

No. 15-2398

**UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

LILY TRANSPORTATION CORPORATION

Respondent

**ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**RESPONSIVE BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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**STATEMENT OF SUBJECT MATTER AND
APPELLATE JURISDICTION**

This case is before the Court on the application of the National Labor Relations Board (“the Board”) for enforcement of a Board Decision and Order issued against Lily Transportation Corporation (“the Company”) on September 30, 2015, and reported at 363 NLRB No. 15. (D&O 1.)¹ The Board had subject

¹ “D&O” references are to the Board’s Decision and Order, which is reproduced in the Addendum to the Company’s opening brief (“Br.”). “A.” references are to the

matter jurisdiction over the proceeding below under Section 10(a), 29 U.S.C. § 160(a), of the National Labor Relations Act, as amended (“the Act”), 29 U.S.C. § 151, et seq. The Court has jurisdiction over this proceeding under Section 10(e) of the Act, 29 U.S.C. § 160(e), because the Board’s Order is final and the unfair labor practice occurred in Mansfield, Massachusetts. The Board’s application was timely because the Act places no time limit on the initiation of enforcement proceedings.

STATEMENT OF THE ISSUE

Whether substantial evidence supports the Board’s finding that the Company was a successor employer and, therefore, violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the exclusive collective-bargaining representative of its drivers.

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

Based on a charge filed by the International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge 15, Local 477 (“the Union”), the Board’s General Counsel issued a complaint, subsequently amended, alleging that the Company was a successor employer and had violated Section 8(a)(5) and (1) of

joint appendix. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

the Act, 29 U.S.C. § 158(a)(5) and (1), by failing and refusing to bargain with the Union, the bargaining representative of certain of its employees. (D&O 4; A. 255-59, 263-66.) After a hearing, an administrative law judge found that the Company had violated the Act as alleged. (D&O 7.) On review, the Board affirmed the judge's finding. (D&O 1.)

II. THE BOARD'S FINDINGS OF FACT

A. Background: the Union's Relationship with Pumpnickel, the Company's Predecessor

Pumpnickel Express, Inc. ("Pumpnickel") was a contract carrier for Chrysler Corporation at a parts-distribution warehouse in Mansfield, Massachusetts ("Chrysler Mansfield"). (D&O 4; A. 35-36.) As a contract carrier, Pumpnickel loaded trucks with automotive parts at the warehouse and distributed them to regional dealerships. (D&O 5; A. 35-36.) In 2006, Pumpnickel recognized the Union as the exclusive bargaining representative of a unit composed of drivers, yard persons, and dock workers at Chrysler Mansfield and entered into a series of collective-bargaining agreements with the Union. (D&O 4; A. 33-34, 268-316, 345-81.)

In 2012, Pumpnickel became the contract carrier for Toyota Motors at its parts-distribution warehouse in Mansfield ("Toyota Mansfield"). (D&O 5; A. 40.) The Union subsequently campaigned to organize Pumpnickel's employees at Toyota Mansfield, ultimately obtaining authorization cards from a majority of the

drivers. (D&O 5; A. 40, 43-45, 49.) The parties then executed a voluntary-recognition agreement in June 2012 that covered a drivers-only unit. (D&O 5; A. 44-45, 267.)

Around the same time, and in an effort to enhance its efficiency, Pumpnickel sought to consolidate the services it separately provided to Chrysler and Toyota by planning to set up a new location to serve both automakers' distribution needs. (D&O 5; A. 46-47.) Pumpnickel and the Union commenced negotiations for a contract that would cover the Toyota Mansfield unit and a supplemental contract that would cover Pumpnickel's employees at the planned combined facility. (D&O 5; A. 51.) On November 20, 2012, Pumpnickel and the Union executed a tentative agreement covering both the Chrysler and Toyota Mansfield units. (D&O 5; A. 52-59, 268.) The Union then held a vote and both sets of Pumpnickel employees voted to ratify the agreement and merge the units. (D&O 5; A. 51, 55, 93-101, 236.)

B. The Company Succeeds Pumpnickel as the Contract Carrier at Toyota Mansfield, Hires a Majority of Former Pumpnickel Drivers, and Refuses To Recognize or Bargain with the Union

In October 2013, Pumpnickel entered bankruptcy and ceased servicing both Mansfield warehouses. (D&O 5; A. 40, 59-60, 62-63.) In late October, the Company secured an agreement to serve as the new contract carrier at Toyota Mansfield. (D&O 5; A. 63, 162-63, 437.) The scope of the work performed by the

Company and the nature of its operation were substantially the same as Pumpnickel's were at Toyota Mansfield. (D&O 6; A 437.) When the Company assumed the work, it hired 20 drivers, 13 of whom previously had worked for Pumpnickel at Toyota Mansfield and had been represented by the Union. (D&O 1 n.2, 5; A. 121-45, 193-94, 316-23.)

On November 27, the Union demanded recognition from the Company with respect to the drivers at Toyota Mansfield, asserting that the Company was a successor to Pumpnickel. The Company rejected the demand. (D&O 5; A. 63-64, 66-67.) In December, 19 employees signed, and the Company received, statements declaring that the employees no longer wished to be represented by the Union. (D&O 6; A. 195-96, 382-86.)

III. THE BOARD'S CONCLUSIONS AND ORDER

Based on the foregoing facts, the Board (Chairman Pearce and Member McFerran; Member Miscimarra, concurring) found that the Company was a successor employer and had violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain with the Union as the exclusive representative of the drivers at Toyota Mansfield. (D&O 1, 2 n.4.) The Board's Order requires the Company to cease and desist from the unfair labor practice found and from, 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, 29 U.S.C. § 157.

(D&O 1-2.) Affirmatively, the Order directs the Company to bargain with the Union on request, to embody any resulting understanding in a signed agreement, and to post a remedial notice. (D&O 2.)

STANDARD OF REVIEW

The Supreme Court “recognize[s] that, in ‘applying the general provisions of the Act to the complexities of industrial life,’ . . . the Board brings to its task an expertise that deserves . . . [judicial] deference.” *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963). *See also Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843-44 & n.11 (1984) (if a statute is silent or ambiguous with respect to an issue, a court must defer to administrative agency’s permissible construction, even if the court would have construed the statute differently). This Court has stated that a “Board order must be enforced if the Board correctly applied the law and if its factual findings are supported by substantial evidence on the record.” *NLRB v. Ne. Land Servs., Ltd.*, 645 F.3d 475, 478 (1st Cir. 2011).

More specifically, “[a]s long as the Board’s interpretation of [the Act] is reasonably defensible, [the Court] will uphold the Board’s conclusions of law even if [it] would have reached a different conclusion.” *McGaw of P.R., Inc. v. NLRB*, 135 F.3d 1, 7 (1st Cir. 1997) (internal citation and quotation marks omitted). The Board’s findings of fact are conclusive if supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340

U.S. 474, 488 (1951); *NLRB v. Solutia, Inc.*, 699 F.3d 50, 59-60 (1st Cir. 2012).

The “substantial evidence” standard is the degree of evidence that could satisfy a reasonable factfinder. *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 377 (1998); *NLRB v. Beverly Enters.-Mass., Inc.*, 174 F.3d 13, 21 (1st Cir. 1999).

A reviewing court may not, in applying that standard, displace the Board’s choice “between two fairly conflicting views, even though the court [may] justifiably have made a different choice had the matter been before it de novo.” *Ne. Land Servs.*, 645 F.3d at 478 (quoting *Universal Camera*, 340 U.S. at 488).

SUMMARY OF ARGUMENT

It is undisputed that, as the Board found, the Company is a successor employer. Under well-established successorship law, the Company was therefore obligated to recognize and bargain with the Union, the incumbent union and exclusive collective-bargaining representative of its drivers. The Company, however, admittedly refused to do so, and the Board thus found its refusal violated Section 8(a)(5) and (1) of the Act.

In reaching its unfair-labor-practice finding, the Board properly rejected the Company’s sole affirmative defense, namely, that it should have been permitted to challenge the Union’s majority status based on signed statements from employees expressing their disaffection from the Union. In doing so, the Board reasonably applied its “successor bar” doctrine, which precludes the Company from

challenging the Union's majority status for a reasonable period of time, at a minimum six months after the first bargaining session. Contrary to the Company's claims, that successor bar is rational and consistent with the Act and, therefore, entitled to judicial deference. Moreover, even if the Company could permissibly challenge the Union's majority status, the Board separately rejected the Company's defense for two independent reasons. Specifically, the Board reasonably found that, under established law, the employee statements the Company cites were both legally tainted and factually insufficient to prove actual loss of majority support.

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE COMPANY WAS A SUCCESSOR EMPLOYER AND, THEREFORE, VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO RECOGNIZE AND BARGAIN WITH THE UNION

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer “to refuse to bargain collectively with the representatives of his employees” 29 U.S.C. § 158(a)(5).² It is, moreover, well settled that a “successor employer” violates Section 8(a)(5) and (1) when it refuses to bargain with the representative of its predecessor’s employees upon request. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 52-53 (1987); *NLRB v. Burns Int’l Sec. Servs., Inc.*, 406 U.S. 272, 287-88 (1972); *NLRB v. Horizons Hotel Corp.*, 49 F.3d 795, 806 (1st Cir. 1995).³ A successor employer is one that “makes a conscious decision to maintain generally the same business and to hire a majority of its employees from the predecessor.” *Fall River*, 482 U.S. at 41; *accord Horizons Hotel*, 49 F.3d at 806. More specifically, an employer will be found to be a successor where there is

² A violation of Section 8(a)(5) creates a “derivative” violation of Section 8(a)(1) of the Act, which makes it unlawful for an employer to “interfere with, restrain, or coerce employees” in the exercise of rights guaranteed in Section 7 of [the Act].” 29 U.S.C. § 158(a)(1). *See Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983); *accord NLRB v. Horizons Hotel Corp.*, 49 F.3d 795, 806 (1st Cir. 1995).

³ Although a successor employer—such as the Company—is “ordinarily free to set initial terms on which it will hire the employees of a predecessor,” *Burns*, 406 U.S. at 294, it remains obligated to thereafter bargain with the incumbent union.

a “substantial continuity” of operations between it and the predecessor employer, and a majority of its work force consists of the predecessor’s employees. *Fall River*, 482 U.S. at 43, 50 (citing *Burns*). The successor’s bargaining obligation follows from its intention “to take advantage of the trained workforce of its predecessor,” which the incumbent union represents. *Id.* at 41.

Substantial evidence supports the Board’s uncontested findings (D&O 1, 6-7) that the Company was a successor, obligated to recognize and bargain with the Union, and that it failed to do so. Specifically, the Company stipulated (D&O 6; A. 437) that it maintained substantial operational continuity with Pumpnickel, providing the same contract-carrier services at the Toyota Mansfield facility. (A. 35-36, 40, 63, 162-63.) And it is undisputed (*see* Br. 8) that a majority of the Company’s drivers at Toyota Mansfield formerly were employed by Pumpnickel at that location.⁴ (A. 121-45, 193-94, 316-23.) Finally, when the Union demanded

⁴ Before the Board, the Company did not dispute that it was a successor employer. (D&O 1; A. 452.) The Company does not directly challenge (Br. 2) that status before the Court. But to the extent the Company suggests it is not a successor by insinuating (Br. 5-6, 25-27) that the Union was not a proper incumbent representative of Pumpnickel’s employees, the Court does not have jurisdiction to entertain that argument. *See* 29 U.S.C. § 160(e) (“No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court”); *accord Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982); *NLRB v. Saint-Gobain Abrasives, Inc.*, 426 F.3d 455, 459 (1st Cir. 2005).

recognition and bargaining, the Company admittedly (Br. 10) refused. (A. 63-64, 66-67.) That unlawful refusal, accordingly, violates Section 8(a)(5) and (1).

Before the Court, the Company insists (Br. 31-41) that it should have been permitted to challenge the Union's majority status based on signed statements from employees expressing their disaffection from the Union. As will be discussed, the Board reasonably rejected the Company's defense for three independent reasons. It found (D&O 1-2) that, under its governing standard, the Company could not challenge the Union's majority status for a reasonable period and that, in any event, the employee statements were both legally tainted and factually insufficient to prove actual loss of majority support.

A. As a Successor Employer, the Company Was Obligated To Recognize and Bargain with the Union for a Reasonable Period Before It Could Lawfully Challenge the Union's Majority Status

The Supreme Court has recognized that the Board's successorship doctrine, which requires a successor employer to recognize its employees' incumbent union, promotes the principal goals of the Act—to encourage stability in collective-bargaining relationships without impairing employees' free choice and, in turn, to further industrial peace. *Fall River*, 482 U.S. at 38-39. The Court reasoned that, “[i]f the employees find themselves in essentially the same jobs after the employer transition and if their legitimate expectations in continued representation by their union are thwarted, their dissatisfaction may lead to labor unrest.” *Id.* at 43-44. As

the Court further explained, “during a transition between employers, a union is in a peculiarly vulnerable position,” because it “is uncertain about the new employer’s plans[]” and “also must protect whatever rights still exist for its members.” *Id.* Thus, “during this unsettling transition period, the union needs the presumption[] of majority status to which it is entitled to safeguard its members’ rights and to develop a relationship with the successor.” *Id.*

By recognizing the incumbent union’s representative status, the successorship doctrine also protects the “position of the employees.” *Id.* at 39. As the Supreme Court explained, “after being hired by a new company following a layoff from the old, employees initially will be concerned primarily with maintaining their new jobs. In fact, they might be inclined to shun support for their former union, especially if they believe that such support will jeopardize their jobs with the successor or if they are inclined to blame the union for their layoff and problems associated with it.” *Id.* at 40. The doctrine thus prevents successor employers from “getting rid of a labor contract and . . . exploiting the employees’ hesitant attitude towards the union to eliminate its continuing presence.” *Id.*

In *UGL-UNICCO Service Co.*, the Board concluded that, to best effectuate the “overriding” labor-law policies supporting successorship, the presumption of majority union support in that context should initially be irrebuttable. 357 NLRB 801, 805-06 (2011) (discussing *Fall River*). Accordingly, the Board imposed a

“successor bar” whereby an incumbent “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.* at 808. The minimum “reasonable period of bargaining” under the successor bar is six months, significantly longer than the time that had elapsed before the Company rejected the Union as its employees’ bargaining representative. *Id.*

The successor bar is similar to other well-established labor law “bars,” which are based on the principle that “a bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed.” *Id.* at 801 (quoting *Franks Bros. Co. v. NLRB*, 321 U.S. 702, 705 (1944)). Those bars preclude challenges to a union’s majority status at various critical junctures in the bargaining relationship, such as the periods immediately following the commencement of exclusive representation or the imposition of a bargaining order to remedy an employer’s unlawful refusal to bargain.⁵ *See id.* at 801 & nn.1-3, 803 & n.9 (noting other bar

⁵ For example, the Board, with court approval, applies a conclusive presumption barring challenges to a unions’ majority status after initial certification, *Ray Brooks v. NLRB*, 348 U.S. 96 (1954), and, as a remedy for unlawful refusal to recognize or

doctrines). In so doing, the bars “promote a primary goal of the [Act] by stabilizing labor-management relationships and so promoting collective bargaining, without interfering with the freedom of employees to periodically select a new representative or reject representation.” *Id.*

The Board in *UGL-UNICCO* reasonably found that successorship warranted an analogous bar. As the Board emphasized, the “basic fact” of successorship is that the bargaining relationship is “an entirely new one,” often originating in the “context where everything that the union has accomplished” with the predecessor employer “is at risk, if not already eliminated.” *Id.* at 806-07. For example, a successor may lawfully choose, on a non-discriminatory basis, which of the predecessor employees to keep and which to let go, reject any existing collective-bargaining agreement, and establish unilaterally all initial terms and conditions of employment, such as wages, hours, and benefits. *Id.* at 805. “In a setting where everything that employees have achieved through collective bargaining may be swept aside, the union must now deal with a new employer and, at the same time, persuade employees that it can still effectively represent them.” *Id.* In other

bargain, the Board precludes challenges to a union’s status for a reasonable period of time after the Board has issued a bargaining order against an employer, *Lee Lumber & Building Material Corp.*, 334 NLRB 399 (1996), *enforced*, 310 F.3d 209 (D.C. Cir. 2002). Moreover, the same day it decided *UGL-UNICCO*, the Board also reestablished its bar on challenges to majority status following an employer’s voluntary recognition of a union as employees’ bargaining representative. *See Lamons Gasket Co.*, 357 NLRB 739 (2011).

words, as the Supreme Court has long recognized, successorship places unions “in a particularly vulnerable position” just when employees may be “inclined to shun support for their former union.” *Fall River*, 482 U.S. at 39-40. Consequently, there is “no doubt that . . . the transition from one employer to another threatens to seriously destabilize collective bargaining, even when the new employer is required to recognize the incumbent union.” *UGL-UNICCO*, 357 NLRB at 805.

To ensure stability, the Board found, a successor-union bargaining relationship “must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed.” *Id.* at 806 (quoting *Franks Bros.*, 321 U.S. at 705). Because “[t]he stability that the Act seeks to preserve is the stability of the existing collective-bargaining relationship,” the “insulated period” of the successor bar “enables the union to focus on bargaining, as opposed to shoring up its support among employees, and to bargain without being ‘under exigent pressure to produce hothouse results or be turned out,’ pressure that can precipitate a labor dispute and surely does not make reaching agreement easier.” *Id.* at 807 (quoting *Ray Brooks v. NLRB*, 348 U.S. 96, 100 (1954)). An insulated period may also increase the incentives for a successor employer to bargain toward an agreement (because employees ultimately may repudiate the union as superfluous if their bargaining demands are satisfied), while decreasing the possibility of a successor delaying or subtly undermining the union in the hope that

the union's support will erode. *Id.* (citing *Ray Brooks*, 348 U.S. at 100). *See also Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 786 (1996) (presumption regarding union majority support “remove[s] any temptation on the part of the employer to avoid good-faith bargaining in an effort to undermine union support.”) (internal quotations omitted). Moreover, “[b]ecause the destabilizing consequences of a successorship transaction for collective bargaining are themselves, in part, a function of successorship doctrine, it seems reasonable for the law to seek to mitigate those consequences, as a ‘successor bar’ does.” *Id.*

In evaluating the merits of a successor bar, the Board rejected the notion that “an insulated period itself aggravates instability, if most employees no longer support the union.” *Id.* As noted, the stability the Act seeks to protect is that of the *existing* bargaining relationship. More importantly, although employee support for the union may fluctuate during the initial successorship period (as it often does during other critical junctures subject to insulated periods), “such fluctuations in employee sentiment are not inconsistent with stable bargaining so long as employees have a periodic opportunity to change or revisit their representation.” *Id.* The Supreme Court, the Board noted, has recognized that “presumptions [regarding majority support] are based not so much on an absolute certainty that the union's majority status will not erode, as on the need to achieve stability in collective-bargaining relationships.” *Auciello Iron Works*, 517 U.S. at 786

(internal citation omitted) (quoting *Fall River*, 482 U.S. at 38). “They address our fickle nature by enabl[ing] a union to concentrate on obtaining and fairly administering a collective-bargaining agreement without worrying about the immediate risk of decertification” *Id.* (internal quotation marks omitted).

Finally, the Board found “that a ‘successor bar,’ given the important statutory policies it serves, does not unduly burden employee free choice, because it extends (as do other insulated periods) only for a reasonable period of bargaining . . . ‘not in perpetuity.’” *UGL-UNICCO*, 357 NLRB at 808. The Board recognized that “[p]erhaps the strongest argument against a ‘successor bar’ is the burden that it places on the Section 7 rights of employees” to file a decertification petition with the Board or, to a lesser extent, to present an employer with a disaffection petition. *Id.* Accordingly, to “more appropriately balance the goals of bargaining stability and the principle of free choice,” the Board limited the successor bar doctrine in two important ways. *Id.* First, it narrowly defined a “reasonable period of bargaining.”⁶ In doing so, the Board explained that the bar’s six-month minimum duration is the approximate time required for employers and unions to reach a

⁶ Where a successor employer expressly adopts the existing terms and conditions of employment as a starting point for bargaining and makes no unilateral changes, the successor bar will be six months, measured from the date of the first bargaining session. *UGL-UNICCO*, 357 NLRB at 808. Where, as here, a successor has unilaterally established initial terms and conditions of employment before bargaining, the bar will be a minimum of six months and a maximum of one year, also measured from the date of the first bargaining session. *Id.*

renewal agreement, and the one year maximum is the same as the insulated period for a newly certified union. *Id.* Moreover, the Board determined that once the minimum six month period has lapsed, the burden is on the party invoking the successor bar to establish that a reasonable period of bargaining has *not* elapsed, using an established multifactor test. *Id.* Second, the Board made clear that the successor bar could not be combined with another conclusive presumption of majority support, the “contract bar,”⁷ to create overlong insulated periods during which a successor employer’s employees cannot reject union representation. *Id.*

B. The Board Reasonably Rejected the Company’s Challenges to the *UGL-UNICCO* Successor Bar

The Board reasonably rejected (D&O 2 n.3) the Company’s argument that it should overrule *UGL-UNICCO* and replace the successor bar with an immediately rebuttable presumption of majority status. As will be discussed, the Company’s challenges (Br. 12-31) to the successor bar—that the bar is not entitled to deference because it is the product of “flip-flopping,” conflicts with Supreme

⁷ Under the Board’s “well-established” contract bar, “for the life of a collective bargaining agreement the status of the union as exclusive bargaining representative may not ordinarily be questioned.” *NLRB v. Marine Optical, Inc.*, 671 F.2d 11, 16 (1st Cir. 1982). In *UGL-UNICCO*, the Board specified that “where (1) a first contract is reached by the successor employer and the incumbent union within the reasonable period of bargaining during which the successor bar applied, and (2) there was no open period permitting the filing of a petition during the final year of the predecessor employer’s bargaining relationship with the union, the contract-bar period applicable to election petitions filed by employees or by rival unions will be a maximum of 2 years, instead of 3.” *UGL-UNICCO*, 357 NLRB at 810.

Court precedent, and is contrary to Section 7—rehash arguments the Board addressed in *UGL-UNICCO* and found to be without merit. The Company’s challenge to the application of the bar in this case is equally unavailing.

As an initial matter, there is no merit to the Company’s assertion that the Board, having “repeatedly flip-flopped” on whether to impose a successor bar, “is not entitled to any deference by this Court.” (Br. 14.) As this Court has acknowledged, “pursuant to *Chevron*, an agency’s change in precedent is not invalidating if the agency adequately explains its reasons. The agency’s explanation must be accompanied by some reasoning that indicates that the shift is rational and, therefore, not arbitrary and capricious. [T]his is not a difficult standard to meet.” *River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 115 (1st Cir. 2009) (internal citations and quotation marks omitted).⁸ *See also FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514-16 (2009) (agency “need not demonstrate to a court’s satisfaction that the reasons for the new policy are *better*

⁸ The Company’s cases (Br. 14-15) are not to the contrary. *See, e.g., Bath Marine Draftsmen’s Ass’n v. NLRB*, 475 F.3d 14, 25 (1st Cir. 2007) (Board not entitled to normal deference on choice of standard where it inconsistently applied two alternative standards to similar facts); *Paintsmiths, Inc. v. NLRB*, 620 F.2d 1326, 1333 (8th Cir. 1980) (no deference to Board where it failed to explain departure from on-point precedent governing issue); *Local 777, Democratic Union Org. Comm., v. NLRB*, 603 F.2d 862, 870-71 (D.C. Cir. 1978) (Board not entitled to normal deference where it failed to address conflicting decisions on nearly identical facts). The quote the Company ascribes to *Yellow Taxi Co. of Minneapolis v. NLRB*, 721 F.2d 366 (D.C. Cir. 1983) (no deference where Board defied on-point governing circuit precedent), is not contained in that opinion.

than the reasons for the old one,” it need only provide “a reasoned analysis for the change”); *Kindred Nursing Ctrs. E., LLC v. NLRB*, 727 F.3d 552, 560 (6th Cir. 2013) (“An administrative agency may reexamine its prior decisions and may depart from its precedents provided the departure is explicitly and rationally justified.”) (citations omitted). There can be no serious question that the Board’s decision in *UGL-UNICCO* met that rational-basis standard.⁹

In deciding *UGL-UNICCO*, which overruled a 9-year-old decision rejecting a prior successor-bar doctrine,¹⁰ the Board explained that, “as prior Boards have recognized, whether to establish a ‘successor bar’ presents an important policy choice, a choice that cannot be resolved by parsing the words of the [Act], but which instead calls on the Board to consider the larger, sometimes competing, goals of the statute.” *UGL-UNICCO*, 357 NLRB at 804. The Board recognized its

⁹ The Company’s further argument (Br. 13), that a Board rule, in addition to being rational, must be supported by substantial evidence, quotes the Supreme Court’s *Fall River* decision out of context. As *Fall River* makes clear, it is the Board’s application of a rule to the facts of a particular case that must be supported by substantial evidence, not the adoption of the rule itself. See *Fall River*, 482 U.S. at 42; see also *McGaw of P.R.*, 135 F.3d at 7 (court will uphold Board’s reasonably defensible interpretations of the Act).

¹⁰ *UGL-UNICCO* expressly overruled *MV Transportation*, 337 NLRB 770 (2002), which had discarded the prior successor bar, established in *St. Elizabeth’s Manor, Inc.*, 329 NLRB 341 (1999). See *UGL-UNICCO*, 357 NLRB at 801. Because of the deference due to the Board, it is of no moment (Br. 24-25) that more than 30 years ago the Sixth Circuit rejected an earlier version of the successor bar in *Landmark International Trucks, Inc. v. NLRB*, 699 F.2d 815, 818 (6th Cir. 1983).

“evolving—and contradictory—jurisprudence” concerning the successor bar, *id.* at 802, and that Board decisions over nearly 40 years had exhibited “policy oscillation,” approving and then rejecting such a bar. *Id.* at 803. But it affirmed that “reevaluating doctrines, refining legal rules, and sometimes reversing precedent are familiar parts of the Board’s work.” *Id.* at 804. Indeed, “[t]o hold that the Board’s earlier decisions froze the development . . . of the national labor law would misconceive the nature of administrative decisionmaking.” *Id.* at 805 (quoting *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 265 (1975)).

Reviewing its successor-bar precedent, the Board in *UGL-UNICCO* found the earlier decisions “notable for their lack of clear and detailed analysis.” *Id.* at 805. And it noted that the case it overruled, *MV Transportation*, 337 NLRB 770 (2002), reflected an unacceptable, “reflexively negative reaction . . . to the possibility of doctrinal evolution,” rejecting the earlier successor bar as an aberration rather than allowing time to assess the effects of the bar. *UGL-UNICCO*, 357 NLRB at 805. The “better approach,” the Board reasoned, would be to give the successor bar a “fair trial” through analysis of its actual operation. *Id.* The Board in *UGL-UNICCO* determined to do just that and provided, as described above (pp. 12-18), a thorough justification for its reversal of *MV Transportation* and re-imposition of a successor bar, based on the policies of the Act and on the analogous use of other bar doctrines to promote those policies

under similar circumstances. The Board also noted that the rationale supporting the successor bar had grown even stronger since the last time it had imposed one in 1999, because “the number and scale of corporate mergers and acquisitions has increased dramatically over the last 35 years,” with “transactions resulting in successorship [becoming] far more common.” *Id.*

The Board in *UGL-UNICCO* also considered and rejected the argument that its decision to establish the successor bar was prohibited by Supreme Court precedent—and, in particular, by a footnote in *Fall River* that the Company cites (Br. 21-22) as requiring a rebuttable presumption of majority status in the successorship context. *Id.* at 806. As the Board explained, that footnote “was merely a description of the legal landscape at the time,” namely, 1987. *Id.* (citing *Fall River*, 482 U.S. at 41 n.8). In the footnote, the Supreme Court cited the Board’s then-controlling decision permitting a successor employer to challenge the incumbent union’s majority status and rejecting the successor bar. *See Fall River*, 482 U.S. at 41 n.8 (quoting *Harley-Davidson Transp. Co.*, 273 NLRB 1531 (1985)). The Court’s reference to *Harley-Davidson*, however, was not a part of its actual holding extending successorship to a new context; “[a]t most, the footnote implies that the rule of *Harley-Davidson* was a permissible interpretation of the statute . . . not . . . that the Board cannot adopt a different view.” *UGL-UNICCO*, 357 NLRB at 806.

As the *UGL-UNICCO* Board further reasoned, even if the passing footnote in the *Fall River* decision could be understood as prescriptive rather than descriptive, “a court’s prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.” *Id.* at 806 n.22 (quoting *Nat’l Cable & Television Commc’ns Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005)). The cursory footnote in *Fall River*, however, fails to satisfy that *Chevron I* standard because it speaks to neither of those requirements. *Id.*

Nor does the Company advance its claim by citing (Br. 21) *Burns*, in which the Supreme Court adopted Board and court case law establishing the case-specific factual requirements for a new employer to qualify as a “successor,” i.e., operational continuity and hiring predecessor employers as a majority of its workforce in the relevant bargaining unit. 406 U.S. at 274, 280. The Supreme Court explained that, if those requirements are met, “a mere change of employers or of ownership in the employing industry is not . . . an ‘unusual circumstance’” sufficient to rebut the “almost conclusive presumption” of majority status for the year following a union’s election and certification as bargaining representative. *Id.* at 279 & n.3 (holding successor employer must recognize union certified to represent predecessor’s employees four months earlier). It was not presented with,

and did not address, the question at issue here, of whether the presumption of an incumbent—but not newly certified—union’s majority status is immediately rebuttable after a transition from predecessor to successor employer.

The *UGL-UNICCO* Board’s reasoning and accompanying jurisprudence also resolve the Company’s remaining challenges to the bar. As discussed in detail above (pp. 11-12), during instances of successorship, both incumbent unions and employees find themselves in vulnerable positions. By promoting stability in incumbent collective-bargaining relationships during periods of destabilization, the successor bar serves labor law’s “overriding policy” of preserving industrial peace. There is thus no merit to the Company’s claim (Br. 18-19, 29) that the successor bar must be overturned because, by requiring employers to recognize and bargain with unions that lack majority support, it causes more instability than the absence of a bar. As also described above (pp. 16-18), the successor bar promotes stability without unduly interfering with employees’ freedom to periodically select a new representative or reject representation. For that reason, the Company cannot support its repeated contentions (Br. 22-24, 28-29) that the successor bar impermissibly elevates union rights (bargaining stability) over employees’ rights (freedom of choice) or is “wholly inconsistent” (Br. 22) with Section 7 because it—like all bars—promotes bargaining stability by temporarily preventing challenges to the presumption of majority status.

Finally, the Company’s “as applied” challenge (Br. 25-31) to the successor bar fails for the reasons its facial legal challenge does (pp. 18-24), and due to the Board’s rejection of the proffered disaffection evidence (pp. 27-35). Moreover, the Company misreads (Br. 30) the Court’s decision in *Big Y Foods, Inc. v. NLRB*, 651 F.2d 40, 41 (1st Cir. 1981), as categorically precluding the Board from employing conclusive presumptions. *Big Y Foods* was a unit-determination case, and the issue was whether the Board had abided by Section 9(b) of the Act, 29 U.S.C. § 159(b), which specifically requires the Board to decide “in each case” the appropriateness of a proposed bargaining unit. *Id.* at 44-46. That statutory mandate prohibits the Board from utilizing an irrebuttable presumption in making such a determination. *Id.* at 45-46. There is no such statutory prohibition governing the present case. And ample evidence supports the Board findings required to establish the violation in this case, i.e., that the Company was a successor employer and that it refused to recognize or bargain with the incumbent Union, consistent with Section 10 of the Act, 29 U.S.C. 160. Pursuant to the well-established presumption of majority support, the Board did not—and did not have to—make an independent finding regarding the Union’s majority status and, in light of the successor bar, the Board properly declined to entertain the Company’s challenge to that presumption.

Nor does the Company provide any supporting authority for its apparent contention (Br. 19-20) that it cannot be subject to the successor bar because it did not acquire Pumpnickel's Toyota Mansfield business through a merger or acquisition. Nothing in *UGL-UNICCO* suggests that the Board intended to limit the successor bar to successorship situations involving mergers or acquisitions, as opposed to any time an employer properly is found to be a successor under established precedent, namely, *Burns* and *Fall River*. To the contrary, the policy reasons supporting the successor bar apply equally in both scenarios because in both cases the advent of a new employer creates a critical juncture in the bargaining relationship.

Having "examined the Act and its express policy goals, Board precedent, and the Supreme Court's decisions with care," the Board in *UGL-UNICCO* reasonably determined that "reestablishing the 'successor bar' doctrine, as modified, will further the policies of the Act." *UGL-UNICCO*, 357 NLRB at 810. Because that decision is rational and consistent with the Act, the Board's application of the bar to the Company, an undisputed successor, was reasonable.

C. The Board Reasonably Rejected the Company's Reliance on the Signed Statements

Even if the rebuttable-presumption standard advocated by the Company replaced the governing successor bar, the Board reasonably found that, for two independent reasons, the Company nonetheless would be precluded from

successfully establishing its unfair-labor-practice defense that the Union had lost majority support.

1. The Company’s ongoing unfair labor practice tainted the signed statements

As the Board found, the Company’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.” (D&O 2 n.4.) That finding is consistent with precedent and supported by substantial—and largely indisputable—evidence.

The Board, with court approval, has long held that an employer’s ongoing unlawful refusal to recognize and bargain with an incumbent union presumptively taints any subsequent employee expression of disaffection with the union. *Lee Lumber & Bldg. Material Corp.*, 322 NLRB 175, 178 (1996), *enforced in relevant part*, 117 F.3d 1454 (D.C. Cir. 1997).¹¹ *See also Bradford Printer & Finishing, LLC*, 356 NLRB 899, 899-900 (2011) (successor employer’s ongoing refusal to bargain with incumbent union tainted employees’ subsequent disaffection petition); *Hampton Lumber Mills-Wash., Inc.*, 334 NLRB 195, 195-96 (2001)

¹¹ The Company incorrectly states (Br. 40) that the District of Columbia Circuit has rejected the Board’s *Lee Lumber* presumption. The two cases it cites predate that court’s decision enforcing *Lee Lumber*, which “specifically upheld the Board’s presumption that an employer’s unlawful refusal to bargain taints a subsequent anti-union petition.” *Harter Tomato Prods. Co. v. NLRB*, 133 F.3d 934, 939 (D.C. Cir. 1998).

(same), *enforced*, 38 F. App'x 27 (D.C. Cir. 2002); *accord Frankl v. HTH Corp.*, 650 F.3d 1334, 1361, 1365 (9th Cir. 2011) (relying on Board's presumptive-taint jurisprudence in affirming district court's injunction against employer pending ongoing Board proceedings). 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."¹² *Lee Lumber*, 322 NLRB at 178 (emphasis added).

¹² In its brief, the Company argues (Br. 38) that the presumption in *Lee Lumber* is invalid as a matter of law because it is not based on substantial evidence, is inconsistent with the Act, and is irrational. Before the Board, however, the Company only argued that had it satisfied the "unusual circumstances" exception to the presumption. (A. 454-55; *see also* A. 452.) Because it failed to challenge the presumption before the Board, and presents no extraordinary circumstances to excuse that failure, the Company cannot do so now. As noted (p. 10 n.4), the Court lacks jurisdiction, pursuant to Section 10(e) of the Act, to consider arguments not raised to the Board. 29 U.S.C. § 160(e); *Saint-Gobain Abrasives*, 426 F.3d at 459.

In any event, the Company's assertion that (Br. 39) that the presumption improperly "relieve[s]" the General Counsel of his evidentiary burden, is incorrect. While a presumption obviates the need for a party to establish some legal or factual element of his case, it applies only once the party establishes the requisite facts. Here, for example, the General Counsel established the relationship between the Union and Pumpernickel's employees, the Company's successor status (a two-part showing), and an unlawful refusal to bargain that was ongoing at the time the Company received employee statements of disaffection.

As noted, the Company does not dispute that it had an obligation, as Pumpnickel's successor, to recognize and bargain with the Union. The Union demanded recognition and bargaining on November 27, and the Company admittedly rejected that demand the same day. (A. 63-64, 66-68.) The Company's unlawful refusal to bargain was ongoing when, in early December, the Company received the signed statements, which bear employee signatures dated between December 6 and December 11. (A. 195-96, 382-86.) Based on those essentially indisputable facts, the Board reasonably found (D&O 2 n.4) that the signed statements presumptively were tainted by the Company's prior unlawful refusal to bargain and that, because "the [Company] never recognized and bargained with the Union, the presumption remains in place."

In passing, the Company asserts (Br. 40) that the unusual-circumstances exception to the *Lee Lumber* presumption of taint should apply because the Company was a successor to a bankrupt predecessor, which is "comparable" to accepted unusual circumstances. To the extent that claim is not waived by perfunctory briefing, *Snyder v. Colluru*, 812 F.3d 46, 53-54 (1st Cir. 2016) ("issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived"), the bankruptcy of a predecessor employer is entirely unlike the accepted unusual circumstances. Those exceptions, which are "construed narrowly," all concern circumstances affecting the identity of the union

or its relationship with unit employees, not the union's or successor's relationship with the predecessor employer. *Lee Lumber*, 322 NLRB at 178 n.24 (citing *Ray Brooks*, 348 U.S. at 98 (accepted unusual circumstances are the dissolution of a union; due to a schism, substantially all members transfer affiliation to new union; or unit's size fluctuated radically within a short time)).¹³

Accordingly, even if the successor bar were rebuttable, the Company would be precluded from relying on the tainted employee statements.

2. The Company failed to authenticate the signed statements, or offer other non-hearsay evidence

Finally, even setting aside the two applicable presumptions, the Company did not meet its evidentiary burden to show that the Union lost majority status. Under established Board law, an employer contesting an incumbent union's majority status bears the burden of demonstrating by a preponderance of the evidence that the union has actually lost the support of a majority of the bargaining unit employees. *Levitz Furniture Co. of the Pac., Inc.*, 333 NLRB 717, 717 (2001)

¹³ In light of the governing *Lee Lumber* presumption, a host of the Company's claims are irrelevant, including: the assertion (Br. 39) that there is no "evidence of an actual link" between its unlawful failure to recognize the Union and the employees' alleged disaffection; its related argument that there is "undisputed evidence" the disaffection arose before it attained successor status and was the Union's fault; and its claim that employees were unaware of its unlawful refusal to recognize the Union when they expressed disaffection. See *Hampton Lumber Mills*, 334 NLRB at 196 n.6 (presumption of taint applies "whether or not the employees actually know that the employer is unlawfully refusing to deal with the union") (citing *Lee Lumber*, 322 NLRB at 177).

(employer must show “the union’s actual loss of majority status”).¹⁴ The Company repeatedly invokes (Br. 25-26, 31, 33, 34) signed employee statements of disaffection in challenging the Board’s unfair-labor-practice and subsidiary findings, including the Board’s application of its established successor bar and presumption of taint. But the Board specifically found (D&O 2n.3) that, even untainted, those statements would be insufficient evidence to meet the Company’s burden; on their own, the statements only “suggested,” but did not prove, that a majority of unit employees no longer wanted union representation.

To carry its burden to show loss of majority support, an employer must present “objective” evidence. *Levitz*, 333 NLRB at 725. With regard to statements or petitions purportedly signed by employees, “[t]he Board has squarely held that where an employer relies on an employee petition for evidence of . . . a union’s loss of majority support, it is the [employer’s] obligation to authenticate the petition signatures on which it relies.” *Latino Express, Inc.*, 360 NLRB No. 112,

¹⁴ The courts of appeals—including the Sixth Circuit, despite the Company’s contrary suggestion (Br. 33 n.13)—uniformly have applied the Board’s rule in *Levitz*. See, e.g., *Pac. Coast Supply, LLC v. NLRB*, 801 F.3d 321, 329 (D.C. Cir. 2015); *Heartland Human Servs. v. NLRB*, 746 F.3d 802, 807 (7th Cir. 2014); *Frankl ex rel. NLRB v. HTH Corp.*, 693 F.3d 1051, 1060 (9th Cir. 2012); *NLRB v. HQM of Bayside, LLC*, 518 F.3d 256, 260 (4th Cir. 2008); *Vanguard Fire & Supply Co. v. NLRB*, 468 F.3d 952, 957 (6th Cir. 2006); *NLRB v. Seaport Printing & Ad Specialities Inc.*, 192 F. App’x 290 (5th Cir. 2006) (per curiam). See also *Grane Health Care v. NLRB*, 712 F.3d 145, 151 n.5 (3d Cir. 2013) (acknowledging *Levitz* as Board law).

2014 WL 2121499, at *25 (2014) (petition insufficient evidence of loss of majority where employer took no effort to authenticate signatures, and testimony at hearing authenticated only fraction of necessary number). *See also Ambassador Servs., Inc.*, 358 NLRB 1172, 1172 n.1, 1182 (2012) (petition insufficient evidence of loss of majority where authenticated signatures did not constitute majority of unit), *affirmed*, 361 NLRB No. 106, 2014 WL 6482780, *enforced*, 622 F. App'x 891 (11th Cir. 2015); *Flying Foods*, 345 NLRB 101, 103 (2005) (same), *enforced*, 471 F.3d 178 (D.C. Cir. 2006). *But see NLRB v. B.A. Mullican Lumber & Mfg. Co.*, 535 F.3d 271, 279 (4th Cir. 2008) (court determined that employer's evidence, including hearsay testimony and signed petition, was sufficient to establish loss of majority support because General Counsel provided no rebuttal evidence).

At the unfair-labor-practice hearing, the Company introduced only the employee statements (A. 382-86), which its general manager claimed he had received from an unnamed employee (A. 195-96). It neither authenticated any of the employees' signatures (A. 78-80, 166, 195-96), nor presented any other non-hearsay evidence (A. 167, 196)—such as employee testimony—demonstrating that the Union had, in fact, lost majority support. The Board therefore reasonably found the “unauthenticated [statements] insufficient to meet [the Company's] burden under *Levitz*.” (D&O 2 n.3.)

Before the Court, the Company asserts, for the first time, a host of challenges (Br. 31-36) to the Board's finding that the signed statements were insufficient evidence under *Levitz*. Under Section 10(e) of the Act, 29 U.S.C. § 160(e), "[n]o objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court," absent extraordinary circumstances. See *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982); *Bath Marine Draftsmen's Ass'n v. NLRB*, 475 F.3d 14, 24 (1st Cir. 2007). The statutory purpose underlying Section 10(e) is that a party must provide the Board with adequate notice of the basis of its objection, and thus the opportunity to respond, before the party may pursue it in court. See *NLRB v. Saint-Gobain Abrasives, Inc.*, 426 F.3d 455, 460 (1st Cir. 2005); *Alwin Mfg. Co. v. NLRB*, 192 F.3d 133, 143 (D.C. Cir. 1999). That is true even where, as here, the Board made a finding in addition to those of the administrative law judge; in that context, it was incumbent on the Company to file a motion for reconsideration if it believed the Board's decision contained material legal or factual errors. *Woelke & Romero Framing*, 456 U.S. at 665-66 (where party failed to raise issue prior to Board's decision, Section 10(e) bar applied because party subsequently could have raised issue to Board on motion for reconsideration); *Bath Marine*, 475 F.3d at 24 (absent adequate notice to Board prior to decision, courts of appeals lack jurisdiction to consider challenge to Board's *sua sponte* finding where a party fails

to move for reconsideration); *NLRB v. St. Regis Paper Co.*, 674 F.2d 104, 108 n.4 (1st Cir. 1982) (refusing to hear an argument that was not presented to the Board “either initially or via a motion for reconsideration”).

The Company did not raise any objection to the Board’s *sua sponte* finding that the lack of authentication prevented the Company from meeting its burden to show actual loss of majority support. (A. 452-56.) It failed to file a motion for reconsideration before the Board and, before the Court, presents no extraordinary circumstances to excuse that failure. Accordingly, the Court lacks jurisdiction to consider any such challenge, and the Board’s finding that the proffered statements were insufficient to satisfy the Company’s burden under *Levitz* stands unchallenged.

In any event, the barred claims would have no merit. In particular, the Company does not advance its cause by emphasizing (Br. 32, 34) the hearsay testimony of general manager Mark Walsh, which focuses primarily on employee unhappiness with Pumpnickel. (A. 187-92.) To the extent he recounted employee dissatisfaction with the Union, he did not testify to any specific number of disaffected employees, and thus his general testimony sheds no light on the dispositive issue of whether a *majority* of unit employees no longer supported the Union. In addition, the Company’s assertion (Br. 34) that the General Counsel should have adduced evidence that the signatures were not authentic ignores both

the applicable presumptions supporting the General Counsel's case and the fact that the burden was on the Company to authenticate its evidence in establishing its affirmative defense, as discussed (p. 32).

In sum, even under the rebuttable-presumption standard it advocates, which is not the law, the Company would be precluded from establishing its unfair-labor-practice defense pursuant to both *Lee Lumber* and *Levitz*. Accordingly, the Company has presented no basis to disturb the Board's well-reasoned finding that it violated Section 8(a)(5) and (1) of the Act by failing to recognize and bargain with the Union.

CONCLUSION

The Board respectfully requests that the Court enter a judgment enforcing the Board's Order in full.

Respectfully submitted,

/s/ Kira Dellinger Vol

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September 2016

**UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

NATIONAL LABOR RELATIONS BOARD)
)
 Petitioner)
) No. 15-2398
 v.)
) Board Case No.
 LILY TRANSPORTATION CORPORATION) 01-CA-118372
)
 Respondent)
)

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 8,480 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2010.

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Dated at Washington, DC
this 20th day of September, 2016

**UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

NATIONAL LABOR RELATIONS BOARD)	
)	
Petitioner)	
)	No. 15-2398
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LILY TRANSPORTATION CORPORATION)	01-CA-118372
)	
Respondent)	

CERTIFICATE OF SERVICE

I hereby certify that on September 20, 2016, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system.

I certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not by serving a true and correct copy at the addresses listed below:

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