

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

EVERGREEN TRAILS INCORPORATED
d/b/a HORIZON COACH LINES,
Employer

and

BOBBY LOWE,
Petitioner

Case 12-RD-104211

and

UNITED SERVICE WORKERS UNION,
LOCAL 74,
Union

DECISION AND DIRECTION OF ELECTION

Evergreen Trails Incorporated d/b/a Horizon Coach Lines (the Employer) provides bus transportation at its Orlando, Florida, location.¹ On May 2, 2013, the Petitioner filed a petition with the Tampa, Florida Regional Office, seeking an election to decertify United Service Workers Union, Local 74, (the Union), the exclusive collective-bargaining representative of the Employer's motor coach drivers at the Orlando location.²

It is undisputed that the Employer is a successor employer to American Coach Lines (American). On September 13, 2012, the Employer acquired the assets of American, which had operated a bus service from the same Orlando location for several years, and began operations as a successor employer to American.³ The Union had

¹ The parties stipulated that the Employer is incorporated in the State of Washington and that during the past 12 months, it has derived gross revenues exceeding \$250,000, and has purchased and received at its Orlando, Florida facility goods and materials valued in excess of \$50,000 directly from points located outside the State of Florida. I find that the Employer is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

² For a period of time, the processing of the petition was blocked by unfair labor practice charges, which were subsequently withdrawn.

³ American was in bankruptcy when the Employer purchased its assets.

been the exclusive collective-bargaining representative of American's motor coach drivers. At the outset of its operations in Orlando, the Employer hired about 300 out of roughly 310 to 315 of the former Orlando based American drivers as its Orlando work force. The Employer recognized and began bargaining with the Union as the exclusive representative of its motor coach drivers employed in Orlando on September 27, 2012.⁴

The main issue in this case is whether, as asserted by the Union, the decertification petition filed on May 2, 2013, is barred by the Board's "successor bar" doctrine, which provides that:

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.⁵

Because the Employer and Union are bargaining for an initial collective-bargaining agreement and the Employer, as a successor employer, unilaterally established initial terms and conditions of employment of the unit employees, the Board holds that a "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 [successor] employer."⁶ The precise duration of the reasonable period depends upon the following factors: whether the parties are bargaining for an initial contract; the complexity of the issues being negotiated and of the parties' bargaining processes; the amount of time elapsed since bargaining commenced and the number of

⁴ See *NLRB v. Burns International Security Services*, 406 U.S. 272 (1972). At the hearing the Petitioner amended the description of the bargaining unit to conform to the historical unit with respect to which the Union was recognized by the Employer's predecessor, American, and with respect to which the Employer recognizes the Union. As amended, the unit includes all full-time motor coach drivers, excluding part-time drivers, all other employees, guards, and supervisors as defined in the Act.

⁵ See *UGL-UNICCO Service Co.*, 357 NLRB No. 76, slip op. at p. 1 (2011).

⁶ *UGL-UNICCO Service Co.*, *supra*, slip op. at p. 9.

bargaining sessions; the amount of progress made in negotiations and how near the parties are to concluding an agreement; and whether the parties are at impasse.⁷

I will further address whether, as also contended by the Union, the petition is untimely because of the recognition bar doctrine, which provides that once a representative is lawfully voluntarily recognized as the exclusive representative of a unit of employees, the representative is similarly entitled to represent the unit employees in collective bargaining for a reasonable period of time without a challenge to its representative status.⁸

The Employer and the Petitioner disagree with the Union's position that a reasonable period of time for bargaining had not elapsed by the time the petition was filed.

Pursuant to the filing of the petition herein, a hearing officer of the Board conducted a hearing. The Employer and the Union presented witnesses.⁹ I have considered the evidence and arguments presented by the parties at the hearing.¹⁰ As explained below, I conclude that the Union has demonstrated, by a preponderance of the evidence, that a reasonable period of time for bargaining had not elapsed as of May 2, 2013, when the petition was filed. However, inasmuch as far more than 12

⁷ *Id.* See *Lee Lumber & Building Material Corp.*, 334 NLRB 399, 405 (2001).

⁸ See *Lamons Gasket*, 357 NLRB No. 72 (2011).

⁹ The Petitioner did not present any witnesses. During the hearing, the Union presented its President as its only witness. The Employer and the Petitioner were given the opportunity to cross-examine the Union President. After completing his testimony, the Union President left the courtroom and the Hearing Officer briefly adjourned the hearing. Subsequently, the Employer called the Union's Business Agent as its witness. Before the Business Agent was called to the witness stand, the Hearing Officer sought to recall the Union President to the witness stand to ask him certain questions, as explained below in Section II.D. The Union's attorney refused to present the Union President again as a witness, contending that the Union President had completed his testimony. The Union President had not been subpoenaed.

¹⁰ Both the Union and the Employer waived their right to file briefs. The Petitioner did not submit a brief.

months have now elapsed since the parties commenced bargaining on September 27, 2012, as explained below, I am directing an election.¹¹

After presenting an overview of the facts and the positions of the parties, I will review the evidence as to whether the parties engaged in bargaining during specific time frames: from September 27, 2012, to December 10, 2012; from December 10, 2012, to February 19, 2013; on February 20 and 21, 2013, and from February 22, 2013, to May 2, 2013, when the decertification petition was filed, and thereafter. Finally, I shall apply the factors set forth in *UGL-UNICCO Service Co.* to determine whether, under the circumstances, a reasonable period for bargaining had elapsed as of May 2, 2013, and whether a reasonable period of time for bargaining has elapsed as of the date of this Decision and Direction of Election.

I. Overview and Positions of the Parties

The Employer acquired the assets of American in Orlando and 15 other locations in the United States and began operating at that location on or about September 13, 2012.¹² As of that date, the Union represented American's motor coach drivers in Orlando pursuant to a collective-bargaining agreement effective from January 26, 2012, until January 25, 2013. Although the Employer maintained certain terms of employment that were identical to the terms set forth in the agreement, the Employer did not adopt the American collective-bargaining agreement. Instead, the Employer set certain initial terms and conditions of employment, including increasing the per diem rates, reducing the over-the-road rates for overnight charters, establishing its own health insurance plan to replace the Union's plan that had covered the unit, reducing the number of uniforms

¹¹ Because the processing of the petition herein was blocked for a period of time by pending unfair labor practice charges, the hearing in this matter was not conducted until more than one year after the parties began bargaining on September 27, 2012.

¹² The Employer acquired the assets of American at 15 other locations on or about the same date. The Orlando location was only one where the American drivers were represented by the Union.

available for drivers, and relaxing certain aspects of the attendance policy. The Employer adopted the remaining terms set forth in the American contract, including rates of pay and work duties.

The Employer considered the former American drivers to be new hires. The Employer communicated the above changes in terms and conditions of employment to American drivers during a series of five meetings at the Embassy Suites Hotel near the Orlando facility in August, 2012. It appears from the record that the changes were also communicated in letters offering the American drivers positions with the Employer.¹³

The Employer recognized the Union by letter on September 27, 2012, and the parties began bargaining on that date. In this letter, the Employer's Chief Business Officer designated the Employer's General Manager as its "lead negotiator," adding that he (the Chief Business Officer) "will be the primary decision maker on behalf of the Company."¹⁴ The General Manager was the only Employer representative who communicated directly with the Union from September 27, 2012, until December 10, 2012. On December 10, 2012, the Employer's Chief Business Officer informed the Union's Business Agent in an email message that the General Manager had been terminated and that the Chief Business Officer was taking over negotiations on behalf of the Employer.¹⁵

The parties met and bargained on February 20 and 21, 2013, and reached tentative agreement on a collective-bargaining agreement by the end of the February 21

¹³ The record contains a letter that the Employer mailed to a former American driver living in Bakersfield, California, offering the driver a position with the Employer at its Bakersfield facility. The Employer's Chief Operating Officer testified that this letter is representative of letters that were mailed to all American drivers at all 16 locations, including Orlando, offering them employment. The letter set a deadline of August 25, 2012, by which the American driver was to return various forms, and states that certain terms and conditions would change (such as the national per diem rate).

¹⁴ The General Manager also had been the General Manager of American.

¹⁵ The Chief Business Officer had become the Employer's Chief Operating Officer by the time of the hearing. It is not clear from the record exactly when he became the Chief Operating Officer. To avoid confusion he is hereinafter referred to as the Chief Business Officer throughout this Decision.

session. The Union conducted a ratification vote regarding the tentative agreement among its members on April 22, 2013, and the members voted to reject the agreement by a 24-19 margin. The decertification petition was filed on May 2, 2013.

The Union contends that the General Manager who was designated as lead negotiator on September 27, 2012, lacked authority to negotiate on behalf of the Employer. Thus, according to the Union, no bargaining occurred from September 27, 2012, until February 20, 2013.

The Union claims that although the parties did not bargain after February 21, the Union attempted to contact the Employer many times in an effort to resume bargaining between April 22, 2013, when the employees rejected the tentative agreement, and May 2, 2013, when the decertification petition was filed.

In short, the Union argues that a reasonable period for bargaining had not elapsed as of May 2, 2013, because bargaining only began on February 20, 2013, and has not resumed since February 21, 2013. Thus, the Union contends, the decertification petition should be dismissed as untimely.

The Employer takes the position that by the time the petition was filed, more than adequate time had passed for the parties to bargain. In support of this position, the Employer maintains that when it began operations in Orlando in September, 2012, it changed only a handful of terms and conditions of employment (from those set forth in the Union's collective-bargaining agreement with American), and thus the circumstances more closely resemble those in which the successor adopts the predecessor's entire collective-bargaining agreement than those in which the successor completely ignores the terms and conditions set forth in the predecessor's agreement. The Employer also claims that even if the Employer unilaterally imposed new terms and conditions, the Employer and Union were in effect bargaining a renewal contract, not an initial one. Thus, The Employer additionally argues that the main issue over which the parties

bargained was wages and that this was a simple issue. The Employer asserts that the parties negotiated for eight and a half months prior to May 2, 2013, citing the face-to-face sessions on September 27, 2012, October 10, 2012, and February 20 and 21, 2013. The Employer also contends that its General Manager had authority to bargain with the Union and prepared for bargaining with the Union President through emails and telephone calls between September 27, 2012, and December 10, 2012. The Employer argues that between December 10, 2012, and February 20, 2013, its Chief Business Officer communicated with the Union's President in preparation for bargaining, and that they bargained in person on February 20 and 21, 2013. The Employer claims that the Union has not attempted to resume bargaining since February 21, 2013.

The Union bears the burden of proof to establish that a reasonable period for bargaining had not elapsed as of the filing date of the petition, as it is the party invoking the successor bar doctrine.¹⁶

II. Facts

A. September 27, 2012, through December 10, 2012

Prior to meeting on February 20 and 21, 2013, the only dates on which a representative of the Employer met in person with representatives of the Union were September 27, 2012, and October 10, 2012. The Employer's General Manager was present on each occasion. The Chief Business Officer was not present for either meeting. The Union was represented at these two meetings by its President and its Business Agent.¹⁷ The Employer did not present any written proposals or counterproposals until February 20 and 21, 2013. The Union made a written proposal on

¹⁶ *UGL-UNICCO Service Co.*, 357 NLRB No. 76, slip op. at p. 9.

¹⁷ Both the Union and the Employer had additional representatives present for bargaining on September 27 and October 10, 2012, including some employee representatives of the Union. Some of these individuals were also present for the February 20 and 21, 2013, bargaining sessions.

September 27, 2012, and responded to the Employer's proposals on February 20 and 21, 2013.

On September 27, 2012, the Union President and Union Business Agent met with the Employer's General Manager. It appears from the record that this meeting lasted about two or three hours. At some point, the Employer's General Manager gave the Union President a letter from the Chief Business Officer stating the Employer's desire to negotiate with the Union, designating the General Manager by name to be lead negotiator, and stating that the Chief Business Officer "will be the primary decision maker on behalf of the Company." The Union presented a two-page document consisting of notes that appear to be proposals on wage rates, insurance, attendance policy, bidding policy, uniforms, and other terms and conditions of employment. The Union Business Agent testified that he prepared this document based upon input from bargaining unit employees. The Employer did not make any counterproposals to the Union on September 27, 2012.

The Union President testified that during the September 27, 2012, meeting, he asked the General Manager about the initial changes the Employer had made to terms and conditions set forth in the American collective-bargaining agreement (such as eliminating the Union health plan option), and the General Manager responded that he had no authority "to make changes or fix anything that's been going on," and that "he [could not] do anything substantively with the contract." The Union President also testified that the General Manager never refused to negotiate with the Union, but said he could not negotiate "right now" because he needed time to get the Employer's new operation in Orlando up and running.¹⁸ The Union's Business Agent testified similarly

¹⁸ The General Manager also said that the Employer was on the verge of losing some work at various Orlando locations and needed time.

and testified that the General Manager informed the Union that he would get back to the Employer.

The evidence as to the communications between the collective-bargaining representatives of the parties after they met on September 27, 2012, and before their February 2013, meetings is vague. Although the record reflects that representatives of the Union met with representatives of the Employer again on October 10, 2012, it is not clear from the record what the parties said to one another at this meeting. Neither the Union nor the Employer exchanged proposals, and the Employer did not respond to the Union's September 27, 2012 proposal other than to inform the Union that it had lost business with Disney and UCF (the University of Central Florida), and that it did not know how much business it would have or how many drivers would still be employed by January 2013. No tentative agreements were reached. Other than the fact that representatives of the Union and Employer met in person on October 10, 2012, there is no evidence in the record that they bargained.

The Union President testified that until December 10, 2012, when the Employer notified the Union that its General Manager had been terminated and would no longer be its negotiator, whenever the Union President asked him about specific terms, the General Manager replied that he had no authority to negotiate agreements on behalf of the Employer. The Union Business Agent testified that he could not recall whether the General Manager ever said that he did not have authority to negotiate.

The Union President testified that although he visited Orlando three to four times per month during this period, and had many conversations with the Employer's General Manager in person and by phone, they did not discuss or exchange proposals as to terms of employment, other than on September 27, 2012.

The Employer's Chief Business Officer testified that he had anticipated prior to September 27, 2013, that bargaining with the Union would resemble bargaining to renew

an existing collective-bargaining agreement more closely than negotiating for an initial collective-bargaining agreement because the Employer was using the collective-bargaining agreement between the Union and American as its starting point "and just made a few tweaks from there," and because the General Manager already had a working relationship with the Union as the General Manager for American in Orlando. The Chief Business Officer testified that he therefore delegated bargaining authority to the General Manager.¹⁹

The Employer's Chief Business Officer testified that he had several telephone conversations and exchanged e-mails with the General Manager from September 27, 2012, through December 10, 2012, on the subject of the meetings and communications with the Union during this period. The Chief Business Officer did not keep a log of these communications or otherwise document them in any way, and he did not provide dates for any of these communications.

The Chief Business Officer testified that the General Manager relayed to him the positions of the Union as to particular subjects of bargaining during some of these emails and phone calls, and told him that the parties "discussed certain areas but ... there was never anything in a written format that they tentatively agreed." The Chief Business Officer testified that his only knowledge of negotiations between the General Manager and the Union was based on what the General Manager told him.

The Chief Business Officer also testified that on September 28, 2012, the General Manager forwarded him by email a copy of the former collective-bargaining agreement between American and the Union, to which the General Manager said he had made changes (marked up), and that he agreed with the General Manager that the marked up version of the former American agreement would comprise the Employer's

¹⁹ The Chief Business Officer testified that the Union President never complained to him that the General Manager said he lacked the authority to negotiate on behalf of the Employer, or that the General Manager was delaying negotiations.

proposals to the Union for an initial collective-bargaining agreement. He testified that during the period from September 27, 2012, to December 10, 2012, "I believed [the General Manager] was discussing what was in this document with [the Union Business Agent]..."

The Employer's former General Manager did not testify. The record does not contain any bargaining notes or other records of bargaining that he may have maintained.

The Employer introduced an exhibit consisting of a chain of three redacted emails between the General Manager and the Chief Business Officer. The subject of all three emails is: "CBA ACLO Current with Markups 08102012."²⁰ The first email is dated September 28, 2012, and the last two are dated October 1, 2012. The three emails refer to an attachment, which the Chief Business Officer testified was the collective-bargaining agreement between the Union and American, with revisions that reflected the Employer's proposed changes as developed during communications between the Chief Business Officer and the General Manager.²¹

The September 28, 2012, email is from the General Manager to the Chief Business Officer and states: "Please see the attached." The first October 1 email is the Chief Business Officer's response, and questions what the General Manager has shared with the Union. The third email, from the General Manager to the Chief Business Officer later on October 1, 2012, reports that the parties were to meet again on October 10, 2012, and that "Everything is straight forward for the most part except pay, uniforms and medical." Although it contains significant redactions, the rest of that email contains

²⁰ It appears that the subject line stands for "Collective Bargaining Agreement American Coach Lines Orlando August 10, 2012."

²¹ The Chief Business Officer testified that this document was compiled over several months, between September, 2012, and February 20, 2013. He testified that it incorporated his comments as well as "other peoples' comments," and was meant as a "negotiating tool." He testified that it was not given to the Union until February 20, 2013.

further comments and questions about the Employer's bargaining positions and strategies concerning the issues of wages, uniforms, vacation and medical benefits. The record does not contain any other emails or documentation showing any other communications between the Chief Business Officer and the General Manager. The record also does not contain any documentation of communications between the General Manager and the Union.

I find based upon the foregoing and the record as a whole,²² that the Employer and Union bargained for about two hours on September 27, 2012, when the Union presented its proposal, but that there is insufficient evidence to demonstrate that they bargained again on October 10, 2012, or on any other occasion through December 10, 2012.²³

B. December 10, 2012, through February 19, 2013

As noted above, on December 10, 2012, the Employer's Chief Business Officer notified the Union's Business Agent by email that the General Manager had been terminated, and that the Chief Business Officer "would be stepping in to assist with the union negotiations." In this email, the Chief Business Officer also asked for any contract language upon which the parties had tentatively agreed and any written proposals that had been exchanged, and notified the Union that he was involved in negotiations with four unions and was not available until the week of February 4, 2013. After receiving this email, the Union Business Agent did not send the Chief Business Officer the Union's September 27, 2012, proposal, which was the only

²² I recognize that the testimony of the Chief Business Officer about the General Manager's communications with the Union is hearsay. Although the Union objected to the introduction of this evidence, I find that the Hearing Officer properly exercised his discretion by admitting it in evidence. *Northern States Beef*, 311 NLRB 1056, fn.1 (1993), quoting *Alvin J. Bart & Co.*, 236 NLRB 242 (1978) ("Administrative agencies ordinarily do not invoke a technical rule of exclusion but admit hearsay evidence and give it as much weight as its inherent quality justifies.").

²³ I note that while there is evidence that the General Manager/lead negotiator lacked authority to negotiate for the Employer, the record is sparse and conflicting on this issue.

proposal either party had made as of that time.²⁴ The parties met next on February 20, 2013.

Other than as described above, the record is unclear as to whether and when the Union and the Employer communicated during the period from the December 10, 2012, until February 20, 2013, and if they did so, whether they discussed specific terms and conditions of employment. The Union Business Agent testified that after September 27, 2012, he did not negotiate with the Chief Business Officer or anyone else representing the Employer until February 20, 2013. The Business Agent further testified that after the Employer's lead negotiator was terminated, he (the Business Agent) called the Employer and left several messages at the Employer's desk, and emailed the Employer, but the Employer did not return his messages.²⁵

The Union President testified that he made more than 50 calls to the Employer's Chief Business Officer in an attempt to bargain, but it appears from the record that the Union President contends that he made all of these calls after the members voted to reject the tentatively agreed upon contract on April 22, 2013.

Based upon the foregoing, and the record as a whole, I find that there is insufficient evidence that the Union and Employer actually engaged in any bargaining at any time from December 10, 2012, through February 19, 2013.

C. February 20 and 21, 2013

On February 20 and 21, 2013, the Employer's Chief Business Officer and former Director of Sales met with the Union's President and Union Business Agent for bargaining. The Union was also represented by three bargaining unit employees. The parties did not establish formal ground rules for bargaining.

²⁴ The Union President testified that he did not know if he had ever seen the email, which was sent to the Union's email address, and which named the Business Agent in the salutation within the message.

²⁵ The record does not reflect the identity of any Employer representative purportedly called or emailed by the Union Business Agent, or the content of the Business Agent's messages.

The parties negotiated for about six hours on February 20, and about three to four hours on February 21. At the beginning of the February 20 session, the Chief Business Officer presented the Union with the marked up version of the expired collective-bargaining agreement between the Union and American, showing the changes that the Employer proposed.²⁶ The Chief Business Officer testified that he reviewed the Employer's proposed changes to the American agreement with the Union, article by article. If the Union was in agreement, the parties tentatively agreed on that provision. If the Union did not agree, the parties negotiated over the change(s) in question, and if they then reached tentative agreement, the Chief Business Officer printed out the revisions and the parties signed off on the changes. The Union did not make counterproposals in writing. The parties worked from the marked-up American agreement.

The Chief Business Officer testified that the parties reached a tentative agreement on proposals after no more than two exchanges of positions or two counterproposals, except on wages and healthcare, which required more lengthy negotiations.

At 3:38 p.m. on February 21, 2013, the Employer's Chief Business Officer emailed the Union's Business Agent, attaching the complete version of the collective-bargaining agreement incorporating all agreed-upon changes to the former American terms. The agreement included changes regarding hotel rooms, paid time off, and wages.

The record contains a document consisting of certain agreed-upon articles from the tentative three-year collective-bargaining agreement reached on February 21, 2013. The bottom of each page of this document bears the initials of the Employer's Chief

²⁶ This is the document that the Chief Business Officer claims he had been marking up for several months based on feedback provided by the General Manager.

Business Officer and the Union President, with dates (either “2/20/13” or “2/21/13”) beside each set of initials. The record also contains a document titled: “Collective Bargaining Agreement Between Evergreen Trails, Inc., d/b/a Horizon Coach Lines And United Service Workers Union Local 74,” which is the “cleaned-up” version of the parties’ tentative agreement that was rejected by the Union members in the bargaining unit when it was submitted for ratification on April 22, 2013. There are no initials or other handwritten markings on the collective-bargaining agreement submitted for ratification.²⁷ The Chief Business Officer testified that this document was “the final full document of all the tentative agreements that we had reached.”

A brief comparison of the American agreement and the agreement submitted for ratification shows that the parties made changes from the American agreement with respect to a number of items, including some, such as non-discrimination/non-harassment, recall, and grievance procedure and arbitration, that had not been changed by the Employer when it commenced operations in Orlando. Based upon the foregoing, and the record as a whole, I find that the parties negotiated on February 20 and 21, 2013, and that these negotiations resulted in a tentative collective-bargaining agreement.

D. Since April 22, 2013

There is no evidence that the parties negotiated after the tentative agreement was rejected on April 22, 2013.

The record is unclear as to whether or how frequently the Union tried to resume negotiations after the contract was rejected. The Union President testified that he

²⁷ The Chief Business Officer testified that sometime after February 21, 2013, and before the ratification vote on April 22, 2013, in a telephone conversation the Union’s Business Agent asked him whether the Employer would make any greater improvement on wages or other contract terms, and he (the Chief Business Officer) replied that the parties had reached a full agreement. The Union’s Business Agent then stated that the Union would hold a contract ratification vote (i.e., on the agreement that was reached on February 21, 2013).

telephoned the Employer's Chief Business Officer's cell phone more than 50 times from the date of the ratification vote until the date the decertification petition was filed, with the intention of asking to negotiate. He testified that he did not reach the Chief Business Officer on any calls before the contract ratification vote, and that he left voice messages on some of the calls asking the Chief Business Officer to call him back, but did not leave any messages saying why he called. The Union President testified that he did not use email.

The Chief Business Officer acknowledged that after the decertification petition was filed, the Union President called him several times, and that he did not take the Union President's first several phone calls. The record includes the cell phone records of the Chief Business Officer for the period from April 18, 2013, through June 17, 2013. It appears from the cell phone records and the testimony of the Chief Business Officer that during this period the Chief Business Officer spoke with the Union President by phone three times, all after the petition herein was filed, including twice on May 10, 2013, and once on May 20, 2013.

The Union President testified similarly, that he spoke to the Chief Business Officer twice after the ratification vote. It is undisputed that the Union President did not ask the Chief Business Officer to resume contract negotiations during these post-ratification vote telephone conversations.

As stated above,²⁸ the Union's attorney refused the Hearing Officer's request to bring the Union President back on the witness stand regarding the phone calls he testified that he made to the Employer's Chief Business Officer.. The Hearing Officer requested that the Union President testify regarding his calls to the Chief Business Officer's cell phone number after April 22, 2013. This occurred before the Employer introduced the Chief Business Officer's cell phone records. Even without drawing an

²⁸ See footnote 9.

inference from the Union's refusal to present the Union President for additional questioning after he had been permitted to step down from the witness stand, I note that this decision by the Union left undisputed the Chief Business Officer's testimony concerning the number of telephone calls reflected in his phone records.

Based upon the foregoing, and the record as a whole, I find that there is insufficient evidence to show that the Union communicated a desire to resume negotiations after April 22, 2013. There is also no evidence that the Employer has attempted to resume negotiations since then.

III. Legal Analysis and Application of the Successor Bar Doctrine

As stated above in Section II.A., the parties first met for bargaining on September 27, 2012. This was the day when the Employer formally recognized the Union, and when the Union conveyed its initial proposals to the Employer in writing. The parties' only other bargaining sessions occurred on February 20 and 21, 2013.

I will now apply the following factors set forth in *UGL-UNICCO Service Co.* to determine whether the period from September 27, 2012, through May 2, 2013, (slightly more than seven months) constituted a reasonable period for bargaining: (1) whether the parties were 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 were to concluding an agreement; and (5) whether the parties were at impasse.

A. Whether the Parties were Bargaining for a First Contract

In *UGL-UNICCO Service Co.*, the Board distinguished between the situation in which the successor employer expressly adopts existing terms and conditions of employment as the starting point for bargaining without making unilateral changes, and that in which the successor unilaterally announces initial terms and conditions of

employment before proceeding to bargain.²⁹ A reasonable period for bargaining in the former situation is six months (a “bright line”) because that is the time typically required for employers and unions to negotiate renewal agreements.³⁰ Negotiation of renewal agreements is “roughly comparable to the process of negotiating a first contract in a successorship situation where the new employer has expressly agreed to abide by the existing terms and conditions of employment.”³¹

By contrast, there is no bright line duration for the successor bar where the successor unilaterally announces initial terms and conditions before bargaining. Instead, a “reasonable period of bargaining will be a minimum of 6 months and a maximum of 1 year, measured from the date of the first bargaining meeting between the union and the [successor] employer.”³²

Although the Employer adhered to most of the provisions from the agreement between the Union and American when it hired its employee complement, it made significant unilateral changes to initial terms of employment that substantially affected the entire bargaining unit, including changes to health insurance, the per diem rate and the over-the-road rates for overnight charters. In such cases, the “reasonable period of bargaining” will be a minimum of 6 months and a maximum of 1 year, measured from the date of the first bargaining meeting between the union and the employer.

Based upon the foregoing, and the record as a whole, I conclude that the parties are bargaining for a first contract. This factor weighs heavily in favor of finding that a reasonable period of bargaining exceeds six months, and that the parties had not bargained for a reasonable period as of May 2, 2013.

²⁹ 357 NLRB No. 76, slip op. at p. 9.

³⁰ Id.

³¹ Id.

³² Id.

B. The Complexity of the Issues Being Negotiated and of the Parties' Bargaining Processes

When the issues being bargained are complex, or when the parties have structured negotiations so as to invite more employee input, negotiations will likely take longer than when the issues are less complex and the structure is more streamlined.³³ As pointed out above, the parties made changes in the final collective-bargaining agreement submitted for ratification with respect to many articles in the American agreement, including articles that had not been unilaterally changed by the Employer when it commenced operations in Orlando.

The record is somewhat unclear as to the complexity of the issues that were negotiated. Both parties' witnesses appeared to agree when testifying that the issues about which they negotiated were those on which the Employer unilaterally implemented changes when it began operations (indeed, the testimony indicates these were the only issues for bargaining). These issues were per diem rates, over-the-road rates for overnight charters, reducing the number of uniforms available, relaxing certain features of the attendance policy, and removing the Union's health insurance plan. However, the record reflects that the parties also negotiated over several other provisions, as the comparison between the American agreement and the final collective-bargaining agreement submitted for ratification shows.

With respect to the structure of the parties' bargaining processes, I have found that there is insufficient evidence that the parties actually negotiated at any time except on September 27, 2012, and February 20 and 21, 2013. There is only hearsay evidence that the parties prepared for negotiations between September 27, 2012, and February 20-21, 2013. The process by which the Employer's General Manager relayed the Union Business Agent's bargaining positions to the Employer's Chief Business Officer was ad

³³ *Lee Lumber & Building Material Corp.*, 334 NLRB at 403.

hoc and is unsupported by any documentation. Even considering the hearsay testimony of the Employer's Chief Business Officer, the record does not support the Employer's position that, under the circumstances, the parties bargained for a reasonable period between September 27, 2012, the date of the first bargaining session, and May 2, 2013, when the petition was filed.

Thus, I conclude that this factor weighs in favor of finding that a reasonable period of bargaining exceeds six months, and that the parties had not bargained for a reasonable period as of May 2, 2013. The parties were negotiating over issues of vital importance to the bargaining unit, and the record reflects that these issues were not limited to the terms the Employer had unilaterally changed when it started its Orlando operations.

C. The Amount of Time Elapsed Since Bargaining Commenced and the Number of Bargaining Sessions

The parties met for bargaining on just three dates (September 27, 2012, and February 20 and 21, 2013). The first of these only lasted about two hours, and the Employer did not make any proposals or respond to the Union's proposal. Although the Union contends that the Employer's General Manager had no authority to negotiate, in fact the parties met and started bargaining on September 27, 2012, and there is no pending allegation or finding that the Employer violated the Act by failing or refusing to bargain in good faith. Accordingly, I find that bargaining started on September 27, 2012. The February 20, 2013, session lasted about six hours, and the February 21 session lasted roughly four hours. Under these circumstances, there was "only a small amount of actual bargaining time."³⁴

³⁴ *Town & Country Plumbing & Heating*, 352 NLRB 1212, 1216 (2008), affd. 352 Fed. Appx. 20 (6th Cir. 2009) (three negotiation sessions each lasting two hours, in five and one-half months, plus exchange by fax and mail regarding a schedule to be added, not enough actual bargaining time to establish that parties bargained for reasonable period).

Based upon the foregoing, and the record as a whole, I conclude that this factor weighs in favor of finding that a reasonable period of bargaining exceeds six months, and that the parties had not bargained for a reasonable period as of May 2, 2013.

D. The Amount of Progress in Negotiations, and how near the Parties were to Agreement

The Board has stated that “which way [this] factor cuts depends on the context...[W]hen negotiations have nearly produced a contract, it is reasonable that the parties should have some extra time in which to attempt to conclude an agreement.”³⁵

The record does not reflect why the collective-bargaining agreement submitted for ratification was rejected, or whether the Union recommended ratification when submitting it for a vote. The margin by which unit employees rejected it, 24-19, and the fact that the parties reached tentative agreement after little actual bargaining, suggests that with additional bargaining, they would likely reach agreement on a contract acceptable to the unit

I conclude that this factor weighs in favor of finding that a reasonable period of bargaining exceeds six months, and that the parties had not bargained for a reasonable period as of May 2, 2013.

E. Whether the Parties were at Impasse

The fact that Union members rejected the tentative agreement does not support a finding that the parties had reached impasse or were close to impasse under the circumstances herein.³⁶ Thus, there is no evidence that the parties were close to impasse before the ratification vote. Rather, they made substantial progress in negotiations and rapidly reached a full agreement after brief negotiations on February 20 and 21, 2013, and there is no evidence to suggest that further negotiations following the

³⁵ *Lee Lumber & Building Material Corp.*, 334 NLRB at 404.

³⁶ See *Teamsters Local 175 v. NLRB*, 788 F.2d 27, 32 (D.C. Cir. 1986) (“failure to ratify a contract proposal cannot automatically result in impasse when the parties’ bargaining history does not even hint that a failure to ratify will cause a breakdown in negotiations.”)

defeat of the tentative agreement in a ratification vote would have been fruitless. Although there is no evidence that the parties have bargained since the tentative agreement was rejected on April 22, 2013, there is also no evidence that they requested additional bargaining, nor is there any evidence reflecting a polarization of the parties' respective positions.

Applying the factors used by the Board to determine whether the parties are at impasse,³⁷ there is insufficient evidence to establish that the parties were at impasse as of May 2, 2013. Thus, the negotiations had not taken place over a prolonged period; there is insufficient evidence that the remaining issues in dispute are so important that further progress is unlikely (in fact, as noted above, the record does not reflect the reasons the tentative agreement was defeated); neither party has asserted that they are at impasse; and there is insufficient evidence that as of May 2, 2013, the parties believed that further progress was unlikely.

As the parties were not at impasse, this factor weighs in favor of finding that a reasonable period for bargaining exceeds six months and had not elapsed as of May 2, 2013.³⁸

F. The Petition was Untimely when Filed

For the foregoing reasons, I conclude that a reasonable period of bargaining had not elapsed when the petition was filed on May 2, 2013, and the petition was untimely when filed.

G. The Successor Bar Doctrine, Rather than the Recognition Bar Doctrine, is Applicable

Although the Employer recognized the Union on September 27, 2012, because the Employer is a successor employer, I conclude that the successor bar doctrine, rather

³⁷ *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), *enfd. sub. nom. AFTRA, Kansas City Local v. NLRB*, 395 F.2d. 622 (D.C. Cir. 1968).

³⁸ *Town & Country Plumbing & Heating*, 352 NLRB at 1216.

than the recognition bar doctrine, applies in this case. However, my decision herein would be the same even if the issue were to be considered under the recognition bar doctrine.

H. In View of the Passage of Time, an Election Should Be Directed

Having concluded that the petition was untimely and that its processing was barred by the successor bar doctrine when it was filed, I nonetheless have decided to direct an election. I do so because more than 15 months have elapsed since the parties began bargaining on September 27, 2012.³⁹ If I dismiss this petition, the Petitioner can immediately file a “new” decertification petition covering the same unit, and the “new” petition will be timely, because more than 12 months have elapsed since the parties began bargaining on September 27, 2012.

Under similar circumstances, the Board has chosen to direct an election rather than dismiss a petition that was subject to a timeliness bar when filed but was no longer barred. As the Board stated in one such case: “To dismiss the petition at this time would subject the Board to an immediate repetition of the proceedings as a new petition could be timely filed as soon as a decision in this case issues.”⁴⁰ Therefore, as the petition has been processed, a hearing has been held, and more than one year has elapsed since the parties began bargaining, I shall direct an election.⁴¹

IV. Conclusions and Findings

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

³⁹ As noted above, more than a year had elapsed at the time the hearing was held.

⁴⁰ *Weston Biscuit Co.*, 117 NLRB 1206, 1208 (1957) (directing election where more than 12 months had elapsed since petition filed even though petition when filed was untimely pursuant to Section 9(c)(3) of the Act); accord *Mason & Hanger-Silas Mason Co.*, 114 NLRB 699, 701 (1963).

⁴¹ Even assuming for the sake of argument that I were to find that bargaining did not start until February 20, 2013, as the Union essentially claims, almost 11 months have elapsed since that time, and I find that 11 months constitutes an adequate period for bargaining and would direct an election.

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 claims to represent certain employees of the Employer.

4. A 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 2(7) of the Act.

5. The following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time motor coach drivers employed by the Employer at its facility located at 4950 L.B. McLeod Road, Orlando, Florida, excluding part-time drivers, all other employees, guards, and supervisors as defined in the Act.

V. Direction of Election

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by United Service Workers Union, Local 74. The date, time, and place of the election will be specified in the Notice of Election that the Board's Regional Office will issue subsequent to this Decision.

A. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who

have been permanently replaced, as well as their replacements, are eligible to vote. Those in military service of the United States may vote if they appear in person at the polls. Ineligible to vote are (1) employees who have quit or have been discharged for cause since the designated payroll period; (2) employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date; and (3) employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); N.L.R.B. v. Wyman-Gordon Company, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list containing the full names and addresses of all eligible voters. North Macon Health Care Facilities, 315 NLRB 359 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized. Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, 201 East Kennedy Blvd., Suite 530, Tampa, FL 33602, on or before January 21, 2014. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever

proper objections are filed. Since the list will be made available to all parties to the election, please furnish two copies of the list.⁴²

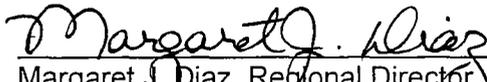
C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices of Election provided by the Board in areas conspicuous to potential voters for a minimum of three full working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the Election Notice. Club Demonstration Services, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the Election Notice.

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, N.W. Washington, D.C. 20570-0001. This request must be received by **January 28, 2014**. The request may not be filed by facsimile, but may be filed electronically.⁴³

DATED at Tampa, Florida this 14th day of January, 2014.


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

⁴² The list may be submitted electronically through the Agency's website at www.nlr.gov, or by facsimile transmission to (813) 228-2874, as well as by hard copy. To file the list electronically, go to the Agency's website at www.nlr.gov, select **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions. Only one copy of the list should be submitted if it is filed electronically or by facsimile.

⁴³ See www.nlr.gov for instructions about electronic filing and the Board's Rules and Regulations with respect to filing requirements generally.