

FJC Security Services Inc. and United Government Security Officers of America International Union and Its Local 350, Petitioner and International Guards Union of America, (IGUA) Local 137, Intervenor. Case 10–RC–115744

May 21, 2014

ORDER DENYING REVIEW

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA
AND SCHIFFER

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel. The Employer’s Request for Review of the Regional Director’s Decision and Direction of Election dated December 11, 2013, is denied as it raises no substantial issues warranting review.¹

In denying review, we do not rely on the Regional Director’s finding that *UGL-UNICCO Service Co.*, 357 NLRB 801 (2011), and *Lee Lumber & Building Material Corp.*, 334 NLRB 399 (2001), are inapplicable because the Employer and Intervenor reached an agreement prior to the filing of the petition. Instead, for the reasons stated by the Regional Director, we conclude that under *UGL-UNICCO* and *Lee Lumber*, there was no successor bar at the time the petition was filed because a “reasonable period for bargaining” that followed the Employer’s commencement of negotiations with the Intervenor had elapsed. See *UGL-UNICCO*, supra, slip op. at 808–809.

Although the parties here disagree on the proper application of the successor bar to the facts of this case, no party has argued that the Board should modify or overrule *UGL-UNICCO*. Contrary to our concurring colleague—who would reject the successor bar and return to the rule of *MV Transportation*, 337 NLRB 770 (2002)—we do not believe that *UGL-UNICCO* is “inappropriate,” “contrary to the Supreme Court’s decision in *Burns*,”² or “inconsistent with the Act.” Nor do we see any need, on this occasion, to address his criticisms of either the successor bar generally or the details of its application. To do so would simply further delay the tally of ballots in this case, where we all agree the Regional Director properly directed an election.

MEMBER MISCIMARRA, concurring.

In *UGL-UNICCO Service Co.*, 357 NLRB 801 (2011), the Board overruled *MV Transportation*, 337 NLRB 770 (2002), and reinstated the “successor bar.” Under that doctrine, when a business changes hands, and if the new employer is a “successor” under *NLRB v. Burns Security*

Services, 406 U.S. 272 (1972), the incumbent union is granted an insulated period—a “reasonable period for bargaining”—during which its majority status may not be challenged. Thus, if a representation petition is filed during that insulated period—whether by employees, the successor employer, or a rival union seeking to oust the incumbent—the petition will be dismissed.

It warrants emphasis that one of the Board’s primary responsibilities under the Act is to *conduct* elections so employees may decide for themselves whether and by whom they wish to have union representation. A “bar” constitutes an exception where the Board will refuse to conduct an election notwithstanding evidence that a substantial number of employees (at least 30 percent) have indicated that they wish to make a different decision about union representation.¹

In the present case, the employees already are represented by one union (the Intervenor), and a representation petition was filed by a different union (the Petitioner). Normally, the Board would process the petition, and a Board-conducted election would determine which union is supported by a majority of employees.² However, the Employer maintains that the petition must be dismissed based on its argument that, under the “successor bar” doctrine reestablished in *UGL-UNICCO*, supra, a “reasonable period for bargaining” had not yet elapsed. My colleagues reject this argument, finding that the Regional Director properly directed an election because the “reasonable period for bargaining” under *UGL-UNICCO* had elapsed.

I agree with the result my colleagues reach, but not with their rationale. I would adhere to the standard established in *MV Transportation*, supra, where the Board held that “an incumbent union in a successorship situation is entitled to—and only to—a *rebuttable* presumption of continuing majority status, which will not serve as a bar” whenever a rival union petition is filed. 337 NLRB at 770. Based on *MV Transportation*, and for reasons stated by former Member Hayes in his *UGL-UNICCO* dissent, I would find that the newly filed petition warrants an election, without any evaluation of whether a “reasonable period for bargaining” had elapsed.

I believe the successor-bar rules adopted in *UGL-UNICCO* are inappropriate and inconsistent with the Act in several respects.

¹ The Regional Director’s Decision and Direction of Election is attached as an appendix.

² *NLRB v. Burns Security Services*, 406 U.S. 272 (1972).

¹ Under the Board’s Rules, a representation petition will be processed only if the petitioner provides written signatures from at least 30 percent of unit employees supporting the petition.

² Consistent with the Board’s practice, the ballot would also give employees the choice not to be represented by any union.

As an initial matter, the Board in *UGL-UNICCO* described the maximum successor-bar period by reference to the 1-year “certification bar” that protects newly certified unions that prevail in an NLRB-conducted election. Thus, the Board in *UGL-UNICCO* pointed out that “1 year is the length of the insulated period for newly-certified unions.” 357 NLRB 801 at 809. However, as described in *UGL-UNICCO*, the successor bar would not start running when the successor is first obligated to recognize and bargain with the union. Rather, the running of the successor bar would commence on the date of the first bargaining session. *Id.*³ Therefore, *UGL-UNICCO* provides that the successor-bar period in many cases would last *more* than a year after the successor employer must recognize the incumbent union. It is anomalous to impose a longer bar in successorship situations than would apply to cases involving a certified union following an NLRB-conducted election.⁴

More generally, *UGL-UNICCO* varies the length of the bar—in particular, the “reasonable period for bargaining”—depending on whether the successor employer exercised its lawful right under *Burns* to establish different initial terms and conditions of employment. *Burns*, 406 U.S. at 294–295. According to *UGL-UNICCO*, if

³ Although *UGL-UNICCO* contains language indicating that the successor bar begins running on the date of the first bargaining session, 357 NLRB 801 at 809, it appears that the Board would rely on the bar (and thereby decline to process rival union or decertification petitions) as soon as the successor became obligated to recognize and bargain with the union. In this respect, the successor bar under *UGL-UNICCO* would presumably bar representation petitions even before it started to run. It appears that the recognition bar would likewise be given effect immediately upon recognition, even though it would not start running until the first bargaining session. See *Lamons Gasket Co.*, 357 NLRB 739, 748 (2011). In my view, such incongruities do not have support in the Act. If there is a “successor bar,” it should begin running when an entity becomes a successor, and if there is a “recognition bar,” it should begin running when an entity extends recognition.

⁴ A newly certified union faces a three-fold challenge: to establish a new bargaining relationship with the employer, to attain familiarity with the business, and to develop a new relationship with employees in the bargaining unit. An incumbent union in the successor context has only the first challenge because, under *Burns*, the union representing any successor employer has already represented a majority of the successor’s employees (when they were employed by the predecessor), and the successor’s obligation to recognize the union is dependent on substantial continuity in the business (with which the union, therefore, is already familiar). *Burns*, 406 U.S. at 280–281. Although successorship situations can involve uncertainty and an “unsettling transition period,” it is significant that the Supreme Court has held these considerations only warrant a “rebuttable presumption of majority status . . . despite the change in employers.” *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27, 41 (1987) (emphasis added); cf. *Burns*, 406 U.S. at 279 fn. 3 (indicating that the certification bar’s “almost conclusive presumption” of majority support continues for a reasonable period, “usually a year,” after which “there is a rebuttable presumption of majority representation”).

the successor adopts the predecessor’s terms and conditions, the length of the “reasonable period for bargaining” will be 6 months after the first bargaining session. If the successor lawfully established different initial employment terms, the “reasonable period for bargaining” will be longer—between 6 months and a year after the first bargaining session—and the determination of whether a reasonable period for bargaining has or has not elapsed will depend on how the Board applies the multiple factors set forth in *Lee Lumber & Building Material Corp.*, 334 NLRB 399 (2001). For several reasons, this framework is contrary to the Supreme Court’s decision in *Burns* and inconsistent with the Act.

First, consistent with the treatment of some other petition bars,⁵ if the Board applies a successor bar, I believe it would be preferable for the bar to exist for a specified time period like 6 months (rather than a “reasonable period for bargaining”) so that everyone could clearly understand whether and when the Board would process any petition.⁶

Second, when a successor has lawfully recognized the predecessor’s union, *Lee Lumber* should not be the basis for determining the duration of the insulated period (indeed, there should be no insulated period). In *Lee Lumber*, the Board was dealing with an employer that had unlawfully withdrawn recognition from the union and unlawfully changed employees’ terms and conditions of employment. To remedy these unfair labor practices, the Board ordered the employer, among other things, to bargain with the union. When setting the duration of a reasonable period for that bargaining, during which the union’s majority status cannot be challenged, the Board

⁵ Under Sec. 9(c)(3), 29 U.S.C. § 159(c)(3), an “election bar” exists for a 12-month period following a valid election. As noted in the text, the Board has applied a “certification bar” for a 1-year period after a union is certified following a Board-conducted election. See *Brooks v. NLRB*, 348 U.S. 96, 103 (1954) (approving the Board’s certification-year policy). A “contract bar” generally exists after the execution of a collective-bargaining agreement for up to 3 years, *General Cable Corp.*, 139 NLRB 1123 (1962), during which a petition may be processed only if filed between 60 and 90 days prior to the agreement’s expiration or 3 years, whichever is later, *Leonard Wholesale Meats*, 136 NLRB 1000 (1962). However, the Board with the approval of the Supreme Court has applied “reasonable period” bars in cases involving voluntary recognition and bargaining orders. See, e.g., *Franks Bros. Co. v. NLRB*, 321 U.S. 702, 705–706 (1944); *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 613 (1969).

⁶ Cf. *Appalachian Shale Products Co.*, 121 NLRB 1160 (1958) (setting forth rules for determining the adequacy of a contract to bar an election, and endorsing “objectivity based on known standards”); *Deluxe Metal Furniture Co.*, 121 NLRB 995 (1958) (setting forth rules pertaining to timeliness so that “unions and employees will now know precisely when they may be expected to file a petition in order to obtain an election”); *Vickers, Inc.*, 124 NLRB 1051, 1052 (1959) (“[T]he Board is convinced of the desirability of establishing specific periods for the timely filing of petitions.”) (emphasis in original).

explained that “when such unfair labor practices have been committed, the lingering effects of the unlawful conduct must be effectively eliminated before employees can exercise *free* choice.” *Lee Lumber*, 334 NLRB at 401 (emphasis in original). The situation in *Lee Lumber* is widely different from the situation in which a successor employer *lawfully* recognized the union without any unfair labor practices. When a successor employer has recognized the union and otherwise satisfied its bargaining obligations, its employees should have the opportunity to exercise their own free choice without delay in a Board-conducted election if there is a valid petition, which is consistent with the rebuttable presumption of majority support recognized by the Supreme Court in *Fall River Dyeing*, *supra*. In any event, it is incongruous to fix the duration of the period during which employees are denied the right to participate in an election based on a case—*Lee Lumber*—where the employer *refused* to satisfy its bargaining obligations under the Act.

Third, it is objectionable to impose a longer insulated period when a successor has exercised its right under *Burns* to establish different initial terms and conditions of employment. By doing so, the Board in *UGL-UNICCO* undercuts a fundamental holding of the Supreme Court’s decision in *Burns*, where the Court concluded that a successor employer “is ordinarily free to set initial terms on which it will hire the employees of a predecessor.” 406 U.S. at 294. The Supreme Court in *Burns* relied on policy considerations that are potentially important to employers, employees, *and* unions, which the Board cannot disregard or effectively overrule. In the Court’s words:

[H]olding . . . the new employer bound to the substantive terms of an old collective-bargaining contract may result in *serious inequities*. A potential employer *may be willing to take over a moribund business only if he can make changes* in corporate structure, composition of the labor force, work location, task assignment, and nature of supervision. Saddling such an employer with the terms and conditions of employment contained in the old collective-bargaining agreement *may make these changes impossible and may discourage and inhibit the transfer of capital*.

406 U.S. at 287–288 (emphasis added).

As a matter of law, the Board lacks authority to diminish the Court’s holding in *Burns* establishing that, even where a successor employer must recognize and bargain with the predecessor’s union, the successor may lawfully establish different initial employment terms, and it is not bound by the predecessor’s collective-bargaining agreement. And as a matter of policy, if a successor employer

lawfully exercises these rights—for reasons that may advance the interests of the employer, employees, *and* the union—the Board should not penalize *employees* by depriving them, for a longer period, of their right to decide in an election whether and by whom they wish to be represented.

In short, when a successor employer is required to recognize and bargain with a predecessor’s union, the union should be afforded the rebuttable presumption of employee support that the Supreme Court upheld in *Burns* and *Fall River Dyeing*. However, if the Board applies a successor bar that involves an irrebuttable presumption for some period of time, (i) the bar should exist for a definite period so that employees, unions, and employers clearly understand whether and when a petition may be processed; (ii) the length of the bar should not depend on the multifactor analysis set forth in *Lee Lumber*; (iii) the period should commence running when the successor is first required to recognize and bargain with the union rather than when the parties have their first bargaining session, because a successor bar may otherwise be longer than the 1-year bar applicable to a newly certified union following a Board-conducted election; and (iv) the exercise of the successor’s right to establish different initial employment terms should not be a basis for making the bar period longer than 6 months.

In successorship situations, a rebuttable presumption of employee support or a shorter-duration successor bar does not automatically defeat the union’s representative status. If the posttransaction employer is a legal successor, it is *required* to recognize the union, to engage in good-faith bargaining, and to refrain from any other unfair labor practices. The processing of any employee or rival union petition will only occur if the petition, at a minimum, is supported by 30 percent of the unit employees. If the Board processes a petition and conducts an election, employees may vote to continue their representation by the incumbent union. However, this outcome, with only the most limited exceptions, should depend on what a majority of employees choose rather than being determined by the Board based on bar doctrines that preclude Board-conducted elections for an indefinite period of time. For these reasons, I concur.

APPENDIX

DECISION AND DIRECTION OF ELECTION

The Employer, FJC Security Services, Inc., is a New York corporation with a principle office in New York, New York, which provides security guard services under contract with the Federal Protective Service in Nashville, Tennessee and surrounding areas. Pursuant to a petition filed by the Petitioner on October 28, 2013, and amended on October 31, 2013, a hearing

was held on December 3, 2013,¹ to resolve issues raised by the petition. The Petitioner and a representative for the Employer appeared at the hearing. No representative of the Intervenor attended the hearing, although the record indicates the Intervenor was timely served with a copy of the petition and Notice of Representation Hearing. All parties filed post hearing briefs which have been duly considered.

As discussed more fully below, during the hearing issues were raised as to whether there were successorship and/or contract bars to the processing of the Petition in this matter. Having duly considered the matter, I have concluded there is no successorship bar and no contract bar prohibiting the processing of the Petition. Accordingly, I will direct an election.

PROCEDURAL HISTORY

In its original Petition, the Petitioner indicated it was seeking a unit of all full and part time employees employed by the Employer performing security services in Nashville, Jackson, and Memphis, Tennessee, excluding all clerical employees, professional employees and supervisors as defined in the Act. Upon learning the Employer no longer provided services in Jackson and Memphis, on October 31, the Petitioner amended its Petition to seek an election in a unit of all full-time and shared-time court security officers and lead security officers employed by the Employer under contract with the United States Marshals Service in Nashville, Tennessee at 801 Broadway, and 701 Broadway, and Ninth Ave, Nashville, Tennessee Ave. all of which are part of the Middle District of Tennessee judicial district excluding all other employees, office clerical employees professional employees confidential employees and supervisors as defined in the Act.

Prior to the hearing, the Petitioner and the Intervenor agreed to enter into a Stipulated Election Agreement for an election to be conducted by mail ballot in a unit which included all security officers including all protective security officers and lead security officers (sergeants) assigned under contract with the Federal Protective Services (Contract HSHQE4-12-D-0004 and any successor contracts) in Nashville, Tennessee, and the surrounding areas excluding all office clerical employees, professional employees, and supervisors as defined in the Act. However, the Employer refused to enter into the agreement.

At the hearing on December 3, the Petitioner formally amended its Petition to seek a unit of all protective security officers and lead security officers (sergeants) employed by the Employer assigned under the contract HSHQE4-12-D-0004 and any successor contracts in Nashville, Tennessee, and surrounding areas excluding all office clerical employees, professional employees, and supervisors as defined in the Act.

During the hearing, the Employer maintained that the Petition should be dismissed both because it had recognized the Intervenor as the representative of the employees being sought (successor bar) and had entered into collective-bargaining agreements which barred processing of the Petition (contract bar). In its posthearing brief, counsel for the Employer advises

¹ Processing of the case was blocked from November 5, 2013, because of a charge filed in Case 10–CA–116337 by the Intervenor, until November 18, 2013, when the charge was withdrawn.

the Employer is no longer contending there is a contract bar but continues to assert there is a successor bar.

Notwithstanding its willingness prior to the hearing to enter into an election agreement, in its posthearing brief the Intervenor now asserts the existence of a contract bar. Specifically, in its brief, the Intervenor states, “We originally opposed the other union where they amended their petition to represent a site and local other than the IGUA at the same address and building in Nashville, Tennessee. Excluding any outpost under the same contract.”

The Petitioner maintains the period of time for a successor bar has passed and that any contracts the Employer and the Intervenor may have entered into could not serve as a bar as they were executed long after the Petition was filed.

FACTS

The Employer was awarded contract HSHQE4-12-D-0004 by Federal Protective Services to provide security to services, effective December 1, 2012, for several government agencies including but not limited to the Social Security Administration and the Internal Revenue Service in Nashville, Tennessee, and surrounding areas (described as middle Tennessee).² Upon obtaining the contract, the Employer hired approximately 95 percent the employees formerly employed by Security Consultants Group, Inc/Paragon (hereafter called the Predecessor) and recognized the Intervenor as the representative of those employees. However, the Employer did not adopt the contract between the Intervenor and the Predecessor.³

Following recognition of the Intervenor, the Employer and the Intervenor held negotiation sessions on January 4 and August 15 lasting 2 or 3 hours each.⁴ During the hearing, an employer witness testified that following the conclusion of the last meeting, there were no outstanding issues and that the Employer thereafter was simply waiting for the Intervenor to sign the contract. On the other hand, an employee witness, who was part of the Intervenor’s negotiating meeting, testified no final agreement on a contract was reached during those sessions. He further testified that after the August meeting, the Intervenor expected the Employer to submit revisions to proposals made during the meeting. However, he did not hear anything further until sometime in October when he was forwarded an email from the President of the Intervenor notifying the Intervenor that a contract had been reached and directing the Intervenor to sign it. It is not clear as to the origination of that instruction.⁵ Upon receipt of this information, representatives and members

² Besides Nashville, the cities of Gallatin, Madison, Lawrenceburg, and Cookeville were named during the hearing. However, it is not clear if all the locations were specifically named. The locations are apparently specified in contract HSHQE4-12-D-0004 with the Federal Protective Service. However, neither it nor the specific locations for security services by the Employer were entered into the record.

³ There was no evidence presented to show the Employer changed any wages, hours or working conditions of the employees when it began providing services on December 1, 2012.

⁴ A meeting scheduled for July 2013 was canceled by the Intervenor.

⁵ Neither the email nor a copy of the purported agreement was introduced in the record.

of the Intervenor balked at signing the agreement and sought out the Petitioner for representation.⁶

During the hearing, the Employer representative presented, not one but two contracts between the Employer and the Intervenor⁷ which he asserted were signed on November 6, 2013, and became effective on December 1, 2013. Both contracts appear identical except for the unit description. One of the contracts (for purposes here Contract A) was for a unit of all protective security officers at 801 Broadway, and 701 Broadway, and Ninth Ave, Nashville, Tennessee, excluding irregular part time personnel, office clerical employees, professional employees and supervisors as defined in the Act. This unit would consist of 10 to 12 security officers. The other (for purposes here called Contract B) was for a unit of all protective security officers in Nashville and surrounding areas (other than the 801 Broadway, and 701 Broadway, and Ninth Ave. locations) excluding irregular part-time personnel, office clerical employees, professional employees and supervisors as defined in the Act. The unit in Contract B would consist of 15 to 20 security officers. The witness did not provide any notes or other documents as to any of the substance of the negotiations or other testimony regarding the substance of the parties' discussions between negotiating sessions etc. The witness also did not present any evidence as to what had happened to the agreement he indicated had been reached back in August and/or as to when and why the unit was split from one into two and placed in separate contracts.⁸

The employee witness testified that all employees of the Employer working under contract HSHQE4-12-D-0004, regardless of location, ultimately report to Lieutenant David Cunningham, that scheduling is completed centrally for all locations, that employees bid for posts by seniority and may work or be assigned at any of the locations serviced by the employer, that all employees call into a central time recording system, that if someone is needed in an outpost one of the newer employees from Nashville will be assigned to cover the post and that all have the same wages and benefits irrespective as to whether they work in Nashville or in outpost locations.

THE ISSUES

The parties are in apparent agreement that if an election is directed any bargaining unit determined should include all full-time and regular part-time protective security officers, including sergeants, employed by the Employer at those locations in

⁶ The witness testified that the Intervenor was subsequently put into receivership by the International.

⁷ The cover pages indicate the contracts are between the Employer and the International Guards Union of America (IGUA), which is the International. However, the recognition clauses state the recognized union is the International Guards Union of America (IGUA) Local 137, which is the Intervenor. There was no evidence presented as to whether Local 137 is a separate legal entity which can serve independently as a bargaining representative or is simply a local designated by the International to service an Employer for which the International is the legal representative.

⁸ The employee witness testified he had been present during all the negotiation sessions and that there had been no discussion during the meetings regarding splitting the unit.

Nashville and surrounding areas specified in its contract HSHQE4-12-D-0004 with the Federal Protective Services, excluding irregular part-time personnel, office clerical employees, professional employees and supervisors as defined in the Act.⁹

However, the Employer contends the Petition should be dismissed because of a successor bar while the Intervenor contends there is a contract bar.

With respect to the successor bar issue, in *UGL-UNICCO Service Co.*, 357 NLRB 801, (2011), the National Labor Relations Board determined that in cases where a successor employer has expressly adopted existing terms and conditions of employment as the starting point for bargaining, without making unilateral changes, challenges to a union's majority could not be made until a reasonable period had elapsed for bargaining. In such cases, the Board defined a "reasonable period of bargaining" as 6 months, measured from the date of the first bargaining meeting between the union and the successor employer.

The Board further determined that in situations where the successor employer recognized the union, but unilaterally announced and establishes initial terms and conditions of employment before proceeding to bargain, the "reasonable period of bargaining" would 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. In determining the length of the reasonable period, the Board directed that the multifactor analysis of *Lee Lumber & Building Material Corp.*, 334 NLRB 399 (2001), should be applied, noting that 6 months represents the approximate time required to reach a renewal agreement while 1 year is the length of the insulated period for newly-certified unions.

The factors set forth in *Lee Lumber*, supra, tending to establish that a reasonable period of time for bargaining has elapsed are: negotiations for a renewal, as opposed to an initial contract, the absence of unusually complex issues or bargaining processes, the passage of a relatively long period of time after the 6-month insulated period, a relatively large number of bargaining sessions, the parties' failure to come close to reaching agreement, and the existence of impasse. The factors tending to establish that a reasonable time for bargaining has not elapsed: are negotiations for an initial contract, the use of complex bargaining processes, the existence of complex issues to be negotiated, relatively little passage of time beyond the 6-month period, relatively few negotiating sessions, the absence of impasse, and a strong likelihood that a contract can be reached in the near future. The factors must be considered together, and none is dispositive individually or necessarily entitled to special weight. In every case, ***the issue is whether the union has had enough time to prove its mettle in negotiations, so that when***

⁹ The Petitioner and the Employer agreed during the hearing and the record supports that Lieutenant David Cunningham and Contract Manager Robert Chase are supervisors within the meaning of Sec. 2(11) of the Act. During the hearing, they also agreed and the record supports that Sergeants Doug Stone, Louis Crawley, and Richard Burgess are unit employees without supervisory authority.

its representative status is questioned, the employees can make an informed choice.

The Employer argues that because this was a first contract the reasonable time for bargaining in this case per *UGL-UNICCO*, id., is 1 year rather than 6 months. It further argues that even if the initial presumptive period for bargaining was 6 months, a full year should be given because the issues being negotiated between the Employer and Intervenor were complex. With respect to this latter argument, no evidence of any complex negotiations or issues was presented during the hearing either for the time actually spent in the two short negotiation sessions held over 7 months apart or for any time between such meetings or thereafter prior to the filing of the Petition in this matter. Rather, it is suggested I draw that conclusion simply by comparing the differences between the Predecessor's contract and the resulting contracts signed on November 6, 2013. Although the contracts do contain differences, many simply involve wording or rearranging of articles. While others might be more substantial, I cannot simply presume the Intervenor and the Employer had significant disagreements on any proposals during negotiations. It was incumbent on the Employer to present evidence of such during the hearing and it did not do so.

With respect to the former argument, as noted above, there was no evidence presented that the Employer substantially changed any wages or other terms of conditions of employment upon beginning operations on December 1, 2012. The first negotiation session was held on January 4, 2013, lasting 2 or 3 hours in length. Thereafter, the parties did not meet again until more than 7 months later on August 14, 2013, for a meeting again lasting just 2 or 3 hours. The Employer's witness testified there were no outstanding issues at the conclusion of the last negotiation session and the Employer was just waiting for the Intervenor to get back with a signed contract. Thereafter, in early October 2013 the Intervenor was directed to sign a contract. *Thus an agreement appears to have been reached.* However, it was not signed by the parties. On October 28, 2013, almost 10 months from the time of the commencement of negotiations, the original petition was filed. It was not until November 6, 2013, the Employer and Intervenor actually signed any collective-bargaining agreements, i.e., those splitting the unit into parts.¹⁰

Both *Lee Lumber* and *UGL-UNICCO*, supra, were intended to give labor organizations in *a reasonable time for bargaining* to prove their mettle in negotiations to the employees they represent without their majority being challenged. Inasmuch as both the Employer and the Intervenor both assert an agreement was, in fact, *reached* prior to the petition being filed I do not believe that *Lee Lumber* and *UGL-UNICCO*, supra, apply in

¹⁰ As noted, there was no discussion regarding the reasons for splitting the unit, when the parties began discussing it or when they agreed to it. It is noteworthy that the unit in Contract A coincides roughly with what the Employer and Intervenor's positions are as to what unit was being sought by the Petitioner in its amended October 31 petition (excluding the reference to the officers being sought as part of the Middle District of Tennessee judicial district) while the unit in Contract B contains all the other employees employed by the Employer pursuant to its contract HSHQE4-12-D-0004 with the Federal Protective Service.

this case as no additional time for bargaining is necessary. The Intervenor has demonstrated its mettle with the employees and those employees are in a position to make an informed choice as to their choice of representative.¹¹

Under these circumstances, I find that a successor bar does not apply in this matter and that the employees in the unit should be given an opportunity to express their choice of representative through a secret ballot election absent a contract bar.

With respect to the contract bar issue, the Board has long held that, for contract-bar purposes, an agreement must meet certain formal and substantive requirements, including the requirement that the document proposed as a bar be signed by both parties prior to the filing of the petition that it would bar. *Appalachian Shale Products Co.*, 121 NLRB 1160 at 1161 (1958). The Board has also long held that the party, asserting that a contract operates as a bar bears the burden of proving that the contract was **signed** by both parties before a petition was filed. *Roosevelt Memorial Park, Inc.*, 187 NLRB 517 (1970). See also *Bo-Low Lamp Corp.*, 111 NLRB 505 (1955), and *Appalachian Shale*, supra at 1160. Finally, the Board has held that where the evidence presented in support of a contract bar is vague, uncertain or inconsistent, a contract bar will not be found. *Road & Rail Services*, 344 NLRB 388 (2005).

In the instant case, there were clearly no signed contracts prior to November 6, 2013. Thus, there is no bar to the filing of the Petition on October 28 or to the October 31 amendment.

The question remains, however, as to whether one or both of the contracts signed on November 6, 2013, may serve as a bar to the amendment of the petition at the hearing on December 3, 2013.

The Board has held that after a contract is properly executed after the filing of a petition but prior to an amendment of the petition, a contract bar may apply if the amendment so substantially departs from the original petition as to constitute a new petition. See *Centennial Development Co.*, 218 NLRB 1284 (1975).

In the instant case, the October 31 amended petition sought all court security officers and lead security officers employed by the Employer under contract with the United States Marshals Service in Nashville, Tennessee, at 801 Broadway and 9th Ave. all of which are part of the Middle District of Tennessee judicial district.¹² The amendment at the December 3, 2013 hearing clarified that the Petitioner was seeking to represent all security officers in Nashville and the surrounding areas in Middle Tennessee. The Employer's witness at the hearing testified there are 10–12 security officers in Nashville and 15–20 securi-

¹¹ Even assuming for the sake of argument that the principles of *Lee Lumber* and *UGL-UNICCO*, supra, apply, the totality of the evidence presented demonstrates that neither the Employer nor the Intervenor had any sense of urgency in reaching an agreement following the commencement of negotiations, meet infrequently and for short periods of time. In the absence of any evidence of complex issues keeping the parties from reaching an agreement, I would find the 10-month period they had for bargaining in this case prior to the Petition being filed was a reasonable period of time for bargaining.

¹² As indicated above, this amendment was made to account for the fact that the Jackson and Memphis locations in the original petition were no longer a part of the area to be serviced by the Employer.

ty officers in the areas surrounding Nashville. The October 31 amended petition indicates approximately 30 unit employees. Thus, while the unit description may have been inartfully worded, the size of the unit indicated and the inclusion of the wording “all part of the Middle District of Tennessee judicial district” makes it clear that in the October 31 amended Petition the Petitioner was seeking more than just the 10–12 security officers working solely within Nashville.

As the record demonstrates, all the security officers working pursuant contract HSHQE4-12-D-0004 for the Employer regardless of location perform the same type of work, share similar working conditions, wages, benefits, commonly bid for posts, and work both within and outside of Nashville as needed, and that all ultimately are supervised by Lieutenant Cunningham. Thus, they appear to have a strong community of interest with each other.

In short, I find that the amendment was not so substantial as to constitute a new petition, and that the contracts signed on November 6, 2013, would not have barred the amendment to the petition at the hearing on December 3, 2013.

In conclusion, I find there is neither a successor nor contract bar to the processing of the Petition.

CONCLUSIONS AND FINDINGS

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

1. The hearing officer’s rulings made at the hearing are free from prejudicial error and are hereby 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 case.
3. The Petitioner and the Intervenor are labor organizations within the meaning of Section 2(5) of the Act and 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 (7) of the Act.
5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full time and regular part time protective security officers, including sergeants, employed by the Employer at locations in Nashville and surrounding areas (as specified in its contract HSHQE4-12-D-0004 with the Federal Protective Services and in any successor contracts for locations in Nashville and surrounding areas), excluding irregular part time personnel, office clerical employees, professional employees and supervisors as defined in the Act.

DIRECTION OF ELECTION

Inasmuch as the employees are scattered throughout Nashville and surrounding areas in Tennessee and do not report to a locations of work under the control of the Employer, a manual election is not feasible in this matter. Accordingly, the National Labor Relations Board will conduct a secret-ballot election by mail 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 the United

Government Security Officers of America International Union and its Local 350, Neither, or the International Guards Union of America. The date, time, and place of the mail-ballot election will be specified in the Notice of Election that will issue subsequent to this Decision.

A. Voting Eligibility

Eligible to vote in the election are those in the unit who are 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 Co.*, 394 U.S. 759 (1969). Accordingly it is hereby directed that within seven (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). 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. 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, only after I shall have determined that an adequate showing of interest among the employees in the unit found appropriate has been established.

To be timely filed, the list must be received in the National Labor Relations Board Nashville Resident Office, 810 Broadway, Suite 302, on or before **December 18, 2013**. 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 through the Agency website, www.nlrb.gov, by mail, by hand or courier delivery, or by facsimile transmission at (404) 331–2858. The

burden of establishing the timely filing and receipt of the list will continue to be placed on the sending party. 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.

C. Notice 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 full working days prior to 12:01 a.m. of the day of the election. In elections involving mail ballots, the election shall be deemed to have commenced the day the ballots are deposited by the Regional Office in the mail. In all cases, the notices shall remain posted until the end of the election. The term "working day" shall mean the entire 24-hour period excluding Saturday, Sundays, and holidays. 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.

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, NW, Washington, DC 20570-0001. This request must be received by the Board in Washington by 5:00 P.M., (EDT) on December 26, 2013. The request may be filed electronically through E-Gov on the Board's web site, www.nlr.gov,¹³ but may not be filed by facsimile.

Dated at Atlanta, Georgia, on this 11th day of December 2013.

¹³ To file the request for review electronically, go to www.nlr.gov and select the E-Gov tab. Then click on the E-Filing link on the menu and follow the detailed instructions. Guidance for E-filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Board's website, www.nlr.gov.