Lily Transportation Corp. *and* International Association of Machinists and Aerospace Workers, AFL–CIO, District Lodge 15, Local 447. Case 01–CA–118372

September 30, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND MCFERRAN

On December 29, 2014, Administrative Law Judge Raymond P. Green issued the attached decision. The Respondent filed exceptions and a supporting brief; the General Counsel filed a brief in support of the judge's decision, limited exceptions and a supporting brief; and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified and set forth in full below.[1]

The judge found that the Respondent, a successor employer, violated Section 8(a)(5) and (1) of the Act when it refused to recognize and bargain with the Union that had represented a unit of drivers under the predecessor employer. For the reasons discussed below, we agree.

I.

The facts are set forth in detail in the judge's decision. In brief, since June 2012, the Union represented a unit of drivers employed by Pumpernickel Express, Inc. at a Toyota Motors parts distribution center in Mansfield, Massachusetts. In October 2013, Pumpernickel went bankrupt and ceased performing services. In late October, the Respondent obtained the contract to replace Pumpernickel at the Toyota facility. The Respondent began operations in early November 2013.

On November 27, 2013, the Union, asserting that the Respondent was a successor to Pumpernickel, demanded recognition.[2] The Respondent rejected that demand, and has not recognized or bargained with the Union at any time since.

The Respondent asserts that, in December 2013, it received signed statements from a majority of its drivers stating that they no longer wished to be represented by the Union. The Respondent entered those statements into the record but did not authenticate any of the signatures.

II.

The judge found that there was substantial continuity of operations between Pumpernickel and the Respondent and that, by the time the Respondent hired a substantial and representative complement (at least by November 24–30, 2013), a majority of its drivers had previously been employed by Pumpernickel and represented by the Union. Accordingly, the judge concluded that the Respondent was a successor employer to Pumpernickel and that it was legally required to recognize and bargain with the Union. See *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972); *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987). There are no exceptions to these findings.

Turning to the Respondent's contention that its refusal to recognize and bargain with the Union was justified by the alleged December 2013 employee statements of disaffection, the judge noted that the Respondent received those statements less than a month after the Respondent commenced operations. He further observed that under *UGL–UNICCO Service Co.*, 357 NLRB No. 76 (2011), an incumbent union is entitled to represent a successor employer's employees for a reasonable period of time (not less than 6 months) before its majority status can lawfully be questioned. The judge therefore found that the Respondent violated Section 8(a)(5) and (1) by refusing to bargain.

On exceptions, the Respondent does not contest the judge's finding that it is a successor employer to Pumpernickel. Instead, the Respondent urges that *UGL–UNICCO* should not be applied "in a mechanical fashion" here. The Respondent argues, as it did to the judge, that any bargaining obligation it had should have ceased in December 2013 when it received signed statements from a majority of drivers stating that they no longer wished to be represented by the Union. The Respondent contends that application of the successor bar would not promote labor stability but would instead force the Union's representation on a group of employees who have unequivocally rejected representation based on conduct that occurred under its predecessor. We find no merit to the Respondent's arguments.

[1] We shall modify the judge's recommended Order to conform to the Board's standard remedial language, and we shall substitute a new notice to conform to the Order as modified.

[2] At the time, the Respondent employed a total of 20 drivers, 13 of whom had been previously employed in the Pumpernickel bargaining unit at the Toyota facility.

III.

As found by the judge, the Respondent was a successor employer to Pumpernickel, and it was legally required to recognize and bargain with the Union when it received the Union's demand for recognition on November 27, 2013. We thus agree with the judge that the Respondent could not withdraw recognition based on the December 2013 employee statements of disaffection because those statements arose before a reasonable period of bargaining had elapsed after the Respondent became a successor. As *UGL–UNICCO* makes clear, no question concerning the Union's representative status could be raised during this period. See 357 NLRB No. 76, slip op. at 8–9. The Board expressly stated in *UGL–UNICCO*:

> [T]he 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*.

Id., slip op. at 8 (emphasis added). For this reason, we affirm the judge's finding that the Respondent's ongoing refusal to recognize and bargain with the Union was unlawful, and we reject the Respondent's argument that any bargaining obligation it had ceased when it received the employees' statements that they no longer wished to be represented by the Union. As noted above, no question of representation can be raised during the bargaining period covered by the successor bar. *UGL–UNICCO*, supra;[3] see also *Jamestown Fabricated Steel and Supply, Inc.*, 362 NLRB No. 161, slip op. at 1 fn. 1 (2015).[4]

ORDER

The National Labor Relations Board orders that the Respondent, Lily Transportation Corp., Needham, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with International Association of Machinists and Aerospace Workers, AFL–CIO, District Lodge 15, Local 447 as the exclusive collective-bargaining representative of the employees in the bargaining unit.

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[3] We reject the Respondent's argument that the Board should overrule *UGL–UNICCO* and replace the conclusive successor bar doctrine with a rebuttable presumption of majority support. See *FJC Security Services*, 360 NLRB No. 115, slip op. at 1 (2014). Notably, however, the Respondent would be unable to rebut even that presumption. As the Board held in *Levitz Furniture Co. of the Pacific*, 333 NLRB 717, 717 (2001), an employer must demonstrate that a union has actually lost the support of the majority of the bargaining unit employees in order to lawfully withdraw recognition. Although the December 2013 employee statements suggested that a majority of the drivers no longer wished to be represented by the Union, the Respondent did not authenticate any of the signatures and did not present any other non-hearsay evidence demonstrating that the Union had lost majority support. This unauthenticated evidence is insufficient to meet the Respondent's burden under *Levitz*. See id. at 725.

[4] Moreover, under the principles established by *Lee Lumber & Building Material Corp.*, 322 NLRB 175 (1996), enfd. in relevant part 117 F.3d 1454 (D.C. Cir. 1997), the Respondent's ongoing refusal to recognize the Union forecloses it from relying on the December 2013 employee statements of disaffection to justify its failure to recognize and bargain with the Union. In *Lee Lumber*, the Board held that an employer's ongoing refusal to recognize and bargain with an incumbent union presumptively taints any subsequent employee expression of dissatisfaction with the union. See 322 NLRB at 178; see also *Bradford Printing & Finishing, LLC*, 356 NLRB No. 109, slip op. at 2 (2011) (finding that a successor employer's ongoing refusal to recognize and bargain with union tainted a subsequent challenge to union's representative status), and *Hampton Lumber Mills-Washington*, 334 NLRB 195, 195–196 (2001) (same).

Further, absent unusual circumstances, the "presumption of unlawful taint can be rebutted only by an employer's showing that employee disaffection arose after the employer resumed its recognition of the union and bargained for a reasonable period of time without committing any additional unfair labor practices that would detrimentally affect the bargaining." *Lee Lumber*, above, 322 NLRB at 178. Here, the Respondent never recognized and bargained with the Union, so the presumption remains in place. See *Hampton Lumber Mills-Washington*, above, 334 NLRB at 196. Nor has the Respondent established any other viable defense.

Member Miscimarra disagrees with the successor-bar principles established in *UGL–UNICCO*, above, 357 NLRB No. 76, for the reasons expressed in his separate opinion in *FJC Security Services*, above, 360 NLRB No. 115, slip op. at 1–4 (Member Miscimarra, concurring). Member Miscimarra would adhere to the standard re-established by the Board in *MV Transportation*, 337 NLRB 770 (2002), under which "an incumbent union in a successorship situation is entitled to—and only to—a *rebuttable* presumption of continuing majority status," which would not bar a valid challenge to a union's majority status. Id. at 770 (emphasis in original). However, Member Miscimarra agrees that the Respondent was a successor employer obligated to recognize and bargain with the Union; the Respondent unlawfully refused to recognize and bargain; and this unlawful conduct—consistent with the Board and court decisions in *Lee Lumber*, above—presumptively tainted subsequent employee expressions of disaffection with the Union. Member Miscimarra does not foreclose the possibility that this presumption may be rebutted in ways other than the manner specified in *Lee Lumber*, but he agrees that the record here is insufficient to support a finding that the Respondent has rebutted the presumption. Because he would find that the instant case is governed by *Lee Lumber*, Member Miscimarra does not reach whether the Respondent's evidence of employee disaffection, if untainted, would have been sufficient to permit the Respondent to lawfully refuse to recognize and bargain with the Union, and therefore he finds it unnecessary to apply or rely on *Levitz Furniture*, above, or to pass on whether *Levitz* was correctly decided.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time drivers employed by the Respondent performing work for Toyota's Mansfield, Massachusetts facility; excluding all other employees, office clerical employees, managerial employees, professional employees, confidential employees, owner operator, guards and supervisors as defined by the Act.[5]

(b) Within 14 days after service by the Region, post at its facility in Mansfield, Massachusetts, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 27, 2013.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 1 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., September 30, 2015

Mark Gaston Pearce, Chairman

Philip A. Miscimarra, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

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[5] Although the Respondent excepted to the judge's finding that it unlawfully refused to recognize the Union in violation of Sec. 8(a)(5) and (1), it has not argued that the judge's recommended affirmative bargaining order is improper, even assuming the Board affirms the judge's finding. We therefore find it unnecessary to provide a specific justification for this affirmative bargaining order. *SKC Electric, Inc.*, 350 NLRB 857, 862 fn. 15 (2007); *Heritage Container, Inc.*, 334 NLRB 455, 455 fn. 4 (2001). See also *Scepter Inc. v. NLRB*, 280 F.3d 1053, 1057 (D.C. Cir. 2002). Member Miscimarra believes the Board should evaluate the appropriateness of an affirmative bargaining order, which is an "extraordinary remedy," *Lee Lumber and Building Material Corp. v. NLRB*, 117 F.3d 1454, 1461 (D.C. Cir. 1997), by giving "due consideration to the employees' section 7 rights," determining whether "other purposes . . . override the rights of the employees to choose their bargaining representatives," and evaluating whether "other remedies, less destructive to employees' rights, are . . . adequate." *Peoples Gas System, Inc. v. NLRB*, 629 F.2d 35, 46 (D.C. Cir. 1980); see also *Lee Lumber*, above, 117 F.3d at 1460–1462. However, he agrees that such an evaluation is unnecessary here given the absence of exceptions to the bargaining order in this case.

[6] If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT fail and refuse to recognize and bargain with the International Association of Machinists and Aerospace Workers, AFL–CIO, District Lodge 15, Local 447 as the exclusive collective-bargaining representative of our employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time drivers employed by us performing work for Toyota's Mansfield, Massachusetts facility; excluding all other employees, office clerical employees, managerial employees, professional employees, confidential employees, owner operator, guards and supervisors as defined by the Act.

LILY TRANSPORTATION CORP.

The Board's decision can be found at www.nlrb.gov/case/01-CA-118372 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

Daniel F. Fein, Esq. and *Gene M. Switzer*, *Esq.*, for the General Counsel.

Alan S. Miller, *Esq.* and *Katherine D. Clark*, *Esq.*, for the Respondent.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. I heard this case in Boston, Massachusetts, on October 21 and November 3, 2014.

The charge was filed on December 5, 2013, and the complaint which was issued on June 30, 2014, alleged as follows:

1. That from about November 20, 2012, until about October 22, 2013, the Union was recognized as the bargaining representative of certain employees of Pumpernickel Express, Inc.

2. That on or about October 29, 2013, the Respondent assumed the operations of Pumpernickel at Toyota's Mansfield, Massachusetts facility.

3. That on or about October 29, 2013, the Respondent became a successor to Pumpernickel, having an obligation to bargain with the Union.

4. That on or about November 27, 2013, the Respondent has refused to bargain with the Union.

Subsequent to the issuance of the complaint, the General Counsel issued two notices of intention to amend the complaint; both of which related to a description of the bargaining unit.

The first, dated October 14, 2014, asserted that the Union had been the recognized bargaining representative of employees working for Pumpernickel at a Chrysler facility in Mansfield, Massachusetts, in the following categories.

> All full-time a regular part-time drivers, warehouse persons and yard persons, but excluding all office clerical employees, managerial employees, professional employees, confidential employees, guards and supervisors as defined in the Act, and all other employees.

The second, dated October 20, 2014, asserted that the appropriate unit for the employees of the Respondent, (the alleged successor), would be:

> All full-time and regular part-time drivers employed by Respondent performing work for Toyota's Mansfield facility, excluding all other employees, office clerical employees, managerial employees, professional employees, confidential employees, owner operator, guard and supervisors as defined by the Act.

Notwithstanding the Respondent's objections to the amendments, I granted them without prejudice to the Respondent having an opportunity to present evidence on the unit issue even if that meant that the hearing would have to be postponed after the General Counsel presented his prima facie case.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

FINDINGS AND CONCLUSIONS

I. JURISDICTION

It is admitted and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I also find that International Association of Machinists and Aerospace Workers, AFL–CIO, District Lodge 15, Local 447 is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The Union has had a long standing relationship with Pumpernickel Express, Inc. which was owned by Joe Guttilla. In relation to this case, the Union was recognized by Pumpernickel in or about 2006 and has had a series of collective bargaining agreements covering drivers, yard persons and dock workers, working at a parts distribution center owned by Chrysler Corporation which was (and still is), located in Mansfield, Massa-

chusetts. In this regard, Pumpernickel was a contract carrier for Chrysler and Pumpernickel's employees and drivers who essentially loaded trucks and drove trucks used to transport Chrysler parts to auto dealers.

In or about 2012, Pumpernickel successfully bid for the job of being the contract carrier for Toyota Motors at its parts distribution center, also located in Mansfield, Massachusetts.

Soon thereafter, the Union commenced a campaign to organize the Pumpernickel employees who worked at the Toyota facility. After obtaining authorization cards from a majority of the drivers, the Union and Pumpernickel executed a voluntary recognition agreement on June 25, 2012. The agreement stated inter alia:

> RECOGNITION. The company recognizes District Lodge 15, Lodge No. 447 of the International Association of Machinists and Aerospace Workers, AFL–CIO as the exclusive bargaining agent at the Company's Mansfield, Massachusetts location and such other domiciles that the Company uses to fulfill its Toyota Mansfield agreement, with respect to rates of pay, wages, hours of work and all other mandatory condition of employer for all drivers covered by this agreement.
>
> BARGAINING UNIT. The company and the Union agree that the employees covered by this agreement shall consist of all drivers and shall exclude all professional, managers, guard and supervisors as defined in the National Labor Relations Act, as amended, and excluding all other employees which the parties agree constitute an appropriate bargaining unit. . . .

Mr. Gitlin, a union representative, explained that the reason this unit did not include any of the dock workers who worked at the Toyota facility was because he was told that Toyota did not want the dock workers to be unionized inasmuch as they worked within the facility on a continual basis, (as opposed to the drivers who were away most of the time), and that Toyota was concerned that they might "infect" its own employees. Gitlin testified that he accepted this explanation and therefore did not press to have the dock workers included in the recognized unit.

Subsequent to June 2012, Pumpernickel, in an effort to enhance efficiency, sought to consolidate the services it provided for both Chrysler and Toyota by setting up a third location to perform its services for both companies. To this end, the Union and Pumpernickel began negotiating, not only for a contract covering the drivers who worked at the Toyota facility, but also a supplemental contract covering the Pumpernickel employees who worked at both the Toyota and the Chrysler facility.

On November 20, 2012, Pumpernickel and the Union executed an agreement covering both sets of employees. This new agreement therefore covered the drivers, yard men and dock workers who worked at the Chrysler facility and also covered the drivers who worked at the Toyota facility. In addition, the parties merged the seniority lists for the drivers who worked at each facility and did so by assigning seniority to each driver, (whether employed at the Chrysler or Toyota facility), by date of industry employment.

In effect, the separate units that had previously been established for Pumpernickel employees; one for the Chrysler facility and one for the Toyota facility, had become merged. Indeed, Mr. Gitlin testified that there was a vote held with the participation of both sets of Pumpernickel employees to ratify the new contract and to merge the units. At this time, there were 34 drivers plus an indeterminate number of other employees who were employed by Pumpernickel to service these two accounts.

All this would have continued but for the fact that in October 2013, Pumpernickel went bankrupt and ceased performing services for both Chrysler and Toyota. Those companies then had to find and utilize common carriers for a period of time.

In late October 2013, the Respondent successfully bid for and obtained a contract with Toyota (but not Chrysler), to be the contract carrier to replace Pumpernickel. It first hired Mark Walsh, a previous Pumpernickel supervisor, to be its general manager. He thereupon recruited employees, (including drivers and dock workers) for Pumpernickel. The parties stipulated:

> The scope of work that Lily Transportation provides for Toyota at its Mansfield, MA facility and the nature of that operation is essentially the same as Pumpernickel previously performed at the same facility. Accordingly, Respondent will not assert as a defense to the unfair labor practice complaint that the NLRB successor doctrine does not apply because of any changes in the nature of the operation.

On or about November 27, 2013, the Union demanded recognition from the Respondent asserting that it was a successor to Pumpernickel. That demand was rejected.

Payroll records for Pumpernickel covering the employees working at the Toyota Mansfield operation show that during the period from November 24, 2013, to November 30, 2013, Pumpernickel employed a total of 28 nonsupervisory employees, consisting of 20 drivers plus eight dock workers. Of this group, 13 of the drivers had been employed by Pumpernickel, performing services for the Toyota account. The other six drivers had been employed by Pumpernickel, performing services for the Chrysler account. There also was one new driver who hadn't previously been employed by Pumpernickel. Of the dock workers, six had previously been employed by Pumpernickel and had been assigned to the Toyota account. The other dock workers were new hires. This means that of the dock workers employed by the Respondent, none had previously been in the bargaining unit under Pumpernickel's last contract with the Union. However, since 19 out of the 20 drivers employed by the Respondent had been employed and covered by the last contract between the Union and Pumpernickel, this means that a majority of the Respondent's work force, (either limited to drivers only or expanded to a unit of drivers and dock workers), would have been employees who had worked for the predecessor and who had been represented by the Union.

With respect to the unit at Lily, it should be noted that it is the General Counsel's position that the drivers, excluding the dock workers, would constitute an appropriate unit. In this regard, the evidence shows that the drivers, who because they are engaged in the interstate transport of goods are subject to the regulations and restrictions of the U.S. Department of Transportation. Among other things, this means that their weekly hours of work are capped. Also, the drivers are paid on a per trip/mileage basis and are not subject to the overtime pro-

visions of the Fair Labor Standards Act. The dock workers, on the other hand, are paid an hourly wage rate and are paid at overtime rates if they work in excess of eight hours on any given day. There are, according to Mark Walsh, instances when a driver will fill in and work on the dock when a dock worker is absent. But he concedes that this may happen only once or twice a month. Usually, if a dock worker is needed, the company obtains a worker from a temporary employment agency.

The evidence shows that dock workers arrive at work at about 2 p.m. and generally work until about 11 p.m. The drivers typically arrive at work at about 4 p.m. and after checking their vehicles and getting their route sheets, leave the premises and generally return after the dock workers have gone home. Thus, except for the briefest period of time when the drivers arrive at the premises, their actual contact with the dock workers is minimal.

The Respondent asserts that in December 2013, it received from a majority of its employees signed statements that they no longer wished to be represented by the Union. In this regard, Respondent's Exhibit 3 consists of a total of 19 signatures, dated in December 2013, stating that these employees no longer desired representation.[1]

Analysis

In *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987), the Supreme Court held that a purchasing employer is required to recognize and bargain with a union representing the predecessor's employees when there is a "substantial continuity" of operations after the transaction *and* if a majority of the new employer's work force, in an appropriate unit, consists of the predecessor's employees when the new employer has reached a "substantial and representative complement."

In the present case, there is no issue regarding "substantial continuity" inasmuch as the parties have stipulated that there was such continuity. The only question here, as far as the General Counsel's case is concerned, is whether a majority of the Respondent's work force, in an appropriate unit, consists of the predecessor's employees when the Respondent reached a "substantial and representative complement." And in the latter regard, there is no dispute that by the period of November 24, 2013, to November 30, 2103, the Respondent had a substantial and representative complement of employees. The rest is arithmetic.

In this proceeding, the parties differ as to what an appropriate unit should be. The General Counsel argues that an appropriate unit should consist only of the drivers employed by the Respondent at the Toyota Mansfield facility. On the other hand, the Respondent contends that the only appropriate unit should consist of the drivers plus dock workers employed at that facility.

It should first be noted that in cases such as this, the bargaining unit need not be the only, or even the most appropriate unit. It is sufficient that the unit be "an" appropriate unit. *Overnite Transportation Co.*, 322 NLRB 723, (1996). See also, *International Bedding Co*., 356 NLRB No. 168 slip op. at page 2 (2011). In the latter case, and unlike the present case, the Union was petitioning for a unit where drivers would be included with production and maintenance employees, and the Board, over the objection of the Employer, found that such a unit could constitute one of several appropriate units.

In this case, the evidence shows that there are substantial differences between the drivers and the dock workers. First, there is the fact that at this particular facility, the history of bargaining between the Union and the predecessor encompassed a unit consisting of drivers and excluding the dock workers. Additionally, the drivers, unlike the dock workers, are required to hold Commercial Driver Licenses, and as over-the-road drivers, they are subject to Department of Transportation rules, including safety rules regulating their hours of work. Only on very rare occasions do drivers perform dock work and dock workers never perform driving work. The drivers are paid at a substantially higher level than dock workers and they are paid principally on a mileage and trip basis instead of on an hourly basis. (Drivers, as opposed to dock workers, are not eligible for overtime pay). Finally, since the schedules of the drivers overlap in only a very limited way with the hours of the dock workers, there is little opportunity for communication between the two groups of employees.

In view of the above, I conclude that at the Toyota Mansfield facility a unit consisting only of drivers and excluding dock workers would constitute an appropriate unit. In *FedEx Freight, Inc*., 362 NLRB No. 43 (2015), the Board, citing *Home Depot USA*, 331 NLRB 1289, 1291 (2000), denied a Request for Review where an employer contended that a petitioned-for unit, (drivers only), was inappropriate because the drivers performed a substantial amount of their time doing dock work. The contention made and rejected was that the only appropriate unit should include the dock workers with the drivers. Member Johnson agreed that the petitioned-for unit limited to drivers was appropriate, but stated that he would rely on the Board's traditional community of interest analysis, finding it unnecessary to express view on correctness of *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011).

Turning to the arithmetic. The evidence shows that of the 20 drivers hired by the Respondent for the Mansfield, Toyota facility, 19 had previously been employed by Pumpernickel and had been represented by the Union. Further, of the group of new hires, 13 of the drivers had previously serviced the Toyota Mansfield account. Thus, assuming that a unit of drivers is appropriate, there is no question but that a majority of the Respondent's drivers employed at this facility had previously been employed by the predecessor and had previously been represented by the Union.[2] Accordingly, I conclude that the Respondent is a successor, having incurred an obligation to bar-

[1] It is noted that the Respondent did not offer evidence to authenticate these signatures.

[2] Even if we added the eight dockmen to the unit, the Union would still represent a majority.

gain with the Union when it took over Pumpernickel's operations for the Toyota Mansfield facility.[3]

The Respondent argues that even if it should be found to be a successor, its obligation to bargain should cease once it had received evidence in the form of petitions and statements demonstrating that a majority of the employees in the unit no longer desired union representation. Since this occurred less than a month after it commenced operations at the Toyota Mansfield facility, the Respondent acknowledges that the Decision in *UGL–UNICCO Service Co*., 357 NLRB No. 76 (2011) would be an impediment to such a defense. In that representation case, a Board majority overruled *MV Transportation*, 337 NLRB 770 (2002), and held that where a successor employer acts in accordance with its legal obligation to recognize a union representing the predecessor's employees, the union is entitled to represent those employees for purposes of bargaining for a reasonable period of time without challenge to its presumed majority status.

The Respondent argues that the present case is sufficiently distinguishable from *UGL–UNICCO*, so that the Board's successor bar rule need not be applied. Alternatively, it argues that the decision in *UGL–UNICCO* should be overruled. I do not think that the facts in this case are sufficiently distinguishable from *UGL–UNICCO* so as to warrant a different result. Nor am I in a position to overrule existing Board precedent. Accordingly, I shall reject the Respondent's argument in this regard.

CONCLUSIONS OF LAW

1. Lily Transportation Corp. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. International Association of Machinists and Aerospace Workers, AFL–CIO, District Lodge 15, Local 447 is a labor organization within the meaning of Section 2(5) of the Act.
3. The appropriate unit consists of all full-time and regular part-time drivers employed by Respondent, performing work for Toyota's Mansfield Massachusetts facility, excluding all other employees, office clerical employees, managerial employees, professional employees, confidential employees, owner operator, guard, and supervisors as defined by the Act.
4. By refusing to recognize and bargain with the Union as the collective-bargaining representative of its employees employed in the aforesaid unit, the Respondent has violated Section 8(a)(5) and (1) of the Act.
5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in unfair labor practice, I shall recommend that it cease and desist therefrom and take certain affirmative action, including the posting of a Notice, designed to effectuate the policies of the Act.

In view of my findings that the Respondent is a successor to Pumpernickel, I shall recommend that it be ordered to recognize and bargain with the Union in the unit found to be appropriate.

The General Counsel requests that the Respondent be required to assemble the employees and have the Notice read to them by its owner or by a Board agent in the presence of its owner. I shall not recommend this type of remedy.

Requiring an owner or high official of a company, (or a union), to read aloud the notice to its assembled employees has not been typically required except in unusual circumstances. In *Federated Logistics & Operations*, 340 NLRB 255, 256–257 (2003), the Board described this as an "extraordinary" remedy. This remedy, along with others, was imposed in a case where the employer (a) unlawfully interrogated employees; (b) created the impression of surveillance; (c) solicited grievances; (d) promised benefits; (e) threatened employees with the loss of existing benefits; (f) threatened to move its operations; (g) withheld benefits and (h) discriminatorily suspended employees for engaging in protected activity. Moreover, in that case, the results of an election were overturned and the Board ordered a new election. Given these findings, in the context of a pending election situation, a Board majority stated:

> The Board may order extraordinary remedies when the Respondent's unfair labor practices are "so numerous, pervasive, and outrageous" that such remedies are necessary "to dissipate fully the coercive effects of the unfair labor practices found." *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 473 (1995) (and cited cases). For example, a public reading of the notice is an "effective but moderate way to let in a warming wind of information, and more important, reassurance." *J.P. Stevens & Co. v. NLRB*, 417 F.2d 533, 539–540 (5th Cir. 1969).

There have been a number of recent cases where the Board has required the reading of a notice. But those cases, in my opinion, involve facts substantially different from and more egregious than those in the present case. For example, in *Jason Lopez' Planet Earth Landscape Inc*., 358 NLRB No. 46, (2012), the Respondent (a) illegally laid off the leader of the organizational campaign who also was a witness in the underlying representation case; (b) had illegally laid off two employees in a unit of 15 employees right after the election; and (c) committed many other serious violations, including promising benefits and "threatening to close the business and reopen it under a different name."

In *Carey Salt Co.,* 360 NLRB No. 38 (2014), the Board concluded that the Respondent violated Sections 8(a)(1),(4), & (5) of the Act by (a) threatening employees that it would withhold a scheduled wage increase until it successfully resisted a petition for injunctive relief; (b) delaying or withholding a scheduled wage increase because of the injunction litigation; and (c) refusing to bargain in good faith by conditioning bargaining on the union persuading the Board to discontinue the injunction litigation. In that case, the Board noted that the Respondent was a repeat offender, in that prior unfair labor practice findings had been enforced in substantial part by the Fifth Circuit Court of Appeals.

[3] The fact that the Respondent took over only a portion of Pumpernickel's operations, (not including the Chrysler Mansfield operation), does not defeat the Union's claim that it is entitled to represent the employees of that portion of the previous unit that was taken over by the successor. *Bronx Health Plan,* 326 NLRB 810, 812–813 (1998).

In *Excel Case Ready*, 334 NLRB 4, 5 (2001), the Board granted this type of remedy after it found that the Respondent, at the outset of a union organizing campaign, (a) coercively interrogated employees; (b) threatened them with the loss of their 401(k) plan; (c) threatened to make their lives a "living hell" and (d) illegally discharged five employees in a unit of 32 employees.

In *McAllister Towing & Transportation Co*., 341 NLRB 394 (2004), the Board ordered the Respondent to permit a Board agent to read the Notice aloud to the assembled employees in the presence of a management official. In that case, the Board held that the Respondent violated the Act by accelerating the timing of a mid-year wage increase in order to influence the outcome of an election. It also found unlawful the Respondent's postelection extension of its 401(k) plan to employees and the granting of five paid holidays. It should be noted that the *McAllister* case, in addition to involving a rerun election, involved a component that indicated a disregard for the Board's processes which may have warranted a conclusion that it would likely violate the Act in the future. In that case, the Board found that Respondent's counsel deliberately refused and/or delayed the production of documents that had been subpoenaed by the General Counsel. The Board stated, inter alia, that this course of behavior was carried out in a way that was "likely to prejudice the General Counsel's case and the overall proceeding."

In my opinion, the conduct of the Respondent in this particular case is not sufficiently egregious so as to warrant the granting of this "extraordinary" remedy. Indeed, the violation here really amounts to a status finding. Apart from the legal issue of whether or not the Respondent is a successor, it has not in any other manner engaged in conduct designed to threaten, restrain or coerce its employees. Nor has it been shown that the Respondent has violated the Act in the past or that it likely will violate the Act in the future.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The Respondent, Lily Transportation Corp., Needham, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain with International Association of Machinists and Aerospace Workers, AFL–CIO, District Lodge 15, Local 447, as the exclusive collective bargaining representative of its drivers employed at the Respondent's operations at the Toyota facility in Mansfield, Massachusetts.

(b) In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and, on request, bargain collectively with International Association of Machinists and Aerospace Workers, AFL–CIO, District Lodge 15, Local 447, as the exclusive representative of Respondent's employees in the unit describe above and if an agreement is reached, embody such agreement in a signed document.

(b) Within 14 days after service by the Region, post at its Mansfield, Massachusetts facility, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 1 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to the physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at the Toyota Mansfield, Massachusetts facility, at any time since November 27, 2013.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 29, 2014

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

[4] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT refuse to recognize and bargain with International Association of Machinists and Aerospace Workers, AFL–CIO, District Lodge 15, Local 447 as the collective bargaining representative of our drivers located at the Toyota Mansfield, Massachusetts facility.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the rights guaranteed to them by Section 7 of the Act.

WE WILL on request, bargain with International Association of Machinists and Aerospace Workers, AFL–CIO, District Lodge 15, Local 447 as the exclusive representative of the employees in the appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

LILY TRANSPORTATION CORP.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/01-CA-118372 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, SE., Washington, D.C. 20570, or by calling (202) 273–1940.