

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

In the Matter of:)	
)	
ECUMEN d/b/a ECUMEN SCENIC SHORES,)	Case No. 18-RD-2724
)	
Employer)	
and)	
)	
KRISTY GROSSKURTH)	
)	
Petitioner)	
and)	
)	
AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES COUNCIL 5)	
)	
Union)	

**UNION’S BRIEF REQUESTING REVERSAL OF REGIONAL DIRECTOR’S
DECISION AND DIRECTION OF ELECTION**

On March 23, 2011, the National Labor Relations Board (“the Board”) granted the request for review filed by AFSCME Council 5 (“the Union”). The Union hereby submits this brief in response to the grant of request for review, requesting that the Board reverse the decision of the Regional Director directing that an election be conducted. The election was scheduled to occur on March 25, but it has been postponed until April 15. Under the successor bar doctrine, however, the petition for an election would be barred altogether, and the Union and the Employer, Ecumen Scenic Shores (“the Employer”), would be required to negotiate for a reasonable period of time. Applying the successor bar doctrine in this matter would best fulfill the purposes of the National Labor Relations Act (“the NLRA”). Accordingly, the Regional

Director's decision should be reversed, and the Union and the Employer should be required to negotiate for a reasonable period of time.

FACTS

The Union began representing employees at Sunrise Nursing Home at least twenty-five years ago. In 1986, the Union and Lake County, the previous owner of the nursing home, agreed that if any transaction affected the ownership or operation of the nursing home, that Lake County "shall make known to any bidder, prior to the transaction, the existence of this agreement." Lake County also agreed to require the transferee, "as a condition of the transfer, to rehire current employees of Sunrise Nursing Home to the extent of the transferees' staffing requirements." The parties reduced their agreement to writing in a Letter of Addendum, which was then appended to the collective bargaining agreement. Every collective bargaining agreement since has included the Letter of Addendum.

The collective bargaining agreement between the Union and Lake County defined the appropriate unit:

For purposes of this Agreement, the appropriate unit as defined by the Bureau of Mediation Services shall mean all employees employed by the Sunrise Nursing Home, Two Harbors, Minnesota, who are public employees within the meaning of Minn. Stat. 179A.03, Subd. 14, excluding supervisory, confidential and all other County employees.

(Art. 2, Sec. 2, Collective Bargaining Agreement, Attach. 1.) This definition incorporated the meaning of public employees under the Minnesota Public Employment Labor Relations Act, Chapter 179A ("PELRA"). The Bureau of Mediation Services performs various functions under PELRA, including determining bargaining units.

Lake County notified the Union on July 28, 2010 that the County's Board of Commissioners had entered into a letter of intent to transfer ownership and operation of Sunrise

Nursing Home to Ecumen, a private entity. The Union and Lake County began negotiating a new collective bargaining agreement before the prior agreement's expiration on September 30, 2010. During negotiations, Lake County affirmed that the Letter of Addendum was active and binding. The parties reached a new agreement that was effective on October 1, 2010.

Throughout the negotiations, Ecumen's attorney, Mark Mathison, was present at the bargaining table. Ken Loeffler-Kemp, the Union's representative, had extensive discussions and exchanges with Mathison regarding bargaining. During that time, the Union learned that Ecumen intended to make offers of employment to a majority of the employees at Sunrise and asked if Ecumen would willingly recognize the Union.

The transfer of ownership of the facility from Lake County to Ecumen occurred on January 1, 2011. But neither Lake County nor Ecumen notified the Union that they had negotiated and signed a Purchase Agreement. The Union independently learned of the Purchase Agreement during the first week of January 2011. The Purchase Agreement provided that Ecumen would set the terms and conditions of employment to its employees and Ecumen made employment offers to most of the predecessor's employees.

On January 19, 2011, Petitioner Kristy Grosskurth filed a decertification petition with Board Region 18 seeking to decertify the Union as the employees' bargaining representative. At that time, the Union still had not received official notice from either the County or Ecumen that Ecumen now owned the nursing home. On January 24, 2011, the Union filed a notice of bargaining with the Federal Mediation and Conciliation Services to negotiate an initial contract with Ecumen. The Union and the Employer submitted documents and position statements regarding the successor bar doctrine to Board Region 18. Regional Director Decision, 3.

Region 18 conducted an evidentiary hearing on the Petition before Hearing Officer Roger O. Czaia on February 15, 2011 in Two Harbors, Minnesota. The parties agreed at the hearing that no testimony was necessary because the sole issue, whether the successor bar applied, was a legal one, and the parties agreed that the prerequisites for the successor bar had been met. Tr. 24:20-24, Feb. 15, 2011.

The Union argued that the petition should be dismissed to give Ecumen and the Union a reasonable period of time to negotiate. On August 27, 2010, the Board granted a request for review in UGL-UNICCO Service Co., stating that a regional director's decision and direction of election "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)." UGL-UNICCO Service Co., 355 NLRB 155 (2010). The Board's decision in UGL-UNICCO on the successor bar doctrine is dispositive of the issues in this matter. Ecumen argued that the petition should be determined under current Board law, which overruled the successor bar doctrine. The Petitioner also stated her belief that the Petition should be determined under current Board law.

The parties did not stipulate to having an election, but did stipulate as to certain other issues. Ecumen agreed that it had hired a substantial majority of the predecessor's employees and agreed that it would not challenge the Union's assertion that it had requested recognition and to bargain. Tr. 20:5-7, 23:14-17. The parties further agreed that if there was an election, all employees in the bargaining unit as of December 31, 2010 under the predecessor employer should be able to vote. The parties agreed to exclude managers, supervisors, confidential employees, guards and professional employees from the bargaining unit, but did not agree on the specific positions that should be excluded. Thus, the bargaining unit should include employees

that Ecumen appears to contend should be excluded from the bargaining unit, and Ecumen agreed that all employees in the bargaining unit as of December 31, 2010 should be permitted to vote in the election. The Petitioner stated no position regarding which employees should be permitted to vote in an election.

The Regional Director issued a decision in this matter on February 23, 2011. The Decision found that under current Board law, a successor employer's recognition of a union does not act as a bar to a decertification petition. The Decision ordered "an election in a unit coextensive with the bargaining unit that existed prior to the Employer assuming operation of the facility. That unit consists of nonprofessional employees, licensed practical nurses and registered nurses." Regional Director Decision, 3-4. The election was scheduled for March 25, 2011.

The Union filed a Request for Review of the Regional Director's decision, and requested a stay of the election on March 9, 2011. On March 23, 2011, the Board granted the Union's Request for Review and denied the request for a stay of the election. The following day, the Union learned that the Regional Director intended to postpone the election for approximately three weeks and issue a Supplemental Decision and Direction of Election to have a Sonotone election. The next day, the Regional Director issued a Supplemental Decision postponing the election, and directing a Sonotone election even though no party had ever presented any evidence regarding which employees should be considered "professional," and the parties had agreed that this issue would be determined after the election on the decertification petition. The Regional Director scheduled the election for April 15, 2011.

ARGUMENT

Under the successor bar doctrine, if a successor employed a majority of a predecessor's employees represented by a union and the union requested recognition, the union's majority status could not be challenged for a reasonable period of time to allow the successor and the union a period of time to negotiate. St. Elizabeth Manor, Inc., 329 NLRB 341, 344 n. 8 (1999). "Thus, because the employer's obligation to recognize the union commences at that time, as soon as those two events have occurred, the bar to the processing of a petition or to any other challenge to the union's majority status begins, whether or not the employer has actually extended recognition to the union as of that time." Id.

All the requirements for the successor bar doctrine are met here: Ecumen, the successor, employed a majority of the predecessor's employees represented by the Union, and the Union requested recognition. Therefore, under the successor bar doctrine, the Union's majority status cannot be challenged, and the Board should reverse the Regional Director's Decision and Direction of Election.

Applying the successor bar doctrine in this matter would effectuate the purposes of the NLRA. Requiring the Employer to negotiate with the Union would promote stability in labor relations, protect employees' rights to choose their representative, and encourage use of collective bargaining. The transition from Lake County to Ecumen as the employer means that collective bargaining will be subject to the NLRA rather than PELRA. Because the transition from public to private sector is significant, it causes more instability than a transition from one private employer to another. If the Union continues to represent employees for a reasonable period of time after this change in ownership, employees will be better able to evaluate the Union's effectiveness and determine whether they want the Union to continue to represent them, or whether they would prefer to be represented by another union, or simply be unrepresented.

CONCLUSION

For the foregoing reasons, the Union respectfully requests that the Board reverse the decision of the Regional Director.

Dated: April 6, 2011

GREGG M. CORWIN & ASSOCIATE
LAW OFFICE, P.C.

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I, Cristina Parra Herrera, certify that on April 6, 2011, I caused the Union's Brief Requesting Reversal of Regional Director's Decision and Direction of Election to be served on the following named individuals via electronic mail and also putting same in the United States mail with proper postage affixed there to:

Marlin O. Osthus
Regional Director
National Labor Relations Board, Region 18
330 South Second Ave., Suite 790
Minneapolis, MN 55401-2221
marlin.osthus@nrlrb.gov

John F. Bowen
John F. Bowen, Ltd.
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I also notified the Petitioner, Kristy Grosskurth, by telephone of the substance of the Special Appeal, and sent a copy of the same by overnight delivery service to:

Ms. Kristy Grosskurth
1606 Highway 61
Two Harbors, MN 55616

Dated: April 6, 2011

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