

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

STUDENT TRANSPORTATION OF
AMERICA, INC.¹

Employer

and

Case 06-RD-127208

ROBERT C. WILLIAMS, III, AN INDIVIDUAL

Petitioner

and

AMALGAMATED TRANSIT UNION, LOCAL 1729,
AFL-CIO, CLC²

Union

REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

The Employer, Student Transportation of America, Inc. (Employer or STA), a successor employer, is a national student transportation company. The Employer employs 107 employees at its facility located in Monroeville, Pennsylvania (the Trafford facility). The Trafford facility is the only facility involved herein. The Amalgamated Transit Union, Local 1729, AFL-CIO, CLC (Union) represents a bargaining unit consisting of drivers and monitors. The Petitioner filed a petition with the National Labor Relations Board seeking to decertify the Union as the collective bargaining representative of the unit employees. A hearing officer of the Board held a hearing and the Petitioner and Employer filed timely briefs.

As discussed more fully below, the parties disagree as to whether there is a successor bar to the processing of the petition in this matter. The Union, contrary to the Petitioner and the Employer, contends the petition should be dismissed based on the existence of a successor

¹ The name of the Employer was amended at the hearing.

² The name of the Union was amended at the hearing.

bar. The Petitioner and the Employer assert that a reasonable period for bargaining has elapsed and an election should be directed. I find that no successor bar existed at the time the petition was filed inasmuch as a “reasonable period for bargaining” has elapsed. Accordingly, I am directing an election in the unit which consists of approximately 107 employees.

To provide a context for a discussion of the issues, I will first provide an overview of the Employer’s operations. Then, I will present in detail the facts and reasoning that support my conclusions on the issue.

I. OVERVIEW OF OPERATIONS

The Employer, a national student transportation company, provides student transportation services for Gateway School District from its Trafford facility. The Terminal Manager is Coleen McAndrew.

On April 15, 2013,³ the Employer was awarded a seven year contract by Gateway School District. The contract was set to commence on July 1, following the expiration of the contract between the predecessor, First Student, Inc., and the school district. The drivers and monitors employed by the predecessor employer were represented for collective bargaining purposes by the Union. In May the Employer began interviewing drivers and monitors. On July 1, it began hiring drivers and monitors for summer routes and, as the summer progressed, for the upcoming school year.

During the interviews, the Employer presented applicants with a wage and benefit package, and sent letters of intent to hire in July. On July 5, the Union sent a letter advising the Employer that it believed the Employer employed a majority of the predecessor’s workforce and asserting the right to represent the unit employees. On July 17, the Employer informed the unit employees that it was going to begin the negotiation process with the Union, and on July 23 the Employer acknowledged the Union’s claim for recognition as the representative of the bargaining unit.

³ Unless otherwise noted, all dates referred to herein are in 2013.

II. THE NEGOTIATIONS

The Employer and the Union began negotiations on August 13. From that date until April 23, 2014 the parties held seven bargaining sessions at the Trafford facility.⁴ Each session lasted between six and nine hours. At the end of each session the parties agreed on the next meeting date. Throughout negotiations the Union has been represented by International Vice President Marcellus Barnes and by Local 1729 President Patricia "Pat" Carfagna.⁵ The Employer was represented by its Vice President Tim Krise for the first three sessions and, since November, by STA management employee Mike Kennedy. Also present during each of the sessions were Terminal Manager Coleen McAndrew and General Manager Ronald Ferek.

At the first session the Union, using the predecessor's collective bargaining agreement as a format, presented its proposals based upon the initial terms and conditions of employment set by the Employer.

At the second session the parties continued to work from the Union's proposal. During the meeting the parties reached tentative agreements on 13 proposals. At the third bargaining session, the parties reached tentative agreements on about 12 or 13 additional proposals.

At the fourth session on November 17, the Employer changed lead negotiators. Mike Kennedy replaced Tim Krise because Krise was busy working on the Employer's bids for work for the following school year. Krise attended the first hour of the session to assist in a smooth transition. Much of the session was spent going over the tentative agreements and the remaining issues. The parties did not make arrangements for a bargaining session in December, due to the tight schedules of both parties and because Union negotiator Barnes did not have his calendar with him. Following the meeting Barnes and Kennedy arranged for a

⁴ The subsequent meetings were held on September 12, October 15, November 19, 2013 and February 4, March 11 and April 23, 2014. As of the date of the hearing another session was scheduled for May 28.

⁵ The Union's negotiating team was joined briefly at the September 12 bargaining session by two employees.

bargaining session in January 2014. The January session was cancelled due to inclement weather which resulted in both Barnes and Kennedy being unable to fly to Pittsburgh.

The parties agreed to reschedule the January session to February 4, 2014. At this, the fifth session, the Employer made some initial proposals and the parties reached agreement on nine more tentative agreements. The Employer continued to primarily work off of the Union's proposal offering changes to its language.

When the parties resumed bargaining on March 11, 2014 the Employer presented some new proposals and the parties reached a single tentative agreement. At the close of this session Kennedy suggested that the parties meet on consecutive dates on April 23 and 24, 2014.

About a week before the next session Kennedy informed Union representative Barnes that he had a conflict on April 24. He suggested cancelling the second session but offered to attend both sessions if Barnes preferred. Barnes agreed to meeting only on April 23. The parties reached one new tentative agreement and scheduled to meet again on May 28.

During the negotiations the parties focused solely on non-economic issues and, by mutual agreement, have not yet discussed wages. There are no defined benefits being proposed by either party. The record establishes that there are open items, many of which are important to both parties. Remaining issues include discipline for absenteeism and for accidents; flat rates of pay received by drivers on certain routes; pay for drivers exceeding a per day guarantee of work; pay for non-revenue work outside of regular school runs; pay for attending meetings and drug testing; wages and wage increases; bidding; assignment of routes not bid on; assignment of routes which become open during the school year; bumping; leaves of absence; removal from a route at the request of the school district; seniority; and management rights.

The instant decertification petition was filed on April 24, 2014, more than eight months after the commencement of negotiations. This is the fourth decertification petition filed since July 2013, with the Petitioner in this matter filing the third petition and fourth petition. Each

preceding petition was administratively determined to be untimely based on the successor bar doctrine.⁶

As stated above, the Union contends that the instant petition is also barred because the parties have still not had a reasonable period of time to bargain a contract. The Employer and the Petitioner contend that under the circumstances of this case there has been a reasonable period for bargaining.

III. ANALYSIS

In *UGL-UNICCO Service Company*, 357 NLRB No. 76 (2011), the Board restored, with modifications, the “successor bar” doctrine which had been earlier rejected by the Board in *MV Transportation*, 337 NLRB 770 (2002). Under the successor bar 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 representation status. *UGL-UNICCO*, slip op. at 1 citing *St. Elizabeth Manor, Inc.*, 329 NLRB 341 (1999). In restoring the successor bar the Board sought to preserve the stability of the existing collective-bargaining relationship, which an insulated period protects. The Board reasoned that employee support for the union may well fluctuate during the period following successorship, and a successor bar may prevent changes in employee sentiment being given effect through an employee petition to the employer or through a Board election. *UGL-UNICCO*, slip op. at 8. Allowing a union a fair chance to succeed where, as here, a successor employer recognizes the union but sets initial terms and conditions of employment prior to bargaining, the Board in *UGL-UNICCO* held that ‘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. See also *FJC Security Services Inc.*, 360 NLRB No. 115 (May 21, 2014). The Board will apply the multifactor analysis of *Lee Lumber and Building*

⁶ The earlier decertification petitions were filed on August 20, 2013 in Case 06-RD-111517, on February 26, 2014 in Case 06-RD-123201, and on March 24, 2014 in Case 06-RD-125038.

Material Corp., 334 NLRB 399 (2001) to make the ultimate determination of whether the period had elapsed. *UGL-UNICCO*, supra, slip op. at 10.

The factors set forth in *Lee Lumber* are (1) whether the parties are bargaining for an initial contract; (2) the complexity of the issues being negotiated and of the parties' bargaining process; (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." See also *Lamons Gasket Co.*, 357 NLRB No. 72 (2011) slip op. at 10.

Thus, in successorship situations a union's status is immune from challenge during the first six months following the start of negotiations. Challenges to a union's status are permitted during the period of six to twelve months following the start of negotiations only if a reasonable period of time has elapsed. To determine whether a reasonable period has elapsed, the Board will apply the multifactor test set forth in *Lee Lumber*, supra. The burden rests with the Union as the party asserting the successor bar to establish that a reasonable period of time has not elapsed. *UGL-UNICCO*, supra at fn 31.

Applying the *Lee Lumber* test here the record establishes that a reasonable period of time has elapsed because the negotiations have not involved complex issues; lack special problems often found in first contract bargaining; and the parties do not appear to be near agreement despite having had seven bargaining sessions in over eight months.

In *Lee Lumber* the Board explained that the fact that parties are engaged in initial bargaining would tend to support an argument that a reasonable time has not elapsed because initial bargaining may include "special problems" which may cause negotiations to take longer than a successor agreement. These problems include the acrimony left over from an organizing campaign; a lack of collective bargaining experience from one or both parties; and the need to establish bargaining procedures and core terms "in the absence of previously established practices." *Lee Lumber*, supra, at 403.

Applying this factor in the present case, the Employer immediately recognized the Union once a full complement of employees was hired of which a majority had been employed by the predecessor. There was no organizing drive and there is no evidence of acrimony between the parties. Both parties are represented by experienced labor negotiators. The parties used an agreed upon format, the predecessor's agreement, which allowed for substantial tentative agreements during the early bargaining sessions. On balance, despite the parties being engaged in bargaining over an initial contract, in the absence of "special problems" I find that this factor supports a finding that a reasonable time for bargaining has elapsed.

A second factor to consider in determining whether a reasonable period of time has passed is the complexity of issues facing the parties. The Board in *Lee Lumber* noted that when the issues being bargained are complex, or when the parties have structured negotiations so as to invite more employee input, it stands to reason that, other things being equal, those negotiations likely will take longer than when the issues are less complex and the structure is more streamlined.

The Union provided no evidence that the issues facing the parties in negotiations are complex. Rather, the parties are faced with contract terms and issues generally found in contracts in the student transportation industry. Both parties are represented by experienced negotiators and the parties streamlined the process by using the predecessor's contract which allowed for quick agreement on many basic issues.

Moreover, the record reveals that Union used little employee input in the negotiations. Union negotiator Pat Carfagna testified that she did not use an employee bargaining committee. She spoke with some employees in what appears to be an ad hoc manner but did not solicit employee input during negotiations. The Union did not hold a meeting with employees until April 21, 2014, and even at that meeting Carfagna did not ask employees what they were looking for in an agreement. Inasmuch as the issues and procedures are not complex I find that this factor supports a finding that a reasonable time for bargaining has elapsed.

As of the date of the hearing in this matter nearly nine months had elapsed since bargaining began. The Employer and Union have met for bargaining on seven occasions from August 13, 2013 through April 23, 2014. Each of these sessions lasted for most of a day. During these sessions the parties have reached tentative agreement on about 37 proposals, seven proposals have been withdrawn, and another 23 are still open. The Board in *Lee Lumber* posited that, “the more time that has elapsed since the parties began to bargain and the more negotiating sessions they have engaged in, the more opportunity they have had to reach a contract, and vice versa.” *supra* at 405. In *Lee Lumber* the Board found that five negotiating sessions held over a span of a little more than a month “weighed heavily against finding that a reasonable time had elapsed.” *supra* at 406.

The Union contends that bargaining has been delayed by STA’s replacement of its lead negotiator in November, by the STA’s unwillingness to meet two days in a row or to meet well into the evening, and by the STA’s cancellation of bargaining sessions. However, the record does not support these contentions. Rather, it indicates that STA negotiator Kennedy came up to speed quickly at the November bargaining session. While two bargaining sessions were cancelled, the first was due to inclement weather and the inability of both Employer and Union negotiators to fly in for the meeting. STA’s lead negotiator Kennedy requested the cancellation of the April 24 meeting, but he offered to attend the session if the Union did not agree to the request. The Union agreed to the cancellation. Neither party actively tried to meet more often.

Despite the assertion at the hearing that the Union was willing to meet until midnight, there is no evidence that the Union offered to do so at any bargaining sessions. In fact, the evidence is clear that neither Employer nor Union has acted in a particularly expeditious manner throughout these negotiations. Moreover, even though the Union indicated at the hearing that the Employer has failed to bargain in good faith, it has not filed an unfair labor practice charge alleging a violation of the Act.

The number of negotiating sessions in this case is not extensive. However, the nine month period of time that has elapsed, and the number of tentative agreements reached,

demonstrates that the parties have spent a substantial length of time in seeking a contract. Notwithstanding the number of tentative agreements reached, the parties have negotiated for nine months and a number of noneconomic issues have yet to be discussed as well as significant economic issues. The Union has neither conveyed that time is of the essence nor requested a more frequent bargaining schedule. The facts indicate that because nine months have elapsed and no effort has been made to accelerate bargaining, this factor is not determinative of the issue.

The fourth factor to be considered is the parties' proximity to agreement. The "bargaining progress, and in particular the likelihood of concluding an agreement in the near future, indicates that a reasonable time for bargaining has *not* elapsed." *Lee Lumber*, supra at 404 (emphasis in original). Where the parties have made considerable progress and are close to reaching an agreement, this factor supports a finding that a reasonable period of time has not passed. In *MGM Grand Hotel*, 329 NLRB 464, 465 (1999), the Board found that a reasonable period of time had not passed, despite the filing of three decertification petitions, the last of which was filed 11 months after bargaining had commenced. The Board noted in that case the nearness to agreement and the parties having reached agreement days after the filing of the final decertification petition.

The Board in *Lee Lumber*, in discussing *MGM Grand Hotel*, emphasized this finding "applies, however, only when parties are near to reaching agreement, not when they have merely made progress in negotiations" and that "if the parties are still not close to reaching a contract after bargaining for 6 months or more (whether or not they have made progress), giving them a bit more time for negotiations is unlikely to enable them to conclude an agreement." *Lee Lumber*, supra, 404-405.

The record reflects that the parties are not close to reaching agreement. The Employer does not believe that it would be possible to reach agreement in the next three months. Moreover, the record establishes that Union negotiator Pat Carfagna told unit employees in late April 2014 that the parties were not close to an agreement. Even if the parties were close to

reaching agreement, there is no evidence that the unit employees would support any agreement reached. The Union has not involved employees in negotiations and has not solicited their input on proposals.

The record shows that the parties had spent an inordinate amount of time on issues of limited import to the majority of the bargaining unit. Many easier issues had been resolved, but the parties have not even discussed the more substantive issues, including economics. The remaining issues include discipline for absenteeism and for accidents; flat rates of pay received by drivers on certain routes; pay for drivers exceeding a per day guarantee of work; pay for non-revenue work outside of regular school runs; pay for attending meetings and drug testing; wages and wage increases; bidding; assignment of routes not bid on; assignment of routes which become open during the school year; bumping; leaves of absence; removal from a route at the request of the school district; seniority; and management rights. This factor favors finding that a reasonable period of time for bargaining has elapsed.

The final factor to be considered is whether the parties are at impasse. Impasse is defined "as the point in negotiations when the parties are warranted in assuming that further bargaining would be futile." Where parties are not at impasse "there is still hope that they can reach an agreement." *Lee Lumber*, supra, at 404. The Employer and Union agree that the bargaining is not at impasse, and as of the hearing another session was scheduled to take place in May. This factor, therefore, weighs in favor of a finding that a reasonable time for bargaining has not passed.

Only one of the *Lee Lumber* factors, the absence of impasse, clearly supports a finding that a reasonable amount of time has not elapsed. Three factors weigh toward a finding that a reasonable amount of time has elapsed at the time the decertification petition was filed: the lack of complexity of negotiations and negotiation processes; the lack of proximity to an agreement; and the lack of special problems in initial contract bargaining. A final factor, the passage of time and number of bargaining sessions does not weigh heavily in either direction. No single factor outweighs the others.

Based on the record evidence as discussed above, I find that the Union has not met its burden of establishing that a reasonable period of time has not elapsed. The employees should have the opportunity to express their choice as to whether or not they wish to be represented by the Union. Accordingly, I find there is no successor bar to the processing of this petition.

IV. FINDINGS AND CONCLUSIONS

Based upon the entire record in this matter and in accordance with the discussion above, I find and conclude as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.
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 matter.
3. The Union represents 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 (7) of the Act.
5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time bus drivers, casual bus drivers, van drivers, monitors and trainers employed by the Employer at its terminal located at 550 Fifth Street Extension, Trafford, Pennsylvania, 15085; excluding office clerical staff, security guards, mechanics and any professional employees 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 Amalgamated Transit Union, Local 1729, AFL-CIO, CLC. 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 in the election 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. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began 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 may have the opportunity to be informed of the issues in the exercise of their 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); *NLRB 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 the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The 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

(overall or by department, etc.). This list may initially be used by me to assist in determining an adequate showing of interest. I shall, in turn, make the list available to all parties to the election.

To be timely filed, the list must be received in the Regional Office on or before June 12, 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. The list may be submitted to the Regional Office by electronic filing, by mail, or by facsimile transmission at 412-395-5986. To file the eligibility 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. The burden of establishing the timely filing and receipt of the list will continue to be placed on the sending party.

Since the list will be made available to all parties to the election, please furnish a total of **two (2)** copies of the list, unless the list is submitted by facsimile or e-mail, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for at least 3 working days prior to 12:01 a.m. of the day 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, DC 20570-0001. This request must be received by the Board in Washington by June 19, 2014. The request may be filed electronically through the Agency's website, www.nlr.gov,⁷ but may not be filed by facsimile.

Dated: June 5, 2014

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⁷ To file the request for review electronically, go to www.nlr.gov, select **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions.