UGL-UNICCO Service Company *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 and Firemen and Oilers Chapter 3, Local 615, Service Employees International Union. Case 1–RC–22447

August 27, 2010

ORDER GRANTING REVIEW

BY CHAIRMAN LIEBMAN AND MEMBERS SCHAUMBER, BECKER, PEARCE, AND HAYES

The Intervenor's request for review of the Regional Director's Decision and Direction of Election is granted as it raises substantial issues regarding whether the Board should modify or overrule *MV Transportation*, 337 NLRB 770 (2002), and return to the successor bar doctrine as set forth in *St. Elizabeth Manor, Inc.*, 329 NLRB 341 (1999).[1] On June 9, 2010, the Board granted the intervenor Bakery Confectionary, Tobacco Workers' and Grain Millers, International Union Local 50's request for review in *Grocery Haulers, Inc.*, Case 3–RC–11944. In that case, the intervenor, among other things, questioned whether *MV Transportation* applies in a "perfectly clear" successor situation, and contended that if it does, "then it requires a showing that the presumption of the incumbent union's exclusive representational status has been rebutted," and that such a showing had not been made in that case. The Board has consolidated these cases for purposes of decisionmaking and briefing. A notice and invitation to file briefs has also issued today in order to afford the parties and interested amici the opportunity to address the issues raised in these cases.

In granting review, we emphasize that we have made no judgments about the ultimate merits. Our dissenting colleague has written an impassioned decision on the merits, but we choose to review the briefs and consider the actual experience of employees, unions, and employers under both *Dana Corp.*, 351 NLRB 434 (2007), and *MV Transportation* before arriving at any conclusions.

Dated, Washington, D.C. August 27, 2010

Wilma B. Liebman, Chairman

Craig Becker, Member

Mark Gaston Pearce, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN LIEBMAN, concurring.

I concur in the decision to grant review. I write separately to address the dissent of Member Schaumber, who takes this occasion not only to address the successor-bar doctrine, but also to denounce other recent actions of the Board with no connection to these cases.

My own prior views on the successor-bar doctrine are a matter of record. I was in the majority in *St. Elizabeth Manor, Inc.*, 329 NLRB 341 (1999), which revived the doctrine, and I dissented less than 3 years later, when a newly-constituted Board quickly reversed that decision in *MV Transportation*, 337 NLRB 770 (2002). I am open to being persuaded either that my prior position was wrong or that even if *MV Transportation* was mistaken, it should nevertheless be left in place. But Member Schaumber's dissent here—which reiterates the analysis of the *MV Transportation* majority and invokes the view of a partisan "commentator"[1]—has not persuaded me that I was wrong before or that granting review and requesting briefing now is unwarranted.[2]

[1] In *MV Transportation*, 337 NLRB 770 (2002), the Board reversed the "successor bar" doctrine. Under the successor bar doctrine, once a successor employer's obligation to recognize an incumbent union attached, the union was entitled to a reasonable period of time for bargaining without challenge to its majority status. *St. Elizabeth Manor, Inc*., 329 NLRB 341 (1999). In *MV Transportation*, the Board overruled *St. Elizabeth Manor* and held 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 to bar an otherwise valid decertification, rival union, or employer petition, or other valid challenge to the union's majority status." 337 NLRB at 770 (emphasis in original).

[1] I mean no disrespect to the author cited, nor do I mean to diminish the invaluable contributions that labor-law practitioners make to the development of the law. I suggest only that a practitioner's view is not that of a scholar or a neutral. For a practitioner's analysis of the successor-bar doctrine diametrically opposed to the view Member Schaumber cites, see Ellen Dichner, *MV Transportation: Once Again the Board Revisits the Issue of Whether an Incumbent Union Is Entitled to an Irrebuttable Presumption of Continuing Majority Support in Successorship Situations*, 19 The Labor Lawyer No. 1, p. 1 (2003).

[2] One of the cases in which briefing is sought raises an important question not addressed in *MV Transportation*: whether the successor bar applies to a "perfectly clear" successor. Member Schaumber offers his view on that issue today, but the Board itself will obviously await briefing.

None of my current colleagues were on the Board when *St. Elizabeth Manor* and *MV Transportation* were deliberated and decided. The two decisions involve an important and difficult issue, which can only be described as a question of labor law policy, as opposed to a matter of statutory construction, strict or otherwise. It is obvious that different Board Members, and different Boards, have different policy views. History shows that on some issues—and they are relatively few—Board policy oscillates.[3]

The tone of my colleague's dissent suggests that he is scandalized by this phenomenon, although it cannot be new to him, having joined in the reversals of several Board decisions "despite the fact that the ink [was] barely dry" (to use his phrasing).[4] Whatever might be said about policy oscillation at the Board, the majority to which my dissenting colleague belonged surely did little to mitigate it.

Here, Member Schaumber criticizes the majority for granting review and soliciting briefing, suggesting that it is somehow improper for an agency to seek information before acting. It seems reasonable to me that the Board might want to hear the views of the labor-management community on an important issue and to learn what real-world experience under Board doctrine has been. Surely the best agency decision is a well-informed decision. To quote Benjamin Disraeli, "Ignorance never settles a question."[5] And as the Supreme Court has explained:

> Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile changing economy.

American Trucking Assns. v. Atchison T. & S.F. Ry. Co., 387 U.S. 397, 416 (1967). These principles apply to the Board. See, e.g., *NLRB v. J. Weingarten, Inc.,* 420 U.S. 251, 266 (1975).

The *MV Transportation* Board fairly faulted the *St. Elizabeth Manor* Board for not seeking briefing on the successor-bar issue. 337 NLRB at 770. In contrast, my colleague joined the prior Board majority in making important doctrinal changes in several other cases where no party sought them and without the benefit of briefing on the issue, whether from the parties or from amici.[6]

I end where my colleague begins, with his criticism of recent Board actions—unrelated to this case—which he says "augur movement toward an activist agenda that includes the likely reversal of several of the prior Board's most important decisions."

My colleague's first example is the solicitation of briefs concerning experience with the Board's decision in *Dana Corp.*, 351 NLRB 434 (2007). *Dana* overruled a 40-year old decision, with the observation that "Board precedent is not immune from reconsideration simply because it is of a certain vintage." 351 NLRB at 441 fn. 32. The *Dana* Board established, administratively, a new and unprecedented notice-and-election procedure triggered by an employer's voluntary recognition of a union. Whatever changes, if any, are made by the Board to the new *Dana* scheme after examining experience over the last 3 years, would be fully within the Board's proper role as an administrative agency.

Member Schaumber's second example is a procurement-related request for information on electronic voting technology, which could be used either at the polling place or for voting by telephone or via the internet. That step—obviously neither a rulemaking, nor an adjudication—was taken by the Board as a body; Member Schaumber did not register a dissent, at least until now. Notably, the Board's sister agency, the National Mediation Board, which regulates the transportation industry, routinely uses telephone and internet voting in union-representation elections, practices it adopted administratively.[7] Criticizing the Board for even seeking information concerning the use of modern election technology seems peculiar. That the National Labor Relations Act was passed in 1935 surely does not mean that the Board is restricted to utilizing the technology of 75 years ago.

Third, Member Schaumber cites *Independence Residences*, 355 NLRB No. 153 (2010). His characterization of that decision is refuted by the majority opinion there. No further engagement on that case is needed here.

Finally, Member Schaumber turns to this case, which he says illustrates an inclination "to elevate and protect the rights of unions . . . at the expense of employees' free choice and unions' responsibilities" and thus to upset the "careful balance" struck in the Taft-Hartley Act" (in con-

[3] See generally, Samuel Estreicher, *Policy Oscillation at the Labor Board: A Plea for Rulemaking*, 37 Admin. L. Rev. 163 (1985). As Professor Estreicher observed 25 years ago:

> One position that should not detain us long holds that policy reversals are inherently wrong or unlawful. These commentators would have the Board adopt, or would impose on the agency, a rule of stare decisis. . . . Such a position would require a new statute.

Id. at 166.

[4] See, e.g., *Brown University*, 342 NLRB 483 (2004); *Oakwood Care Center*, 343 NLRB 659 (2004); *IBM Corp.*, 341 NLRB 1288 (2004).

[5] John Bartlett, *Familiar Quotations*, No. 6356 (10th ed. 1919).

[6] See, e.g., *Toering Electric Co.*, 351 NLRB 225 (2007); *Oil Capitol Sheet Metal*, 349 NLRB 1348 (2007); *Harborside Healthcare, Inc.*, 343 NLRB 906 (2004).

[7] See Introduction of Internet Voting/Mock Election, 34 NMB No. 13 (Jan. 29, 2007); Telephone Electronic Voting, 29 NMB 482 (2002).

trast to the Wagner Act, which was outside the "mainstream of American political thought"). Needless to say, I dispute my colleague's provocative characterizations. In any event, before us now is strictly an Order Granting Review (as well as an invitation for briefing issuing this same day), which does not require a debate about basic questions of Federal labor law or American political thought. It should be enough to point out that elimination of the successor-bar doctrine has made it possible for successor employers unilaterally to withdraw recognition from a union without ever engaging in bargaining and without employees ever having voted in a secret-ballot election to decertify the union.[8] How that result promotes *either* collective bargaining *or* employee free choice—much less strikes a balance between the two—is hard to see.

Dated, Washington, D.C. August 27, 2010

Wilma B. Liebman, Chairman

NATIONAL LABOR RELATIONS BOARD

MEMBER SCHAUMBER, dissenting.

Recent decisions and notices by the newly-formed Board majority augur movement toward an activist agenda that includes the likely reversal of several of the prior Board's most important decisions. For example, my colleagues issued an unprecedented request for briefing on experience with the Board's decision in *Dana Corp.*,[1] despite the fact that the ink is barely dry on that decision and no party has advanced arguments that warrant rehearing. *Dana* protects employee rights by requiring employees to be informed of their employer's voluntary recognition agreement based on a card check and provides a short window period within which they may challenge their employer's recognition through a secret ballot vote. My colleagues' grant of review in this case and in *Grocery Haulers, Inc.*, Case 3–RC–11944, and solicitation of briefing in these cases, is an obvious precursor to reconsidering *Dana*. They also recently solicited requests for information on electronic voting technology, specifically including technology to be used for remote voting, that could erode the sanctity and privacy of the ballot booth and subject the process of voting to scrutiny and coercion by interested parties, the same defects that often taint unsupervised card checks.[2] Finally, they also issued a remarkable decision in *Independence Residences,* 355 NLRB No. 153 (2010), which contravenes settled precedent and Section 8(c) of the Act by effectively deferring to a preempted state statute that imposes impermissible restrictions on both employers' rights to express, and employees' Section 7 rights to receive, noncoercive information opposing unionization.

In a time of decreasing union density in the private sector, my colleagues appear prepared to elevate and protect the rights of unions—as established by the Wagner Act—at the expense of employees' free choice and unions' responsibilities—as established by the Taft-Hartley Amendments. With Taft-Hartley, Congress struck a careful balance between unions' rights and unions' responsibilities, and brought the Wagner Act into the mainstream of American political thought by, among other things, protecting an employee's right to refrain from union and other concerted activity and an employer's First Amendment right to express noncoercive opposition to unionization. I believe that the Board's decisions should seek to maintain rather than subvert that balance.

With its notice and invitation to file briefs, also issued today, the majority continues this disturbing trend, soliciting briefing on whether to overrule long-established Board precedent concerning the bargaining obligations of successor employers. I am not, as my colleague suggests, "scandalized" by the Board's practice, from time-to-time, of revisiting its policies or precedents. As my colleague notes, I have participated in reconsidering precedents that I thought were wrongly decided or obsolete in today's workplace. This notice, however, follows two previous failed attempts to overrule the rebuttable presumption standard, punctuated by the Sixth Circuit's pointed disapproval of the Board's first attempt to overrule the standard, as discussed below. And while I agree that it is often useful for the Board to solicit the opinion of the labor-management community when reconsidering its policies, the Board has already done so on this issue, soliciting briefs only a few years ago before overruling the "successor bar" doctrine in *MV Transportation,* 337 NLRB 770 (2002). In short, this is well-traveled and well-settled territory that needs no reconsideration, and

[8] Cf. *Hampton Lumber Mills-Washington*, 334 NLRB 195 (2001), enfd. No 01-1276 (D.C. Cir. May 17, 2002) (pre-*MV Transportation* case applying *St. Elizabeth Manor* to find withdrawal of recognition unlawful).

[1] 351 NLRB 434 (2007).

[2] These requests followed earlier solicitations for briefing on whether to amend the Board's existing remedies to incorporate compound interest and electronic notice posting. Chairman Liebman observes that I did not register a dissent to the request for information concerning electronic voting technology. That is true, but only because there is no Board tradition of filing dissents to procurement information requests. However, my strong reservations cannot fairly be described by my colleague as newly-minted for this dissent.

because I believe my colleagues' efforts are misguided as a matter of law and policy, I respectfully dissent.

In *NLRB v. Burns International Security Services,* 406 U.S. 272 (1972), the Supreme Court held that a successor employer—an employer that (1) assumes the predecessor's business and maintains substantial continuity of operations, and (2) hires a majority of its employee complement from among the predecessor's employees—has an obligation to recognize and bargain with the predecessor employer's bargaining representative. For at least the past 35 years, with the exception of two ill-conceived and ultimately ill-fated detours, the Board has held that a successor's bargaining obligation is subject to a rebuttable presumption of union majority support. As the Board definitively explained in *MV Transportation,* supra at 773, this longstanding precedent strikes a careful balance between honoring employees' free choice regarding bargaining representation and promoting stability in labor relations. The majority now seeks for a third time to upset this balance by requesting briefing on whether to modify or overrule *MV Transportation*. This quixotic challenge to the well-reasoned and long-established principles of *MV Transportation* represents, at best, a waste of the Board's and the parties' resources; at the worst, it will reestablish demonstrably bad law. I refuse to follow my colleagues down this proven dead-end path.

In *Southern Moldings*, 219 NLRB 119 (1975), the Board affirmed that a successor employer's bargaining obligation with an incumbent union is subject to a rebuttable presumption of continuing majority support. The Board specifically rejected the union's argument that a successor's bargaining obligation is the same as the obligation of an employer that has voluntarily recognized a union, that is, that the incumbent union continues to enjoy an irrebuttable presumption of majority support for a reasonable period of time after the successor commences operations. See *Keller Plastics*, 157 NLRB 583 (1966).

The Board's policy regarding a successor's bargaining obligation has withstood two direct attacks over its long history. In *Landmark International Trucks*, 257 NLRB 1375, 1375 fn. 4 (1981), the Board inexplicably ignored *Southern Moldings* and stated, "We can discern no principle that would support distinguishing a successor employer's bargaining obligation based on voluntary recognition of a majority union from any other employer's duty to bargain for a reasonable period." The Sixth Circuit, vacating the Board's decision, had no such difficulty. As the Court explained:

> There is no reason to treat a change in ownership of the employer as the equivalent of a certification or voluntary recognition of a union following an organization drive. In the latter cases the employees must be given an opportunity to determine the effectiveness of the union's representation free from any attempts to decertify or otherwise change the relationship. However, where the union has represented the employees for a year or more, a change in ownership of the employer does not disturb the relationship between employees and the union. While the relationship between the employees and employer is a new one, the relationship between the employees and union is one of long standing.

Landmark International Trucks v. NLRB, 699 F.2d 815, 818 (6th Cir. 1983).[3] Not long thereafter, in *Harley-Davidson Transportation Co.,* 273 NLRB 1531, 1531–1532 (1985), the Board, citing the Sixth Circuit's *Landmark* decision, reaffirmed the principle that a successor's bargaining obligation with an incumbent union is subject to a rebuttable presumption of majority support. The Board expressly overruled its analytically-deficient *Landmark* decision.

The Board's policy on a successor's bargaining obligation remained intact for the next 14 years, when a divided Board revived its discredited *Landmark* rationale in *St. Elizabeth Manor, Inc.*, 329 NLRB 341 (1999). The majority argued that a bargaining obligation in successorship and in voluntary recognition requires the same protection from a challenge because both result from a "voluntary" act. Id. at 342–343. Thus, an employer's decision to voluntarily recognize a union is analogous to an employer's decision to "voluntarily" become a successor by hiring a majority of its employees from the predecessor's work force. As the dissent noted, this false analogy ignored the Sixth Circuit's statement in *Landmark*—cited with approval by the Board in *Harley Davidson*—that "a successor employer's obligation to bargain with the representative of its predecessor's employees arises by operation of law and cannot be truly voluntary." Id. at 348 (Hurtgen and Brame dissenting); *Harley-Davidson*, 273 NLRB at 1532.

The underlying justification for the majority's decision in *St. Elizabeth Manor* is a speculative parade of horribles that allegedly accompanies every change of ownership: employees "may fear that the successor employer will not want the union"; employees' "anxiety about their status under the successor may lead to employee dissatisfaction" with the incumbent union; the successor "may be reluctant to commit itself wholeheartedly" to the bargaining process; and successor employers "could use a successor enterprise as a way of getting rid of a labor contract and of exploiting employees." Id. at 343–344.

[3] In *UGL-UNICCO Service Co.,* one of the cases at issue here, the incumbent union has represented the unit in question for *20 years*.

In the face of all this assumed chaos, the majority felt duty-bound to create a "successor bar," protecting the union's representative status by granting it an irrebuttable presumption of majority support for a reasonable period of time. Under this doctrine, maintaining the union's representative status is given priority over employee free choice.

The Board wasted little time reversing *St. Elizabeth Manor's* poorly-reasoned "successor bar" doctrine. In *MV Transportation,* supra, the Board reviewed its precedent regarding a successor's bargaining obligation and concluded that "the position articulated by the Board in *Southern Moldings* represents the appropriate balance between employee freedom of choice and maintenance of stability in bargaining relationships." 337 NLRB at 773. Despite the majority's lip service in *St. Elizabeth Manor* to the importance of employees' free choice, the Board found that deferring employees' choice for a reasonable period of time—which could last years once the employer and the union reach a collective-bargaining agreement—"promotes the stability of bargaining relationships to the exclusion of the employees' Section 7 rights to choose their bargaining representative." Id. (citation omitted). While the Board acknowledged the possibility that employees might experience some stress and instability during a change of ownership, it questioned "the unsupported leap to the assumption that such anxiety would render the employees incapable of making an informed decision regarding union representation, or that it would cause them to 'shun' the union" Id. at 775. Thus, the Board repealed the "successor bar" doctrine and restored the proper balance between employee free choice and industrial stability.[4]

As this history shows, the Board has reviewed and refined its jurisprudence on a successor's bargaining obligation over nearly four decades, and it has twice rejected the "successor bar" doctrine and exposed its flaws. As one commentator has stated: "The brief career of *St. Elizabeth Manor* is an illustration of how purely result-driven decisions rarely survive the analytical scrutiny of decisionmakers who do not share the ideology of their predecessors." Siebert, *The Brief Career of St. Elizabeth Manor: Once Again an Incumbent Union Is Entitled Only to a Rebuttable Presumption of Continuing Majority Status in Successorship Situations*, 19 Lab. Law 17, 22 (2003). In my view, revisiting this issue for a third time is a futile and unwise exercise.

Moreover, the underlying cases that give rise to this grant of review and notice do not warrant the majority's solicitation of briefs or a reconsideration of *MV Transportation.* The Board granted review in *Grocery Haulers, Inc.,* to consider whether the Regional Director abused her discretion by reinstating a rival union's allegedly untimely representation petition. The incumbent union's request for review does not challenge the holding of *MV Transportation* or request that the Board review or overturn its principles. Thus, the notice is not responsive to the union's motion.[5] In *UGL-UNICCO Service Co.*, the incumbent union requests that the Board overrule *MV Transportation* and bar a rival union's representation petition, filed 1 month after the successor commenced operations. The union, however, has represented the unit in question *for 20 years*, and its relationship with its unit employees is well-established. The union offers no new or compelling justification for requiring the additional protection of a "successor bar," i.e., a "reasonable period of time" after the successor took over, to preserve its longstanding relationship with its unit employees.

Finally*,* the Order Granting Review itself offers no reason for reconsidering *MV Transportation*, and it provides no guidance to the parties as to why the issue deserves or requires another look.

For the reasons stated above, I strongly dissent from the majority's Order Granting Review on this issue.

Dated, Washington, D.C. August 27, 2010

Peter C. Schaumber, Member

NATIONAL LABOR RELATIONS BOARD

MEMBER HAYES, dissenting.

I join Member Schaumber in dissenting from the majority's decision to review yet again the well-reasoned doctrine that there should be no election bar to an imme-

[4] As my colleague notes, a successor may unilaterally withdraw recognition from an incumbent union, but only if it can prove that the incumbent union has, in fact, lost majority status. *Levitz*, 333 NLRB 717, 723 (2001). Such proof usually takes the form of an employee petition and thus is based on the employees' choice of representation. Employees' may also exercise their choice by filing a decertification petition or by voting for a rival union that files a petition.

[5] As my colleague notes, the Respondent raised in its request for review whether *MV Transportation* applies to a "perfectly clear" successor. I find this question irrelevant to the principal point at issue—the "successor bar." In *Burns*, 406 U.S. at 294–295, the Supreme Court stated that, in the case of a perfectly clear successor, "it will be appropriate to have [the successor] eventually consult with the employees' bargaining representative before he fixes terms." The "perfectly clear" designation, therefore, affects the successor's freedom to set terms and conditions at the beginning of the bargaining relationship. This additional obligation has no bearing on whether the incumbent union, after the successor commences operations, should have a rebuttable presumption of majority support, as provided by current Board law, or an irrebuttable presumption for a reasonable period of time, as provided by a "successor bar."

diate challenge of a union's continuing majority support among unit employees of a successor employer. Consequently, I would adhere to and apply the principles of *MV Transportation* in the pending cases. While I share Member Schaumber's concerns regarding the broader potential implications of actions taken by our colleagues in this case and elsewhere, I believe that I may best address such concerns in a future context.

Dated, Washington, D.C. August 27, 2010

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Brian E. Hayes, Member

NATIONAL LABOR RELATIONS BOARD