

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

BRANDYWINE LEHIGH TRANSPORTATION, LLC ¹	
Employer	
and	
LISA M. SCHROY	
Petitioner	Case 04-RD-101983
and	
AMALGAMATED TRANSIT UNION LOCAL 1603, AFL-CIO ²	
Union Involved	

REGIONAL DIRECTOR’S DECISION AND ORDER

The Union Involved³ represents a unit of the Employer’s drivers, mechanics, and monitors (the Unit) who serve the Southern Lehigh School District (the School District). With respect to the Unit, the Employer is a successor to First Student, Inc., which provided services to the School District until August 2012. The Petitioner has filed a petition seeking to have the Union decertified as the representative of the Unit, but the Union contends that the petition should be dismissed based on the Board’s “successor bar” doctrine. The Employer and the Petitioner contend that there is no successor bar that precludes the processing of the petition.

A Hearing Officer of the Board held a hearing, and the parties made oral arguments at the conclusion of the hearing. I have considered the evidence and the arguments presented by the parties, and, as discussed below, I have concluded that a successor bar precludes processing of this petition. Accordingly, I shall dismiss the petition.

This Decision shall first set forth the factors relevant to determining whether there is a successor bar. Then it will present the relevant facts and analysis supporting the conclusion that the petition should be dismissed.

¹ The Employer’s name appears as amended at the hearing.

² The Union Involved’s name appears as amended at the hearing.

³ For convenience, this Decision will hereinafter refer to the Union Involved as “the Union.”

I. THE SUCCESSOR BAR DOCTRINE

A successor is an employer that takes over all or part of a business operation from another company, continues the operation without substantial change, and hires as a majority of its workforce employees who worked for the predecessor. Successor employers are obligated to bargain with the union which represented their predecessors' employees, but are ordinarily not required to adopt their predecessors' union contracts. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 41-42 (1987); *NLRB v. Burns International Security Services*, 406 U.S. 272, 278-279 (1972).

In *UGL-UNICCO Service Company*, 357 NLRB No. 76 (2011), the Board announced that it was restoring the successor bar doctrine.⁴ The Board stated that it sought to provide unions with a reasonable period of bargaining in which their majority status cannot be challenged following a change in the identity of the employer, and that this doctrine seeks to appropriately balance the goals of bargaining stability and employee free choice.

Pursuant to the successor bar doctrine, successor recognition of a union that represented the employees of a predecessor employer operates as a bar to the filing of a decertification petition or a petition for certification by a rival union for a "reasonable period of bargaining." Where the successor expressly adopts the bargaining unit's existing terms and conditions of employment as the starting point of negotiations, the reasonable period of bargaining, during which a petition is barred, is deemed to be six months. If the successor changes employee terms and conditions of employment prior to bargaining, however, the reasonable period for bargaining is a minimum of six months and a maximum of one year, depending on the circumstances. The bar in either situation is measured from the date on which the successor employer and the union first meet to begin negotiations. *Id.*, slip op. at 8-9.

The Board held in *UGL-UNICCO* that in determining the period of the successor bar after a successor changes employees' terms and conditions of employment, the Board considers the following factors: (1) whether the parties are bargaining for an initial contract; (2) the complexity of the issues being negotiated and the parties' bargaining processes; (3) the amount of time elapsed since bargaining commenced and the number of bargaining sessions; (4) the amount of progress made in bargaining and how near the parties are to concluding an agreement; and (5) whether bargaining is at impasse. The burden is on the party that invokes the successor bar doctrine to show that a reasonable period for bargaining has not elapsed. *UGL-UNICCO Service Company*, supra at 9-10. See *Lee Lumber & Building Materials Corp.*, 334 NLRB 399 (2001), enf'd. 310 F.3d 209 (D.C. Cir. 2002).⁵

⁴ The Board had previously announced a successor bar doctrine in *St. Elizabeth Manor, Inc.*, 329 NLRB 341 (1999), but the Board overruled *St. Elizabeth Manor* in *MV Transportation*, 337 NLRB 770 (2002).

⁵ These are the same factors used in defining a reasonable period for negotiations following an unlawful refusal to bargain, as set forth in *Lee Lumber*.

II. FACTS

The Employer conducts its operations in the School District from a facility in Coopersburg, Pennsylvania. Prior to August 2012, Unit employees worked for First Student and were covered by a collective-bargaining agreement between First Student and the Union. In August, 2012, the Employer became the contractor for School District transportation services and hired as a majority of its employees individuals who had worked for First Student. On August 10, the Union requested that the Employer recognize it as the representative of the Unit, and the Employer granted recognition on August 17.

With one exception, the Employer continued in effect all of the terms and conditions of employment under which Unit employees worked while employed by First Student. The change involved wages and holidays. Under the First Student contract, employees were entitled to be paid for up to four holidays and one personal day each school year. The Employer, however, gave non-probationary drivers the option of either continuing to be paid for those days or receiving a higher hourly wage rate. Most employees who were given this opportunity elected to forego the paid days off in exchange for the higher wage rate.

The Employer and the Union began bargaining for a collective-bargaining agreement for the Unit on October 2, 2012. Three additional sessions were held -- on December 12, 2012, February 13, 2013 and March 12, 2013. At the time of the hearing, a fifth meeting was scheduled for April 26, 2013.

At the outset of negotiations, the Employer and the Union agreed to try to resolve non-economic issues before tackling economics. The parties used the language of the First Student agreement as a starting point, although both sides have proposed changes to this agreement. By the conclusion of the last session before the hearing, on March 12, 2013, most non-economic issues had been resolved.

During the March 12 meeting, the Union made its initial economic proposal. As confirmed by an April 4 e-mail, the Union is seeking improved bereavement leave, additional Employer contributions to health insurance premiums, increased safety and attendance bonuses, improved food stipends, and wage increases of four percent per year in each year of the agreement. The Employer agreed to respond to these proposals at the next bargaining session.

The Petitioner filed the petition in this case on April 4, 2013.

III. ANALYSIS

The Employer took over First Student's transportation operation in the School District and hired former First Student employees as a majority of its workforce. Therefore, it is a successor employer. If the Employer had simply adopted First Student's contract with the Union as the starting point in bargaining, the successor bar would have lasted for six months. However, the Employer made a significant change in employee terms and conditions of employment at the

time of the takeover by offering employees a wage increase in lieu of certain paid days off.⁶ Accordingly, the successor bar lasted for a “reasonable period of bargaining,” between six months and one year from the time the Employer and Union commenced bargaining.⁷

Bargaining began on October 2, 2012, and the petition was filed on April 4, 2013, six months and two days after negotiations began. The determination of whether a reasonable period has expired is based on the five factors cited by the Board in *UGL-UNICCO*, supra, and *Lee Lumber*, supra. Applying those factors, I find that a reasonable period for bargaining has not elapsed in this case.

The first factor considered by the Board is whether the parties are bargaining for an initial contract. The Board has recognized that first-contract negotiations are likely to require more time than bargaining in an established relationship, and stated that bargaining for an initial contract will normally be a factor supporting a finding that a reasonable time for bargaining has not elapsed. *Lee Lumber*, supra at 403. In *UGL-UNICCO*, supra, slip op. at 9, the Board indicated that successor bargaining will always be deemed to involve an initial contract. This factor therefore weighs in favor of finding a bar.

The second factor is the complexity of negotiations and bargaining processes. The parties have not used any processes that would be likely to complicate bargaining, and the Employer and Union agreed to use the First Student contract as a template, which presumably simplified the negotiations. Nothing in the record suggests that the Employer’s School District operation has any features which might make negotiations particularly complicated or difficult. Thus, this factor supports a conclusion that there has been a reasonable period of bargaining. *Town & Country Plumbing & Heating*, 352 NLRB 1212, 1216 (2008), enf. 352 Fed. Appx. 20 (6th Cir. 2009).

The third factor, the amount of time that elapsed since the commencement of bargaining and the number of sessions, trends in the opposite direction. Barely six months had elapsed when the petition in this case was filed, and the parties have held only four bargaining sessions. The relatively brief period of bargaining and the small number of sessions favor a conclusion that bargaining has not extended for a period sufficient to allow the parties to fully explore the possibilities of reaching agreement. *Town & Country Plumbing & Heating*, supra.

The fourth factor – the amount of progress and nearness to agreement – also supports finding a bar in this case. Discussing this factor in *Lee Lumber*, supra at 404, the Board noted that a finding that parties were close to agreement would normally indicate that bargaining

⁶ The Employer asserts that it did not make a change to Unit employees’ terms and conditions of employment prior to negotiations, but that the change was made by the employees who chose the higher wage rate themselves. I reject this argument, because the Employer unilaterally offered employees the opportunity for this change in their compensation.

⁷ The Employer also argues that the case should be analyzed pursuant to the recognition bar doctrine, rather than the successor bar doctrine, and therefore the bar period began on August 17, 2012, the date when the Employer granted recognition to the Union. I disagree, as the facts of this case fit squarely into the frame of analysis set forth by the Board in *UGL-UNICCO*, supra.

should be allowed to continue, while a failure to come close to a conclusion, especially after numerous sessions, might suggest that a reasonable period for negotiations had expired, even where there had been considerable progress. This case does not fall neatly into either of these categories. While the parties are not near agreement, the circumstances suggest that their failure to make greater progress can be attributed mostly to the small number of bargaining sessions. Those few sessions have, however, produced agreement on most non-economic issues, which makes it reasonable to conclude that additional sessions are likely to result in the resolution of the remaining issues and agreement to a full contract. In these circumstances, I find that the parties' considerable progress indicates that negotiations have not been permitted to continue for sufficient time to allow a fair chance for success and that a reasonable time for bargaining has not elapsed.

Applying the fifth and final factor, it is clear that negotiations are not at impasse; indeed, the Employer has not yet responded to the Union's initial economic proposal. Thus, this factor also favors a finding that a reasonable time for bargaining has not yet elapsed.

In sum, I find that the majority of the factors considered by the Board support a finding that a reasonable time for bargaining has not elapsed since the negotiations began. I rely in particular on: the small number of sessions; the lack of opportunity for give-and-take on economic issues; and the fact that the parties are involved in negotiations with each other for the first time. It also bears emphasis that the petition was filed only two days into the six to 12-month period for determining whether there is a successor bar. On balance, I find that there is a successor bar to the instant petition and I shall therefore dismiss this petition.⁸ *UGL-UNICCO*, supra; see also *Badlands Golf Course*, 355 NLRB No. 42 (2010).

IV. CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and for the reasons set forth above, I conclude and find as follows:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

⁸ The Employer contends that I do not have the authority to issue this Decision because I was appointed by a Board which lacked a quorum due to constitutionally invalid recess appointments. I recognize that the United States Court of Appeals for the District of Columbia Circuit has concluded that certain recess appointments were not valid. See *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013). However, as the Court itself acknowledged, its decision conflicts with rulings of at least three other federal Courts of Appeals. See *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004), cert. denied 544 U.S. 942 (2005); *U.S. v. Woodley*, 751 F.2d 1008 (9th Cir. 1985); *U.S. v. Allocco*, 305 F.2d 704 (2d Cir. 1962). This question remains in litigation, and pending a definitive resolution, the Board has indicated that it is charged to fulfill its responsibilities under the Act. See *Belgrove Post Acute Care Center*, 359 NLRB No. 77, slip op. at fn. 1 (2013). I shall, similarly, fulfill my responsibilities as Regional Director.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.

3. The Union Involved is a labor organization that claims to represent certain employees of the Employer.

4. No question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

V. ORDER

IT IS HEREBY ORDERED that the petition be, and it hereby is, dismissed.

VI. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, NW, Washington, D.C. 20570-0001. Upon the filing of such request for review, the filing party shall serve a copy of the request on the other parties and shall file a copy with the Regional Director either by mail or by electronic filing to Region4@nlrb.gov.⁹ A request for review may also be submitted by e-mail. For details on how to file a request for review by e-mail, see <http://gpea.NLRB.gov/>. The request for review must be received by the Board in Washington by 5:00 p.m., DST on **Tuesday, May 14, 2013**.

Signed: April 30, 2013

at Philadelphia, Pennsylvania



DENNIS P. WALSH
Regional Director, Region Four
National Labor Relations Board

⁹ See OM 05-30, dated January 12, 2005, for a detailed explanation of requirements which must be met when electronically submitting representation case documents to the Board or to a Regional Office's electronic mailbox. OM 05-30 is available on the Agency's website at www.nlrb.gov.