

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

In the Matter of:

UGL-UNICCO Service Company,

Employer,

and

**Area Trades Council, a/w IUOE Local 877;
IBEW Local 103; Plumbers Union (UA) Local 12;
Carpenters Union (NEJCC) Local 51; Painters
and Allied Trades Council District No. 35,**

Case No. 1-RC-22447

Petitioner,

and

**Firemen and Oilers Chapter 3, Local 615,
Service Employees International Union,**

Intervenor.

**RESPONSIVE BRIEF OF THE INTERVENOR FIREMEN AND OILERS CHAPTER 3,
LOCAL 615, SERVICE EMPLOYEES INTERNATIONAL UNION**

Introduction

On November 1, 2010, Firemen and Oilers, Chapter 3, Local 615, Service Employees International Union, the Intervenor in the above referenced matter (hereinafter referred to as Chapter 3 or Intervenor), filed a brief urging the National Labor Relations Board (Board) to reconsider and overrule its decision in *MV Transportation*, 337 NLRB 770 (2002), a decision that reversed the “successor bar” doctrine. The Petitioner, Area Trades Council (ATC), filed a brief in which it took no position on the successor bar but argued that, in the event the Board overrules *MV Transportation*, the successor bar should be applied prospectively and should not

apply in the instant case. Chapter 3 files this responsive brief in opposition to the brief filed by the ATC.

Argument

ANY DECISION OVERRULING, MODIFYING, OR LIMITING THE APPLICATION OF MV TRANSPORTATION SHOULD APPLY IN THIS CASE BECAUSE IT WILL NOT CAUSE MANIFEST INJUSTICE.

The Petitioner begins its argument by correctly stating that it is “(t)he Board’s usual practice to apply new policies and standards ‘to all pending cases in whatever stage.’” *John Deklewa & Sons*, 282 NLRB 1375, 1389 (1987) (citing *Deluxe Metal Furniture Co.*, 121 NLRB 995, 1006-1007 (1958)). Brief on Behalf of Petitioner Area Trades Council (“Petitioner’s Brief”) at p. 3. The Board more recently reiterated this principle in *SNE Enterprises, Inc.*, 344 NLRB 673 (2005).

In *SNE Enterprises, Inc.*, the Board described the following test for determining the propriety of retroactive application:

Under *Securities & Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 203 (1947), the propriety of retroactive application is determined by balancing any ill effects of retroactivity against “the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles.” See also *Aramark School Services*, 337 NLRB at 1063. Pursuant to this principle, the Board has stated that it will apply an arguably new rule retroactively to the parties in the case in which the new rule is announced and to parties in other cases pending at the time so long as this does not work a “manifest injustice.” See *Pattern & Model Makers Assn. of Warren*, 310 NLRB 929, 931 (1993); *Loehmann’s Plaza*, 305 NLRB 663, 672 (1991), supplemented by 316 NLRB 109 (1995), review denied by *Food & Commercial Workers, Local 880 v. NLRB*, 74 F.3d 292 (D.C. Cir. 1996); see also *NLRB v. Bufco Corp.*, 889 F.2d 608, 609 (7th Cir. 1990) (citing cases), *enfd. Dunn v. Postal Service*, 960 F. 2d 156 (Fed. Cir. 1992).

In determining whether the retroactive application of a Board rule will cause manifest injustice, the Board will consider the reliance of the parties on preexisting law, the effect of retroactivity on accomplishment of the purposes of the Act, and any particular injustice arising from the retroactive application. See, e.g., *Pattern & Model Makers Assn. of*

Warren, 310 NLRB at 931; see also *Consolidated Freightways v. NLRB*, 892 F.2d 1052, 1058 (D.C. Cir. 1989); *Retail Wholesale Store Union v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972); *NLRB v. Bufco Corp.*, 899 F.2d at 612.

Id. at 673; *Foster Poultry Farms*, 352 NLRB 1147, 1151 (2008) (“All decisions are applied retroactively. . . unless retroactive application would cause manifest injustice.”) (citations omitted).

SNE Enterprises, Inc. involved the retroactive application of the Board’s decision in *Harborside Healthcare, Inc.*, 343 NLRB 906 (2004), a decision addressing objectionable prounion activity by supervisors. In that case, the Board determined that “(a) balancing of the relevant factors indicates that retroactive application of the *Harborside* standard will not work a manifest injustice in this case.” *Id.* Specifically, the Board stated that there was no evidence that the supervisors in *SNE Enterprises, Inc.* who were found to have engaged in objectionable conduct took pre-*Harborside* law into account before engaging in the conduct at issue. Moreover, the Board determined that, even if there had been such reliance, any prejudice suffered does not rise to the level of manifest injustice because the case concerns the validity of a representation election, not an unfair labor practice. The Board contrasted the case with *Epilepsy Foundation of Northeast Ohio v. NLRB*, 268 F. 3d 1095 (2001), enfg. in part 331 NLRB 676 (2000), in which the retroactive application of the Weingarten rule in a non-union setting would have resulted in the finding of a violation and an order to pay damages. *Id.* at 673-674.

The Board stated:

In the instant case, the Board is not finding a violation or ordering any party to pay damages or issuing any kind of order against a party. Although the election may be invalidated and subsequently re-run, no party will suffer the kind of order that concerned the court in *Epilepsy Foundation*.

Id. at 674.

When the above analysis is applied to the case at bar, it is clear that the application of the successor bar in this matter will not cause manifest injustice. First, although the Petitioner asserts that it relied on the rule in *MV Transportation* in attempting to unseat Chapter 3 as the representative of the petitioned-for unit, Petitioner's Brief at p. 7, there is absolutely no evidence, in the form of an offer of proof or otherwise, to support this assertion. Further, even if Petitioner did rely on this rule, "any prejudice (it) may have suffered does not rise to the level of a manifest injustice." *SNE Enterprises, Inc.*, 344 NLRB at 673. Like *SNE Enterprises, Inc.*, this case is a representation case, not an unfair labor practice case. No party will be exposed to an order or damages if the successor bar is applied. Id., *Foster Poultry Farms*, 352 NLRB at 1152.

Additionally, the instant case, unlike *SNE Enterprises, Inc.*, does not even involve the setting aside of an election which resulted in the certification of a representative. As the Petitioner notes, the ballots in this election have been impounded, and "for all that is known at this time, the Intervenor might have received the majority of the votes cast. . . ." Petitioner's Brief at p. 10. There is no basis upon which to conclude that there has been *any* injustice to the Petitioner.

The remaining element in the balancing test is "the effect of retroactivity on accomplishment of the purposes of the Act." *SNE Enterprises, Inc.*, 344 NLRB at 673, *Foster Poultry Farms*, 352 NLRB at 1151. In the event the Board overrules, modifies or limits *MV Transportation* in such a way that an incumbent union in a perfectly clear successor situation is entitled to a reasonable period of time to negotiate with the successor employer, such a decision would "preserve() stability and promote() collective bargaining, without sacrificing employee free choice." *MV Transportation*, 337 NLRB 770, 776 (2002) (Liebman, dissenting), *St. Elizabeth Manor, Inc.*, 329 NLRB 341, 345-346 (1999) (Successor bar "better carries out 'the

object of the National Labor Relations Act’ . . . namely ‘industrial peace and stability fostered by collective bargaining agreements providing for the orderly resolution of labor disputes between workers and employers.’”) [citing *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781,785 (1996)]. In the instant case, Chapter 3 faced a challenge to its representative status as the result of a petition that was filed only *one month* after the successor assumed operations. The application of the successor bar in this case would further the purposes of the Act by allowing Chapter 3 a reasonable time to bargain with the new employer before having to contend with a challenge to its status as bargaining representative.

The application of such a decision in this case is further supported by the fact that the successor bar provides only a “limited period of repose.” *MV Transportation*, 337 NLRB at 776 (Liebman, dissenting). “After a reasonable period of time has elapsed, the Board may, in a proper proceeding and upon a proper showing, take steps in recognition of changed situations that might make appropriate changed bargaining relationships.” *St. Elizabeth Manor, Inc.*, 329 NLRB at 346 (citation omitted). Clearly, the application of the successor bar in this case would not permanently foreclose the Petitioner from seeking to represent the unit employees.

Finally, with respect to the question of whether a change in the successor bar rule should apply in the instant case, the Board should consider the “checkered history of the Board’s repeated reversals” in the cases involving the issue of the successor bar. 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 Status in Successorship Situations*, 19 *The Labor Lawyer* No. 1, p. 1, 9 (2003). It is noteworthy that the decisions in *Southern Moldings, Inc.*, 219 NLRB 119, 120 (1975), *Landmark International Trucks*, 257 NLRB 1375, 1376 (1981), *Harley-Davidson Transportation Co.*, 273 NLRB 1531, 1532 (1985),

St. Elizabeth Manor, Inc., 329 NLRB at 346, and *MV Transportation*, 337 NLRB at 776, were all applied in the very cases in which the rules were announced. Likewise, any decision overruling, modifying or limiting the application of *MV Transportation* should also apply to the case at bar.

Conclusion

For all of the foregoing reasons, and all of the reasons set forth in its brief dated November 1, 2010, Chapter 3 respectfully urges the Board to reconsider and overrule *MV Transportation*, reinstate the successor bar doctrine, and remand this matter to the Regional Director with instructions to apply the successor bar doctrine in this case.

Respectfully submitted,

FIREMEN AND OILERS CHAPTER 3.
LOCAL 615 SEIU
By its attorney

November 12, 2010
Date

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CERTIFICATE OF SERVICE

I, Randall E. Nash, counsel for Firemen and Oilers Chapter 3, Local 615 Service Employees International Union in Case No. 1-RC-22447, certify that I have served a copy of the Responsive Brief of the Intervenor Firemen and Oilers Chapter 3, Local 615 Service Employees International Union upon the following persons, by electronic mail, on the twelfth day of November, 2010 at the addresses below:

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