

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

DATE: June 9, 2014

TO: Jonathan B. Kreisberg, Regional Director  
Region 1

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

SUBJECT: Lily Dedicated Logistics  
Case 01-CA-118372

**Successorship Chron**  
530-4825-6700  
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This Section 8(a)(5) and (1) case was submitted to Advice on the question of whether the Board's reestablishment of the "successor bar" rule in *UGL-UNICCO Service Co.*<sup>1</sup> left a loophole by which a successor employer could avoid attachment of the successor bar by simply not recognizing the union. We conclude that regardless of when the successor bar begins, *Lee Lumber*<sup>2</sup> still dictates that a *Burns*<sup>3</sup> successor may not rely on employee disaffection arising after the employer unlawfully failed to recognize and bargain with the incumbent union.

FACTS

Prior to October 15, 2013,<sup>4</sup> Pumpnickel Express, Inc. ("Predecessor") provided driving delivery services to a Toyota plant in Mansfield, Massachusetts. The Predecessor's employees were represented by District Lodge 15, Local Lodge No. 447, International Association of Machinists and Aerospace Workers, AFL-CIO ("Union"). Around mid-October, the Predecessor declared bankruptcy, ceased operations, and terminated all employees. After two weeks, Toyota entered into a contract with Lily Dedicated Logistics ("Employer") to replace the Predecessor. Although the Employer initially staffed its operation from employees temporarily drawn from other work

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<sup>1</sup> 357 NLRB No. 76 (Aug. 26, 2011).

<sup>2</sup> *Lee Lumber & Building Material Corp.*, 334 NLRB 399 (2001), *enforced*, 310 F.3d 209 (D.C. Cir. 2002).

<sup>3</sup> *NLRB v. Burns Int'l Sec. Servs., Inc.*, 406 U.S. 272 (1972).

<sup>4</sup> All dates hereinafter are in 2013.

sites, the Employer soon hired a permanent staff, a majority of whom were bargaining unit employees for the Predecessor.

On November 27, the Union contacted the Employer and requested bargaining. The Employer replied that it was going “non-union,” and that it did not have to recognize the Union because the Predecessor had declared bankruptcy. Between December 6 and December 12, a majority of the Employer’s bargaining unit employees wrote letters indicating they no longer wished to be represented by the Union.

### ACTION

We conclude that the Employer has not fulfilled its obligation as a *Burns* successor to recognize and bargain with the incumbent Union. Accordingly, under *Lee Lumber*, the Employer must demonstrate that it has bargained with the Union for a reasonable period of time before it can challenge the Union’s majority status. Since the Employer has not bargained at all with the Union here, it has violated Section 8(a)(5) and (1).

Upon acquiring a business, a new employer has an obligation to bargain with the union that represented its predecessor’s employees if the new employer continues its predecessor’s business in substantially the same form and if a majority of its workforce was formerly employed by the predecessor.<sup>5</sup> The successor employer’s obligation to recognize the union attaches after the occurrence of two events: (1) a demand for recognition or bargaining by the union; and (2) the employment by the successor employer of a “substantial and representative complement” of employees, a majority of whom were employed by the predecessor.<sup>6</sup> If a successor employer fails to recognize and bargain with a union once these conditions have been met, it violates Section 8(a)(5) and (1) of the Act.<sup>7</sup>

Furthermore, it is well established that an incumbent union’s representative status cannot be lawfully challenged in an atmosphere of unremedied unfair labor practices that undermine employee support for the union.<sup>8</sup> An employer’s unlawful

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<sup>5</sup> *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 41 (1987); *Burns*, 406 U.S. at 279–81.

<sup>6</sup> *Hampton Lumber Mills-Washington*, 334 NLRB 195, 195 (2001) (quoting *Royal Midtown Chrysler Plymouth*, 296 NLRB 1039, 1040 (1989)).

<sup>7</sup> *Id.*

<sup>8</sup> *Lee Lumber*, 334 NLRB at 399.

failure to recognize or bargain is presumed to cause any employee disaffection from the union that arises during the course of the employer's unlawful conduct.<sup>9</sup> Absent unusual circumstances, the presumption can be rebutted only if the employer can show that the disaffection arose after it resumed recognizing the union and bargained for a reasonable period of time, without committing further unfair labor practices that would adversely affect bargaining.<sup>10</sup> This presumption applies whether or not the employees actually know that the employer is unlawfully refusing to deal with the union.<sup>11</sup> The Board has regularly applied these principles in *Burns* successorship contexts. Thus, when a successor employer violates Section 8(a)(5) and (1) by refusing to recognize an incumbent union, any employee disaffection arising after the successor obligation attaches is presumed to be caused by the refusal to recognize.<sup>12</sup>

In addition, under the successor bar reestablished by the Board in *UGL-UNICCO*, an incumbent union's representative status cannot be challenged until the successor employer has bargained with it for a reasonable period of time. Prior to being overturned in *MV Transportation*,<sup>13</sup> the successor bar commenced "once a successor employer's obligation to recognize an incumbent union attache[d]."<sup>14</sup> Thus, where a successor employer failed to recognize an incumbent union, the union's representative status could not be challenged both because of the unresolved unfair labor practice and because the successor bar attached when the bargaining obligation attached.<sup>15</sup>

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<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 399, 402 (noting that a "reasonable period of time" would be, at a minimum, six months).

<sup>11</sup> *Hampton Lumber Mills-Washington*, 334 NLRB at 196 n.6.

<sup>12</sup> See *Bradford Printing & Finishing, LLC*, 356 NLRB No. 109, at 2 (Mar. 25, 2011); *Sullivan Industries*, 322 NLRB 925, 926 (1997) (remanding case to ALJ to determine whether a majority of employee signatures on disaffection petition predated or postdated the date the successor obligation attached and employer refused to recognize).

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

<sup>14</sup> *St. Elizabeth Manor, Inc.*, 329 NLRB 341, 341 (1999).

<sup>15</sup> See *Hampton Lumber Mills-Washington*, 334 NLRB at 196 (holding that employee petition did not justify refusal to bargain because employee disaffection was presumably caused by refusal to bargain under *Lee Lumber*, and because union was

However, when the Board reestablished the successor bar in *UGL-UNICCO*, it stated that the successor bar commenced “when a successor employer acts in accordance with its legal obligation to recognize an incumbent representative of its employees.”<sup>16</sup> It further noted that the successor bar “will apply in those situations where the successor has abided by its legal obligation to recognize an incumbent union, but where the ‘contract bar’ doctrine is inapplicable.”<sup>17</sup> Therefore, a literal reading of *UGL-UNICCO* could be interpreted to mean that the successor bar only attaches once an employer has fulfilled its obligation to recognize the incumbent union, and would not apply where an employer has neglected to do so. Although the Board did not specifically address this issue in *UGL-UNICCO*, there is no reason to conclude that it intended to narrow the protections afforded by *Lee Lumber* in the successorship context. The Board in *UGL-UNICCO* was not confronted with a successor employer that had unlawfully refused to bargain; rather, the case concerned an employer that had fulfilled its legal obligations as a *Burns* successor. Thus, although the Board in *UGL-UNICCO* altered the *St. Elizabeth* successor bar by reducing the contract bar that follows certain successor bars from three years to two, there is no reason to believe that such a modification would also apply in the *Lee Lumber* context.<sup>18</sup>

In the present case, the Employer continued the Predecessor’s business virtually unchanged. Neither the Predecessor’s bankruptcy nor the two-week hiatus before the Employer took over are any reason to doubt the substantial continuity of business.<sup>19</sup> Here, the Union demanded bargaining on November 27, by which point the Employer had hired a substantial and representative complement of employees, almost all of whom were bargaining unit employees for the Predecessor. Therefore, the Employer’s

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entitled to a reasonable period of bargaining without challenge to its majority status under *St. Elizabeth*).

<sup>16</sup> 357 NLRB No. 76, at 1.

<sup>17</sup> *Id.* at 8.

<sup>18</sup> *See id.* at 10 (determining that this modification would mitigate the possibility that consecutive application of the successor bar and the contract bar might unduly burden employee free choice by leading to a prolonged insulated period).

<sup>19</sup> *See Fall River*, 482 U.S. at 45 (holding that a seven-month hiatus is only relevant if there are other indicia of discontinuity); *Sullivan Industries*, 322 NLRB at 925 (failing to ascribe any relevance to fact predecessor declared bankruptcy).

successor bargaining obligation attached on November 27, and the failure after that point to recognize and bargain with the Union violated Section 8(a)(5) and (1).

Furthermore, the Employer's failure to recognize the Union is not justified by the subsequent employee disaffection with the Union. The employees acted between December 6 and 12, after the Employer had already unlawfully refused to recognize the Union. Thus, as a matter of law, the Board presumes that the employee disaffection was caused by the Employer's unlawful conduct, regardless of whether the employees were even aware of the refusal.<sup>20</sup> Until the Employer can rebut that presumption by proving it has bargained with the Union for a reasonable period of time, it cannot rely on such shows of disaffection to withdraw recognition.<sup>21</sup> Since the Employer here has not bargained with the Union at all, it cannot rebut the presumption that the disaffection was caused by its own misconduct. Because the Union is already clearly immune to challenge under *Lee Lumber* due to the Employer's unfair labor practices, the Employer must demonstrate that it has bargained with the Union for a reasonable period of time before it can challenge the Union's majority status. Although the Union's majority status might, as discussed above, also be immune to challenge due to the successor bar, we need not reach that question here.

Because the Employer has not fulfilled its obligation as a *Burns* successor to recognize and bargain with the incumbent Union, it has violated Section 8(a)(5) and (1), and cannot rely on employee disaffection with the Union to withdraw recognition until it has bargained with the Union for a reasonable period of time. Accordingly, the Region should issue complaint, absent settlement.

/s/  
B.J.K.

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<sup>20</sup> See *Lee Lumber*, 334 NLRB at 399; *Hampton Lumber Mills-Washington*, 334 NLRB at 196 n.6.

<sup>21</sup> The Employer has not claimed any "unusual circumstances" that would otherwise rebut this presumption.