaining process itself. The successorship bar also reduces the temptation for employers to exploit the dynamics of the transition to rid itself of an incumbent union. As the Supreme Court recognized in *Fall River*, the union is "particularly vulnerable" after a successorship, and "[w]ithout the presumptions of majority support and with the wide variety of corporate transformations possible, an employer could use a successor enterprise as a way of getting rid of a labor contract and of exploiting the employees' hesitant attitude towards the union to eliminate its continuing presence." 482 U.S. at 38-39. *See also Brooks v. NLRB*, 348 U.S. 96, 100 (1954); *St. Elizabeth Manor*, 329 NLRB at 345.

The fact that the successor employer's conduct in setting terms and conditions of work unilaterally is not unlawful under current doctrine is no obstacle to reinstating the successorship bar.[3] Practically speaking, workers are not labor lawyers, and they will not realize that it is the legal rules governing successorship that preclude their union from taking action on their behalf, not the union's own ineffectiveness. The harm done to the relationship between employees and their union by an employer's unilateral changes is the same regardless of whether employees are

[3] The Court reasoned in *Burns*, 406 U.S. at 294, that the setting of initial terms by a successor cannot be characterized as unlawful "unilateral changes," because from the *successor's* perspective the terms are new, not different. But from the perspective of the *employees*, who are continuing to work at the same workplace performing the same jobs, any new terms set unilaterally by the successor are indeed "changes" to their terms and conditions of employment.

aware that the employer has done anything wrong. *Lee Lumber and Bldg. Material Corp. v. NLRB* ("*Lee Lumber II*"), 117 F.3d 1454, 1458 (D.C. Cir. 1997) ("in cases involving an unlawful refusal to recognize and bargain, . . . the causal relationship between unlawful act and subsequent loss of majority support may be presumed, . . . *regardless of whether the employees were aware of the employer's unlawful behavior*") (quotation marks and citation omitted, emphasis added); *Lee Lumber I*, 322 NLRB at 177 (where a union is "deprived of the opportunity to represent the employees, it is altogether foreseeable that the employees will soon become disenchanted with that union, because it apparently can do nothing for them. This later consideration, we emphasize, does not depend on whether the employees *actually know* that the employer is unlawfully refusing to deal with the union") (citation omitted, emphasis added).[4]

Moreover, nothing in Board law requires a finding of unlawful conduct to permit a bar to be imposed on challenges to the union's majority status. The Board applies a conclusive presumption of majority status in many contexts in which the employer has done nothing unlawful: for example, in the first year of certification, when the employer has recognized the union voluntarily, and when the parties have reached a collective bargaining agreement. Challenges to a union's majority status are also barred when an employer agrees to bargain in good faith in settling a Section 8(a)(5) charge, notwithstanding that settlement agreements do not require any admission of wrongdoing. *See Poole Foundry & Machine Co.*, 95 NLRB 34 (1951).

---

[4] Similarly, when an employer makes unilateral changes or engages in direct dealing, that conduct is inherently destructive to the fundamental principles of collective bargaining even if the employer is acting in good faith. *See, e.g.*, *Katz*, 369 U.S. at 743; *McClatchy Newspapers, Inc.*, 321 NLRB 1386, 1390 (1996), *aff'd in relevant part by* 964 F.2d 1153 (D.C. Cir. 1997)*; Waddell Engineering Co.*, 305 NLRB 279, 281 (1991) ("*Whether intended or not*, even absent union animus, such conduct tends to undermine the status of the employee representative and is inconsistent with the principles of good-faith bargaining.") (emphasis added).

Because the purpose of a bar is not to punish unlawful behavior but to "give the bargaining relationship time to succeed" when it is "new or broken," *Lee Lumber I*, 322 NLRB at 180, barring challenges to the union's majority status until the parties have bargained in good faith for a reasonable period is equally appropriate in the successorship context.

C. ULTCW's Experience Underscores That Reinstating the Successorship Bar is Necessary to Counterbalance the Effects of the Transition on the Workforce.

ULTCW's experience with employer transitions in the nursing home industry in California illustrates the dynamic inherent in successorship situations that we have just described. Changes in ownership and corporate form are a hallmark of the nursing home industry.[5] In 2007, ULTCW represented employees at approximately 37 nursing home facilities, and since then, workers at about 28 additional facilities have joined ULTCW. In those few years, at least eleven ULTCW-represented nursing homes changed ownership. And, six out of those eleven changed hands more than once. At three of those homes – Villa Maria Elena Healthcare Center, Glendora Grand, Inc., and Centinela Grand, Inc. – the successor employers sought to exploit the disruption caused by the successorship by instigating challenges to the Union's representation status soon after the transition.

ULTCW's experience confirms that the transition from predecessor to successor is extremely disruptive. To start, the change in ownership often takes place behind the scenes – with little or no notice to the Union. The successor takes control on paper, but makes no

---

[5] *See* David C. Grabowski & David G. Stevenson, *Ownership Conversions and Nursing Home Performance*, 43 Health Services Research 1184, 1184-1203 (2008); Nicholas G. Castle, *Nursing Home Closures, Changes in Ownership, and Competition*, 42 Inquiry 281, 281-92 (2005); Julia Shaw Holmes, *The Effects of Ownership and Ownership Change on Nursing Home Industry Costs*, 31 Health Services Research 325, 335 (1996).

immediate personnel or operational changes. As a result, the union not only "has no formal and established bargaining relationship with the new employer," but also "is uncertain about the new employer's plans, and cannot be sure if or when the new employer must bargain with it." *Fall River*, 482 U.S. at 39.

Moreover, because the successor employer cannot afford any cessation in operations, it retains all of the predecessor's employees at the time of transition. Nursing home residents require care around the clock, and the incoming operator requires the existing skilled workforce to continue caring for their patients. Thus, it is common in ULTCW's experience for the successor to retain the entire incumbent workforce immediately upon assuming control of an operation, in order to minimize the potential disruption to patients and their families that would accompany a drawn-out process of deciding which of the predecessor's employees to retain and which to replace.

Then, the successor avails itself of its privileges under *Spruce Up* to have its cake and eat it too: it evades incurring a duty to bargain over the initial terms and conditions of employment by making a *Spruce Up* announcement of its intent to make changes, but it avoids driving off too many employees (which might force the nursing home to shut its doors or violate minimum staffing regulations) by not providing any specific information as to what those changes will be. *See, e.g.*, *S & F Market Street Healthcare LLC, d/b/a Windsor Convalescent Healthcare of Long Beach v. NLRB* ("*Windsor II*"), 530 F.3d 354 (D.C. Cir. 2009), *denying enf. in part*, 315 NLRB 975 (2007) (successor who makes general announcement of intent to make changes without providing any specifics has no duty to bargain over initial terms). Only *after* the employees have

already accepted the successor's offers of employment do they learn, piecemeal, what unilateral changes the successor has decided to make.

To make matters worse, the successor's unilateral changes usually erase many of the gains that ULTCW had achieved in collective bargaining with the predecessor. Thus, when the successor finally starts bargaining with ULTCW, the Union must not only embark on a new bargaining relationship, but it must also fight to regain rights and benefits it had won before. Indeed, in most cases, the successor eliminates fundamental rights that the employees have come to take for granted. For example, successor employers commonly eliminate employees' seniority by changing every employee's start date to the date of hire by the successor, and the Union must negotiate for the employees to be credited for all of their years of service at the facility – even though the employees never stopped working. Such changes not only eliminate employees' seniority rights with respect to matters such as job transfers, layoff and recall, and assignment of overtime, but also strip employees of all kinds of benefits to which their seniority entitled them, such as vacation time, sick days, and eligibility for health insurance. Most employees do not understand why the Union is powerless to prevent such losses, and many become afraid for their jobs, angry, or disillusioned – or all of the above. Given these circumstances, it is unsurprising that ULTCW often finds that bargaining with a successor is *more* difficult than bargaining a first contract with a newly organized employer.

ULTCW's experience with this successor *modus operandi* was well documented by the Board in *S&F Market Street Healthcare LLC d/b/a Windsor Convalescent Center* ("*Windsor I*"), 351 NLRB 975 (2007), *enf. denied in part*, 530 F.3d 354 (D.C. Cir. 2009). In *Windsor*, the employer retained virtually the entire workforce, and gave workers offer letters stating that it

would set new terms and conditions of work, but gave no specifics. 351 NLRB at 981 & n.27. Some supervisors (who were also retained from the predecessor's workforce) told retained employees not to worry, their terms and conditions of employment would not change. *Id.* Despite these assurances, and *after* the employees had already accepted the successor's offers of employment, the successor distributed new employee handbooks that reflected significant changes to the employees' terms and conditions of employment. *Id.* at 981-82.

Recent successorships at two other ULTCW-represented facilities, Centinela Grand and Glendora Grand, are also illustrative. ULTCW had represented employees at Centinela and Glendora since 2002. At that time, the two nursing homes were owned by Pleasant Care Corporation, which owned many nursing homes in Southern California. ULTCW and Pleasant Care successfully negotiated a first contract, as well as successor agreements. After Pleasant Care filed for bankruptcy in 2007, Centinela and Glendora were acquired by Integrated Nursing and Rehabilitation Care ("Integrated"). Integrated retained the predecessor's employees, and entered into a one-year collective bargaining agreement with ULTCW in January 2008. After that agreement expired, ULTCW and Integrated were unable to reach another agreement before a new owner stepped in. ULTCW was not informed when the sale of Glendora and Centinela was finalized; only after the fact, in February 2010, did the new employer notify the Union that the takeover had occurred. The new owner separately incorporated the facilities as "Centinela Grand, Inc." and "Glendora Grand, Inc.," but retained all of the same employees, supervisors, and facility managers at the time of transition.

Some weeks later, the successor required the employees to fill out new job applications. At that time, the successor told the employees little to nothing about their new terms and

conditions of employment, but said only that it planned to issue a new employee handbook. Employees learned what unilateral changes the successor was making in bits and pieces. For example, the employees did not know that their "birthday" holiday had been eliminated until one worker's request for time off for her birthday was denied. Later, the successor gave some workers raises, but without explaining the reasons for having done so or the disparities in treatment of different workers.[6]

ULTCW's experience at Glendora and Centinela further confirms both the disruptiveness inherent in successorships under current law, and that, without the *St. Elizabeth Manor* successorship bar, employers may try to exploit the employee fear and union vulnerability created by that disruption. The new owner first met with ULTCW for the purpose of bargaining in late March 2010, and the parties met once more in April. In May, a decertification petition was filed at Glendora, and in June, a decertification petition was filed at Centinela. The filing of these petitions effectively halted collective bargaining.

ULTCW members reported that supervisors were involved with the circulation of the decertification petitions at both facilities; and the Union filed unfair labor practice charges which blocked the petitions in both cases. *See* Case No. 21-CA-39376 (Glendora); 21-CA-39408 (Centinela). At Centinela, workers who had witnessed a supervisor circulating the decertification petition provided affidavits to Region 21, and when the petitioner failed to rebut the Union's showing of supervisory taint, the decertification petition was dismissed. Region 21 is also issuing a complaint regarding this alleged §8(a)(1) violation.

---

[6] Region 21 is dismissing an unfair labor practice charge based on this unilateral change, on the ground that the employer lawfully complied with *Spruce Up*.

At Glendora, by contrast, employees who personally observed the supervisory taint were too afraid to testify. As a result, Region 21 unblocked the Glendora decertification petition and solicited withdrawal of the unfair labor practice charge. The employer waged a full-blown anti-union campaign, and a majority of employees voted to decertify.

If the *St. Elizabeth Manor* successorship bar had been in effect, the employer could not have exploited the employees' fear and the Union's vulnerability (resulting from the employer's unilateral changes to working conditions) to stoke these decertification campaigns, at least not without first bargaining in good faith for a reasonable period of time. Even if it were true that the employer was behind one decertification petition but not the other, it is reasonable to presume that the Union's loss of majority support at Glendora resulted from the successorship itself. Had employees at either facility harbored genuine dissatisfaction regarding ULTCW's representation based on its track record prior to the last takeover, they surely would have filed decertification petitions at any time during the several months before the transition that the contract with Integrated was open. They did not do so.

ULTCW's experience with another employer, Villa Maria Elena Healthcare Center, further underscores why reinstating the successorship bar is necessary to fulfill the purposes of the Act. In 2006, the employees at Villa Maria Elena went through not just one but two successorship transitions. When the second successor took over in December 2006, it refused to recognize or bargain with ULTCW, even though the majority of its employees were employed by its predecessor. ULTCW filed unfair labor practice charges, and eventually the Board ordered the successor to recognize and bargain with the Union. *See Santa Fe Healthcare LLC d/b/a Villa Maria Elena Healthcare Ctr.*, Case No. 21-CA-37593. However, after several months of surface

bargaining, the successor attempted to withdraw recognition from ULTCW, claiming employees had informed management that ULTCW no longer enjoyed majority support. ULTCW filed additional unfair labor practice charges, and sought a finding that the successor was in contempt of the prior bargaining order. Only after the case was referred to the Contempt Division did the successor agree to settle the charges and resume bargaining. Upon ULTCW's insistence, the settlement agreement expressly provided that no challenge to ULTCW's majority status could be made until after the successor had bargained in good faith for a reasonable period. Soon after the settlement agreement was executed, the parties reached a collective bargaining agreement that was ratified by the majority of employees.

In sum, by exploiting the disruption of a successorship, this employer evaded its duty to bargain for several years, and nearly succeeded in eliminating ULTCW altogether. If the Region and Contempt Division had not recognized the damage done by the successor's conduct and made clear that any challenges to ULTCW's majority status would be barred until the parties bargained in good faith for a reasonable period, this employer likely would have kept trying to rid itself of the Union rather than fulfill its duty to bargain. Instead, with the aid of that reasonable bar, the Union was able to ensure that the employees' choice to exercise their collective bargaining right was respected, and the collective bargaining process worked to achieve labor peace. Imposing a comparable requirement at the *start* of successorships, rather than only after years of litigation and delay, will mitigate the damage associated with such transitions and "permit unions to develop stable bargaining relationships with employers, which will enable the unions to pursue the goals of their members, and this pursuit, in turn, will further industrial peace." *Fall River*, 482 U.S. at 38-39.

D. *MV Transportation*'s Arguments for Eliminating the Successorship Bar Cannot Withstand Scrutiny.

When the practical effects of successorship law are considered in totality, the arguments raised by the *MV Transportation* majority in overruling *St. Elizabeth Manor* cannot withstand scrutiny.

First, the *MV Transportation* majority unquestioningly adopted the notion, first stated in *Southern Moldings*, 219 NLRB 119 (1975), that a successorship bar is inappropriate because it would grant the *union* "greater rights with the successor than it had with the predecessor." *MV Transportation*, 337 NLRB at 771, 773. This view ignores the fact that successorship law grants the *employer* greater rights than its predecessor – including the right to abrogate an existing collective bargaining agreement and thereby eliminate any contract bar. *See supra*, Section I.A.; *see also Road & Rail Services, Inc.*, 348 NLRB 1160, 1162 (2006) (*Burns* successors are assured "the right to act unilaterally"). A successorship bar is necessary to restore the balance between employer and union rights that successorship law subverts.

Second, the *MV Transportation* majority also adopted the groundless assumption made by the Sixth Circuit in *Landmark International Trucks, Inc. v. NLRB*, 699 F.2d 815, 818 (6th Cir. 1983), that a successorship bar is unnecessary because even though "the relationship between employees and employer is a new one," "the relationship between employees and union is one of long standing." However, the *Landmark* court overlooked the effects of the employer's refusal to bargain, unilateral changes to terms and conditions of employment, and direct dealing on the relationship between the employees and their union. *See id.* As discussed above, the law ties the hands of the union during the successorship transition, while it simultaneously permits the new

employer to eliminate gains the union secured through earlier collective bargaining, thereby poisoning the union's relationship with its members. Restoring the successorship bar would give the incumbent union a fair chance to repair that rift, without imposing an unrealistic burden on the union to achieve instantaneous results in the earliest days of its new relationship with the employer. *Cf. Fall River*, 482 U.S. at 38-39.

Third, *MV Transportation* mistakenly believed that the mere existence of the duty to bargain in successorship situations would be sufficient to serve the Act's interest in labor peace. 337 NLRB at 773-74. As we have demonstrated, however, the mere fact that the successor employer is obligated to bargain with the incumbent union *after* the successor has already unilaterally changed terms and conditions of employment, abrogated the predecessor's collective bargaining agreement, and engaged in direct dealing with the employees is not sufficient to undo the damage caused by those actions to the employees' faith in their incumbent union and the process of collective bargaining as a whole. It is that damage, and the resulting challenges to the union's majority status, that undermine labor peace. Indeed, in every other context where the law imposes on an employer the duty to bargain in good faith with the union, that duty is coupled with a protected period during which the union's majority status may not be challenged, in the interest of facilitating the stability of bargaining relationships. *See, e.g.*, *Keller Plastics Eastern, Inc.*, 157 NLRB 583, 587 (1966) (voluntary recognition bar); *General Cable*, 139 NLRB 1123 (1962) (contract bar); *Brooks*, 348 U.S. 96 (certification bar). The *MV Transportation* majority's decision to divorce an employer's statutory duty to bargain from a conclusive presumption of the union's majority status solely in the context of successorships lacks any basis in law, logic, or practical experience.

Finally, the *MV Transportation* majority's arguments that the successorship bar is inconsistent with employee free choice are equally misplaced. Where, as in the successorship context, a loss of employee support follows an employer's refusal to bargain with a union, ordering the employer to bargain with that union "*does not involve any injustice to employees* who may wish to substitute for the particular union some other bargaining agent or arrangement," because "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." *Franks Bros. Co. v. NLRB,* 321 U.S. 702, 705-06 (1944) (emphasis in original). "After such a reasonable period the Board may, in a proper proceeding and upon a proper showing, take steps in recognition of changed situations which might make appropriate changed bargaining relationships." *Id*. *See also Lee Lumber II*, 117 F.3d at 1459-60 (finding "the Board's [conclusive] presumption actually supports employee free choice" because it prevents an employer from pointing to an intervening loss of employee support when such loss is a "foreseeable consequence" of the employer's conduct, and the Board permits "an employer to rebut the presumption by bargaining for a reasonable time and thereby countering the ill effects of the employer's failure to do so"); *Lee Lumber III*, 334 NLRB at 401-02 (requiring good faith bargaining for reasonable period before presumption of taint may be rebutted "promotes employee free choice").

The majority in *MV Transportation* expressed concern that "the successor bar could preclude the employees' exercise of their Section 7 rights for as long as several years," 337 NLRB at 773, but the factual scenario that troubled those Board members is hardly the norm, and in the rare instance where that scenario might arise, the Regions would have the flexibility under

St. Elizabeth Manor to adjust the length of the successorship bar to accommodate the interest in employee choice.

The *MV Transportation* majority described the following hypothetical:

> [A] successor employer could engage in bargaining with the incumbent union and, prior to the expiration of a "reasonable period of time," reach agreement with the union on a new collective-bargaining agreement, which then would serve as a bar to a representation petition for the duration of the contract, up to a period of 3 years. Moreover, the incursion on the employees' freedom of choice could be even more severe (up to 6 years) if the union and the predecessor employer were parties to a collective-bargaining agreement that served to bar any employee efforts to remove or replace the Union prior to the successor's assumption of operations.

Id.

With respect to the majority's first point, the same can be said of the certification and voluntary recognition bars: these bars, just like the successorship bar, prevent challenges to a union's representation status during the bargaining phase and, if agreement is reached, that initial bar will be followed by a contract bar. But this has never been thought to be incompatible with employee free choice. *See, e.g.*, *Fall River*, 482 U.S. at 38 ("The presumptions of majority support further th[e] policy [of industrial peace] by promoting stability in collective-bargaining relationships, without impairing the free choice of employees." (quotation marks and citation omitted)); *Brooks*, 348 U.S. at 98-99; *Keller Plastics*, 157 NLRB 583.

The worst-case scenario next posited by the majority is a red herring. In reality, the successorship transition will rarely occur just as a three-year contract bar is coming to an end, such that subsequent bars might result in an extended bar on representation proceedings. It is far more likely that a change in employers will occur during an open period, or midway through the predecessor's collective bargaining agreement – as demonstrated by ULTCW's experience. *See*

supra, Section I.C. (describing Glendora and Centinela successorships taking place during open periods); *Windsor I*, 351 NLRB at 992 (successorship occurred midway through one bargaining unit's contract (which itself was for less than three years) and during the open period for another bargaining unit). Indeed, when a successorship takes place during or shortly after an open period, and the challenge to the union's majority status is initiated only *after* the transition, the timing strongly supports the inference that the majority of employees were satisfied with the incumbent's representation and that any loss of support is a function of the successorship itself.

As in any other situation where a bar on representation proceedings is imposed for a "reasonable period," the length of the successorship bar would be determined on a case-by-case basis. *Lee Lumber III*, 334 NLRB at 402. Thus, even if the worst-case scenario hypothesized by the *MV Transportation* majority actually presented itself, in deciding whether to dismiss the decertification or rival petition in accordance with the successorship bar, the Board could create a narrow exception, *i.e.,* refrain from dismissing the petition where the total length of time since the last open period exceeds three years (the current limit on the contract bar).

II. A Successorship Bar Should Apply Equally to "Perfectly Clear" Successors as Well as Ordinary *Burns* Successors

"Perfectly clear" successorship situations are not materially different from "ordinary" *Burns* successor situations for purposes of whether a bar on election petitions should be imposed for a reasonable period of bargaining following the transition. Current Board doctrine, developed in the context of delineating the duty to bargain in good faith, labels as "perfectly clear successors" those successor employers who conceal their true intentions to set new terms and conditions of work, whether deliberately or through a failure to communicate clearly with the

incumbent workforce, as well as those successor employers who agree to bargain with the union before setting initial terms and conditions of work. *Spruce Up*, 209 NLRB at 195. In all of these successorship cases, just as in "ordinary" successorship situations, the "overriding" public interest in industrial stability that animates the NLRA (*Fall River*, 482 U.S. at 38) requires that the incumbent union be permitted a reasonable period of time to embark on its bargaining relationship with the new employer before the Union's presumption of majority support can be called into question.

A. The *St. Elizabeth Manor* Successorship Bar Should Be Applied Uniformly to All Successorship Situations, Including All "Perfectly Clear" Successor Scenarios.

As we demonstrated in Part I, a successorship bar furthers the policies underlying the Act by mitigating the inherently destabilizing effects of employer transitions on the incumbent workforce, thus facilitating nascent collective bargaining relationships. Employee dissatisfaction with the incumbent union in such transitions, where it exists, can be traced in substantial part to the dynamics inherent in the transition to a new collective bargaining relationship and to the legal regime that privileges *all* successor employers to abrogate the predecessor's collective bargaining agreement. *See supra* Section I.A-C.

The across-the-board successorship bar we advocate acknowledges that employee dissatisfaction expressed under these circumstances does not necessarily reflect employees' uncoerced preference regarding their representative, but is a result of the transition itself in its legal context. Because the inherently destabilizing qualities that can instigate employee dissatisfaction with their incumbent union are found in all successorships, the rationale set forth above for reinstating the successorship bar applies equally to "perfectly clear" successorships, at

least as so defined under the Board's existing precedents. Moreover, such an across-the-board bar would be straightforward for the Regions to administer and would minimize pre-election litigation.

1. The Board Has Narrowed the Definition of "Perfectly Clear" Successor From That Articulated by the Supreme Court in *Burns*

Any analysis of whether to apply an election bar to "perfectly clear" successorship situations "as defined by *NLRB v. Burns Security Servs.*, 406 U.S. 272, 294-95 (1972), and subsequent Board precedent" (Notice & Invitation to File Briefs at 1) necessarily begins with the Supreme Court's ruling in *Burns*. *Burns* held that an "ordinary" successor employer was privileged to "set initial terms and conditions of employment on which it will hire employees of a predecessor," 406 U.S. at 294, but that such an employer would be obligated to bargain with the incumbent union upon hiring a majority of its employees from the predecessor's workforce, *id.* at 281; *see also Fall River*, 482 U.S. at 41. Even so, *Burns* recognized that for certain successors, the duty to bargain attaches immediately upon the successor's decision to retain the incumbent workforce, which continues to be represented by the incumbent union:

> [T]here will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative *before* he fixes terms.

406 U.S. at 294-95 (emphasis added).

Thus, in the Supreme Court's formulation, the only difference between the "ordinary" successor (who is privileged to set initial terms and conditions of employment unilaterally) and the "perfectly clear" successor (who is not) is the employer's decision to retain the predecessor's workforce. The "perfectly clear" successor must recognize and bargain with the incumbent

union "before he fixes terms" because the bargaining obligation is premised on the reasonable presumption that the same employees who were represented by the union before the transition continue to support their union. *Burns*, 406 U.S. at 278-81.

Whether or not it might be reasonable to distinguish between "ordinary" and "perfectly clear" successors "as defined in [*Burns*]" for purposes of determining whether to process election petitions challenging the incumbent union's majority status, the Board's subsequent decisions necessarily alter the analysis. The Board has significantly narrowed the definition of a "perfectly clear" successor from the Supreme Court's straightforward articulation in *Burns*. Under the Board's existing case law, there is no material difference between "ordinary" and "perfectly clear" successors for purposes of deciding whether to reinstate the election bar of *St. Elizabeth Manor*.

In *Spruce Up*, 209 NLRB 194, the Board expressly narrowed the "perfectly clear" successor definition articulated in *Burns*, and held that *any* successor employer – even one who had retained virtually all of the predecessor's workforce – is privileged to set initial terms and conditions of employment unilaterally. *Id.* at 295. Instead of following *Burns* to hold that all successor employers who retain virtually the entire incumbent workforce have an immediate duty to bargain, the Board restricted that immediate bargaining obligation to only a few such employers:

> We believe the caveat in *Burns* . . . should be restricted to circumstances in which the new employer has either actively or, by tacit inference, misled employees into believing they would all be retained without change in their wages, hours or conditions of employment, or at least to those circumstances where the new employer . . . has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment.

Spruce Up, 209 NLRB at 195. Under *Spruce Up* and its progeny, then, there are three distinct kinds of "perfectly clear" successor employers who must negotiate with the incumbent union before fixing the employees' initial terms and conditions of continued employment: (1) the employer who actively misleads employees regarding its intent to set initial terms and conditions of employment (*see, e.g.*, *Fremont Ford*, 289 NLRB 1290); (2) the employer who fails to clearly and timely communicate its intentions to the workforce (*see, e.g.*, *Rosdev Hospitality*, 349 NLRB 202, 203, 207 (2007); *Metro Mayaguez, Inc. d/b/a Hospital Pavia Perea*, 352 NLRB 418 (2008)); and (3) the employer who does not intend to set terms and conditions of employment without first bargaining over them with the incumbent union (*see, e.g.*, *Road & Rail Servs., Inc.*, 348 NLRB 1160, 1160-62 (2006)).[7]

[7] Any *other* successor employer, even one who has retained the predecessor's entire workforce, is free to determine its initial terms and conditions of employment without first bargaining with the incumbent union. *Spruce Up*, 209 NLRB at 195. Indeed, one recent decision applying *Spruce Up* holds that a successor employer who retains the predecessor's work force may avoid any initial bargaining obligation merely by announcing that it has plans to change the terms and conditions of employment, without clearly laying out the specific changes it intends to make. *Windsor II*, 530 F.3d 354. *Spruce Up* thus represents a significant and unwarranted narrowing of the duty to bargain from that articulated by the Supreme Court in *Burns*. *See, e.g.*, *Spruce Up*, 209 NLRB at 206 (Member Fanning, dissenting in part); *id.* at 207-08 (Member Pennello, dissenting in part); *Canteen Co.*, 317 NLRB 1052, 1054-55 (1995) ("I question the validity of *Spruce Up* and believe that it grafts on an additional requirement for finding a 'perfectly clear' successor which is neither warranted nor intended by the Supreme Court in *Burns*. . . . *Spruce Up* represents a misreading of *Burns*.") (Chairman Gould, concurring). Not only did *Spruce Up* misread *Burns*, its narrowing of *Burns*' holding barring certain successors from setting initial terms and conditions of employment unilaterally has been extraordinarily detrimental to the stability of collective bargaining relationships, and therefore to "industrial peace," which is the "overriding policy of the NLRA." *Fall River*, 482 U.S. at 38; *see supra* at I.A.-C. (discussing practical effects on industrial peace of the *Spruce Up* legal regime). In this or another appropriate case, the Board should revisit *Spruce Up* to align Board doctrine concerning the duty to bargain with the Supreme Court's ruling in *Burns*.

As we discuss below, the differences between these various "perfectly clear" successors are differences of degree rather than of kind. All of these successors, like "ordinary" successors (*i.e.*, those who openly set initial terms and conditions under *Spruce Up*), engage in conduct that is inherently destructive to the relationship between the incumbent employees and the union (whether intentionally or inadvertently); and all of them place the incumbent union in the unrealistic and unfair position of producing immediate success in bargaining with the new employer to prevent employees from losing confidence in their union. Indeed, the "perfectly clear" successor who conceals its true intentions to change terms and conditions of work causes an even greater disruption in the relationship between employees and their union than the "ordinary" successor that does so forthrightly. Thus, for the same reasons that a successorship bar is warranted in "ordinary" successor situations, it is also warranted in all "perfectly clear" successor situations.

2. The Misleading or Vague "Perfectly Clear" Successor

The rationale for requiring a reasonable period of good faith bargaining without challenge to the incumbent union's majority status in "ordinary" successorship situations is particularly compelling in the first and second kinds of "perfectly clear" successorships, where the employer misleads employees about its intent to set initial terms and conditions of employment or does not clearly communicate its intent.

The nursing home industry provides a powerful practical illustration of why this is so. The industry abounds with successor employers who retain virtually all of the predecessor employer's workforce, because the nature of the business demands that transitions from one operator to another be seamless. *See supra* Section 1.C. Under *Burns*, such successors would

uniformly be required to bargain with the incumbent union before changing any of the employees' terms and conditions of work. 406 U.S. at 294. However, in ULTCW's experience, these successor employers rarely do so. As discussed *supra*, most nursing home successors avail themselves of their privilege under *Spruce Up* to unilaterally determine the initial terms and conditions of work. Many more fail to clearly communicate to the retained employees – either before or after assuming control – their plans for setting new terms and conditions of work.[8]

The distinction between the "ordinary" successor who openly avails itself of the privilege to set unilateral terms and conditions of work and the "perfectly clear" successor who conceals its intent to do so is purely a legal one; the "ordinary" successor does not commit an unfair labor practice when it implements those changes, while the "perfectly clear" successor does. *See, e.g.*, *Fremont Ford*, 296 NLRB at 1296 ("perfectly clear" successor that misleads employees regarding its intent to set initial terms of employment "forfeits" the right to make those changes

---

[8] *See supra* at Section I.C.; *see also Windsor I*, 351 NLRB at 976 ("No changes to terms and conditions of employment were discussed with the employees during the interviews . . . nor were employees invited to accept employment under specified new terms. . . . Respondent mailed or hand-delivered offers of 'temporary employment' . . . [stating] that '[o]ther terms and conditions of your employment will be set forth in Windsor's personnel policies and its employee handbook.' The Respondent did not otherwise give the carry-over employees notice of any specific changes that would be made to their terms and conditions of employment."); *A&C Healthcare*, 354 NLRB No. 33 at 3 (2009) (nursing home successor employer assumed control of operation, retained all employees, and announced new terms and conditions over the next several months); *Centinela Grand*, Case No. 21-CA-39408 (successor employer retained virtually all employees and only produced new employee handbook to incumbent union months later at first bargaining session); *cf. Hospital Pavia Perea*, 352 NLRB at 425 ("The Hospital did not require the employees of the predecessor to fill out job applications, nor were they offered employment by the Hospital rather all they had to do was show, as usual, for work and they continued to be employed without change to the terms and conditions of employment. . . . Likewise, the Hospital upon assuming control . . . and beginning operation . . . did not inform employees of any intentions on its part to set initial terms and conditions of employment. The Hospital announced no such intention until approximately some 17 days later and its announcement even at that time was vague.").

unilaterally). However, the "perfectly clear" successor label means little in the very different context of whether to process an election petition filed after the transition. As a practical matter, regardless of the label that is applied to the employer, the transition in employers has equally and predictably destabilizing effects on employees and on their relationship with their union. If anything, the employer that is misleading or vague about its plans to set new terms and conditions of work exacerbates the inherently destabilizing effects of a post-*Spruce Up* transition because employees are inevitably surprised by the successor employer's changes to the terms and conditions of work when they eventually occur, and are likely to blame their union for failing to prevent those changes.

To be sure, the "perfectly clear" successor who has misled its employees or failed to clearly communicate its intent to change the terms and conditions of work commits an unfair labor practice when it eventually implements those changes, so the incumbent union is not wholly without a remedy. Such an unfair labor practice charge would block the processing of a post-transition election petition, pursuant to the Board's existing policies. *See* Rep. Casehandling Manual §11730.3(b). However, the possibility that the election petition may be held in abeyance pending processing of the charge, and may even be dismissed, is not sufficient to remedy the conditions that led to the filing of the petition in the first place. As the Board recognized in *St. Elizabeth Manor*, among the justifications for the sucessorship bar is that *any* successor "may be reluctant to commit itself wholeheartedly to bargain for a collective-bargaining agreement with the incumbent union when at any time following the recognition, the union's majority status may be attacked." 329 NLRB at 343. To the extent that a successorship bar would encourage successor employers to bargain in good faith and without reservation from

the outset, that ameliorative function is even *more* important – not less so – with the "perfectly clear" successor which, by concealing its true intention to change the terms and conditions of employment, is *already* violating its duty to bargain.

This kind of "perfectly clear" successor is already failing to deal forthrightly with the union, and its unfair labor practices are at least as damaging to the union's relationship with the employees as any lawful conduct under *Spruce Up* (if not more so, for the employer's lack of candor with its employees). In the unfair labor practice context, after all, "[a]n employer's unlawful failure to recognize or bargain is *presumed* to cause any employee disaffection from the union that arises during the course of the employer's unlawful conduct." *Lee Lumber III*, 334 NLRB at 399 (emphasis added). That is why "[i]t is well established that an incumbent union's representative status cannot lawfully be challenged in an atmosphere of unremedied unfair labor practices that undermine employees' support for the union." *Id.* For much the same reasons that the Board bars election petitions and withdrawals of recognition for a reasonable period following a finding that the employer has failed to bargain in good faith, the same prophylactic bar should be imposed in those "perfectly clear" successorship situations where the employer has concealed its intentions regarding setting new terms and conditions of work, because that employer is not bargaining in good faith.

3. The "Perfectly Clear" Successor Who Agrees to Bargain Before Setting Initial Terms and Conditions of Employment

Even the third kind of "perfectly clear" successor, the one who agrees to bargain with the union before setting initial terms and conditions of employment, engages in conduct that is inherently destabilizing to the relationship between the incumbent union and the employees. For

even this employer, who is the most respectful of the incumbent union's role as employee representative, retains the right to set initial terms and conditions of work unilaterally after bargaining to impasse. *See, e.g.*, *Planned Bldg. Servs.,* 347 NLRB 670, 675 (2006). In many situations where the successor has agreed to bargain from the outset, the predecessor's collective bargaining agreement will not have expired at the time of the transition; but the successor's decision to bargain with the union before setting initial terms prematurely terminates that prior agreement, depriving employees of the benefit of the bargain they struck with the predecessor. In contrast, the predecessor employer cannot propose changes or bargain to impasse until expiration of the previous contract and in the context of an established collective bargaining relationship. Even in this last successorship scenario, then, "because the employer and the union are embarking on a new relationship, all the issues are open . . . [and] bargaining . . . is likely to present a greater challenge than bargaining between partners in an established relationship who are negotiating a new contract after having lived under an earlier contract or contracts so that only selected issues are likely to be on the table." *St. Elizabeth Manor*, 329 NLRB at 343.[9]

In short, even though this kind of successorship situation is the least disruptive and perhaps the most likely to result in a successful bargaining relationship, an insulated post-transition period is still necessary so that the union can develop that bargaining relationship

---

[9] The facts of *UGL* are illustrative. There, the successor employer immediately recognized and agreed to bargain with the incumbent union, even adopting the remainder of the predecessor's collective bargaining agreement. However, because that agreement was set to expire just a few weeks after the successor employer assumed control, the incumbent union would have no choice but to bargain with the successor for a new contract almost immediately, placing at risk its earlier contract gains with the predecessor. *See also Road & Rail*, 348 NLRB at 1161 (although successor employer offered to bargain first with the incumbent union before setting initial terms, it informed the union that it planned to negotiate for several specific changes).

rather than being expected to produce instantaneous results in a "hothouse" atmosphere. *Brooks v. NLRB*, 348 U.S. 96, 100 (1954), quoted in *MV Transportation*, 337 NLRB at 779 (Member Liebman, dissenting); *see also Fall River*, 482 U.S. at 38 (presumption of continued majority support for union after transition to new employer "enable[s] a union to concentrate on obtaining and fairly administering a collective bargaining agreement without worrying that, unless if produces immediate results, it will lose majority support and will be decertified").

B. A Uniform Successorship Bar For All Successorship Situations Would Minimize Litigation and Discourage Improper Incentives.

Additionally, a bar that applies across the board to all successorship situations would be the easiest for the Regions to administer, and would eliminate complicated pre-election hearings and investigation. *Cf. Midland Nat'l Life Ins. Co.*, 263 NLRB at 131-32 (revising election-related rules to remove incentives for parties to engage in protracted litigation); *Appalachian Shale Prods.*, 121 NLRB 1160, 1161-62 (1958) (revising contract bar rules to make them easier to apply). To determine whether a successor is a "perfectly clear" successor often involves lengthy litigation, as demonstrated by the vast body of case law spawned by *Spruce Up.* If the Board were to adopt a partial bar that applies in some successorship scenarios but not others, where a decertification or a rival union's election petition is filed, litigation over the applicability of the limited bar, however defined, would surely ensure. Thus, if the rationale for a partial successorship bar that applies only to certain kinds of successorships is to facilitate the processing of petitions in *other* contexts, the limited bar would surely backfire.

Moreover, a partial successorship bar would also risk injecting employers into many pre-election proceedings inappropriately. It is a bedrock principle of the NLRA that employees are

entitled to select their representative, if any, in an atmosphere free of employer coercion or influence. *See* 29 U.S.C. §151, §157, §158(a)(1). However, even the employer that is the most respectful of its employees' §7 rights will have an opinion concerning whether it prefers its employees to be represented by a union or not, and if so, by which union. A limited election bar that applies to some successorship situations, but not to all of them, would give employers an incentive to litigate what sort of successor they are, depending on the petition under consideration and the union or unions involved. Depending on the circumstances, an employer might even collude with the incumbent union to avoid an election, or with a challenger union or RD petitioner to secure one. A limited successorship bar that permitted some election petitions to be processed, but not others, would encourage such improper collusion, thus undermining employees' free choice.

Finally, a partial successorship bar whose application turns on the kind of successorship that is at issue might give some employers an incentive to set initial terms and conditions or not (or to do so openly, or not) based on their preferences regarding dealing with the employees' incumbent union. It is entirely within the employer's control to decide which kind of successor it will be. The Board should not adopt any rule that enables employers to further exploit the legal rules regarding successorship to influence employees' exercise of their right to choose their representatives.

CONCLUSION

For the foregoing reasons, the Board should overrule *MV Transportation* and reinstate the successorship bar rule of *St. Elizabeth Manor*.

//

Dated: November 1, 2010

Respectfully submitted,

Eileen B. Goldsmith
Jennifer Sung
ALTSHULER BERZON LLP
177 Post St., Suite 300
San Francisco, CA 94108

By: /s/
Jennifer Sung

Attorneys for ULTCW

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of this document is being served this day upon the following persons, by electronic mail, at the addresses below:

Mr. Lester A. Heltzer
Executive Secretary
National Labor Relations Board
1099 14th St. N.W.
Washington, D.C. 20570-0001
(via E-Gov E-Filing)

Arthur Telegen, Esq.
Seyfarth Shaw LLP
World Trade Center East
Two Seaport Lane, Suite 300
Boston, MA 02210
atelegen@seyfarth.com

James F. Lamond, Esq.
McDonald, Lamond & Canzoneri
Attorneys at Law
Cordaville Office Center
153 Cordaville Road, Suite 320
Southborough, MA 01772-1834
jflamond@comcast.net

Steven S. Goodman, Esq.
Jackson Lewis, LLP
58 South Service Rd., Suite 410
Melville, NY 11747
Goodmans@jacksonlewis.com

Bruce C. Bramley, Esq.
Pozefsky, Bramley & Murphy
90 State Street, Suit e1405
Albany, NY 12207
bbramley@pbmlaw.net

Louie Nikolaidis
Lewis, Clifton & Nikolaidis
350 Seventh Avenue, Suite 1800
New York, NY 10001-5013
lnikolaidis@lcnlaw.com

This is to certify that a true and correct copy of this document is being served this day upon the following persons, by overnight delivery, at the addresses below:

Randall E. Nash, Esq.
111 Devonshire St, Suite 500
Boston, MA 02109

Dated: November 1, 2010

By: /s/
Jennifer Sung
Attorney for SEIU ULTCW, Local 6434

Altshuler Berzon LLP
177 Post St., Suite 300
San Francisco, CA 94108
(415) 421-7151
(415) 362-8064 (Fax)
jsung@altshulerberzon.com