

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27**

KCORP SUPPORT SERVICES (KSS), and
KCORP TECHNOLOGY SERVICES (KTS)

Employers,

and

Case 27-RC-133235

INTERNATIONAL UNION OF OPERATING
ENGINEERS, AFL-CIO

Petitioner,

and

INTERNATIONAL BROTHERHOOD
OF TEAMSTERS LOCAL 222,

Intervenor

REGIONAL DIRECTOR'S DECISION AND ORDER

On July 22, 2014, International Union of Operating Engineers, AFL-CIO (Petitioner) filed a petition under Section 9(c) of the National Labor Relations Act (Act), as amended, seeking to represent a unit of employees employed by KCorp Support Services (KSS) and KCorp Technology Services (KTS) (Employers). The petition identified the unit as including all full-time, part-time and temporary employees in engineering and custodial including the chief engineer(s), and excluding management and clerical employees as defined by the Act. Although not entirely clear from the face of the petition, the Petitioner clarified that the unit it is seeking is a statewide unit, comprised of employees employed by the Employers at all of the buildings in the State

of Utah for which they hold service contracts with the General Services Administration (GSA).

On July 23, 2014, International Brotherhood of Teamsters Local 222 (Intervenor) intervened in the proceedings claiming that it has been voluntarily recognized by the Employers as the exclusive collective-bargaining representative for the petitioned-for unit and has already begun bargaining an agreement with the Employers.

A hearing was held before a hearing officer of the National Labor Relations Board on August 1, 2014. As discussed below, based on the record from that hearing, I conclude that, while the Intervenor was recognized by the Employers as the exclusive collective-bargaining representative for the petitioned-for unit, the recognition was not based on an actual demonstration of majority status. Thus, there is no recognition bar to the instant petition. However, the Intervenor was voluntarily recognized by the predecessor employer DMS EQUA Solutions (DMS) before the Employers assumed control of the service contracts. The predecessor's grant of recognition was based on an actual demonstration of majority status. The record establishes that the Employers are successors of the predecessor employer DMS. Therefore, the petition is barred under the successor bar doctrine. Accordingly, I shall order that the petition in this matter be dismissed.

CONCLUSIONS AND FINDINGS

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. Upon the entire record in this proceeding, I find:

1. The hearing officer's rulings are free from prejudicial error and are hereby affirmed.
2. The Employers are engaged in commerce within the meaning of Section 2(6) and (7) of the Act and it will effectuate the purposes of the Act to assert jurisdiction in this case.
3. The Petitioner and Intervenor are labor organizations within the meaning of Section 2(5) of the Act.
4. The parties have stipulated that the following employees of the Employers constitute a unit appropriate for the purposes of collective bargaining:

All full-time and regular part-time janitorial and mechanical employees employed by the Employers at Federal buildings in the State of Utah, which currently includes the Forest Service Building, Ogden, Utah; James V. Hansen Federal Building, Ogden, Utah; Wallace F. Bennett Federal Building, Salt Lake City, Utah; IRS Building, Provo, Utah; J. Will Robinson Federal Building, Provo, Utah; Frank E. Moss Federal District Courthouse Salt Lake City, Utah; U.S. Courthouse for the Utah District, Salt Lake City, Utah; EXCLUDING all office clerical employees, managerial and professional employees, guards and supervisors as defined in the Act.

ISSUES AND POSITIONS OF THE PARTIES

The issue in this matter is whether the instant petition is barred, by either a recognition bar or a successor bar. The Petitioner seeks to represent the above statewide unit and argues that either the Intervenor does not represent any of the unit employees, or if it does represent some, it doesn't represent the entire unit on a statewide basis. The Intervenor's position is that it was voluntarily recognized by the Employers after a demand and showing of majority support in June 2014, and therefore the petition is barred under the recognition bar doctrine. In the alternative, the Intervenor argues that the petition is barred by the successor bar doctrine based on its

bargaining relationship with the predecessor employer. The Employers declined to take a position on either issue in the case.

FACTS

A. The Employers

KSS is a federal government services contractor with facilities maintenance contracts for maintenance and engineering services at the following federal buildings in the State of Utah: the IRS Building in Provo, J. Will Robinson Federal Building in Provo, Frank E. Moss Federal District Courthouse¹ in Salt Lake City, and the newly constructed U.S. Courthouse in Salt Lake City.

KTS is a federal government services contractor with facilities maintenance contracts for maintenance and engineering services at the following federal buildings in the State of Utah: the Forest Service Building in Ogden, James V. Hansen Federal Building in Ogden, and Wallace F. Bennett Federal Building in Salt Lake City.

The facilities described above are subject to service contracts between the Employers and GSA that expire November 1, 2014, but may be extended for up to three months to February 1, 2015, at the unilateral option of GSA.

KTS and KSS, “as separate employers,” consented to the combined unit and stipulated to the description of the bargaining unit above, “consisting of employees of each separate employer.” Separate employers may consent to a combined unit. *Oakwood Care Center*, 343 NLRB 659 (2004). However, they declined to take a position on the recognition of either the Petitioner or the Intervenor as the collective-

¹ For continuity, I will use “Frank E. Moss Federal District Courthouse” as that is the term used by the parties at the hearing. I take administrative notice of the fact that the name used by the General Services Administration, the owner of the building, is “Frank E. Moss U.S. Courthouse.”

bargaining representative, and they did not present any evidence at the hearing. The record contains no evidence regarding the relationship between the two employers. The Intervenor was dealing with one representative for both Employers for bargaining purposes, Howard Anastasi.² The petitioned-for unit and the unit for which the Intervenor claims to have been recognized contains employees of both employers. Moreover, the record indicates that employees who were actually employed by KSS were covered by the previous collective-bargaining agreement signed by KTS.

B. Intervenor's Prior Bargaining Relationship with KTS

The Intervenor had a previous collective-bargaining agreement with KTS that was in effect from May 1, 2010 to April 30, 2013. The recognized unit was for janitorial and mechanical employees at the Wallace F. Bennett Building in Salt Lake City and the Forest Service Building and James V. Hansen Federal Building in Ogden. The Intervenor and KTS negotiated a new collective-bargaining agreement in March 2013 that would have been effective from May 1, 2013 to April 30, 2017. Those negotiations were conducted with KTS representative Howard Anastasi. However, the agreement was ultimately not signed and was not timely submitted to GSA by May 1, 2013. Apparently, this was due to the fact that KTS knew it might be losing the service contracts for those buildings. The unit described in the unsigned collective-bargaining agreement simply states that it includes employees in the Salt Lake City and Ogden Federal Buildings.

² The draft collective-bargaining agreement sent to Anastasi by the Intervenor after their June 24, 2014 meeting identifies him as "HR Manager" for KTS. The petition identifies him as "H/R" for KSS.

C. Intervenor's Bargaining Relationship with predecessor employer DMS

The GSA contracts for the Wallace F. Bennett Building, the Forest Service Building, the James V. Hansen Federal Building, and all other federal buildings in the State of Utah were awarded to DMS in January 2014. However, KTS was to continue operating in the Wallace F. Bennett Building, the Forest Service Building, and the James V. Hansen Federal Building until May 1, 2014.

After DMS was awarded the GSA service contracts, employees from the Frank E. Moss Federal District Courthouse and the newly constructed U.S. Courthouse for the Utah District contacted the Intervenor seeking representation. The Intervenor obtained authorization cards from employees of DMS, and then contacted DMS in early March 2014 and sent DMS a letter on March 4, 2014, requesting recognition and informing them that they had authorization cards from employees. A third-party conducted a card check on April 1, 2014, and certified that the Intervenor had cards from a majority of DMS's employees, which consisted of 35 employees employed at all federal buildings in the State of Utah.

The Intervenor and DMS met and negotiated on April 17, 2014, with respect to all the federal buildings in the state. The result was a draft collective-bargaining agreement, with the unit defined as employees employed at the Frank E. Moss Federal District Courthouse, the U.S. Courthouse for the Utah District, the James V. Hansen Federal Building, the Forest Service Building, the Wallace F. Bennett Federal Building, the Provo IRS Building, the J. Will Robinson Federal Building, and the St. George

Federal Building.³ The term of the agreement was May 1, 2014 to December 13, 2018. The collective-bargaining agreement was awaiting DMS' signature when DMS withdrew from the GSA contracts. This occurred no more than a couple of weeks after the bargaining session. Shortly thereafter, the Employers were awarded all of the GSA contracts.

D. Intervenor's Recent Bargaining with the Employers

When the GSA contracts were awarded to the Employers, the Intervenor updated all of the employees' cards to reflect that the employees were employed by the Employers rather than DMS. These cards were from the same employees the Intervenor had collected for DMS, along with a few more. Intervenor Business Agent Marty Cowin then contacted the Employers and informed representative Howard Anastasi that they had authorization cards for all the Utah federal buildings for which the Employers had been awarded the service contracts. Anastasi told Cowin that they needed to schedule a time to sit down and negotiate a new contract.

On June 24, 2014, Intervenor Representatives Cowin, Secretary/Treasurer Spencer Hogue and Union Steward Edward Smith met with Anastasi. Cowin informed Anastasi that he had authorization cards from all their buildings. Cowin offered to show him the cards. He spread them out, signature side down, on the table. Anastasi declined to examine them, saying there was no need and that he would recognize the Intervenor. Anastasi agreed to amend all of the buildings for which they had a service contract statewide into the collective-bargaining agreement they had previously

³ Ultimately, the St. George building was not part of the GSA contracts awarded to the Employers, and is therefore not at issue in this proceeding. There is one employee at that building, who is not an employee of either of the Employers. That employee's employer is unknown.

negotiated for the Wallace F. Bennett Building, the Forest Service Building, and the James V. Hansen Federal Building. Anastasi informed Cowin that this would consist of approximately 36-38 employees. Additionally, he said there were 35 employees at the time and thought they would possibly need to hire a few more people. The parties discussed wages and health and welfare options. At the conclusion of the meeting, Anastasi requested that Cowin send him a copy of the previously negotiated collective-bargaining agreement so he could make his proposals, and return it to them. They did not schedule another date to meet because of vacation schedules. During the meeting on June 24, Anastasi had Human Resources Administrator for the Employers Brandy Putnam email information on wages and insurance to Cowin. On June 26, 2014, Putnam sent another email to Cowin requesting a copy of the agreement for Anastasi to review.

Currently, the Employers follow the terms of the 2013-2017 agreement that KTS had negotiated with the Intervenor but had not signed. However, the Employers are paying wages and benefits pursuant to the expired 2010-2013 agreement because negotiations on those items are not yet complete. Since May 2014, KTS has complied with dues check-off and submitted dues to the Intervenor.

E. Intervenor's Authorization Cards

At hearing, the Employers provided lists of KSS and KTS employees as of July 22, 2014, who work in the buildings involved in this proceeding. The hearing officer verified that the Intervenor had a majority of cards for both KTS and KSS employees. For current KTS employees, the cards were dated between March 20, 2014 and May

28, 2014. For current KSS employees, they were dated between May 3, 2014 and June 12, 2014.

F. Petitioner's Organizing Campaign

On July 10, 2014, the Petitioner began organizing employees in the bargaining unit and obtained its first authorization cards. The petition was filed on July 22, 2014.

APPLICABLE LEGAL STANDARDS AND ANALYSIS

“ [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.” *Frank Bros. Co. v. NLRB*, 321 U.S. 702, 705 (1944). This principle applies to both the recognition bar doctrine as recognized in *Lamons Gasket Company*, 357 NLRB No. 72 (2011), and the successor bar doctrine as recognized in *UGL-UNICCO, Service Company*, 357 NLRB No. 76 (2011).

A. Recognition Bar

An employer's voluntary recognition of a union, based on an uncoerced showing of majority support, bars an election for a reasonable period of time in order to permit the employees' chosen representative to serve in that capacity and seek to negotiate a collective-bargaining agreement with the employer. *Lamons Gasket Company*, supra. The reasonable period of time for bargaining after voluntary recognition is no less than six months after the parties' first bargaining session and no more than one year. *Id.* slip op. at 10.

Regarding the required showing of majority support, “Informal recognition granted a union will not constitute a bar to a petition by a rival labor organization where it does not ‘affirmatively appear... that the Employer extended recognition to the Intervenor in good faith on the basis of a previously demonstrated showing of majority and at a time when only that union was actively engaged in organizing the unit employees.” *Display Sign Service, Inc.*, 180 NLRB 49 (1969); see also *Sound Contractors Association*, 162 NLRB 364 (1966), *Josephine Furniture Company, Inc.*, 172 NLRB 404 (1968). In *Display Sign Service*, the intervenor union requested recognition based on a majority of cards, which it offered to the employer for examination. The employer declined to examine them and stated that he accepted the intervenor’s statement that that they were signed by a majority of employees, and then signed a recognition agreement. The Board found that because the intervenor had not actually demonstrated its majority status prior to recognition, there was no bar to a petition.

In support of its position that a recognition bar exists, the Intervenor relies on cases involving the conversion of a Section 8(f) contract to 9(a) contract, where the standard to determine whether voluntary recognition has been established is whether: (1) there was an unequivocal demand for recognition by the union, (2) the employer unequivocally granted recognition, and (3) there was a contemporaneous showing of the union’s majority support among unit employees or it was demonstrated that the employer acknowledged or accepted that the union enjoyed majority support. *NLRB v. Triple C Maintenance, Inc.*, 219 F.3d 1147, 1153 (10th Cir. 2000). See also *Donaldson Traditional Interiors*, 345 NLRB 1298, 1299 (2005), in which the Board determined that

the employer association had voluntarily recognized the intervenor despite the fact that the employer did not actually view the cards. I find these cases inapposite as they involve the conversion of 8(f) contracts to 9(a) contracts in the construction industry and the Employers involved in this matter are not construction industry employers.

The facts in this case are similar to the situation in *Display Sign Services*, supra. The record establishes that the Intervenor offered to show the authorization cards and even fanned them out on the table. However, like in *Display Sign Services*, the Employer did not actually look at the cards. Rather, Employer representative Anastasi stated that he did not need to look at them and that he recognized the Intervenor. Accordingly, there was no actual demonstration of majority status, and under the theory of *Display Sign Services*, there is no recognition bar to the instant petition.

B. Successor Bar

In *UGL-UNICCO Service Co.*, 357 NLRB No. 76 (2011), the Board reinstated the “successor bar doctrine.” 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 employees in collective bargaining with their new employer for a reasonable period of time, without challenge to its representative status. *Ibid.*, citing *St. Elizabeth Manor, Inc.*, 329 NLRB 341 (1999). As stated in *UGL-UNICCO*,

The ‘successor bar’ will apply in those situations where the successor has abided by its legal obligation to recognize an incumbent union, but where the “contract bar” doctrine is inapplicable, either because the successor has not adopted the predecessor’s collective-bargaining agreement or because an agreement between the union and the successor does not serve as a bar under existing rules. In such cases, the union is entitled to

a reasonable period of bargaining, during which no question concerning representation that challenges its majority status may be raised through a petition for an election filed by employees, by the employer, or by a rival union; nor, during this period, may the employer unilaterally withdraw recognition from the union based on a claimed loss of majority support, whether arising before or during the period.

357 NLRB No. 76, slip op. at 8.

This “reasonable period” will be for no less than six months and no longer than one year. *Id.*, slip op. at 9. Where a successor employer has expressly adopted existing terms and conditions of employment as the starting point for bargaining, without making unilateral changes, the reasonable period of bargaining will be six months from the first bargaining session. *Ibid.* Where a successor employer recognizes the union, but unilaterally changes terms and conditions of employment the reasonable period of bargaining will be a minimum of six months to one year, and the Board will apply the multifactor analysis set forth in *Lee Lumber & Building Material Corp.*, 334 NLRB 399 (2001) after six months to make the ultimate determination.⁴ *UGL-UNICCO*, *supra*, slip op. at 8-9.

Accordingly, “[a] new employer is a successor to the old – and thus required to recognize and bargain with the incumbent labor union – when there is ‘substantial continuity’ between the two business operations and when a majority of the new company’s employees have been employed by the predecessor.” *UGL-UNICCO*, *supra*, slip op. at 3, citing *Fall River Dyeing and Finishing Corp. v. NLRB*, 482 U.S. 27, 42-44, 46-47 (1987).

⁴ The test is inapplicable at this time because the parties did not start bargaining until June 24, 2014, and the petition was filed on July 22, 2014. In addition, the Employer did not make unilateral changes to terms and conditions of employment upon taking over the GSA contracts.

In *N.L.R.B. v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972), the Court established the factors to consider when determining whether an employer is a successor. An employer will be found to be a *Burns* successor if there is (1) a substantial continuity of the work force and (2) a substantial continuity of the business enterprise.

Continuity of the Work Force

Continuity of the work force means that a majority of the successor's employees were employees of the predecessor, that employees acquired from the predecessor still constitute an appropriate bargaining unit, and that the successor has hired a substantial and representative complement of its intended workforce. *Fall River Dyeing*, supra.

In the instant matter, the Employers took over almost all of the GSA contracts previously awarded to DMS in the state of Utah in May 2014. The only contract they did not take over was the one for the St. George building. If a successor purchases only a portion of the predecessor's business, there will still be a successorship finding if the portion of the business purchased constitutes a separate, appropriate unit. *Simon Debartelo Group*, 325 NLRB 1154 (1998). Also, a change in the size of the unit will not, by itself, defeat a successorship finding as long as the union retains majority status and the expanded or contracted unit remains appropriate. *Bronx Health Plan*, 326 NLRB 810 (1998); *Stewart Granite Enterprises*, 255 NLRB 569, 573 (1981). Thus, the fact that the contract for the St. George building, at which only one employee was working, was not granted to the Employers does not affect a successorship finding.

After being awarded the service contracts from GSA, the Employers hired a work force comprised of a majority of former DMS employees. The Intervenor testified that it obtained authorization cards to present to the Employers from the same employees as those who signed cards while employed by DMS. It has been established that DMS granted recognition of the Intervenor based on an actual showing of majority support through a third-party card check. It is undisputed that that card check was performed on April 1, 2014, based on a total of 35 employees. It is also undisputed that the Employers' work force as of June 24, 2014 – the date Anastasi met with the Intervenor - - consisted of 35 employees. The Employer submitted employee lists showing its employees employed as of July 22, 2014. Those lists also show 35 employees. As the Intervenor collected cards from the same employees as it had from DMS, and those cards established majority support for the Intervenor, it can be concluded that the Employers' workforce consists of a majority of former DMS employees. It is undisputed that the successors' employees acquired from the predecessor still constitute an appropriate bargaining unit.

The record demonstrated that the Employer intends to hire as many as 38 employees in total. As discussed above, it may be reasonably assumed that at the time the Employers assumed control of operations from DMS, it hired 35 employees. Thus, the successors had hired a substantial and representative complement of its intended workforce. However, an analysis of the existence of a substantial and representative complement is irrelevant where an immediate, or near immediate, transfer of the work force occurs without any interruption and without any "start-up" time or staggered hiring of the initial work force. *Eye Weather*, 325 NLRB 973 (1998); *Torch Operating Co.*, 322

NLRB 939 (1997). It appears such was the case in the instant matter. There is no evidence of an interruption in operations or staggered hiring of the initial work force.

As a majority of the successor's employees were employees of the predecessor and those employees constitute an appropriate bargaining unit, the record has established a substantial continuity of the work force.

Continuity of the Business Enterprise

The criteria involved in determining whether there is substantial continuity of the business enterprise requires a factual analysis of the "totality of circumstances." *Fall River Dyeing and Finishing Corp. v. NLRB*, 482 U.S. 27, 42-44, 46-47 (1987). Careful consideration is given to, but not limited to, the following factors: (1) whether there has been a continuation of the same business operations; (2) whether the new employer utilizes the same facilities as the previous employer; (3) whether the new employer utilizes the same or substantially the same work force; (4) whether the same jobs exist under the same working conditions; (5) whether the new employer utilizes the same or substantially the same supervisors; (6) whether the new employer utilizes the same machinery, equipment, and/or methods of production; (7) whether the new employer manufactures the same products, offers the same services, and/or has the same customers; and (8) whether there has been a hiatus between the previous and the new employer's operations. None of these factors is dispositive. See *JMM Operational Services, Inc.*, 316 NLRB 6 (1995), *NLRB v. Band-Age, Inc.*, 534 F.2d 1 (1st Cir. 1976).

Here, the record sufficiently establishes that the Employers were engaged in the same operation as DMS as it assumed the same GSA contracts. Those who succeed

to a contract may be a successor without purchasing any of the assets of the predecessor. *Capital Cleaning*, 322 NLRB 801 (1996). The Employers provided the same service to the same customers in the same buildings with the same work force, and there is no evidence that there was a hiatus between the previous and the new employer's operations.

Based on the totality of circumstances, the record has established a substantial continuity of the business enterprise. Therefore, the Employers are successors to DMS under *Burns*. The fact that there are two separate employers does not compel a different conclusion as two employers may be considered successors of a single predecessor. *Mayfield Holiday Inn*, 335 NLRB 38 (2001). As such, the Intervenor is entitled to a reasonable period of time during which its majority status cannot be challenged. The reasonable period is at least six months from the date of the first bargaining session, since the record reflects the Employers have not made unilateral changes and has adopted the current terms and conditions of employment as a starting point for bargaining. *UGL-UNICCO*, supra, slip op. at 9.

Accordingly, there is a successor bar to the instant petition.

CONCLUSION

Based on the foregoing and the entire record, I find that the petition in this case is barred by the successor bar doctrine, and therefore must be dismissed.

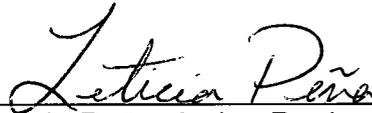
ORDER

IT IS ORDERED that the petition in this matter is dismissed.

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 and Order 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 DC by **September 5, 2014**. The request may be filed electronically through the Agency's website, www.nlr.gov, but may not be filed by facsimile.

DATED at Denver, Colorado this 22nd day of August, 2014.



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