

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

AMBASSADOR SERVICES, INC.

and

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION,
LOCALS 1922 AND 1359, AFL-CIO

Cases 12-CA-26758
12-CA-26759
12-CA-26832

and

ERIC SWANSON, an Individual

Party in Interest

**ACTING GENERAL COUNSEL'S
BRIEF IN SUPPORT OF CROSS-EXCEPTIONS
TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

Christopher C. Zerby
Counsel for the Acting General Counsel
National Labor Relations Board
Region 12
201 East Kennedy Blvd., Suite 530
Tampa, Florida 33602-5824
Telephone No. (813) 228-2693

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I. STATEMENT OF THE CASE AND INTRODUCTION.

Counsel for the Acting General Counsel respectfully submits this brief to the Board in support of Acting General Counsel's cross-exceptions to the Decision of Administrative Law Judge George Carson II (the ALJ) in this matter.¹

On March 27, 2010, Ambassador Services, Inc. (the Respondent) began providing stevedoring services to Disney Cruise Lines (DCL) at Port Canaveral Florida. (ALJD 2:45-3:8; Tr. 27-29; R. Ex. 14).² At all material times prior to March 27, 2010, Florida Transportation Services, Inc. (FTS) provided stevedoring services to DCL at Port Canaveral, Florida. (ALJD 2:45-3:8; Tr. 27-29). On March 22, 2002, the Board certified International Longshoremen's Association, Locals 1922 and 1359, AFL-CIO (the Union) as the collective-bargaining representative of all full-time and regular part-time porters/longshoremen employed by Southern Labor Services, Inc. and FTS at Port Canaveral.³ (ALJD 2:37-43; GC Ex. 2). The Union was also certified as the collective bargaining representative of the same unit of FTS employees on August 6, 2003, July 19, 2007, and November 18, 2008, following elections held pursuant to the filing of decertification petitions.⁴ (ALJD 2:37-43; GC Exs. 3-5). The Union remained the collective-bargaining representative of the FTS unit employees until March 27, 2010, when Respondent succeeded FTS as the employer of that unit of employees.

¹ Respondent filed exceptions to the ALJ's findings and conclusions that it committed certain unfair labor practices Respondent's exceptions are addressed in detail in Acting General Counsel's Answering Brief, which is being filed simultaneously with Acting General Counsel's cross-exceptions and this brief in support of cross-exceptions.

² As used herein, the numbers following "ALJD" refer to the page and line number of the Administrative Law Judge's Decision, and the numbers following "Tr." refer to the page and line numbers of the transcript. For example, "Tr. 68:19-22" refers to transcript page 68, lines 19 to 22. In addition, "GC" refers to General Counsel's exhibits and "R" refers to Respondent's exhibits.

³ In 2002, Southern Labor Services, Inc. and FTS were joint employers of the porters/longshoremen working at Port Canaveral and the initial certification included both employers.

⁴ As of July 19, 2007, Southern Labor Services, Inc. was no longer a joint employer of the unit employees. On July 19, 2007 and November 18, 2008, the Union was certified as the bargaining representative of the unit employees employed by FTS.

Sometime prior to March 2010, DCL awarded the contract for stevedoring services at Port Canaveral to Respondent, and Respondent replaced FTS and began providing those services on March 27, 2010. (ALJD 2:45-3:8; Tr. 27-29; R. Ex. 14). Respondent hired most of the former FTS unit employees to work on its contract with DCL, and as of March 27, 2010, a majority of Respondent's porters/longshoremen working on the DCL contract were former FTS bargaining unit employees represented by the Union.⁵ (ALJD 3:1; Tr. 29-30; GC Exs. 1(s), 1(u); R Exs. 13, 14). The services provided to DCL by Respondent are essentially the same as the services that FTS provided to DCL. (Tr. 29). Thus, as Respondent admits, and as the Administrative Law Judge (the ALJ) found, Respondent is a successor employer to FTS. *NLRB v. Burns Int'l Security Services, Inc.*, 406 U.S. 272 (1972). (ALJD 2:45-3:8; GC Ex. 1(u)). Therefore, as of March 27, 2010, the Union represented a majority of the employees in an appropriate unit and Respondent had an obligation to recognize and bargain with the Union upon request.. It appears that all of the former FTS employees hired by Respondent were required to serve a 90-day probationary period. (Tr. 179, 292). Assuming the probationary period began on March 10, 2010, it would not have ended until around June 10, 2010.

Respondent's Employee Safety and Environmental Handbook that is in evidence as General Counsel Exhibit 9 was in effect when Respondent won the DCL contract. (ALJD 8:52-9:21; Tr. 44-46; GC Ex. 9). Respondent distributed the handbook to all of its newly hired employees on the DCL job, and the employees were told to review it. (Tr. 44-46). The handbook contained a rule forbidding employees from "walking off the job and/or leaving the premises during working hours without permission." (ALJD 6:50-7:23;

⁵ As used herein, the term "employees" refers to Respondent's unit employees who were specifically hired to perform work pursuant to Respondent's contract with DCL, and does not include other employees employed by Respondent at Port Canaveral.

GC Ex. 9, p.14 – Class III Infraction 14).⁶ This rule was in effect until July 30, 2010, when Respondent unilaterally implemented a revised “leaving the premises” rule. (ALJD 14:11-17; Tr. 46-48; GC Ex. 10, p.13-14).

On May 19, 2010, by facsimile and regular mail, the Union sent a letter to Respondent demanding recognition and bargaining, and Respondent received the letter that day. (ALJD 3:29-32; Tr. 339-340; GC Ex. 6). On May 20, 2010, former FTS employee Donald Bartlett distributed copies of the Union’s recognition demand letter to employees in Parking Lot A adjacent to the terminal where Respondent provides stevedoring services to DCL. (ALJD 34-39; Tr. 34-36). The record also establishes that Bartlett returned to the parking and distributed literature on May 27, 2010, and possibly on other dates as well. (ALJD 8:15-42; Tr. 164-165, 174, 215).

On May 27, porter Brian Postmus saw former FTS employee Donald Bartlett in Parking Lot A. (ALJD 8:15-42, Tr. 164-165). As Postmus made his way to the terminal, Bartlett gave him a copy of the Union’s May 19, 2010, recognition demand letter. (ALJD 8:15-42; Tr. 164-165; GC Ex. 6). After lunch that same day, employee Eric Swanson approached Postmus and asked if he wanted to sign a “decertification letter.” (ALJD 8:15-42; Tr. 165-166). Postmus did not sign. (8:15-42; Tr. 165-166).

Between about 3:00 p.m. and 4:30 p.m. that same day, Postmus saw vessel supervisor Donald May in the luggage hall near the area where employees sign out, and spoke to him about the letter Swanson asked him to sign. (ALJD 8:15-42; Tr. 166-167). Postmus told May that it was a coincidence that the letter came out the same day that Don (Bartlett) handed him paperwork in the parking lot. (Tr. 166-167). As found by the

⁶ The handbook also contained an overly broad rule prohibiting employee solicitation and distribution, which the ALJ found violated Section 8(a)(1) of the Act. (ALJD 6:50-7:16; GC Ex. 9, p.13 – Class II Infraction 1).

ALJ, May replied, “[I]t was no coincidence. Eric [Swanson] and I had been working on it for a couple of weeks.” (ALJD 8:15-42; Tr. 165-167:2-4).⁷

In mid to late May 2010, vessel supervisor May told employee John Martin that Respondent had received correspondence from the Union and asked Martin where he stood.⁸ (ALJD 7:48-8:2; Tr. 54-55). Martin replied that he attended all the Union meetings and remained informed so that if there was a vote, his vote would not be influenced by the company or a Union spokesperson. (ALJD 7:48-8:2; Tr. 54-55). There is no evidence that Martin’s sympathies or activities with respect to the Union were known to Respondent before supervisor May interrogated Martin.

On June 2, 2010, Respondent’s counsel, by letter, informed the Union that Respondent would not recognize and bargain with the Union, based on a petition against the Union that had been signed by a purported majority of Respondent’s employees servicing the DCL contract. (ALJD 3:41-47; GC Exs. 7 and 8).

Following an investigation of the unfair labor practice charges filed by the Union, the Regional Director of Region 12 of the National Labor Relations Board issued a Consolidated Complaint and Notice of Hearing on March 31, 2011. (GC Ex. 1(a)-1(s)). The hearing in this case was held on June 8 and 9, 2011, at Cocoa Beach, Florida, and the ALJ issued his decision on September 13, 2011.

The ALJ concluded that Respondent violated Section 8(a)(1) of the Act by maintaining an overly broad no-solicitation rule; informing employees that it had assisted with a petition to decertify the Union; soliciting employees to sign a petition to decertify the Union; and informing employees that they could not solicit or distribute literature on

⁷ Respondent filed exceptions to the ALJ’s findings and conclusions regarding May’s statement to Postmus.

⁸ Respondent filed exceptions to the ALJ’s findings and conclusions that John Martin, who has the title porter supervisor, is not a supervisor within the meaning of Section 2(11) of the Act. As noted above, Respondent’s exceptions are addressed in Acting General Counsel’s Answering Brief.

the property at which they were working. (ALJD 15:25-29). The ALJ also concluded that Respondent violated Section 8(a)(1) and (5) of the Act by failing and refusing to recognize and bargain with the Union.⁹ (ALJD 15:31-32).

The ALJ concluded that Respondent did not violate the Act in any other manner and recommended dismissal of all other allegations of the complaint. (ALJD 17:15-16). The Acting General Counsel has filed cross-exceptions to ALJ's findings and conclusions that Respondent did not violate the Act in several respects. The cross-exceptions raise the following questions:

1. Did the ALJ err by finding and concluding that Respondent, by supervisor Donald May, did not coercively interrogate employee Martin about where Martin stood regarding the Union, by failing to find and conclude that May's interrogation of Martin violated Section 8(a)(1) of the Act, and by failing to provide an appropriate remedy for that violation of the Act?
2. Did the ALJ err by finding and concluding that a reasonable employee would not understand Respondent's rule forbidding "walking off the job and/or leaving the premises during working hours without permission" nullified the right to strike guaranteed by Section 13 of the Act, by failing to find and conclude that Respondent violated Section 8(a)(1) of the Act by maintaining that rule until July 30, 2010, and by failing to provide an appropriate remedy for that violation of the Act?
3. Did the ALJ err by failing to retroactively apply the Board's decision in *UGL-UNICCO Services, Inc.*, 357 NLRB No. 76 (2011) to this case and find that the successor bar doctrine set forth therein is an additional ground for finding and concluding that Respondent violated Section 8(a)(1) and (5) of the Act by withdrawing recognition from the Union?

The answer to each of these questions is yes, and the ALJ's findings and conclusions regarding these issues should be reversed.

⁹ Respondent exceptions to certain of the ALJ's findings and conclusions that Respondent committed independent violations of Section 8(a)(1) of the Act and to the ALJ's findings and conclusions that Respondent violated Section 8(a)(1) and (5) of the Act by withdrawing recognition from the Union are addressed in Acting General Counsel's Answering Brief.

II. ARGUMENT.

A. The ALJ erred by finding and concluding that supervisor Donald May's questioning of employee John Martin was not coercive and did not violate Section 8(a)(1) of the Act.

In determining if the questioning of an employee about union activity violates the Act, the Board considers "whether under all the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act." *Bloomfield Health Care Center*, 352 NLRB 252, at 252 (2008), quoting *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984), enf'd. sub. nom. *HERE Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). Among the factors that may be considered in making such an analysis are the identity of the questioner, the place and method of the interrogation, the background of the questioning and the nature of the information sought, and whether the employee is an open union supporter.

Contrary to the ALJ's findings, an analysis of the totality of circumstances demonstrates that supervisor Donald May's pointed interrogation of Martin regarding his union sympathies was coercive. (ALJD 7:48 to 8:10). May is in charge of Respondent's operations on the DCL contract. May informed Martin that Respondent had received a letter from the Union demanding recognition and bargaining, and asked Martin to tell him where he stood with regard to the Union. Unlike the employee questioned in *Rossmore House*, there is no evidence that Martin openly supported the Union. Thus, May's question wasn't directed to an open union supporter in an attempt to learn why he supported the Union, or to learn more about the Union, but was intended to determine whether or not Martin supported the Union. May's interrogation of Martin came at a time when Respondent had only held the DCL contract for about a month and a-half and had not yet responded to the Union's demand for bargaining. Furthermore, the newly hired former FTS employees were still in their probationary period when the question was asked.

Although the ALJ correctly noted that May did not commit other unfair labor practices during the same conversation in which he interrogated Martin, May interrogated Martin in mid to late May 2010, at about the same time that he committed other independent violations of Section 8(a)(1) of the Act on behalf of Respondent. These violations included telling employee Postmus that Respondent had been assisting employee Swanson with the decertification effort for about two weeks, and soliciting employee Martin to sign the decertification petition.

Despite correctly acknowledging that an employee's subjective reaction to an interrogation is not determinative of its coercive nature, the ALJ improperly found that Martin's response established context supporting his conclusion that the circumstances of May's interrogation of Martin were not coercive. Thus, the ALJ found, "Martin's forthright response reveal[ed] that he did not consider the inquiry by May to be coercive." (ALJD 8:4-7). However, the ALJ's finding that Martin's response to May was forthright is purely speculative and fails to support his contention that Martin was not coerced. Although Martin's response to May did not profess opposition to the Union, neither did it reveal any sympathies Martin may have held for the Union. One might just as easily speculate that Martin was withholding his true union sympathies because he was afraid to upset May. Not only is Martin's subjective reaction to the interrogation irrelevant, but it does not establish context to the circumstances of the interrogation that supports the ALJ's conclusion that the interrogation was not coercive. The ALJ offered no further explanation for his conclusion that May's questioning of Martin was not coercive.

In summary, the totality of the circumstances establishes that May's interrogation of Martin was coercive and violated Section 8(a)(1) of the Act, and the ALJ's finding to the contrary should be reversed.

B. The ALJ erred by holding that Respondent's rule forbidding "walking off the job and/or leaving the premises during working hours without permission" did not violate Section 8(a)(1) of the Act.

As mentioned above, Respondent maintained in its employee handbook a rule forbidding employees from "walking off the job and/or leaving the premises during working hours without permission." (ALJD 6:52-7:23; GC Ex. 9, p.14 – Class III Infraction 14). This rule was in effect until July 30, 2010, when Respondent implemented a new rule prohibiting employees from "leaving the job or premises during working time without notice." (ALJD 14:11-20; Tr. 46-48; GC Ex. 10, p.13-14). The ALJ concluded that no employee would reasonably read the pre-July 30, 2010, rule as nullifying the right to strike and found that the rule did not violate the Act. (ALJD 7:39-42).

Under well established Board law, an employer violates Section 8(a)(1) of the Act if it maintains a work rule that "reasonably tends to chill employees in the exercise of their Section 7 rights" or if employees would reasonably construe the language of the rule to prohibit Section 7 activity. *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004) quoting *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998).

Respondent's rule prohibited "walking off the job and/or leaving the premises during working hours without permission." Strikes, which are generally protected by the Act, necessarily entail "walking off of the job without permission." Therefore, even though the rule did not use the work "strike," it in fact explicitly restricts Section 7 activity, and therefore violated Section 8(a)(1) of the Act. In addition to the fact that the rule explicitly restricted employees' Section 7 activity, an employee reading the rule would reasonably conclude that employees are required to receive permission from Respondent before concertedly walking off the job, or going on strike.

In a decision of the two-member Board, then-Board Chairman Liebman and Member Schaumber found rules virtually identical to Respondent's to be unlawful.

Crowne Plaza Hotel, 352 NLRB 382, 387 (2008). The rules in that case prohibited hotel employees from “[l]eaving your work area without authorization before the completion of your shift” and “[w]alking off the job.” Chairman Liebman and Member Schaumber found that these rules required employees to obtain management’s permission before engaging in such protected concerted activity, thereby allowing management to abrogate the Section 7 right to engage in such activity, or altogether prohibiting employees from exercising their Section 7 right to engage in such protected concerted activities. *Id. at 387.*¹⁰

The ALJ, relying on *Wilshire at Lakewood*, 343 NLRB 141 (2004), vacated on other grounds, 345 NLRB 1050 (2005), reversed and remanded sub. nom. *Jochims v. NLRB*, 480 F.3d 1161 (D.C. Cir. 2007), concluded that Respondent’s rule did not violate the Act. (ALJD 7:39-42). The employer in *Wilshire at Lakewood* operated a nursing home and the rule in question prohibited employees from “abandoning your job by walking off the shift without permission . . .” *Wilshire at Lakewood*, 343 NLRB at 144. The Board concluded that employees of *Wilshire at Lakewood* would read the rule at issue in that case as “intended to ensure that nursing home patients are not left without adequate care during an ordinary workday.” *Id.*

Respondent contends that its rule prohibiting walking off the job is justified by a need to perform a head count in the event of a “code red.” (ALJD 7:32-37). However, there is no evidence that Respondent has ever had a “code red” or performed a head count pursuant to a “code red.” Unlike nursing home employees such as the employer

¹⁰Citing *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 16-17 (1962) (holding that company’s discharge of employees for engaging in unauthorized walkout to force company to improve their working conditions violated the Act notwithstanding that company rule “forbade employees to leave their work without permission of the foreman,” as a contrary holding would “prohibit even the most plainly protected kinds of concerted work stoppages” without the foreman’s permission); and *Labor Ready, Inc.*, 331 NLRB 1656, 1656 fn. 2 (2000) (invalidating, as overbroad, a rule stating, “Employees who walk off the job will be discharged”). See also, ALJ Robert A. Giannasi’s decision in *T & TW Farm Products, Inc. d/b/a Heartland Catfish Company, Inc. and Heartland Alabama, LLC*, JD-10-70, slip op. at 9-10 (2010), distinguishing *Wilshire at Lakewood*.

in *Wilshire at Lakewood*, Respondent's employees do not care for sick or infirm residents. Rather, Respondent's employees merely move passenger luggage and DCL, not Respondent, is primarily responsible for the safety of passengers. There is no evidence that the inability to perform a "head count" of Respondent's employees would put passengers or employees at risk. Moreover, if the rule was in fact motivated by safety concerns, Respondent easily could have limited its prohibition against walking off the job to code red situations. In summary, Respondent's purported need to perform a head count does not implicate health and safety concerns that are similar to those that are always present for nursing home employees who are charged with caring for elderly and infirm residents, and the possibility that Respondent may some day have a code red situation does not justify the broad prohibition on employees' Section 7 rights set forth in Respondent's rule prohibiting walking off the job.

Accordingly, Respondent's rule prohibiting employees from walking off the job during working hours without permission unlawfully restricted the right to engage in a strike in violation of Section 8(a)(1) of the Act and the ALJ's finding to the contrary should be reversed.

C. The ALJ erred by failing to retroactively apply the Board's successor bar holding in *UGL-UNICCO Services, Inc.* to the facts of this case, failing to find that Respondent's violation of that holding is an additional ground for concluding that Respondent violated Section 8(a)(1) and (5) of the Act by withdrawing recognition from the Union, and failing to apply the remedy for a successor employer's refusal to recognize and bargain with a union set forth in *UGL-UNICCO Services* to this case.

On August 26, 2011, the Board issued its decision in *UGL-UNICCO Services, Inc.*, 357 NLRB No. 76 (2011). In that decision, the Board adopted the "basic statement of the 'successor bar' rule essentially as articulated in *St. Elizabeth Manor*." 357 NLRB No. 76, slip op. at 8-10. Thus, in the absence of a "contract bar" a union is entitled to a "reasonable period of bargaining" during which the employer may not "unilaterally withdraw recognition from the union based on a claimed loss of majority support,

whether arising before or during the period.” *Id.* The *UGL-UNICCO* Board did not determine whether or not it would apply its holding retroactively to unfair labor practice charges. *Id.*

The Board’s “usual practice is to apply all new policies and standards to ‘all pending cases at whatever stage.’” *Levitz Furniture Co. of the Pacific*, 333 NLRB 717, 729 (2001), quoting *Deluxe Metal Furniture Co.*, 121 NLRB 995, 1006-07 (1958). The only time that the Board does not retroactively apply its holdings is when doing so will result in “manifest injustice.” See *Kentucky River Medical Center*, 356 NLRB No. 8 slip op. at 4 (2010).

The Board followed its usual practice and retroactively applied its holdings in *St. Elizabeth Manor, Inc.*, 329 NLRB 341 (1999), which originally established the successor bar, and *MV Transportation*, 337 NLRB 770 (2002), which did away with the successor bar. In fact, the Board retroactively applied its holding in both of those cases without analyzing whether doing so would result in a manifest injustice. For example, in *Hill Park Health Care Center*, 334 NLRB 328, 328 (2001), the Board retroactively applied its holding in *St. Elizabeth Manor* and concluded that the employer, a *Burns* successor that had not bargained with the union, was barred from withdrawing recognition from the union.¹¹ The Board also retroactively applied *St. Elizabeth Manor* in *University Medical Center*, 335 NLRB 1318, (2001) and *Inn Credible Caterers, Ltd.*, 333 NLRB 898 (2001). After reversing *St. Elizabeth Manor*, the Board retroactively applied *MV Transportation* in *Aramark School Services, Inc.*, 337 NLRB 1063 (2002) and *Williams Energy Services*, 340 NLRB 764 (2003).

¹¹ The administrative law judge issued his decision finding the employer unlawfully withdrew recognition from the union based on conflicting evidence of union support prior to the Board issuing its decision in *St. Elizabeth Manor*. See *Hill Park Health Care Center*, 334 NLRB 328 (2001).

As demonstrated above, the Board has historically applied its holdings regarding successor bars and withdrawals of recognition retroactively, sometimes without considering whether doing so would cause a manifest injustice. Following its past practice, the Board should retroactively apply its holding in *UGL-UNICCO* to this case and similar cases as a matter of course. Moreover, retroactive application of the Board's holding in *UGL-UNICCO* to the facts of this case would not create a manifest injustice.

The Board uses a three part test to determine if retroactive application of a holding will result in a manifest injustice. The factors considered by the Board include (1) the parties' reliance on preexisting law; (2) the effect of retroactivity on accomplishment of the purposes of the underlying law which the decision refines; and (3) any particular injustice to the losing party under retroactive application of the change of law. *E.g., Wal-Mart Stores, Inc.*, 351 NLRB 130, 134 (2007); *SNE Enterprises, Inc.*, 344 NLRB 673, 673 (2005) (internal citation omitted).

In *SNE Enterprises, Inc.*, the Board found that retroactive application was appropriate in part because there was "no evidence that the supervisors took [the previous] law into account before engaging in their conduct during an election campaign." 344 NLRB 673, 673 (2005). Furthermore, when a party's actions are arguably unlawful even under existing law, then the Board will conclude that the reliance factor favors retroactive application of the law. For example, in *Pattern Makers (Michigan Model Mfrs.)*, 310 NLRB 929, 931 (1993), the Board found retroactive application was appropriate because "the union did not enjoy complete certainty as to how it would fare under Board law when it fined [a member]."

Here, the record evidence establishes that Respondent did not rely on well established law as a basis for its decision to withdraw recognition. First, as the ALJ found, Respondent based its refusal to recognize and bargain with the Union on a tainted employee decertification petition, and Respondent also failed to demonstrate that

the decertification petition was signed by a sufficient number of unit employees to establish an actual loss of majority support by the Union. Thus, it appears that Respondent did not rely on established law as grounds for refusing to recognize (or withdraw recognition from) the Union. (ALJD 14:4-7). Second, despite the Board's public invitation for amici briefs addressing *MV Transportation* and the successor bar issue, Respondent did not address the successor bar issue in its brief to the ALJ.¹² Finally, although the ALJ noted in his decision that the issue of retroactivity would be presented in the event his findings are altered, Respondent did not argue in its brief in support of exceptions that it relied on the Board's holding in *MV Transportation* when it refused to recognize the Union, or that *UGL-UNICCO* should not be applied retroactively. Respondent's decision to refuse to recognize the Union based on a tainted petition, and its failure to address the successor bar issue in its brief to the ALJ and in its brief in support of exceptions, shows that Respondent did not rely on established preexisting law when it withdrew recognition. Thus, the reliance factor weighs in favor of retroactive application of the Board's holding in *UGL-UNICCO*.

Regarding the second factor, retroactive application of the successor bar to this case will further the interests the Board is seeking to protect in *UGL-UNICCO*. As the Board stated in *UGL-UNICCO*:

In a setting where everything that employees have achieved through collective bargaining may be swept aside, the union must now deal with a new employer and, at the same time, persuade employees that it can still effectively represent them. As the Supreme Court recognized in *Fall River*, successorship places the union 'in a peculiarly vulnerable position,' just when employees 'might be inclined to shun support for their former union.'

¹² Prior to the ALJ's decision in the instant case, and prior to deciding *UGL-UNICCO*, in *UGL-UNICCO* the Board invited briefs from the parties and interested amici addressing whether or not it should overturn *MV Transportation*. *UGL-UNICCO Service Co.*, 355 NLRB No. 155 (2010) (Board Order granting reviewing and seeking briefs). At the least, the Board's invitation for briefs gave Respondent constructive knowledge that the Board might reinstate its successor bar rule.

UGL-UNICCO Service Co., 357 NLRB No. 76, slip op. at 5, quoting *Fall River Dyeing and Finishing Corp.*, 482 U.S. 27, 39-40 (1987). By reinstating the successor bar doctrine, the Board is seeking to give an incumbent union the opportunity to “exist and function for a reasonable period in which it can be given a fair chance to succeed” in bargaining. *Id.* slip op. at 6, quoting *Frank Bros. Co.*, 321 U.S. 702, 705 (1994). Here, the Respondent announced that it was refusing to recognize and bargain with the Union 14 days after receiving the Union’s demand for recognition and bargaining. (ALJD 3:29-47). This did not give the Union a reasonable period of time to function as the bargaining representative, and did not give the Union an opportunity to show employees that it can effectively represent them. Retroactively applying the successor bar doctrine to this case will give the Union that opportunity, but without unduly burdening employee free choice since the bar only lasts for a reasonable period of time. In a situation such as this, where the successor employer has unilaterally announced and established initial terms and conditions of employment, the reasonable period is between 6 months and 1 year, measured from the date of the first bargaining meeting between the union and the employer. *UGL-UNICCO Services Co.*, 357 NLRB No. 76, slip op. at 9 (2011). If, after a reasonable period has passed, the employees no longer desire to be represented by the Union, the employees can make that choice known and seek an election, or Respondent can withdraw recognition based on an uncoerced showing of an actual loss of majority support. Thus, application of the *UGL-UNNICCO* successor bar doctrine to this case will restore labor relations stability without unduly burdening employee Section 7 rights.

Finally, there is no evidence establishing that retroactive application of the successor bar rule to this case will cause a particular injustice to Respondent. In order to establish a particular injustice, the losing party must show something more than mere

reliance on existing law. *John Deklewa & Sons*, 282 NLRB 1375, 1389 (1987). For example, the Board has held that retroactive application imposes a particular injustice when it results in heavy monetary penalties or when retroactive application would severely destabilize existing collective bargaining relationships. *Levitz Furniture Co. of the Pacific, Inc.*, 333 NLRB 717, 729 (2001); *Dana Corp.*, 351 NLRB 434, 444 (2007). Where there is no monetary liability, or when the remedy is for a limited duration, the Board has typically not found any particular injustice. *SNE Enterprises*, 344 NLRB at 673-74; *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994); *John Deklewa & Sons*, 282 NLRB at 1389.

Here, Respondent will not face any direct monetary liability as a result of retroactive application of the successor bar doctrine set forth in *UGL-UNNICO*. There are no unilateral changes that the Respondent will have to rescind. Furthermore, Respondent will only have to recognize and bargain with the Union for a reasonable period of time. Finally, Respondent committed multiple unfair labor practices, which mitigates any particular injustice it might face through the retroactive application of the Board's holding in *UGL-UNICCO*. The lack of any evidence that Respondent will face a particular injustice favors retroactive application of the Board's successor bar rule.

In summary, the Board has historically applied its decisions concerning the applicability of successor bar rules retroactively and the Acting General Counsel urges the Board to continue to do so. In addition, the retroactive application of the successor bar rule announced by the Board in *UGL-UNICCO* will not cause a manifest injustice because Respondent did not rely on existing law when it unlawfully refused to recognize and bargain with the Union, there is no evidence that retroactive application will cause a particular injustice to Respondent, and retroactive application will further the interests the Board is seeking to protect by restoring labor relations stability. Therefore, in addition to the grounds relied upon by the ALJ to find that Respondent violated Section 8(a)(1) and

(5) of the Act, the Board should retroactively apply the successor bar rule announced in *UGL-UNICCO* to this case as an additional basis for so finding, and apply the remedy set forth therein.

IV. CONCLUSION

In summary, Counsel for the Acting General Counsel urges the Board to grant all of the cross-exceptions and to modify the ALJ's recommended Order and Notice to Employees accordingly. A recommended Notice to Employees is attached.

DATED at Tampa, Florida, this 30th day of November, 2011.

Respectfully submitted,

/s/ Christopher C. Zerby
Christopher C. Zerby
Counsel for the Acting General Counsel
National Labor Relations Board
Region 12
201 East Kennedy Boulevard, Suite 530
Tampa, Florida 33602
Telephone No. (813) 228-2693

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document, Acting General Counsel's Brief in Support of Cross-Exceptions to the Administrative Law Judge's Decision in Cases 12-CA-26758 et al was electronically filed this 30th day of November, 2011 as follows:

By electronic filing at www.nlr.gov to:

Lester A. Heltzer
Executive Secretary
National Labor Relations Board – Room 11602
1099 Fourteenth Street, N.W.
Washington, D.C. 20570-0001

By electronic mail to:

Daniel M. Shea, Esq.
Matthew T. Gomes, Esq.
Nelson, Mullins, Riley & Scarborough, LLP
201 17th Street, NW, Suite 1700
Atlanta, Georgia 30363
E-mail: Daniel.Shea@nelsonmullins.com
Matthew.gomes@nelsonmullins.com

Neil Flaxman, Esq.
80 Southwest 8th Street
Suite 3100
Miami, Florida 33130
E-mail: flaxy@bellsouth.net

/s/ Christopher C. Zerby
Christopher C. Zerby
Counsel for the Acting General Counsel
National Labor Relations Board
Region 12
201 East Kennedy Boulevard, Suite 530
Tampa, Florida 33602
Telephone No. (813) 228-2693

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO:

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT fail or refuse to recognize and bargain with International Longshoremen's Association, Locals 1922 and 1359, AFL-CIO (the Union) as the exclusive collective-bargaining representative of our employees in the bargaining unit with respect to rates of pay, wages, hours of work, work rules, and other terms and conditions of employment:

WE WILL NOT maintain or enforce an unlawfully broad rule prohibiting unauthorized solicitation and/or distribution of literature.

WE WILL NOT assist with a petition to decertify the Union as your collective bargaining representative.

WE WILL NOT ask you about your union sentiments and activities.

WE WILL NOT solicit you to sign a petition to decertify the Union.

WE WILL NOT tell you that you cannot solicit or distribute literature on the property at which you are working.

WE WILL NOT maintain or enforce a rule prohibiting you from walking off the job and/or leaving the premises without permission.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize and, on request, bargain with International Longshoremen's Association, Locals 1922 and 1359, AFL-CIO as your exclusive representative in the following appropriate unit concerning terms and conditions of your employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time porters/longshoremen employed by the Employer who receive and transfer luggage and provisions on to and out of the cruise vessels operated by Magical Cruise Company, Limited, d/b/a Disney Cruise Lines at Port Canaveral, Florida, excluding all other employees, office

clerical employees, managerial employees, guards and supervisors as defined in the Act.

AMBASSADOR SERVICES, INC.

(Employer)

DATED: _____ BY: _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. We conduct secret ballot elections to determine whether employees want union representation and we investigate and remedy unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov [Information in Spanish is also available on the Board's website]

NLRB, Region 12	Telephone:	(813) 228-2641
201 East Kennedy Blvd., Suite 530	Hours:	8:00 a.m. to 4:30 p.m.
Tampa, FL 33602-5824		

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED OR COVERED BY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE.