

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

**VALLEY PROTEINS, INC.** )  
)  
                          **Employer,** )  
)  
**and** )  
)  
**GREG COLLINS,** )  
)  
                          **Petitioner,** )  
)  
**and** )  
)  
**THE INDUSTRIAL UNION OF MARINE AND** )  
**SHIPBUILDING WORKERS OF AMERICA DL 4/** )  
**INTERNATIONAL ASSOCIATION OF MACHINISTS** )  
**AND AEROSPACE WORKERS, AFL-CIO, AND** )  
**UNINCORPORATED ASSOCIATION AND ITS** )  
**MEMORIAL LODGE 1784,** )  
)  
                          **Intervener.** )  
\_\_\_\_\_ )

**Case 05-RD-102809**

**REQUEST OF VALLEY PROTEINS, INC. FOR REVIEW  
AND REVERSAL OF ORDER DISMISSING PETITION**

Pursuant to 29 C.F.R. § 102.67(c), Valley Proteins, Inc. (“Valley Proteins” or the “Employer”) requests review by the National Labor Relations Board (“Board”) of the Decision Dismissing the Petition (“Decision”) issued by the Regional Director, Region 5, dated April 26, 2013, involving Valley Proteins, Petitioner Greg Collins (“Petitioner”) and The Industrial Union of Marine and Shipbuilding Workers of America DL 4/International Association of Machinists and Aerospace Works, AFL-CIO, and Unincorporated Association and its Memorial Lodge 1784 (the “Union”) (the Employer and the Union are referred to hereinafter as the “Parties”). Valley Proteins provides the following brief in support of this request.



## **GROUND FOR REVIEW AND SUMMARY OF ARGUMENT**

Valley Proteins requests review of the Decision on three grounds. First, under 29 C.F.R. § 102.67(c)(1), Valley Proteins requests review on the ground that a substantial question of law is raised by the Order because of the absence of Board precedent in relation to the Regional Director's determination that the "successor bar" as outlined in *UGL-UNICCO Service Co.*, 2011 NLRB LEXIS 488 (August 26, 2011), bars further processing of the Petitioner's decertification petition ("Petition").

The *UGL-UNICCO* successor bar doctrine and no other decisions applying its doctrine have addressed the facts of this case, where the majority of employees of Allen Biotech LLC (the "Company") – the entity that sold its rendering business to Valley Proteins – had already signed the Petition to decertify the Union prior to that sale and there is no evidence that these employees' decertification Petition resulted from or otherwise related to the sale of the business (i.e. the concerns discussed in *UGL-UNICCO* giving rise to the successor bar doctrine). Indeed, the evidence presented by the Petitioner in response to the Regional Director's Notice to Show Cause demonstrates that the employees had signed the Petition prior to the purchase of the Linkwood, Maryland rendering plant ("Linkwood facility") by Valley Proteins on April 1, 2013, but were waiting to file that Petition because they were barred from filing until April 28, 2013 pursuant to the contract bar doctrine. In addition, another prior decertification petition had been signed by the vast majority of employees in January 2013, which was presented to the Regional Director in response to his Notice to Show Cause. *UGL-UNICCO* did not address this situation and no subsequent Board decisions have addressed it or other situations where employees validly sign or file decertification petitions prior to the sale of a business. Thus, Board review is requested in light of this absence of precedent.

Second, review and reversal is requested under § 102.67(c)(1) because the Regional Director's application of *UGL-UNICCO* to this case departs from the purposes of the successor bar doctrine – stabilization of labor relations and preservation of employee choice – as outlined in *UGL-UNICCO*. One of those purposes is to prevent the destabilization of labor-relations that can occur as a result of the sale of a business. That purpose would not be served in this case because (1) the labor-management relations had already destabilized prior to the sale of the business, (2) there was no evidence that the employees' desire to terminate their representation by the Union had anything to do with the sale of the business, and (3) would perpetuate the destabilization that had already occurred prior to the sale. Accordingly, the successor bar should not be applied in this case because its purpose to stabilize labor relations would not be served in this case.

Likewise, the second purpose of *UGL-UNICCO*'s successor bar doctrine – the preservation of the employees' choice to periodically select their representatives – would not be served by applying the bar to this case for two reasons. First, this purpose would not be served because the Regional Director's application of the successor bar would inappropriately delay the employee's choice another six months to a year without any justification of preserving labor relations, given that their decision to decertify the Union preceded the sale of the business by four months and was unrelated to the successor employer, Valley Proteins. Second, the inappropriateness of delaying the employees' choice another six months to a year is also apparent when considering that they could have filed the Petition on April 28, 2013, but for the Company being sold on April 1, 2013 – a decision over which they had no control, yet is now infringing their right to chose their representative.

Third, proper grounds for review exist under 29 C.F.R. § 102.67(c)(4) because any Board rule that applies the successor bar doctrine without regard to employees' actions prior the sale of the business indicating a question concerning representation should be reconsidered and modified. In particular, to the extent (as the Regional Director's decision suggests) that the *UGL-UNICCO* decision was intended to apply to every factual scenario involving the sale of a business and the successor bar doctrine *without consideration of employees' actions prior to the sale of the business*, there are compelling reasons for reconsideration of this Board rule. First, as explained above, the purposes of the successor bar doctrine – stabilization of labor relations and employee choice – would not be fulfilled in this case (or in other cases) where (1) there is clear and convincing evidence that prior to the sale of the business a substantial number of employees (30 percent or more) have indicated that there is an question concerning representation and (2) there is no evidence that the employees' desire to decertify is related to the potential sale of their business. In addition, when applying the successor bar doctrine, the Board should take into consideration actions by employees prior to the sale of the business that indicate a question concerning representation that has resulted from reasons unrelated to the sale of the business because of the fundamental importance of freedom of choice under the Act. Thus, to the extent the *UGL-UNICCO* ruling was intended to apply to every successor situation and without consideration of actions by employees prior to the sale of the business, it should be reconsidered and modified.

Based on any of these grounds, the Employer requests that the Board review and reverse the Order dismissing the Petition.

## SUMMARY OF PROCEEDINGS AND RULINGS

This brief arises from the dismissal of the Petition filed by Petitioner on April 15, 2013, showing that at least 30% of the Employees in the bargaining unit no longer wish to be represented by the Union. In response to the Petition, the Regional Director issued a Notice requesting that the parties submit reasons in writing why the Board should not dismiss the Petition as being barred by the successor bar doctrine in accordance with the Board's decision in *UGL-UNICCO*.

The Petitioner filed a response to the Board's Notice. In his response, the Petitioner stated that the Petition was "done" before Valley Proteins purchased the Linkwood facility on April 1, 2013, but the employees could not file their Petition because they were barred from doing so until the window period began on April 28, 2013, which was 90 days before July 28, 2013 – the expiration of the then current labor agreement between the Company and the Union. In fact, as demonstrated in the record presented to the Board through the Employer's Brief in Response to the Notice, the majority of the employees had signed a petition to decertify in early January 2013, four months before the sale of the business. The Petitioner further stated in his response that he believed that because the employees had decided to petition the Board prior to the sale of the business and because the only bar at that time was the contract bar, he did not think it was right that the successor bar should apply to their Petition.

The Employer also filed a response to the Board's Notice. The Employer supported the Petitioner's position and argued that the *UGL-UNICCO* decision, relied on by the Regional Director, did not address the facts presented in this case and did not prevent the processing of the Petition. Moreover, the Employer explained its position that the purposes that gave rise to the application of the successor bar doctrine in *UGL-UNICCO* – stabilizing labor-management

relationships without interfering with the freedom of employees to periodically select a new representative or reject representation – would not be fulfilled in a case like this, where the employees stated their desire to reject representation months prior to the sale. To the contrary and consistent with the policies explained in *UGL-UNICCO*, the Employers argued that an additional delay of six months to a year in the processing of the employees’ decertification efforts would unnecessarily interfere with the bedrock principle of freedom of choice.

None of the factual assertions made by the Petitioner or the Employer were disputed by the Union. In fact, the Union did not file any response to the Regional Director’s Notice to Show Cause.

In his letter enclosing his Decision to Dismiss the Petition, the Regional Director did not address the arguments made by the Petitioner or the Employer for why the Petition should be processed and why the successor bar, as outlined in *UGL-UNICCO*, did not address the facts of this case. Instead, he simply concluded:

After carefully considering the positions of the parties stated in their responses to the Notice to Show Cause, I find the “successor bar” doctrine applicable to the facts of this case and bars further processing of this petition.

(Decision, at 1.)

### **SUMMARY OF RELEVANT RECORD FACTS**

Valley Proteins is a Virginia corporation engaged in the rendering business. Its headquarters office is in Winchester, Virginia, and it operates rendering facilities in several other states, including the State of Maryland.

On information and belief, the Union or its predecessors in interest, has represented the production and maintenance employees (“Employees”) who have worked at the Linkwood facility involved in this case since approximately 1972, or for over forty (40) years.

During the latter part of 2012, Valley Proteins began to negotiate with the Company to purchase its rendering facility in Linkwood, Maryland. Negotiations and due diligence proceeded under a confidentiality agreement between Valley Proteins and the Company (the “Sale Parties”) pursuant to which they agreed not to disclose to others outside the potential transaction that a purchase of the assets of the Company related to its Linkwood facility might occur.

On March 7, 2013, the Sale Parties entered into a definitive asset purchase agreement (the “APA”) pursuant to which the Company would sell certain assets involved in its rendering operation at the Linkwood facility to Valley Proteins with a closing to occur on or about April 1, 2013 (the “Transaction”). In the APA, Valley Proteins did not assume the collective bargaining agreement (“CBA”) between the Company and the Union covering the terms and conditions of employment of the bargaining unit represented by the Union. This CBA was effective July 29, 2012 through July 28, 2013.

Prior to the closing of the Transaction, Valley Proteins solicited applications for employment at the Linkwood facility from all employees of the Company. Valley Proteins also advertised in the general labor market around Linkwood, Maryland for applicants to fill positions at the Linkwood facility. As of April 1, 2013, Valley Proteins had hired the vast majority of its employees to operate the Linkwood facility and it had hired all active employees of the Company who were employed at the time of the closing of the Transaction. Others who were not employed with the Company have been hired by Valley Proteins to work at the Linkwood facility, as well.

On or about the middle of January 2013, during the negotiations and due diligence that led to the APA, Valley Proteins learned from management representatives of the Company that

30 of the 35 Employees who were employed in the bargaining unit represented by the Union had signed or submitted a Petition (a) seeking to decertify the Union as their exclusive bargaining representative, or (b) requesting the Company to withdraw its recognition of the Union. Valley Proteins was not advised whether this Petition was ever filed with the Board. No representative of Valley Proteins played any role in this Petition that was submitted to the Company's management. Later, on April 14, 2013, Valley Proteins management was given a copy of this Petition that apparently was prepared and signed by Employees in early January 2013. In early January 2013, the Petition was signed by 30 individuals who were employed by Company and represented by the Union at the time, and who are still employed at the Linkwood facility as of today.

Valley Proteins was advised that in late February 2013, representatives of the Company and the Union met to engage in effects bargaining regarding the anticipated transaction between the Sale Parties. Valley Proteins was informed of those negotiations, but not the results, which were held in advance of the parties signing the APA.

After the Transaction closed, Mark Duval, on behalf of the Union, requested Valley Proteins to provide dates and times to commence negotiations for a new collective bargaining agreement. Thereafter, Valley Proteins informed the Union that the Union had not formally demanded to be recognized as the bargaining representative for its new employees at the Linkwood facility, that Valley Proteins had not recognized the Union, and that Valley Proteins did not believe it had an obligation to recognize the Union based on the facts as they were understood at the time.

Around this time, on April 15, 2013, Greg Collins, an employee of Valley Proteins at the Linkwood facility, filed the Petition in this case seeking to decertify the Union as the bargaining

representative for the Valley Proteins Employees at the Linkwood facility. This Petition was prepared prior to the closing of the sale of the business to Valley Proteins but the Employees had not yet filed the Petition because they were barred from filing the Petition until April 28, 2013 – ninety days before the expiration of the current contract year.

### **LEGAL ANALYSIS**

The Regional Director based his Decision to deny the Employees’ Petition in this case on the Board’s decision in *UGL-UNICCO*, where the Board established a new framework for the successor bar doctrine. 2011 NLRB LEXIS 488 at \*1-4. More specifically, the Board adopted the framework of *Lee Lumber*, where the Board precluded “any challenge to a representative’s status for a reasonable period of time,” which the Board determined would be a minimum of six months and a maximum of one year, measured from the date of the first bargaining meeting between the union and the employer. *Id.* at \*2 n.3, 38 (citing *Lee Lumber*, 334 NLRB 399). As explained more fully below, the *UGL-UNICCO* decision did not address the facts of this case, and the purposes for the successor bar are not served in this case. Moreover, even if *UGL-UNICCO* was intended to apply to all successor cases, an exception to its rule should be made for situations like this case presents, where a substantial number of employees have indicated there is a question concerning representation *prior to the sale of the business* and there is no evidence that the question resulted from the sale of the business.

**I. The Regional Director’s Decision Should Be Reviewed Because Neither *UGL-UNICCO* Nor Subsequent Board Precedent Has Addressed the Situation in This Case Where the Majority of Employees Indicated Their Desire to Decertify the Union Prior to the Sale of the Business.**

The Regional Director’s Decision, which applies the successor bar doctrine to this case, did not address the arguments made by the Petitioner and the Employer in response to the Notice. Rather, the Regional Director simply concluded that the successor bar doctrine applies to the facts of this case, without any further explanation, and then proceeded to determine that he believed that the Employer was a successor, even though the parties had not raised the issue of whether the Employer was a qualifying “successor”. (*See* Decision, at 1.) In view of this analysis, the Regional Director appears to interpret the *UGL-UNICCO* successor bar as applying to a petition whenever there is an apparent successor and regardless of other circumstances of the case, such as clear and undisputed actions by a substantial number of employees prior to the sale of the business indicating their intent to terminate their union representation for reasons unrelated to the sale of the business.

Surely the Board did not intend, as the Regional Director apparently interprets, that the *UGL-UNICCO* successor bar would apply to every successorship situation and without regard for any consideration of clear actions by a substantial number of employees communicated *prior to the sale of the business*. This point is apparent from the following example. Consider the situation where employees file a valid decertification petition within the 60 to 90 day window period prior to the expiration of a collective bargaining contract. In such a situation, the petition would be barred from processing until the expiration of the contract year. However, what if the employees’ business was sold to a successor before the expiration of the contract? In particular, if the business was sold to a successor one day prior to the expiration of the contract year, would the successor bar apply in this situation, even though the employees had already filed a valid

petition prior to the sale of the business?

*UGL-UNICCO* did not address the above explained situation, but surely the Board would not apply the successor bar to that situation. Similarly, *UGL-UNICCO* did not address the situation in this case, where there is undisputed evidence that the vast majority of the employees in the bargaining unit signed a petition to decertify the Union in January 2013, four months before the sale of the business, and were waiting to file the Petition until the contract window period began, which would have begun on April 28, 2013. The Employees almost made it to April 28. However, on April 1, just 27 days before, the Company was sold. Should the Board bar their Petition for another six months to a year, simply due to the fact that their Company was sold, something over which they had no control or influence?

Situations like these, where a clear majority of employees have expressed their desire to hold an election and decertify their representative prior to the sale of the business, were not addressed by *UGL-UNICCO*. Moreover, they have not been addressed in subsequent Board decisions. For this reason, the Regional Director's Decision is based on an absence of Board precedent, and the Employer, therefore, requests review.

**II. The Regional Director's Decision Should Be Reviewed and Reversed Because It Departs from *UGL-UNICCO* in that the Purposes of the Successor Bar Would Not Be Served In this Case Where the Majority of Employees Signed the Petition Prior to the Sale of the Business and There Is No Evidence that the Employees' Petition Resulted from the Sale of the Business.**

Review of the Regional Director's Decision and its reversal is also appropriate because his Decision departs from the purposes underlying *UGL-UNICCO*'s successor bar doctrine. As explained below, the purposes underlying the successor bar – preservation of employee freedom of choice and stabilization of labor relations – are not served in this case.

In *UGL-UNICCO*, the Board established the general framework for successorship cases in part because it noted that “the transition from one employer to another threatens to seriously

destabilize collective bargaining.” *Id.* at \*22. Thus, by establishing a successor bar, the Board purposed to stabilize labor-management relations among union, employee, and employer which had been working and going along just fine until the sale of the business. This purpose would not be fulfilled in this case for three reasons. First, in this case, the relationship between the vast majority of the employees and Union had destabilized months before the sale of the business, as is apparent based on the employees’ signing a petition in January 2013 seeking to decertify the Union and signing a second Petition prior to the sale in April 2013. The purpose of the successor bar was to prevent a stable environment that had been working relatively well from being destabilized, but in this case, that purpose could not be served since the relationship had been destabilized prior to the sale of the business.

Second, in this case, there is no evidence that the Employees’ desire to decertify in January 2013 or again prior to the sale in April 2013 had any relation to the potential sale of the business. The employees would not have known of the potential sale in January 2013 because it had been subject to a confidentiality agreement that extended prior to and during January 2013. As explained in the *UGL-UNICCO* decision, the purpose of the successor bar doctrine was to prevent the destabilizing effects of *successorship*, not of other unrelated factors that may lead employees to make a change in their representation. Thus, the primary purpose of the successor bar – preventing the destabilizing effects of successorship – would not be fulfilled in this case.

Third, this purpose would not be served in this case because the likely result of delaying the employees’ desire to vote for another six months or year, as required under the Decision, would be to *perpetuate* the destabilization of labor relations until the Employees’ get their desired outcome – the termination of their representation by the Union. Telling the employees to wait longer when they could have filed their Petition on April 28, but for the Company being

sold – a decision over which they had no control – would most likely frustrate the Employees and further destabilize relations with the Union. Thus, for these reasons, the application of the successor bar to this case would not stabilize labor relations as it is intended to do.

In addition to stabilizing labor relations, the Board's other purpose for the successor bar doctrine in *UGL-UNICCO* was to preserve "the freedom of employees to periodically select a new representative or reject representation." *Id.* at \*1-2. This purpose would not be served in this case for two reasons. First, this purpose would not be served because the Regional Director's application of the successor bar would inappropriately delay the employee's choice another six months to a year without any justification of preserving labor relations, given that their decision to decertify the Union preceded the sale of the business by four months and was unrelated to the successor employer, Valley Proteins.

The inappropriateness of delaying the Employees' choice another six months to a year is also apparent when considering what would have happened if the business had not been sold in April 2013. If the business had not been sold to Valley Proteins, then the employees could have filed for decertification as early as April 28, 2013 (almost two weeks ago), which was ninety days from the expiration of their existing CBA on July 28, 2013. Despite the fact that the Employees could have filed this past April 2013, the Regional Director's Decision if affirmed would delay the Employees' exercise of free choice for a minimum of another six months to a maximum of another year. Such an outcome would not fulfill the purposes of the successor bar doctrine and, even more, would depart from the Board's stated purpose in *UGL-UNICCO* to balance stabilization of labor management relations "without interfering with the freedom of employees to periodically select a new representative or reject representation" by ensuring

continued instability and interference with freedom of choice for at least another six months. *UGL/UNICCO*, 2011 NLRB LEXIS 488 at \*1-2.

In sum, delaying the Employees' representation choice for another six months to a year would interfere with the bedrock principle of freedom of choice without clearly advancing any stabilization of labor-management relations. Moreover, instead of preserving or stabilizing a collective bargaining relationship that was agreeable to the Employees, the successor bar, if applied in this case, would force the Employees to continue to be represented for another six months to a year by the Union that they had already been represented by through the CBA, and for the last forty (40) years, but that the Employees now reject. For these reasons, the Decision departs from this Board's precedent in *UGL-UNICCO* and should be reviewed and reversed.

**III. The Regional Director's Decision Should Be Reviewed and Reversed Because There Are Compelling Reasons for Reconsideration of any Board Rule That Would Apply the Successor Bar Without Regard to Actions by Employees Prior to the Sale of the Business Indicating a Question Concerning Representation.**

Even if the Board initially intended the *UGL-UNICCO* decision to apply to any and all successors *without regard to actions by employees prior to the sale of a business*, there are compelling reasons to reconsider this Board rule and provide an exception to this rule. First, as explained above, the purposes of the successor bar doctrine – stabilization and choice – would not be fulfilled in this case (or in other cases) where (1) there is clear and convincing evidence that prior to the sale of the business a substantial number of employees (30 percent or more) have indicated that there is an question concerning representation and (2) there is no evidence that the employees' desire to decertify is related to the potential sale of their business. Accordingly, an exception to the successor bar should be considered in this situation.

Second, when applying the successor bar doctrine, the Board should take into consideration actions by employees prior to the sale of the business that indicate a question

concerning representation that has resulted from reasons unrelated to the sale of the business because of the fundamental importance of freedom of choice under the Act. The Board noted in *UGL-UNICCO* that an employee's freedom of choice has long been considered a "bedrock principle" of the Act. 2011 NLRB LEXIS 488 at \*33 ("Employee freedom of choice is . . . a bedrock principle of the statute.") (citation omitted). This choice has been established and preserved through elections where employees have the opportunity to express their choice for representation through a vote, which is the Board's "preferred way" to resolve questions concerning representation. *Levitz Furniture Co. of the Pacific*, 333 NLRB 717, 723 (2001) (stating that "Board-conducted elections are the preferred way to resolve questions regarding employees' support for unions"). The Board prefers and ensures that such questions be resolved expeditiously and without unnecessary delay. *Transcare New York, Inc.*, 355 NLRB 326, 328-329 (2010) ("The Board's Rules and Regulations are structured to ensure the expeditious resolution of questions concerning representation."); *see also W. A. Krueger Co.*, 299 NLRB 914, 921 (1990) (concurring and dissenting) (disapproving of union-caused delays through the "filing of meritless objections" that would "completely frustrate employee realization of the premise of the Act—that its prohibitions will go far to assure **freedom of choice** and majority rule in employee selection of representatives") (citing *Ilgwu v. NLRB*, 366 U.S. 731, 738-739 (U.S. 1961)).

In view of the fundamental importance of employee choice and the Board's preference for resolving questions concerning representation through expedited elections, the Employees' choice in this case should be preserved through an election and without further delay. This point is especially true in this case where the concerns about the stabilization of the prior labor-management relationship and the typical vulnerabilities of the successorship situation, as

discussed above, are not present because the Employees had documented their intent to decertify the Union in January 2013, well before sale of the business on April 1, 2013. Moreover, as explained in subsection A of Section I above, there will likely be other situations in which the Board will need to revisit the appropriateness of the successor bar based on employee actions, such as when a petition is filed during the window period but the business is sold prior to the expiration of the contract term. Accordingly, for these further reasons, review is appropriate in this case.

### **CONCLUSION**

For the foregoing reasons, the Employer requests that the Board review and reverse the Regional Director's Decision and remand for the processing of the Employees' decertification petition.

Respectfully submitted this 9th day of May, 2013.

/s/ D. Eugene Webb, Jr.

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 9th day of May, 2013, I caused the foregoing to be served by electronic mail and U.S. first-class regular mail on the following:

Wayne R. Gold, Regional Director  
National Labor Relations Board  
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*/s/ D. Eugene Webb, Jr.* \_\_\_\_\_

D. Eugene Webb, Jr.

*Counsel for Valley Proteins, Inc.*