

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27**

SHAMROCK FOODS, INC.

Employer

and

Case 27-RD-260796

CURTIS THOMASON

Petitioner

And

**GENERAL TEAMSTERS WAREHOUSEMEN
AND HELPERS LOCAL 483**

Union

REGIONAL DIRECTOR'S DECISION AND ORDER

Shamrock Foods, Inc. (Shamrock) is engaged in distributing food products to institutional clients across the United States. Shamrock is an employer that took ownership and control of operations from Food Services of America, Inc. (FSA)—the predecessor employer—in October 2019.¹ Prior to Shamrock's assumption of FSA's operations, on March 21, 2019, General Teamsters Warehousemen and Helpers Local 483 (Union) was certified as the exclusive collective-bargaining representative of all full-time and regular part-time delivery drivers employed by FSA domiciled at its facilities located in Meridian and Twin Falls, Idaho, and Baker City, Oregon (Unit).²

¹ The parties stipulated that (1) the Union was certified as the majority collective-bargaining representative of the Unit at the time FSA controlled operations, (2) Shamrock acquired FSA's operations pertaining to the Unit employees in October 2019, and (3) a majority of Shamrock's delivery drivers employed in the Unit are former employees of FSA. (B. Exh. 2)

² The parties stipulated that when Shamrock offered employment to the two bargaining unit employees domiciled in Baker City, Oregon, those Unit employees declined employment and currently Shamrock does not employ any drivers in Baker City.

On May 26, 2020, the Petitioner, an Individual, filed a petition in Case 27-RD-260796 seeking to decertify the Union as the bargaining representative of the Unit. There are approximately 35 employees in the Unit.

A hearing officer of the National Labor Relations Board (Board) held a hearing in this matter on June 23 and 24, 2020. Shamrock, the Union, and the Petitioner fully participated in the hearing, and all parties waived their right to file post-hearing briefs.

The sole issue litigated at the hearing was whether the petition in this matter is barred under the Board's successor bar doctrine. Based on the record and relevant Board law, I find that the processing of the petition is precluded by the successor bar doctrine set forth in *UGL-UNICCO Service Company*, 357 NLRB 801 (2011). Thus, there is no question concerning representation, and I am dismissing the instant petition.

ISSUES AND POSITIONS OF THE PARTIES

On June 1, 2020, the Region issued a Notice to Show Cause to the parties, which requested argument concerning why the petition should not be barred by the successor bar doctrine in accordance with the Board's decision in *UGL-UNICCO Service Company*, 357 NLRB 801 (2011).³ Shamrock and the Petitioner filed responses arguing that *UGL-UNICCO* was incorrectly decided and should be overturned and that the bargaining-unit employees in this case should be afforded an opportunity to express their desires regarding continued representation by the Union. Shamrock also argues in its response that even if the successor bar was found to be applicable, the Board should decline to apply the bar mechanically and rather find that the Union has not met its burden to show that the status of the negotiations warrants such a bar. The Union did not submit

³ It was initially unclear to the Region whether Shamrock had implemented new terms and conditions of employment for the Unit when it took over the FSA operations in about October 2019. As noted *infra*, the record establishes that it did so.

any further argument in response to the Notice to Show Cause, but offered a written copy of its position at hearing, arguing that the Board's successor bar doctrine required dismissal of the petition.

FACTS

A. Union Commences Bargaining Initial Contract with FSA

The principal executive officer of Teamsters Local 670 and International Representative for the International Brotherhood of Teamsters, herein referred to as the Union's lead negotiator, was appointed as the lead negotiator on behalf of Local 483, in part because of his existing relationship with FSA in other contract negotiations. He testified that the first bargaining session between the Union and FSA took place around July 2019, at which time the Union presented its initial proposals to FSA. At some point, the Union was informed that another company, U.S. Food Service, Inc. (U.S. Foods), would be purchasing FSA and that negotiations with the Union would take place jointly between FSA and U.S. Foods. The lead negotiator for FSA continued to be the lead negotiator for the joint sessions with U.S. Foods, and the remaining members of the negotiating team on behalf of FSA also continued to represent both FSA and U.S. Foods. FSA and U.S. Foods further agreed to acknowledge all past tentative agreements made in prior negotiations between FSA and the Union.

The Union's lead negotiator testified that he attended seven or eight bargaining sessions with FSA and U.S. Foods, including negotiation sessions on September 5, 9, and 10, 2019. The Union had also agreed to meet with FSA/U.S. Foods on November 5 and 6, 2019, but those sessions were ultimately cancelled. While it is not entirely clear from the record, at that time the lead negotiator for FSA and U.S. Foods was required to travel and address a determination made by the Federal Trade Commission (FTC) that FSA and U.S. Foods would have to divest themselves

from three parts of the country, including in Meridian and Twin Falls, Idaho and Baker City, Oregon, in order for the merger to be completed. No agreement for an initial collective-bargaining agreement was ever reached between the Union and FSA/U.S. Foods.

B. Shamrock Acquires FSA's Operations and Recognizes the Union

Shamrock acquired FSA's operations relevant to this petition, in October 2019, and set its own terms and conditions for unit employees, including wages and benefits, as a condition of employment. Ultimately, the majority of the employees hired by Shamrock in the petitioned-for Unit were former employees of predecessor employer, FSA. In an email exchange dated November 13, 2019, Shamrock recognized the Union as the exclusive collective-bargaining representative, and the parties agreed to have their first bargaining session on December 4, 2019.

C. Shamrock and Union Commence Bargaining Initial Contract

At the commencement of negotiations on December 4, 2019, Shamrock took the position that it would not recognize any prior bargaining that had occurred with either FSA or U.S. Foods. Shamrock's negotiating team included its legal counsel as the lead spokesperson, the Human Resources Manager, and the Local Manager. Out of Shamrock's negotiating team, the Local Manager was the only person who had attended any sessions between the Union and FSA/U.S. Foods. The record did not reflect that Shamrock had any other existing collective-bargaining agreements with any labor organization.

The Union presented a comprehensive written proposal at the December 4 negotiations. Shamrock, for its part, proposed as a ground rule that until the parties had agreement on an entire article of the contract, there was no tentative agreement. On the other hand, once agreement was reached on an entire article, both parties were to sign a separate document setting forth the agreed-upon article. The parties did not come to an agreement on that ground rule proposal, as the Union

was of the view that whenever the parties were proposing identical language on a section or an article of the contract, there was a tentative agreement on that section or article.

The Union and Shamrock met again for bargaining on or about February 5 and 6, 2020, and both parties exchanged written proposals. The Union's lead negotiator testified that the Union did not reject any of Shamrock's proposals at the close of the session, but rather indicated the Union would consider the proposals. At the end of the February bargaining session, the parties agreed to meet again on March 24 and 25, 2020.

D. Negotiations Canceled Because of Coronavirus Pandemic

On March 11, 2020, Shamrock's legal counsel sent an email to the Union cancelling bargaining sessions previously scheduled for March 24 and 25, 2020 due to the Coronavirus pandemic and the health concerns of one of its bargaining representatives. The Union agreed to cancel the March 24 and 25, 2020 sessions. The parties also had bargaining sessions scheduled for April 21 and 22, 2020, which were cancelled due to a stay-at-home order in effect at the time in the State of Idaho, which precluded face-to-face meetings.

E. Petitioner Files Decertification Petition and Parties Continue Communications

The instant petition was filed on May 26, 2020. That same day, Shamrock's legal counsel sent an email to the Union's lead negotiator asking to postpone the parties' bargaining session previously scheduled for May 28, 2020, in light of the petition filed in the instant case. The Union's lead negotiator replied by email on May 27, 2020, agreeing to postpone the session.

On June 17, 2020, the Union's lead negotiator emailed Shamrock's legal counsel and requested a restatement of Shamrock's position in bargaining. Shamrock's legal counsel responded in an email with all of Shamrock's proposals included as attachments.

On June 18, 2020, the Union's lead negotiator emailed the Union's counterproposal to Shamrock's legal counsel. That email included several attachments where the Union had signed the tentative agreement form for many of the articles proposed by Shamrock. The email also included a description of which sections of Shamrock's proposals the Union agreed to and which sections would require further bargaining. The Union's lead negotiator also suggested commencing negotiations after the hearing in Case 27-RD-260796 closed.

On June 19, 2020, Shamrock's legal counsel sent an email response to the Union's lead negotiator with a signed attachment for a tentative agreement only as to Article 1. The email stated that Shamrock needed to revisit the other proposals and that they would need to cancel the videoconference previously scheduled for June 23, 2020 due to the NLRB hearing scheduled for the same day.

The Union's lead negotiator testified that he created a running document following his last interaction with Shamrock's legal counsel, which the Union entered into evidence during the hearing as Union Exh. 1. According to the witness, the document shows that there were some agreement on the inclusion and removal of certain language from the proposals being circulated by the parties. Articles 16-23 were economic terms and neither party had yet exchanged proposals on those articles as of the hearing. No parties claimed that negotiations had reached impasse.

I. ANALYSIS

A. **Applicable Legal Principles**

In *UGL-UNICCO*, the Board restored the "successor bar" doctrine, which had been overturned in *MV Transportation*, 337 NLRB 770 (2002). Under the successor bar doctrine, as previously enunciated in *St. Elizabeth Manor, Inc.*, 329 NLRB 341 (1999), when a successor

employer acts in accordance with its legal obligation to recognize an incumbent union, but where the contract bar doctrine is inapplicable, that union is entitled to represent the employees in collective bargaining with the successor employer for a reasonable period of time, not less than six months, without challenge to its representative status. *UGL-UNICCO Service Co.*, 357 NLRB 801, 808 (2011). The Board noted in *UGL-UNICCO* that “a bar creates a *conclusive* presumption of majority support for a defined period of time, preventing any challenge to the union’s status, whether by the Employer’s unilateral withdrawal of recognition from the union or by an election petition filed with the Board by the employer, by employees, or by a rival union.” 357 NLRB at 803. In imposing bars to elections in various contexts, the Board supports the principle that newly created bargaining relationships should be given a reasonable chance to succeed before being subject to challenge. *Lamons Gasket Co.*, 357 NLRB 739 (2011). Indeed, in *UGL-UNICCO*, *supra*, the Board noted the importance of promoting the stability of collective-bargaining relationships in the context of a successorship, where a change of employers could seriously destabilize collective bargaining, even where the new employer is required to recognize the incumbent union. *Id.*, citing *Franks Bros. Co. v. NLRB*, 321 U.S. 702, 705 (1944).

The Board's *UGL-UNICCO* decision refined the successor bar doctrine by defining the "reasonable period of bargaining" in which the incumbent union would be protected from challenge. In this regard, where an employer expressly adopts the predecessor's terms and conditions of employment, the reasonable period of bargaining will be six months measured from the date of the first bargaining meeting. The Board referred to this period as an “insulated period” and that the 6-month period was intended “to fix a bright-line rule for such cases.” *supra*, at 809. On the other hand, where an employer does not expressly adopt its predecessor's terms and conditions of employment, the reasonable period of bargaining can be extended beyond the

minimum six months, up to a maximum of one year, measured from the date of the first bargaining meeting between the union and the employer. In such cases, the Board will apply a multifactor analysis, as set forth in *Lee Lumber & Building Material Corp.*, 334 NLRB 399 (2001), to determine whether the initial six-month insulated period should be extended. *UGL-UNICCO*, *supra*, at 808-809. The factors considered in this analysis include: (1) whether the parties are bargaining for an initial contract; (2) the complexity of the issues being negotiated and of the parties bargaining processes; (3) the amount of time elapsed since bargaining commenced and the number of bargaining sessions; (4) the amount of progress made in negotiations and how near the parties are to concluding an agreement; and (5) whether the parties are at impasse. In *UGL-UNICCO*, the Board cited the determination in *Lee Lumber* that "[t]he burden of proof will be on the party who invokes the 'successor bar' to establish that a reasonable period of bargaining has *not* elapsed." 357 NLRB at 809.

B. Petition Filed Prior to Expiration of Minimum 6-Month Insulated Period

Because Shamrock ultimately hired as a majority of its workforce the Unit employees who worked for the predecessor employer, Shamrock complied with its obligation as a successor employer and recognized the Union on November 13, 2019. The parties agreed to meet to negotiate a first contract. The first bargaining meeting took place on December 4, 2019, which establishes that the petition filed on May 26, 2020 was filed within six months of the first bargaining date. Accordingly, the petition should not be entertained and should be dismissed because it was filed within the six-month minimum period required for negotiations under *UGL-UNICCO*.⁴

⁴ While the petition will be dismissed because it was prematurely filed prior to the expiration of the six-month minimum, since this petition was filed shortly before the minimum period for bargaining had expired, and that minimum period had elapsed prior to the hearing in this matter, I will also address the factors relevant to whether a sufficient period had elapsed *after* the six-month minimum, and prior to the hearing in this matter. The relevant factors set forth in *Lee Lumber & Building Material Corp.*, 334 NLRB 399 (2001), as applied to this case are as follows: (1)

C. Union Has Met Burden Showing Bar Should Be Extended

CONCLUSIONS AND FINDINGS

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. Upon the entire record in this proceeding, I find:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The parties stipulated and I find that Shamrock is engaged in commerce within the meaning of the Act, and that it will effectuate the purposes of the Act to assert jurisdiction herein.⁵
3. The parties stipulated and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.
4. No question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 2(6) and (7) of the Act.

there is no dispute that the parties are bargaining for an initial contract, which weighs against finding that a reasonable period to bargain had elapsed; (2) the issues being negotiated involve every aspect of the terms and conditions of employment as the parties have had no prior relationship and negotiations began afresh after Shamrock's takeover, which also weighs against finding a reasonable period for bargaining had expired; (3) the amount of time elapsed since bargaining commenced and the number of bargaining sessions have been limited to some extent by the extraordinary nature of the COVID-19 pandemic, weighing against a finding of a "reasonable period"; (4) the parties appear to have made some steady progress in negotiations, with multiple proposals being exchanged and some agreements being reached, but the economic issues remained to be discussed, which makes this a neutral factor; and (5) there is no evidence that the parties had reached impasse thereby suggesting that a sufficient time for bargaining had not elapsed. As such, the record establishes that, as of the dates of the hearing, the Union has met its burden to show, even if it were determined that the petition could not be dismissed on the grounds that it was filed shortly before the six-month period after the first bargaining session, that a reasonable period for bargaining had not yet elapsed.

⁵ The parties stipulated that Shamrock is an Arizona corporation with a facility and principal place of business in Phoenix, Arizona, and is engaged in the business of distributing food products to restaurants, healthcare facilities, and educational facilities across the United States. Within the past 12 months, a representative time period, Shamrock, in conducting its food distribution operations has purchased and received goods and services at its Phoenix facility valued in excess of \$50,000 directly from points outside the State of Arizona.

ORDER

Accordingly, **IT IS ORDERED** that the petition in Case 27-RD-260796 be, and it is, dismissed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67(c) of the Board's Rules and Regulations, you may obtain a review of this action by filing a request with the Executive Secretary of the National Labor Relations Board. The request for review must conform to the requirements of Section 102.67(d) and (e) of the Board's Rules and Regulations and must be filed by **August 11, 2020**.

A request for review must be E-Filed through the Agency's website and may not be filed by facsimile.⁶ To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Dated: July 28, 2020

/s/ Paula S. Sawyer

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⁶ On October 21, 2019, the General Counsel (GC) issued Memorandum GC 20-01, informing the public that Section 102.5(c) of the Board's Rules and Regulations mandates the use of the E-filing system for the submission of documents by parties in connection with the unfair labor practice or representation cases processed in Regional offices. The E-Filing requirement went into immediate effect on October 21, 2019, and the 90-day grace period that was put into place expired on January 21, 2020. Parties who do not have necessary access to the Agency's E-Filing system may provide a statement explaining the circumstances, or why requiring them to E-File would impose an undue burden.