

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 12**

PARAGON SYSTEMS, INC.

Employer

and

UNITED GOVERNMENT SECURITY  
OFFICERS OF AMERICA (UGSOA)<sup>1</sup>

Case 12-RC-106870

Petitioner

and

INTERNATIONAL UNION SECURITY  
POLICE AND FIRE PROFESSIONALS  
OF AMERICA (SPFPA) AND ITS  
AMALGAMATED LOCAL 127<sup>2</sup>

Intervenor

**DECISION AND ORDER**

Paragon Systems, Inc., herein called the Employer, is engaged in providing security services in Lake, Volusia, Orange and Osceola counties within the State of Florida.<sup>3</sup> On June 10, 2013, United Government Security Officers of America, herein called the Petitioner, filed a petition with the National Labor Relations Board, under Section 9(c) of the National Labor Relations Act, seeking to represent a unit including all full-time and regular part-time security officers employed by the Employer pursuant to its Government Security Contract in Lake, Volusia, Orange and Osceola Counties, Florida, including the National Law Enforcement

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<sup>1</sup> The Petitioner's name appears as amended at the hearing.

<sup>2</sup> The Intervenor's name appears as amended at the hearing.

<sup>3</sup> The parties stipulated that the Employer is an Alabama corporation with an office and place of business located in Florida and that the Employer is engaged in the business of providing security services for Federal facilities under contract with Federal Protection Services, Department of Homeland Security in Lake, Volusia, Orange and Osceola counties within the State of Florida. The parties further stipulated that, during the past 12 months, a representative period of time, the Employer in the course and conduct of its operations, generated gross volume of business in excess of \$500,000, and purchased and received at its Florida facilities goods and materials valued in excess of \$50,000 directly from points located outside the State of Florida. The parties further stipulated, and, based on the foregoing and the record as whole, I find, that at all material times the Employer has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Control Center, excluding all other employees, office clerical employees, lieutenants, professional employees and supervisors as defined in the Act. The unit employees are currently represented for the purposes of collective bargaining by International Union Security Police and Fire Professionals of America (SPFPA) and its Amalgamated Local 127, herein collectively called the Intervenor. There are approximately 45 to 50 employees in the bargaining unit.

On June 26, 2013, a hearing officer of the Board held a hearing in this case. The Petitioner and the Intervenor fully participated in the hearing. The Employer did not make an appearance at the hearing, but it entered into certain written stipulations with the Petitioner and the Intervenor, which the Hearing Officer admitted into evidence. I have considered the evidence and arguments presented by the parties.<sup>4</sup>

The parties stipulated that the petitioned-for unit is an appropriate bargaining unit.<sup>5</sup> The parties also stipulated that there is no collective-bargaining agreement covering any of the employees in the unit sought in the petition and there is no contract bar to this proceeding.

The sole issue to be decided is whether the petition should be dismissed because, as the Intervenor contends, the “successor bar” doctrine set forth by the Board in *UGL-UNICCO Service Company*, 357 NLRB No. 76 (2011) bars the processing of the petition and a question concerning representation does not exist. The Petitioner contends that no such bar exists because more than a reasonable amount of time has passed during which the Employer and the Intervenor have failed to agree on an initial collective- bargaining agreement.

As explained below, I conclude that the successor bar doctrine is applicable in this case and, thus, there is no question concerning representation. Accordingly, I shall dismiss the petition. After setting forth the relevant facts, I shall apply the controlling Board principles.

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<sup>4</sup> The hearing officer’s rulings are free from prejudicial error and are affirmed. The parties were afforded the opportunity to file briefs. I have carefully considered the briefs of the Petitioner and the Intervenor. The Employer did not file a brief.

<sup>5</sup> The parties stipulated that the Petitioner and the Intervenor are labor organizations within the meaning of Section 2(5) of the Act.

## **I. Facts**

### **A. The Employer recognized the Intervenor and made changes to unit employees' initial terms and conditions of employment**

ARES Group Inc., herein called ARES, was the predecessor employer to the Employer. ARES was engaged in providing security services for the Federal Protective Services. The Intervenor and ARES were parties to a collective-bargaining agreement effective from July 1, 2008 through September 30, 2011, pursuant to which the Intervenor represented security officers employed by ARES at federal facilities in nine Florida counties, including not only Lake, Volusia, Orange and Osceola, but also Marion, Brevard, and three other counties.<sup>6</sup> ARES continued to recognize the Intervenor after the expiration of that agreement on September 30, 2011.

Thereafter, the Intervenor and ARES negotiated a successor collective-bargaining agreement effective from March 1, 2012 through February 27, 2014, covering the ARES employees in the four county unit (Lake, Volusia, Orange and Osceola) currently employed by the Employer and at issue herein.

Sometime after March 1, 2012, the Employer bid on and was awarded the Federal Protective Services (FPS) contract then being performed by ARES, and on December 1, 2012, the Employer commenced operations and replaced ARES as the successor employer on that contract. On November 27, 2012, several days before the Employer commenced operations as the successor employer to ARES, the Employer's Vice President of Labor Relations (VP) sent an email to the Intervenor's International Regional Vice President (RVP), stating, "[a]ttached please find the proposed Local 127 CBA that we just discussed." Thus, from the outset of its operations, the Employer had effectively recognized the Intervenor as the collective-bargaining representative of the unit employees.

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<sup>6</sup> The other three counties are not identified in the record.

The Intervenor's chief steward in Orange County testified that the Employer required all ARES security officers to pass a physical examination in order to be hired by the Employer, and that all of the unit employees passed that examination and were hired by the Employer.

The Petitioner and the Intervenor stipulated that the Employer unilaterally announced and established initial terms and conditions of employment before proceeding to bargain with the Intervenor. However, there is no record testimony regarding any announcement of changed terms and conditions of employment before the Employer hired the ARES employees, and the stipulation does not indicate when the announcement of changes occurred, or whether such an announcement occurred before the Employer hired the former ARES security officers.

When it commenced operations on the FPS contract the Employer did not adopt the collective-bargaining agreement between the Intervenor and ARES. Certain terms and conditions of employment, including wage rates, were retained, as the Employer was subject to the Service Contract Act, but, as indicated above, the Employer made unilateral changes to other terms and conditions of employment at the start of its operations.<sup>7</sup>

According to the Intervenor's witnesses, including its chief shop steward in Orange County, at the start of its operations the Employer unilaterally changed the method for distributing health and welfare employee benefits payments; the amount of employee vacation time, sick leave and personal leave; the definition of full-time employee status, to require employees work at least 40 hours per week to be considered full-time; and the payment for employee travel time. In addition, the Employer scheduled many unit employees to work less

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<sup>7</sup> Successor employers are ordinarily free to set initial terms based on which they will hire the employees of a predecessor without first bargaining with the union that represents the employees. *NLRB v. Burns International Security Services*, 406 U.S. 272, 294-295 (1972). However, when a successor employer either actively, or by tacit inference, misleads the employees into believing that they will be retained without changes in their wages, hours or conditions of employment, or the successor employer fails to clearly announce its intent to establish new conditions before inviting the predecessor's employees to accept employment, it is considered a "perfectly clear" successor employer and must first bargain over initial terms. *Canteen Co.*, 317 NLRB 1052 (1995), *enfd.* 103 F.3d 1355 (7<sup>th</sup> Cir. 1997); *Spruce Up Corp.*, 209 NLRB 194, 195 (1974). There have been no unfair labor practice charges alleging that the Employer violated the Act by failing to bargain with the Intervenor over changes in the initial terms of employment of the unit.

than 40 hours per week, whereas unit employees usually worked 40 hours per week when employed with ARES.

With respect to the method of distributing health and welfare benefits, ARES paid employees \$3.80 per hour worked in lieu of health and welfare benefits. In contrast, the Employer offers unit employees the option of participating in its medical plan or receiving a contribution to a 401(k) plan in lieu of health and welfare benefits, but there is not an option to receive additional wages in lieu of health and welfare benefits. Furthermore, the Employer does not provide employees with health and welfare benefits payments for paid vacation hours. Whereas ARES paid unit employees 25 cents per mile of travel time when attending training events, the Employer compensates employees for travel time by providing the minimum wage for the first 90 minutes of travel and straight time pay for travel in excess of 90 minutes. In addition, for employees who work less than 40 hours per week, the Employer pro-rates the full amount of health and welfare benefits payments, vacation time, sick time and personal time. The Employer and the Intervenor did not negotiate the aforementioned changes to the unit employees' initial terms and conditions of employment.

**B. Negotiations between the Employer and the Intervenor for an initial collective-bargaining agreement**

Starting on or about November 27, 2012, the Employer's VP and the Intervenor's RVP conducted collective-bargaining negotiations for an initial collective-bargaining agreement by email and, apparently, by telephone. Neither of these individuals testified at the hearing, but email messages they exchanged were admitted in evidence. Bargaining proposals that were apparently attached to some of the emails were not introduced in evidence. As of the date of the hearing, the parties had held a single face-to-face bargaining session, on June 14, 2013, four days after the filing of the petition in this matter.

As noted above, on November 27, 2012, the Employer's VP sent an email to the Intervenor's RVP on the subject of "FL CBA," stating that a proposed collective-bargaining

agreement was attached. The email is in evidence, but the proposed agreement is not. After receiving no response to his November 27, 2012 email, on December 11, 2012, the Employer's VP sent a follow-up email requesting the Intervenor's response to the Employer's contract proposal. On December 12, 2012, the Intervenor's RVP replied by email, objecting to reductions in vacation benefits, sick and personal time, and the changed method of paying health and welfare benefits. The Intervenor's RVP further stated that its committee would review the proposed non-economic language and that the Intervenor would submit a counter-offer to the Employer.

On December 26, 2012, the Intervenor's RVP sent an email to the Employer's VP on the subject of "Orlando," stating, "...per our discussions, here is the WV CBA with the changes we discussed." It appears that a document titled "SPFPA 127 orlando counter 122612.doc" was attached to that email. The attachment was not offered in evidence. However, it appears that the attachment was the Intervenor's counterproposal for a collective-bargaining agreement to cover the unit involved in the instant case. That same day the Employer's VP replied that he would review the proposal and respond. On December 27, 2012, the Intervenor's RVP sent another email to the Employer's VP, objecting to the fact that employees in a different bargaining unit in Tampa, Florida were still receiving health and welfare benefits from the Employer in their paychecks, whereas the majority of the employees (in the Orlando unit) had opted out of the Employer's medical plan and their payments in lieu of medical benefits were being deposited in a 401(k) plan (rather than added to their paychecks). In the same email, the Intervenor's RVP further objected to the reduction in work hours of the Intervenor's chief shop steward in Orange County.

On January 4, 2013, the Intervenor's RVP sent an email to the Employer's VP with another proposed collective-bargaining agreement, titled "SPFPA 127 orlando counter 010413.doc." The message in the email stated, "Per our conversations, this document should reflect those discussions. For your review." The proposal attached to that email was not offered

in evidence. On the same day the Employer's VP replied by email that he would review the Intervenor's counterproposal. It is not clear whether or not the proposal attached to the January 4, 2013 email is the same as the proposal that was offered for ratification on January 10, 2013. However, the evidence suggests that the proposal offered for ratification on January 10, 2013, was the product of a tentative agreement between the Intervenor and the Employer.

On January 10, 2013, the Intervenor held a contract ratification vote on a proposed collective-bargaining agreement that would be effective from January 14, 2013 to November 13, 2015. The Intervenor's Local 127 President testified that the proposed agreement was the product of talks between the Intervenor's RVP and the Employer's VP, and "the Company came up with a onetime offer for us to take over to the employees for ratification," but that he had no personal knowledge of the negotiation process. He further testified that he received the proposal by email from the Local 127 Vice President. Although the proposal that was presented for ratification was admitted in evidence, the Local 127 Vice President did not testify and there is no further evidence that explains how the terms of the proposal were determined.

On January 10, 2013, the Intervenor's membership rejected the proposed agreement, with 20 employees voting against ratification and four employees voting for ratification. According to the Intervenor's chief steward in Orange County, the unit employees' main objection to the rejected agreement was the provision that if a unit employee decided not to participate in the Employer's health care plan, the Employer put the money for health and welfare benefits into a 401(k) plan for the employee.

On April 11, 2013, the Employer's VP sent an email to the Intervenor's RVP on the subject of "L 127 Rejected CBA," reminding him that the parties still needed to set a date "to get to the table" to negotiate a collective-bargaining in view of the rejection of the proposed agreement in December (apparently a reference to the proposal rejected in the January 10, 2013 ratification vote). The Employer's VP questioned whether the Intervenor was available to negotiate on May 2, 2013, and noted that the Employer was withdrawing a proposal it had made

to allow employees to receive 50% of the health and welfare funds in cash. The record does not otherwise reflect anything about the Employer's and Intervenor's communications or lack thereof between January 14, 2013 and April 11, 2013. There is no evidence that the Intervenor responded to the April 11, 2013 email in any fashion.

On May 2, 2013, the Employer's VP sent an email to the Intervenor's RVP on the subject of "USGOA FL CBAs," stating that on the previous day the Employer had reached a tentative collective-bargaining agreement (with the Petitioner and its Local 31) in the Jacksonville, Florida area, which included minimal wage increases effective on December 1, 2013, and no cash payments for health and welfare benefits, that the Employer had made a last, best and final contract offer concerning the bargaining unit (represented by the Petitioner) in Tampa, Florida, and that the Employer would forward those documents to the Intervenor in the next week. In the same email the Employer's VP asked the Intervenor's RVP when he wanted "to talks for the Orlando group [i.e. the bargaining unit at issue in this proceeding, covering the Employer's security officers at federal facilities in Lake, Volusia, Orange and Osceola Counties, Florida], either in person or face to face [sic]." Later that day, the Intervenor's RVP responded with an email simply stating his thanks, but not responding to the inquiry about a date for a face-to-face meeting.

On June 10, 2013, the Petitioner filed the instant petition.

On June 14, 2013, the Employer and the Intervenor conducted a face-to-face collective bargaining session. The record does not reflect how this meeting was scheduled. The meeting was held at the Intervenor's union hall in Merritt Island, Florida. Present for the Intervenor were its International Region 2 Director, its Local 127 President, its Local 127 Vice President, its chief shop steward in Orange County, and a Local 127 Business Agent. Present for the Employer were its VP and its program manager. As a basis for negotiations, the parties used an agreement that the Employer had reached with the Petitioner and its Local 31 in May, 2013, covering the bargaining unit of the Employer's armed and unarmed security officers assigned to

federal facilities in Jacksonville, St. Augustine, Port Orange, and Day, Florida, and surrounding areas under the Employer's contract with the Department of Homeland Security.

During the June 14, 2013 bargaining session, the Employer and the Intervenor reached a tentative agreement on a full collective-bargaining agreement. The tentative agreement had most of the same provisions as the aforementioned agreement between the Employer and the Petitioner and its Local 31. It also included some modifications, including some different increases in wage rates and health and welfare benefits that were to become effective on December 1, 2013.

On June 19, 2013, the Intervenor held a contract ratification vote on the tentative collective-bargaining agreement that had been reached on June 14, 2013. The membership rejected the tentative agreement with 24 employees voting against ratification and two voting in favor of ratification. There is evidence that unit employees were concerned with the fact that the tentative agreement still defined full-time employees as those working at least 40 hours per week, notwithstanding that most unit employees only worked about 38 work hours per week, and vacation, sick leave and personal leave benefits were pro-rated for employees who worked less than 40 hours per week. There is evidence that some unit employees were concerned with provisions of the tentative agreement concerning bereavement pay, travel time pay and health and welfare benefits. Many employees expressed to the Intervenor that if they could obtain full-time work hours, they would ratify a proposed collective bargaining agreement.

There is evidence that subsequently the Intervenor's RVP and the Employer's VP held further discussions which led to their agreement to define full-time employees as those who work at least 37 hours per week. The Intervenor then sent out notices to the bargaining unit employees stating that there would be another contract ratification vote held on June 24, 2013.

On June 24, 2013, the Intervenor held an "emergency" contract ratification meeting for its members in the bargaining unit to vote on the most recently proposed collective bargaining agreement, which would have been effective from June 24, 2013 through June 30, 2016. The

Intervenor explained to the membership that the Employer had agreed to define full-time employees as those who work at least 37 hours per week. This third proposed agreement was also rejected, with 20 employees voting against ratification and 16 voting in favor of ratification. There is some evidence that employees were concerned with the hours of scheduled work shifts at a particular work location in Orange County, and were concerned with the fact that they would not receive health and welfare benefits for hours while they were on vacation or other forms of leave, i.e. while they were not actually working. Some employees also expressed concerns about bereavement pay and travel pay. When the Intervenor's chief shop steward in Orange County was asked whether he discussed the employees' reasons why they did not vote for the agreement, he testified that he had, and that there are factions in the Local union, and some employees were unhappy with anything and were speaking of trying to get other unions to represent them, but they did not provide any substantial reason as to why they did not vote for the contract. He further testified that he believes that only a small number of employees are pushing others to vote against ratification, and that with some additional changed terms he thinks a contract will be ratified, noting that the most recent contract proposal came much closer to ratification.

The Employer and the Intervenor have not scheduled any further bargaining sessions, and there is no evidence that they have attempted to schedule any further bargaining sessions. However, the Intervenor plans to continue negotiating with the Employer. The evidence shows that the Employer has not stated that it is unwilling to engage in further negotiations, and that the Employer has not yet made a "last, best and final" contract offer to the Intervenor. To the contrary, the Employer has asked the Intervenor what else it needs to do for the bargaining unit employees, i.e. in order to reach agreement on a contract that will be ratified. Thus, the Intervenor's Region 2 Director testified that the Intervenor and the Employer are not at impasse in negotiations.

## **II. Analysis**

### **A. The successor bar doctrine**

In *UGL-UNICCO Service Company*, 357 NLRB No. 76 (2011), the Board decided to restore the “successor bar” doctrine, discarded in *MV Transportation*, 337 NLRB 770 (2002). Under that doctrine, when a successor employer acts in accordance with its legal obligation to recognize an incumbent representative of its employees, the previously chosen representative is entitled to represent the employees in collective bargaining with their new employer for a reasonable period of time, without challenge to its representative status. *St. Elizabeth Manor, Inc.*, 329 NLRB 341 (1999). The *UGL-UNICCO* Board modified the “successor bar” doctrine set forth in *St. Elizabeth Manor*, in order to mitigate its potential impact on employees who might wish to change representatives or reject representation altogether. 357 NLRB No. 76, slip op. at p.1.

The Board noted that a bar creates a *conclusive* presumption of majority support for a defined period of time, preventing any challenge to the union’s status, whether by the employer’s unilateral withdrawal of recognition from the union or by an election petition filed with the Board by the employer, by employees, or by a rival union. The Board further explained that its doctrines barring the processing of representation petitions and an employer’s unilateral withdrawal of recognition from a union are well established in labor law, based on the principle that “a bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed.” 357 NLRB No. 76, slip op. at p.3, citing *Franks Bros. Co. v. NLRB*, 321 U.S. 702, 705 (1944). Citing *St. Elizabeth Manor*, the Board further held that the successor bar should extend only for a reasonable period of time, and “not in perpetuity.” 357 NLRB No. 76, slip op. at p.6.

In *UGL-UNICCO*, the Board addressed the situation, as here, where the contract bar doctrine is not applicable, and the successor employer recognizes the union, but unilaterally announces and establishes initial terms and conditions of employment before proceeding to bargain.<sup>8</sup> The Board held that, “[i]n such cases, the ‘reasonable period of bargaining’ will 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.” 357 NLRB 76, slip op. at p.9. The Board defined a “reasonable period of bargaining” in such cases by drawing on its decision in *Lee Lumber & Building Material Corp.*, 334 NLRB 399 (2001), where the Board defined a reasonable period of bargaining in the context of remedying an unlawful refusal to recognize and bargain with an incumbent union. In *Lee Lumber* the Board determined that a reasonable period for bargaining was no less than six months, but no more than one year, and that:

The factors we will consider in determining whether the initial six month insulated period should be extended are: (1) whether the parties are bargaining for an initial contract; (2) the complexity of the issues being negotiated and of 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 negotiations and how near the parties are to concluding an agreement; and (5) whether the parties are at impasse.

334 NLRB at 402, cited at 357 NLRB No. 76, slip op. at p.9. In *UGL-UNICCO*, the Board cited the *Lee Lumber* Board’s determination that the burden is on the General Counsel to prove that a reasonable period for bargaining had not elapsed after six months. 334 NLRB at 405. The *UGL-UNICCO* Board held that “[t]he burden of proof will be on the party who invokes the ‘successor bar’ to establish that a reasonable period of bargaining has *not* elapsed” after six months. 357 NLRB No. 76, slip op. at p.9.

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<sup>8</sup> The Employer did not adopt or bridge the ARES contract with the Intervenor and there is insufficient evidence to establish that it is a perfectly clear successor employer to ARES. Although the Employer apparently retained all of the unit employees and maintained at least certain terms of employment, including wage rates, as required by the Service Contract Act, as noted above, it is undisputed that the Employer made unilateral changes in some other terms and conditions of employment of the unit employees, and the Intervenor did not file an unfair labor practice charge alleging that the Employer unlawfully failed or refused to bargain over the changes in the initial terms of employment of the unit employees.

**B. The petition was filed prior to the expiration of the six-month minimum reasonable period of bargaining**

Addressing the commencement date for measuring the period of bargaining in this case, the Petitioner contends that the relevant bargaining period began on November 27, 2012, when the Employer submitted its first collective-bargaining agreement proposal to the Intervenor. If the November 27, 2012 date is used as the starting point, then more than six months of bargaining between the Employer and the Intervenor had elapsed at the time the Petitioner filed its petition on June 10, 2013. The Intervenor asserts that the relevant bargaining period commenced on June 14, 2013, the date of the first face-to-face bargaining meeting. Using that date, bargaining had not even started at the time the Petitioner filed its petition. The Intervenor bases its position on literal language of *UGL-UNICCO*, where the Board held that the “reasonable period of bargaining” will 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. (Emphasis added).

Section 8(d) of the Act sets forth the mutual obligation of an employer and the representative of its employees to bargain collectively by meeting at reasonable times and conferring in good faith with respect to wages, hours, and other terms and conditions of employment. Based on the literal wording of *UGL-UNICCO*, Section 8(d) of the Act, and longstanding Board law, the Intervenor’s argument that the six month insulated period should not begin until the first face-to-face meeting occurred has some persuasive value.

Thus, the Board has long held:

It is elementary that collective bargaining is most effectively carried out by personal meetings and conferences of the parties at the bargaining table. Indeed, the Act imposes this duty to meet.

*U.S. Cold Storage Corp.*, 96 NLRB 1108, 1108 (1951), *enfd.* 203 F.2d 924 (5<sup>th</sup> Cir. 1953), *cert. denied* 346 U.S. 818 (1953). An employer’s obligation to meet and bargain with the labor organization, which is the bargaining representative of its employees, is not satisfied by merely

inviting or demanding written proposals in advance of any face-to-face negotiations. *Fountain Lodge, Inc.*, 269 NLRB 674 (1984), citing *U.S. Cold Storage Corp.*, 203 F.2d at 928. Similarly, in *Rasco Olympia, Inc.*, 185 NLRB 894 (1970), the Board adopted the judge's recommendation in finding that "bargaining by mail is not, except under rare and unusual circumstances, an acceptable substitute for direct, face-to-face bargaining at the conference table by the bargaining principals."

The facts of this case, however, are distinguishable from the facts in the above-discussed cases where the Board found that a party's failure to engage in face-to-face bargaining was unlawful. The evidence leads to the conclusion that the Employer expressed its eagerness to bargain beginning as early as November 2012. The Intervenor and the Employer then chose to bargain by email and telephone, rather than by face-to-face meetings, until June 2013. In fact, there is no evidence that the Intervenor, which is the only party asserting a successor bar, requested face-to-face negotiations. Based on the evidence, the only party that sought a face-to-face meeting was the Employer, and that occurred on April 11, 2013. Moreover, the Intervenor apparently ignored the Employer's April 11, 2013, request for a face-to-face meeting, and it failed to respond to the Employer's May 2, 2013, request for a face-to-face meeting, other than to say "thanks."

The evidence shows that the parties were fully dealing with each other by email and in discussions between the Intervenor's RVP and the Employer's VP that occurred between December 26, 2012, when the Intervenor's RVP emailed a full counter-proposal for a collective-bargaining agreement to the Employer, and January 10, 2012, when the Intervenor presented a proposed agreement to its membership for a ratification vote. Although the parties apparently had some communications that pre-dated the Employer's November 27, 2012 contract proposal, the earliest clear evidence that the Intervenor responded to the Employer was the December 12, 2012, email, when the Intervenor objected to certain provisions in the Employer's proposal that embodied changes in terms of employment that the Employer had imposed when

it started operations on December 1, 2012. The Union more fully engaged the Employer in bargaining by making a complete counterproposal of its own “with the changes we discussed” on December 26, 2012. Although the mere exchange of proposals would not necessarily constitute the start of actual negotiations, from the emails it appears that the Intervenor’s RVP and the Employer’s VP were also discussing contract terms, apparently by telephone, by that time, and it appears that both parties were satisfied with that method of negotiating, and neither party had requested a face-to-face meeting at that point.

The emails exchanged on January 4, 2013, show that by then there were further negotiations by email and verbal discussion between the Intervenor’s RVP and the Employer’s VP, and the evidence tends to show that sometime between January 4 and January 10, 2013, they reached a tentative agreement on the terms of the complete collective-bargaining agreement that was offered to the Intervenor’s membership within the unit for ratification on January 10, 2013.

Accordingly, for the purpose of determining the six month insulated period during which the successor bar applies, I find that negotiations began on December 12, 2012, notwithstanding that there was no face-to-face meeting until June 14, 2013.<sup>9</sup>

Thus, the petition was filed less than six months after negotiations started, but as of this date, July 25, 2013, more than six months have elapsed since negotiations started. This result is the same whether December 12, 2012, January 10, 2013, or any date in between, is used as the date negotiations started.

**C. The Intervenor failed to meet its burden of showing that a reasonable period of bargaining had *not* elapsed” after six months**

With respect to whether the initial six month insulated period for bargaining following the “first bargaining meeting” (which I have determined took place by email exchanges and verbal

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<sup>9</sup> In so finding, I note that in today’s world, electronic communications and “virtual meetings” often take the place of actual face-to-face meetings. To find otherwise would allow parties to artificially block challenges by a rival union by their choice of the manner in which to negotiate.

discussions that apparently were telephone conversations in this case) should be extended, the Intervenor has the burden of proof.

I find that the first factor to be considered, whether the parties are bargaining for an initial contract, weighs slightly against a finding that a reasonable period of time has elapsed. Thus, the Employer and the Intervenor are bargaining for an initial collective-bargaining agreement in this particular unit, which may make negotiations more protracted than renewal negotiations. In this regard, the parties apparently have tried various documents as a basis for negotiations. On the other hand, this factor weighs less heavily against finding that a reasonable period of time has elapsed than in cases where there has been an acrimonious organizing campaign. In this regard, the evidence shows that the Employer retained all of the unit employees, immediately recognized the Intervenor as the unit employees' bargaining agent, and maintained certain terms and conditions of employment, including wage rates.

I find that the second factor, whether the issues being negotiated and the procedures adopted for bargaining are complex, weighs in favor of finding that a reasonable period of time has elapsed. Thus, there is no evidence of ground rules in negotiations, the parties seem to have an amicable relationship, they have reached three tentative agreements on a full collective-bargaining agreement in six months, despite the fact that there is no evidence that they bargained at all for approximately half of that time. In addition, the evidence shows that the parties have been able to agree on non-economic terms very quickly, the scope of issues being negotiated is fairly narrow, and the parties have quickly agreed to contract language on most items.

I find that the third factor, the passage of time and the number of bargaining sessions, militates against a finding that the six month insulated period should be extended. Considered by itself, the fact that only several weeks have passed since the six month period expired weighs in favor of extending that period. On the other hand, although there has only been one face-to-face bargaining meeting, neither party has sought frequent meetings, there is no

evidence that the Intervenor has requested more frequent “give-and-take” in any fashion, and I find that the third factor weighs against extending the six month insulated period. In this regard I note that the Intervenor failed to call as witnesses either its own International Regional Vice President or the Employer’s Vice President of Labor Relations, the only persons who could shed light on the true extent of the negotiations. In addition, it is clear that the Intervenor failed to introduce a number of contract proposals and perhaps other emails that could have helped establish the extent of negotiations. The evidence shows that there were a number of discussions and emails exchanged between November 27, 2012, and January 10, 2013 that led to a rather quick ratification vote on a proposed agreement. After a three month hiatus in negotiations between January 10, 2013, and April 11, 2013, the Intervenor ignored the Employer’s requests to meet and bargain until at least some time in May 2013. Then, quickly after the filing of the petition in this matter, the parties reached two tentative collective-bargaining agreements that were put to ratification votes by the Intervenor. Although there have not been a lot of bargaining sessions, that appears to be attributable to the parties’ lack of urgency, at least until the petition was filed, and it appears that the Employer has accommodated the Intervenor’s requests to negotiate, by whatever means, throughout their bargaining process.

I find that the fourth and fifth factors, the presence or absence of impasse and the proximity to agreement, weigh in favor of extending the reasonable period of time for bargaining beyond six months because there is no indication that the parties are at or near impasse, there has been recent movement in negotiations, and, as noted, the parties have been able to reach three tentative agreements, including two in the last month, and although the Union membership has rejected all three agreements, the most recent ratification vote was much closer than the first two ratification votes. Although there was no evidence that further bargaining meetings had been scheduled as the time of the hearing, at that point it had only been two days since the most recent contract ratification vote. In addition, the Employer has not made an offer it

characterizes as its last, best and final offer, and there is no evidence that the Intervenor has threatened to strike. On the other hand, as the Intervenor's shop steward testified, at least some unit employees appear to be opposed to continued representation by the Intervenor, and inclined not to ratify any agreement, so long as the Intervenor is their bargaining agent.

In summary, after weighing all of the *Lee Lumber* factors to determine whether a reasonable period of bargaining elapsed after six months, and although a close issue, I find that the Intervenor has not met its burden of establishing that the six month insulated period of bargaining should be extended. The Intervenor's failure to present the key witnesses who could shed light on the bargaining process is a key consideration in making this finding.

**D. The petition is untimely because it was filed on a date less than six months from the commencement of negotiations**

*UGL-UNICCO* does not directly reach the question as to whether a petition must be dismissed based on the successor bar doctrine if it is filed during the reasonable period of bargaining but when a decision on the petition is not issued until that time has elapsed, and it does not appear that there is any precedent that directly answers this question.

However, there is precedent regarding this issue with respect to certain other bars to the processing of a representation petition. A certification year bar requires the dismissal of a representation petition filed at any point before the end of the certification year because:

the mere retention on file of such petitions, although unprocessed, cannot but detract from the full import of a Board certification, which should be permitted to run its complete 1-year course before any question of the representative status of the certified union is given formal cognizance by the Board.

*Centr-O-Cast & Engineering Co.*, 100 NLRB 1507, 1508 (1951). On the other hand, the Board will entertain a petition filed within 60 days of the end of an election year bar, so long as the election is not held before the end of the one year period since the prior valid Board election, as required by Section 9(c)(3) of the Act. *Vickers, Inc.*, 124 NLRB 1051 (1959).

I find that a successor bar is more closely analogous to a certification year bar, where there is an incumbent labor organization representing the unit employees, than it is to an

election year bar, where there is no incumbent bargaining agent. I also note that in *UGL-UNICCO* the Board refers to the reasonable period of bargaining as the “insulated period,” suggesting that no petition may be filed during that period, as is the case during the insulated period in contract bar cases. In contract bar cases the Board held that the insulated period:

will prevent the threat of overhanging rivalry and uncertainty during the bargaining period, and will eliminate the possibility for employees to wait and see how bargaining is proceeding and use another union as a threat to force their current representative into unreasonable demands.

See *Deluxe Metal Furniture Co.*, 121 NLRB 995, 1000-1001 (1958); see also *Leonard Wholesale Meats*, 136 NLRB 1000, 1001 (1962). The same analysis is applicable here.

Accordingly, I am dismissing the petition herein because it was untimely filed during the six month reasonable period for bargaining.

### **III. Order**

It is hereby ordered that the petition is dismissed.

### **IV. 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 14<sup>th</sup> Street, N.W. Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5:00 p.m., EST/EDT on August 8, 2013. The request may not be filed by facsimile.<sup>10</sup>

DATED at Tampa, Florida this 25<sup>th</sup> day of July 2013.

  
Margaret J. Diaz, Regional Director  
National Labor Relations Board, Region 12  
201 E. Kennedy Blvd., Suite 530  
Tampa, Florida 33602-5824

<sup>10</sup> The request may be submitted electronically through the Agency’s website at [www.nlr.gov](http://www.nlr.gov), as well as by hard copy. To file the request electronically, go to the Agency’s website at [www.nlr.gov](http://www.nlr.gov), select **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions.