

**United States Government  
National Labor Relations Board  
OFFICE OF THE GENERAL COUNSEL**

## Advice Memorandum

S.A.M.

DATE: November 9, 2011

TO : Rochelle Kentov, Regional Director  
Region 12

FROM : Barry J. Kearney, Associate General Counsel  
Division of Advice

SUBJECT: Ambassador Services, Inc. 347-4050-5000  
Cases 12-CA-26758, 12-CA-26759, 501-8444  
and 12-CA-26832 530-3000  
JD(ATL)-25-11 530-4075

The Region submitted this case for advice as to whether to argue in exceptions that the Board should apply retroactively the successor bar rule established in *UGL-UNICCO*.<sup>1</sup>

We conclude, in agreement with the Region, that it should seek retroactive application of *UGL-UNICCO* in this case because it would not cause "manifest injustice" to the Employer.

### **FACTS**

#### *Background*<sup>2</sup>

On March 22, 2002, the International Longshoreman's Association, Locals 1922 and 1359 (the Union), was certified as the exclusive bargaining representative of the longshoreman/porters working for Florida Transportation Services (FTS), which provided porter services to Disney Cruise Lines (DCL) at the Port Canaveral facility. After certification, the Union bargained with FTS for several years but was unable to reach a collective-bargaining agreement. During bargaining, the Union faced three decertification elections (August 6, 2003; July 19, 2007; and November 18, 2008), but was recertified each time and continued to serve as the exclusive bargaining representative for the duration of the relationship between FTS and DCL.

Ambassador Services, (the Employer) replaced FTS as the service contract provider for DCL on March 27, 2010.<sup>3</sup>

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<sup>1</sup> *UGL-UNICCO Service Co.*, 357 NLRB No. 76 (Aug. 26, 2011).

<sup>2</sup> A full description of the underlying facts in these cases is set forth in our previous Advice Memorandum, dated February 28, 2011.

After replacing FTS, the Employer hired a majority of the employees who formerly worked for FTS. The Employer has claimed that, during this transition, it was unaware that the FTS employees were represented by the Union, and it subsequently made several changes to the employees' initial terms and conditions of employment. The Employer additionally claims that it first became aware of the Union seven weeks later, on May 19, when the Union first demanded recognition and bargaining.

On June 2, the Employer replied to the Union's request, claiming that it had not been aware of the Union's prior relationship with the FTS employees before receiving the May 19 demand for recognition. The Employer further advised the Union that the Employer had received a notice of dissatisfaction "signed by 75%" of the employees, and that based on that showing of disaffection, the Employer would not recognize the Union. Thereafter, the Employer has consistently refused to recognize the Union, though it does not appear that it has made any further changes to employees' terms and conditions of employment.

In a prior Advice Memorandum in these cases, we concluded that the Employer had lawfully acted in setting the initial terms and conditions of employment. We further concluded that the disaffection petition was tainted by other unlawful conduct and therefore the withdrawal of recognition was unlawful.<sup>4</sup> The Region subsequently issued a consolidated complaint that was heard by Administrative Law Judge (ALJ) George Carson II on June 8, 2011. The issue of whether the Employer was a *Burns* successor was not litigated before the ALJ because the Employer had admitted that allegation of the complaint.

*Findings and Conclusions of the ALJ*

After the administrative hearing concluded and the parties submitted briefs, but before the ALJ issued his decision, the Board announced its decision in *UGL-UNICCO*.<sup>5</sup> In that representation case, the Board reinstated the successor bar doctrine, holding that the union was entitled to a "reasonable period of bargaining" before the Board would process an election petition from a competing union.<sup>6</sup>

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<sup>3</sup> All dates are in 2010, unless otherwise noted.

<sup>4</sup> *Ambassador Services, Inc.*, Cases 12-CA-26752 et al., Advice Memorandum dated February 28, 2011.

<sup>5</sup> 357 NLRB No. 76 (Aug. 26, 2011).

<sup>6</sup> *Id.* slip op. at 6, quoting *Lee Lumber & Building Material Corp.*, 344 NLRB 399, 402 (2001). In its opinion, the Board

In its decision, the Board indicated that it would "apply this new rule retroactively in representation proceedings," but left open the issue of whether it would apply the bar retroactively in unfair labor practice proceedings.<sup>7</sup>

On September 13, 2011, the ALJ issued his decision in the instant cases finding, in relevant part, that the Employer had committed numerous violations of Section 8(a)(1) that tainted the disaffection petition; that, in any event, the petition was not supported by a majority of the employees in the unit; and that the Employer therefore violated Section 8(a)(5) by withdrawing recognition from the Union. In his decision, the ALJ noted the Board's recent decision in *UGL-UNICCO* but declined to decide whether the successor bar should be applied retroactively to these pending cases.

The Employer has filed exceptions to the ALJ's decision, including challenges to his findings that the Employer unlawfully assisted the decertification effort and that the petition did not have majority support. The Employer has not, however, in its arguments to the ALJ or its exceptions to the Board, addressed whether the successor bar doctrine announced in *UGL-UNICCO* should be applied retroactively to this case. Nor has it attempted to rely on the lack of a successor bar in the law prior to *UGL-UNICCO*.

#### **ACTION**

We agree with the Region that it should seek retroactive application of the Board's decision in *UGL-UNICCO* to the facts of this case and that the successor bar should be argued as an alternative theory of employer liability.

The Board's "usual practice is to apply all new policies and standards to 'all pending cases at whatever stage.'"<sup>8</sup> The practice of "applying each pronouncement of a

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established some principles to determine when a "reasonable period of bargaining" has passed, including adopting a bright-line, six-month rule where the successor adopted the predecessor's terms and conditions of employment. However, after determining that the successor bar applied retroactively in this case, it then remanded the case to the Regional Director for further consideration.

<sup>7</sup> *Id.* slip op. at 8.

<sup>8</sup> *Levitz Furniture Co. of the Pacific*, 333 NLRB 717, 729 (2001), quoting *Deluxe Metal Furniture Co.*, 121 NLRB 995, 1006-07 (1958).

rule of law to the case in which the issue arises and to all pending cases in whatever stage is traditional and . . . the wiser course to follow.”<sup>9</sup> The “usual practice” of retroactive application will be abandoned, however, when it results in “manifest injustice.”<sup>10</sup> The Board utilizes the following three-factor test to determine whether retroactive application would result in “manifest injustice”: the reliance of the parties on preexisting law; the effect of retroactivity on accomplishment of the purposes of the underlying law which the decision refines; and any particular injustice to the losing party under retroactive application of the change of law.<sup>11</sup>

*Previous Retroactive Treatment of Successor Bar by the Board*

As a starting point, we note that the Board has retroactively applied both *St. Elizabeth Manor, Inc.*,<sup>12</sup> which initially established the successor bar, and *MV Transportation*,<sup>13</sup> which subsequently overruled *St. Elizabeth Manor* and removed the successor bar.<sup>14</sup> This includes retroactive application in the procedural posture of this case: where the hearing in the case closed before issuance of the decision whose retroactive application is being considered. For example, in *Hill Park Health Care Center*, the Board retroactively applied the successor bar to find that an employer had unlawfully withdrawn recognition from

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<sup>9</sup> *Deluxe Metal Furniture Co.*, 121 NLRB at 1006-07 (noting that prospective application of precedent “would create an administrative monstrosity”).

<sup>10</sup> *E.g.*, *Kentucky River Medical Center*, 356 NLRB No. 8, slip op. at 4-5 (Oct. 22, 2010).

<sup>11</sup> *E.g.*, *Wal-Mart Stores, Inc.*, 351 NLRB 130, 134 (2007); *SNE Enterprises, Inc.*, 344 NLRB 673, 673 (2005) (internal citations omitted).

<sup>12</sup> 329 NLRB 341 (1999).

<sup>13</sup> 337 NLRB 770 (2002).

<sup>14</sup> *E.g.*, *University Medical Center*, 335 NLRB 1318, 319, 319 n.7 (2001) (retroactively applying successor bar); *Hill Park Health Care Center*, 334 NLRB 328, 328 (2001) (same); *Inn Credible Caterers, Ltd.*, 333 NLRB 898, 898 (2001) (same); see *Aramark School Services, Inc.*, 337 NLRB 1063, 1063 n.1 (2002) (retroactively applying *MV Transportation*); *Williams Energy Services*, 340 NLRB 764, 764-65 (2003) (same).

the union.<sup>15</sup> In that case, the employer conceded that it was a *Burns* successor but argued to the ALJ that it lawfully withdrew recognition from the union based on a decertification letter signed by a majority of employees.<sup>16</sup> The ALJ disagreed and found that the employer had unlawfully withdrawn recognition based on conflicting evidence of union support.<sup>17</sup> In considering the employer's exceptions to the ruling, the Board agreed with the ALJ that the employer had acted unlawfully, but did so relying on the successor bar that was established after the ALJ had heard the case and issued his decision.<sup>18</sup>

In retroactively applying the successor bar in *Hill Park* and other cases after *St. Elizabeth Manor*, the Board did not even address whether the retroactive application would be manifestly unjust to the employer.<sup>19</sup> Thus, it appears that the Board would apply *UGL-UNICCO* retroactively in this case as a matter of course. Nevertheless, the Region should affirmatively argue that the Board should apply the successor bar in the present case, and that such retroactive application would not result in "manifest injustice" for the Employer.<sup>20</sup>

#### *Parties' Reliance on Preexisting Law*

In examining the reliance factor in the "manifest injustice" analysis, an important consideration is whether there is record evidence that the party relied on existing Board law in support of its actions.<sup>21</sup> For example, in *SNE Enterprises*, the Board found that retroactive application was appropriate in that case in part because there was "no evidence that the supervisors took [the previous] law into account before engaging in their conduct during an election campaign."<sup>22</sup> Another factor that will serve to discount

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<sup>15</sup> *Hill Park Health Care Center*, 334 NLRB at 328.

<sup>16</sup> *Id.* at 335.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 328.

<sup>19</sup> See *id.* The Board did not undertake a full, three-prong manifest injustice analysis in any of the cases cited *supra* note 14.

<sup>20</sup> E.g., *Wal-Mart Stores, Inc.*, 351 NLRB at 134 (analyzing propriety of retroactive application and declining to apply decision retroactively where it would lead to "manifest injustice.")

<sup>21</sup> *SNE Enterprises, Inc.*, 344 NLRB at 673.

reliance on pre-existing law is whether the party's actions were arguably unlawful even under pre-existing law.<sup>23</sup> In *Pattern Makers*, for example, the Board found retroactive application was proper because "the union did not enjoy complete certainty as to how it would fare under Board law when it fined [a member]."<sup>24</sup> Conversely, where there is clear evidence of reasonable reliance on well-established precedent, the Board will weigh that factor against retroactively applying the law.<sup>25</sup>

In the present case, the "reliance" factor weighs in favor of retroactive application. The Employer's conduct and legal arguments demonstrate that it did not withdraw recognition on the basis of established, pre-existing law. Like the employer in *Pattern Makers*, this Employer did not "enjoy complete certainty as to how it would fare under Board law" as its actions were, at least in the opinion of the ALJ who heard the case, unlawful even under pre-existing law. The Employer's lack of reliance is further demonstrated by the fact that it has never addressed the issue of the successor bar (or lack thereof) in any of its arguments to the Region, the ALJ, or the Board. The Employer's silence on this issue in its exceptions to the ALJD is particularly significant because the ALJD explicitly refers to the potential impact of the successor bar on the Board's disposition of this case. And even before the ALJD issued, the Employer had notice—or at least constructive notice—that the Board was soliciting amicus briefs on the issue of whether it should overturn *MV Transportation* and return to the successor bar rule,<sup>26</sup> bringing into question its unconditional reliance on the

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<sup>22</sup> *Id.* Similarly, in *Epilepsy Foundation*, the Board retroactively applied its newly announced decision in part because "there [was] absolutely no evidence in the record even remotely suggesting that the Respondent was relying on the state of Board law when it decided to take action." *Epilepsy Foundation of Northeast Ohio*, 331 NLRB 676, 679 (2000), *rev'd in rel. part*, 268 F.3d 1095 (D.C. Cir. 2001).

<sup>23</sup> *E.g.*, *Pattern Makers*, 310 NLRB 929, 930 (1993).

<sup>24</sup> *Id.*

<sup>25</sup> *E.g.*, *Walmart Stores, Inc.*, 351 NLRB at 134-35; *Dana Corp.*, 351 NLRB 434, 443-44 (2007).

<sup>26</sup> *UGL-UNICCO Service Co.*, 355 NLRB No. 155 (2010) (Board order granting review and inviting briefs from parties and interested amici to determine whether to modify or overrule *MV Transportation*).

lack of a successor bar.<sup>27</sup> Thus, there is no evidence that the Employer relied on the absence of a successor bar to justify its withdrawal of recognition from the Union.

*Effect of Retroactivity on Accomplishment of Purposes of Underlying Law Which Decision Refines*

Retroactive application of the successor bar to this case would further the interests that the Board in *UGL-UNICCO* sought to protect. A fundamental policy underlying the Act is to promote the stability of collective bargaining relationships.<sup>28</sup> The successorship situation presents special difficulties to the stability of collective-bargaining relationships, as the transition in employing enterprises is unsettling for both the union and employees:

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. As the Supreme Court recognized in *Fall River*, successorship places the union 'in a peculiarly vulnerable position,' just when employees 'might be inclined to shun support for their former union.'<sup>29</sup>

The Board in *UGL-UNICCO* sought to rectify these concerns by reinstating the successor bar, thus giving the union an opportunity "to exist and function for a reasonable period in which it can be given a fair chance to succeed" in bargaining with the successor employer.<sup>30</sup> In doing so, it also recognized the potential obstacles that the successor

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<sup>27</sup> See, *Allied Mechanical Services*, 351 NLRB 79, 80 n.6 (2007) (noting that criticism of standard in other areas of the law discounted employer's reasonable reliance on existing standard).

<sup>28</sup> *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 37-38 (1987); *Franks Bros. Co. v. NLRB*, 321 U.S. 702, 705 (1944); *Lammons Gasket Co.*, 357 NLRB No. 72, slip op. at 9-10 (Aug. 26, 2011); *St. Elizabeth Manor*, 329 NLRB 341, 344-45 (1999).

<sup>29</sup> *UGL-UNICCO Service Co.*, 357 NLRB No. 76, slip op. at 5, quoting *Fall River Dyeing and Finish Corp.*, 482 U.S. at 39-40.

<sup>30</sup> *Id.* slip. op. at 6, quoting *Frank Bros. Co.*, 321 U.S. at 705.

bar places on employees' Section 7 rights, but found that the bar "does not unduly burden employee free choice, because it extends (as do other insulated periods) only for a reasonable period of bargaining."<sup>31</sup>

The situation here presents precisely the scenario that the Board sought to ameliorate by re-establishing the successor bar. The Employer withdrew recognition only twelve days after receiving the initial demand for recognition from the Union, before the parties even had an opportunity to begin bargaining. Consequently, the important policy of labor relations stability was greatly impacted by the successorship transition in this case. And although employees' Section 7 rights arguably will be impacted by retroactive application of the successor bar, there is compelling evidence that employees never freely exercised these rights due to the Employer's accompanying unfair labor practices. Further, the Board in *UGL-UNICCO* noted that the impact on Section 7 rights is arguably lessened "when it prevents an employer from unilaterally withdrawing recognition from the union"—as happened in the present case—as compared to preventing employees from voting in a decertification election.<sup>32</sup> Based on these considerations, retroactive application of the successor bar to this case furthers the policy of labor management stability that the Board was seeking in *UGL-UNICCO*, without overly burdening employees' free exercise of their Section 7 rights.<sup>33</sup>

*Particular Injustice to Losing Party*

In considering whether retroactive application would lead to a particular injustice to a losing party, the Board recognizes that a losing party may have relied to some extent on the pre-existing rule and that this reliance may lead to some additional burden. However, reliance on existing law, by itself, is not enough to establish particular injustice for the losing party; some additional burden must be shown beyond mere reliance.<sup>34</sup> One important

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<sup>31</sup> *Id.* slip op. at 8.

<sup>32</sup> *Id.*

<sup>33</sup> See *Ameristeel, et al.*, Cases 5-CA-28402 & 5-CA-28432, Advice Memorandum dated April 4, 2000, at 24-25 (finding that where decertification effort occurred shortly after successor took over the predecessor's operations, retroactive application of similar successor bar would support the policies that the underlying decision, *St. Elizabeth Manor*, sought to refine).

<sup>34</sup> See *John Deklewa & Sons*, 282 NLRB 1375, 1389 (1987).

factor in determining whether the additional burden on the losing party rises to the level of particular injustice depends on the severity of the accompanying remedy for the unfair labor practice finding. The Board has found retroactive application imposes a particular injustice on the losing party when liability results in heavy monetary penalties or when retroactive application would severely destabilize existing collective bargaining relationships.<sup>35</sup> When there is no monetary liability associated with the corresponding unfair labor practice finding,<sup>36</sup> or when the accompanying remedy is for a limited duration,<sup>37</sup> the Board has typically not found any particular injustice. Another important factor the Board considers is whether the party has committed other, related unfair labor practices independent of those subject to retroactive application of the law.<sup>38</sup>

Here, retroactive application would not result in a particular injustice for the Employer. The Employer does not face any direct monetary liability, only a prospective bargaining order, as it has not made any unlawful unilateral changes.<sup>39</sup> Further, it will only be faced with

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<sup>35</sup> *Levitz Furniture Co. of the Pacific, Inc.*, 333 NLRB 717, 729 (2001)(finding retroactive application not proper, in part because employers who relied on existing law "could be liable for significant amounts of make-whole relief if we were to apply our new standard to pending cases."); *Dana Corp.*, 351 NLRB at 444 (finding retroactive application improper where it would "destabilize established bargaining relationships.")

<sup>36</sup> *SNE Enterprises*, 344 NLRB at 673-74; *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994).

<sup>37</sup> *John Deklewa & Sons*, 282 NLRB at 1389 (liability "must be borne only for the duration of the contract involved."); see *Electrical Workers IUE Local 444 (Paramax Systems)*, 311 NLRB 1031, 1042, *enf. denied*, 41 F.3d 1532 (D.C. Cir. 1994).

<sup>38</sup> *Epilepsy Foundation*, 331 NLRB at 679.

<sup>39</sup> The fact that the Employer has not made any significant unilateral changes after withdrawing recognition from the Union distinguishes this case from *Ameristeel, et al.*, Cases 5-CA-28402 & 5-CA-28432, Advice Memorandum dated April 4, 2000, where we found that the successor bar established in *St. Elizabeth Manor* should not be applied retroactively. In *Ameristeel*, the employer had made "numerous operational innovations" after withdrawing recognition, such that returning to the status quo would "severely disrupt operations" and lead to particular

such an order for a reasonable period of time. Finally, as the ALJ has found, this Employer has committed other unfair labor practices and is coming to the Board with unclean hands, a factor mitigating any particular injustice to this Employer.<sup>40</sup>

In these circumstances, the Board should rely on its default policy of retroactive application of its decisions. Analysis of all three of the factors considered in the "manifest injustice" test tilts in favor of retroactive application. There is little evidence of reliance on existing law by the Employer, and any reliance that occurred is countered by the Employer's other unlawful conduct. Retroactive application also furthers the policies of the underlying law, as this case presents the exact scenario which *UGL-UNICCO* was designed to address—labor instability during a successorship transition. Finally, the Employer in this case does not face any particular injustice, as it will only face a prospective bargaining order, not monetary liability.

Accordingly, in addition to opposing the Employer's exceptions, the Region should argue in cross-exceptions that the Board should apply *UGL-UNICCO* retroactively to this successor Employer because it would not result in a manifest injustice and that, pursuant to that decision, the Employer was barred from withdrawing recognition from the Union for a reasonable period of time.

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injustice for that employer. *Id.* at 27. In the present case, the Employer has not made significant operational changes, and thus would not face a similar injustice.

<sup>40</sup> *Compare, Epilepsy Foundation of Northeast Ohio v. NLRB*, 268 F.3d 1095, 1102-03 (D.C. Cir. 2001) (court denied enforcement of the Board's retroactive application of Weingarten rights to non-union employees in part because the employer would have to "pay damages to an employee who, without legal right, flagrantly defied his employer's lawful instructions.") (emphasis in original).