UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

In the Matter of:

UGL-UNICCO Service Company,

Employer,

and

Area Trades Council, a/w IUOE Local 877;
IBEW Local 103; Plumbers Union (UA) Local 12; **Case No. 1-RC-22447**
Carpenters Union (NEJCC) Local 51; Painters
and Allied Trades Council District No. 35,

Petitioner,

and

Firemen and Oilers Chapter 3, Local 615,
Service Employees International Union,

Intervenor.

BRIEF OF THE INTERVENOR FIREMEN AND OILERS CHAPTER 3, LOCAL 615, SERVICE EMPLOYEES INTERNATIONAL UNION

Introduction

On May 27, 2010, Firemen and Oilers, Chapter 3, Local 615, Service Employees International Union, the Intervenor in the above referenced matter (hereinafter referred to as Chapter 3 or Intervenor), requested review of the Decision and Direction of Election issued by the Regional Director of the First Region dated May 17, 2010 (Decision). In its request for review, Chapter 3 asked the National Labor Relations Board (Board) to reconsider and overrule *MV Transportation*, 337 NLRB 770 (2002), a decision that reversed the "successor bar" doctrine.

On August 27, 2010, the Board issued an order granting review in this case. Additionally, the Board issued a notice and invitation to file briefs in this case and *Grocery Haulers, Inc*., Case 3-RC-11944, in which it invited the parties and amici to address some or all of the following questions: (1) Should the Board reconsider or modify *MV Transportation*? (2) How should the Board treat the "perfectly clear" successor situation, as defined by *NLRB v. Burns Security Services*, 406 U.S. 272, 294-295 (1972), and subsequent Board precedent? As a party to *UGL-UNICCO Service Company*, Chapter 3 submits this brief to address the issues raised by the Board. Chapter 3 begins with a Statement of the Case below and a Statement of the Facts it presented in its offer of proof to the Regional Director.

Statement of the Case

On April 23, 2010, the Area Trades Council (Petitioner or ATC) filed a petition with Region 1 seeking to represent a unit of thirty-three (33) employees employed by UGL-UNICCO Service Company (Employer or UNICCO) at various State Street Bank facilities in Massachusetts. B-1.[1] As of that date, Chapter 3, which had represented the employees in the petititoned-for unit when they were employed by Building Technology Engineers, Inc. (BTE), had been recognized by UNICCO, the successor to BTE, as the exclusive collective bargaining representative for the employees in the petitioned-for unit. Tr. 8-10, I-3.

In the proceedings before the Regional Director, Chapter 3 contended that the petition filed by the ATC should be barred by operation of the successor bar doctrine. In

[1] Transcript references are set forth herein as Tr. followed by the page number. Board Exhibits are referred to as B- followed by the exhibit number. Intervenor Exhibits are referred to as I- followed by the exhibit number.

the Decision, the Regional Director denied Chapter 3's request for application of the successor bar as follows:

> The Intervenor's request that *MV Transportation* be overruled and that a "successor bar" be found here is denied. Rather, in accordance with existing Board precedent, I shall process the petition.

Decision at p. 3.

Statement of the Facts

At the hearing before the Regional Director, Chapter 3 was permitted to make an offer of proof in order to advance its argument for the application of the successor bar doctrine. Decision at p. 2. The facts set forth below are contained in the offer of proof.

For over 20 years Firemen and Oilers Local 3 represented employees employed by BTE at the State Street Bank locations that are in question in this proceeding. Tr. 8.[2] In approximately 2008, Firemen and Oilers Local 3 became Firemen and Oilers Chapter 3 of Local 615 SEIU. The Chapter has remained an autonomous chapter of Local 615 and has been clarifying the change in subsequent collective bargaining agreements. Id. The most recent collective bargaining agreement between Chapter 3 and BTE was dated April 23, 2007 to April 19, 2010. Id., I-1.

In February, 2010, UNICCO informed Chapter 3 that it would be assuming the operation and maintenance services at the State Street locations in question. By way of a letter dated February 27, 2010, UNICCO notified Chapter 3 of its intention to offer employment to the existing members of the bargaining unit who currently work at the State Street facilities. I-2.

[2] The employees are building engineering and maintenance employees including electricians, HVAC mechanics, watch engineers, and mechanics. B-2.

Chapter 3 requested recognition and was recognized by UNICCO as the bargaining agent for the employees in the unit in question. The parties on March 5, 2010 executed a Memorandum of Agreement which would govern the initial terms and conditions of employment. This document adopted the remaining 29 days of the existing BTE contract, with several modifications as set forth in the Memorandum of Agreement. It also acknowledged that the parties had given notice of intention to modify the agreement and negotiate a new collective bargaining agreement. Tr. 9; I-3.

UNICCO proceeded to hire 32 of 33 employees that had been employed by BTE at the State Street locations. The one employee who was not hired by UNICCO declined UNICCO's offer of employment. Tr. 9.

Effective March 22, 2010 UNICCO assumed the operations of BTE at the State Street locations and has maintained substantial continuity with the predecessor's operations. UNICCO hired a majority of its employees from among BTE's employees. Employees working for UNICCO have continued to work in the same facilities performing the same duties and responsibilities they had performed for BTE. Tr. 9-10.

Representatives of Chapter 3 and UNICCO held a meeting on April 6, 2010 to negotiate a collective bargaining agreement. A second meeting was scheduled for April 26, 2010. At this second meeting, UNICCO informed Chapter 3 of the pending petition filed by the ATC and the parties agreed to suspend negotiations that day. Tr. 10-11.

As discussed above, the Regional Director, citing *MV Transportation*, denied Chapter 3's request for application of a successor bar and directed an election.

Argument

I. THE BOARD SHOULD RECONSIDER AND OVERRULE MV TRANSPORTATION.

A. The Board Adopts the Successor Bar Rule in St. Elizabeth Manor.

In *St. Elizabeth Manor, Inc.*, 329 NLRB 341 (1999) the Board adopted the successor bar rule. The successor bar rule was derived from the same policy considerations that gave rise to the recognition bar in cases involving newly organized units, see *Keller Plastics Eastern, Inc.*, 157 NLRB 583 (1966), *Sound Contractors*, 162 NLRB 364 (1966), namely that, in both situations, "the employer and the union are embarking on a new relationship," the parties "are in a stressful transitional period," and the employer "may be reluctant to commit itself wholeheartedly to bargain for a collective-bargaining agreement with the incumbent union when at any time following the recognition, the union's majority status may be attacked." *St. Elizabeth Manor,* 329 NLRB at 342-343.

The decision in *St. Elizabeth Manor* was the product of a careful analysis of recognition bar principles and their applicability in the successor context. The Board began its analysis with a history of Board precedent, including a discussion of *Southern Moldings, Inc*., 219 NLRB 119 (1975), in which the Board concluded that the recognition bar rule of *Keller Plastics, supra,* applied only to the initial organization of an employer's employees and did not apply in the context of a successor employer. *St. Elizabeth Manor*, 329 NLRB at 341-342. From there, the Board discussed the decision in *Landmark International Trucks*, 257 NLRB 1375 (1981), in which the Board "mov(ed) away from its holding in *Southern Moldings*," and "stated that it could 'discern no principle that would support distinguishing a successor employer's bargaining obligation

based on voluntary recognition of a majority union from any other employer's duty to bargain for a reasonable period.'" *St. Elizabeth Manor*, 329 NLRB at 342 (citing 257 NLRB at 1375 fn. 4). The Board then discussed the Sixth Circuit's reversal of the *Landmark* decision, *Landmark International Trucks, Inc. v. NLRB*, 699 F.2d 815 (6th Cir. 1983), and the Board's express overruling of its decision in *Landmark* in *Harley-Davidson Transportation Co*., 273 NLRB 1531 (1985). *St. Elizabeth Manor*, 329 NLRB at 342. The Sixth Circuit acknowledged the need for employees in a newly organized unit to have "an opportunity to determine the effectiveness of the union's representation free of any attempts to decertify or otherwise change the relationship." Id. The Sixth Circuit stated that this opportunity was not necessary in a successorship situation because the employees already had the opportunity to assess the effectiveness of the union. Id. The court's analysis in *Landmark* and the Board's analysis in *Harley-Davidson* focused on the longstanding relationship between the employees and the union and the prior employer. The analysis ignored the change in the identity of the employer and the challenges this change can pose to the employees and their representative.

After reflecting upon the decisions discussed above, the Board in *St. Elizabeth Manor*, concluded that:

> although the basic premise the Sixth Circuit followed in *Landmark* is correct—that employees in an initial recognition situation must be given a reasonable opportunity to determine the effectiveness of the union's representation, free of any attempts to challenge its majority status—the subsequent conclusion that employees in a successorship situation do not have these same concerns is faulty.

St. Elizabeth Manor, 329 NLRB at 342. The Board went on to discuss the similarities between the two situations, including the fact that both relationships result from a voluntary act and involve the creation of a new relationship. Consequently, it is likely

that all issues will be open, leading to more challenging bargaining than in an established bargaining relationship with an existing contract. Id. at 342-343.

Further, the Board acknowledged that both situations gave rise to a "stressful transition period." Thus, while employees may have had the opportunity to assess the effectiveness of the union in dealing with the predecessor employer, "they have not had the opportunity to learn if the incumbent will be effective with the successor." Given the understandable concerns about job security and working conditions that employees may have as a result of a change in ownership, their "anxiety . . . may lead to employee disaffection before the union has had the opportunity to demonstrate its continued effectiveness." Id. at 343.

Finally, the Board explained that a successor employer "may be reluctant to commit itself wholeheartedly to (collective bargaining) when at any time following the recognition, the union's majority status may be attacked." Id. The Board reasoned that "(a) reasonable period free of outside distractions will permit the parties to attempt to bring their new relationship to fruition, i.e., to engage in the process of collective bargaining." Id. The Board also cited *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27 (1987) for the propositions that the presumptions of majority support remove the temptation on the part of an employer to avoid good faith bargaining and that the rationale behind these presumptions is particularly pertinent in the successorship context. Id. at 343-344.

Accordingly, the Board stated that it saw "no reason in law or logic" why a bargaining representative in a successorship situation should not have as least as much

protection as the representative of a newly organized unit. Id. at 344. The Board overruled *Southern Moldings* and held

> . . .that once a successor's obligation to recognize an incumbent union has attached (where the successor has not adopted the predecessor's contract), the union is entitled to a reasonable period of bargaining without challenge to its majority status through a decertification effort, an employer petition, or a rival petition.

Id. at 344.

B. The Board Overrules St. Elizabeth Manor in MV Transportation.

In *MV Transportation*, 337 NLRB 770 (2002), the Board overruled *St. Elizabeth Manor* and stated that an incumbent union in a successorship situation is entitled only to a rebuttable presumption of continuing majority status, which will not serve as a bar to an otherwise valid petition. Id. at 770. The Board concluded that *St. Elizabeth Manor* "represented an unwarranted departure from established Board precedent," id.at 772, and further "conclude(d) that in a successor employer context the position articulated by the Board in *Southern Moldings* represents the appropriate balance between employee freedom of choice and the maintenance of stability in bargaining relationships." Id. at 773. Then-Member Liebman dissented, id. at 776-782, characterizing the Board's rejection of the "limited period of repose" provided by *St. Elizabeth Manor* as the "abandonment of a framework that best accommodates the economic realities of the 21st Century," id. at 776, and stating, *inter alia*, that "*St. Elizabeth Manor* was a sound, logical outgrowth of current successorship law, which seeks to reconcile the sometimes competing interests of employers and employees in the context of changes in corporate ownership." Id. at 777.

C. The Reasoning in MV Transportation is Flawed and the Decision Does Not Strike an Appropriate Balance Between Employee Freedom of Choice and the Maintenance of Stable Bargaining Relationships.

The contention of the majority in *MV Transportation* that *St. Elizabeth Manor* was "an unwarranted departure from well-established Board precedent," ignores what one commentator has referred to as the "checkered history of the Board's repeated reversals" in this area. Ellen Dichner, *MV Transportation: Once Again the Board Revisits the Issue of Whether an Incumbent Union is Entitled to an Irrebuttable Presumption of Continuing Majority Status in Successorship Situations*, 19 The Labor Lawyer No. 1, p. 1, 9 (2003). This "checkered history" is set forth in *St. Elizabeth Manor*, *supra*, and summarized in Section I.A of this Argument.

Further, the majority's conclusion that *Southern Moldings* strikes the appropriate balance between employee freedom of choice and the maintenance of stability in bargaining relationships is patently wrong because the analysis in *Southern Moldings* and *M/V Transportation* focuses primarily on the relationship between the employees and their union and gives short shrift to (1) the fact that the identity of the employer has changed and (2) the repercussions this change may have on the employees and the union.

As discussed above, while the relationship between the employees and the union may be established, the relationship between the union and the successor employer is a new one. It is likely that "all issues may be open," meaning that the union and the employer may have to start from scratch by negotiating a new collective bargaining agreement rather than simply amending certain articles of an existing agreement. *St. Elizabeth Manor*, 329 NLRB at 342-343. Additionally, it is not only the *union* that is in a new relationship with the new employer. The *employees* themselves are now in the

employ of a new entity and are likely to be fraught with concern and uncertainty about their futures with the new employer. This "stressful transition period" and the anxiety associated with it "may lead to employee disaffection before the union has had the opportunity to demonstrate its continued effectiveness." Id. at 343. Finally, there are the concerns expressed by the Board in *St. Elizabeth Manor* that a successor employer may be reluctant to commit itself wholeheartedly to (collective bargaining) when at any time following the recognition, the union's majority status may be attacked." Id. See also *Fall River Dyeing, supra.*

The majority opinion in *MV Transportation,* while purporting to strike a balance between employee freedom of choice and the stability of bargaining relationships, fails to give serious consideration to the factors discussed above and their impact on the stability of the bargaining relationship. Rather, it glosses over these problems and focuses, instead, on employee freedom of choice. In this regard, *MV Transportation* overstates the impact of the successor bar on employee freedom of choice. The successor bar, like the recognition bar, "applies for a 'reasonable period,' not in perpetuity." *St. Elizabeth Manor,* 329 NLRB at 346. As then-Member Liebman said in her dissent in *MV Transportation*, the successor bar provides nothing more than a "limited period of repose." *MV Transportation*, 337 NLRB at 776. For all of these reasons, *MV Transportation* does not strike "the appropriate balance between employee freedom of choice and the maintenance of stability in bargaining relationships." Id. at 773. **.**

D. The Application of the Successor Bar in the Instant Case Will Provide Chapter 3 with a Reasonable Period to Bargain with the Successor Employer While Still Protecting Employee Freedom of Choice.

The instant case presents a compelling set of facts upon which to reconsider the decision in *MV Transportation, supra*. In this case, Chapter 3 represented the employees in the petitioned-for unit when they were employed by BTE. The most recent collective bargaining agreement was in effect from April 23, 2007 to April 19, 2010. I-1. In February, 2010, UNICCO informed Chapter 3 that it would be assuming the operation and maintenance services at the State Street locations in question and that it intended to offer employment to the existing members of the bargaining unit. Accordingly, Chapter 3 properly requested recognition from UNICCO and the parties entered into a Memorandum of Agreement, a transitional document that governed the initial terms and conditions of employment, pending negotiation of a new collective bargaining agreement. I-3. See *Road & Rail Services, Inc.*, 348 NLRB 1160, 1161-62 (2006) (Employer "was a perfectly clear successor and, therefore, did not violate the Act by recognizing and bargaining with the Union prior to hiring employees and commencing operations.").

Effective March 22, 2010, UNICCO assumed the operations of BTE at the State Street facilities. UNICCO hired 32 of the 33 employees in the BTE bargaining unit. These employees have continued to work in the same State Street facilities performing the same duties and responsibilities for UNICCO as they had for BTE.

In accordance with the Memorandum of Agreement, Chapter 3 and UNICCO began negotiations for a collective bargaining agreement on April 6, 2010, approximately two weeks after UNICCO assumed operations at the State Street facilities. A second session was held on April 26, 2010. At this meeting, UNICCO informed Chapter 3 that

the ATC had filed the instant petition. Accordingly, the parties agreed to suspend negotiations that day.

The offer of proof establishes that UNICCO assumed the operations of BTE at the State Street facilities and has maintained substantial continuity with the predecessor's operations. Further, UNICCO hired a majority of its employees from among BTE's employees. Accordingly, UNICCO is a successor to BTE and it admitted as much at the hearing. Tr. 7-8. As such, UNICCO is obligated to recognize Chapter 3. *MV Transportation*, 337 NLRB at 778 (Liebman, dissenting) [citing *NLRB v. Burns Services*, 406 U.S. 272 (1972)]. In fact, UNICCO *did* recognize Chapter 3 and the parties were in the nascent stages of their relationship and in the process of negotiating an agreement when the ATC filed its petition.

In the absence of the application of a successor bar, Chapter 3 will face a challenge to its representative status as the result of a petition that was filed only *one month* after UNICCO assumed the operations of BTE. The allowance of such a challenge at this early stage "would undermine the bargaining relationship before it had any real chance to flourish." Id. at 777.

A union in a successorship situation should not be subjected to "exigent pressure to produce hot house results or be turned out." Id. at 779 [citing *Brooks v. NLRB*, 348 U.S. 96, 100 (1954)]. Nor should an employer be tempted "to avoid good faith bargaining in the hope that, by delay, it can undermine the union's support among employees." Id. Instead, a union in a successorship situation, like a union that has been recognized following an organizing campaign, should have a reasonable time to bargain with the new employer. Id.

In his dissent in the order granting review in the instant case, then-Member Schaumber notes that Chapter 3 "has represented the unit in question *for 20 years*, and its relationship with its unit employees is well-established." 355 NLRB No. 155 at p. 5 (emphasis in original). Then-Member Schaumber suggests this is a reason to *deny* the protection of a successor bar. But Chapter 3 submits that this is precisely the reason to *apply* the successor bar in this case. The fact that Chapter 3 had represented the unit employees for more than 20 years when they were employed by the predecessor suggests that it was the anxiety arising from the change in the employing entity that caused "employee disaffection before the union has had the opportunity to demonstrate its continued effectiveness." *St. Elizabeth Manor*, 329 NLRB at 343.

Finally, as discussed above, the successor bar protects employee rights because it applies only for a "reasonable period." It is a "limited period of repose." *MV Transportation*, 337 NLRB at 776 (Liebman, dissenting).

For all of the above reasons and all of the reasons set forth in *St. Elizabeth Manor, Inc.*, *supra*, and in then-Member Liebman's dissent in *MV Transportation, supra*, Chapter 3 respectfully requests the Board to reconsider and overrule *MV Transportation*, reinstate the successor bar doctrine, and remand this matter to the Regional Director with instructions to apply the successor bar doctrine in this case.

II. IN THE ALTERNATIVE, THE BOARD SHOULD LIMIT THE APPLICATION OF MV TRANSPORTATION.

In its request for review in *Grocery Haulers, Inc.*, Bakery, Confectionery, Tobacco Workers and Grain Millers, Local 50 (Local 50) contends, *inter alia*, that *MV Transportation* should not apply in the case of a "perfectly clear successor." If the Board does not overrule M/V Transportation, the Intervenor joins in the request of Local 50 to

limit the application of this decision.

Conclusion

For all of the foregoing reasons, Chapter 3 respectfully urges the Board to reconsider and overrule *MV Transportation*, reinstate the successor bar doctrine, and remand this matter to the Regional Director with instructions to apply the successor bar doctrine in this case. Just as there was "no reason in law or logic" to distinguish between newly organized units and successor units at the time of the decision in *St. Elizabeth Manor*, there is none today.

Respectfully submitted,

FIREMEN AND OILERS CHAPTER 3.
LOCAL 615 SEIU
By its attorney

November 1, 2010
Date

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CERTIFICATE OF SERVICE

I, Randall E. Nash, counsel for Firemen and Oilers Chapter 3, Local 615 Service Employees International Union in Case No. 1-RC-22447, certify that I have served a copy of the Brief of the Intervenor Firemen and Oilers Chapter 3, Local 615 Service Employees International Union upon the following persons, by electronic mail, this first day of November, 2010 at the addresses below:

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