DECISION AND ORDER

On December 22, 2021, Kerry Atkins (“Petitioner”) filed the original petition in this case with National Labor Relations Board (“Board”) under Section 9(c) of the National Labor Relations Act (“Act”), seeking to decertify Teamsters Local Union No. 135 (“Union”) as the exclusive collective-bargaining representative of approximately 33 production and maintenance employees employed by US Brick Holdings, LLC (“Employer”) at its facility in Mooresville, Indiana. The parties stipulated to the following unit of current employees (“Unit”):

Included: All production and maintenance employees, including all shale haul truck drivers and sample employees, employed by the Employer at its Mooresville, Indiana, plant and pit operations;

Excluded: All office clerical employees, maintenance engineers, technicians, professional employees, delivery truck drivers, and guards and supervisors as defined in the Act.

The Union asserts an election under the instant petition is barred by the Board’s successor-bar doctrine while the Employer and Petitioner contend the successor bar should not apply in the circumstances of this case or the successor bar is invalid.

As explained below, based on relevant Board law and the entirety of the record, and after careful consideration of the parties’ arguments and briefs, I find the Employer is a successor and

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1 I find that the stipulated Unit is coextensive with the existing bargaining unit as recognized in Art. 2.1 of the predecessor collective-bargaining agreement between the Union and General Shale. See Mo’s West, 283 NLRB 130, 130 (1987) (citing Campbell Soup Co., 111 NLRB 234 (1955)).
a reasonable period of time has not passed since it recognized and began bargaining with the Union; thus, the successor bar applies. Accordingly, I am dismissing the petition.

I. FACTS

The Employer manufactures, distributes, and sells brick and has a corporate office in Charleston, South Carolina. It operates four manufacturing facilities, including three with distribution yards and retail sales, in Alabama, Indiana, South Carolina, and Tennessee, and at least nine freestanding retail distribution yards throughout the United States. The Employer currently employs approximately 300 employees across its field operations.

The Unit employees at issue in the instant petition work in the Employer’s manufacturing facility in Mooresville, Indiana (“Mooresville Plant”).

Until November 16, 2021, the Unit employees were employed by predecessor employer General Shale Brick Inc. (“General Shale”). Most recently, the Union and General Shale were parties to a collective-bargaining agreement with effective dates from November 1, 2018, through October 31, 2021.2

On October 1, 2021, the Department of Justice (“DOJ”) filed a civil antitrust lawsuit to block General Shale’s acquisition of Meridian Brick LLC (“Meridian”) unless it divested certain assets. On October 6, 2021, General Shale agreed to the terms of DOJ’s divestiture settlement, including sale of the Mooresville Plant’s assets to the Employer.

Around October 20, 2021, the Union and General Shale agreed to a memorandum of agreement (“MOA”) extending their 2018-2021 collective-bargaining agreement from “October 31, 2021, to December 15, 2021, or until the effective date of the sale to US Brick [Employer], whichever is sooner.”3 Employer President Catherine Templeton testified that “there was no mention at the Department of Justice level or in the Asset Purchase Agreement of how [the Employer] would deal with” the collective-bargaining agreement between the Union and General Shale.

On November 14, 2021, Employer President Catherine Templeton emailed multiple Unit employees a letter announcing their termination from General Shale and immediate employment with the Employer under new terms and conditions, in relevant part.4

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2 The record indicates Unit employees have been represented by the Union or its predecessor, Teamsters Local Union No. 716 (which merged with the Union in 2015), since at least 1995.

3 The MOA in record evidence is signed and dated by only the Employer; however, Union Business Agent Rick Smith testified that the Union and Employer agreed to extend the contract.

4 Templeton testified that the letter was emailed to all General Shale and Meridian employees for whom she had addresses, and that she also texted the letter to multiple employees for whom she had phone numbers. The letter also announced employees would receive Thanksgiving turkeys.
First – of course you get Thanksgiving and the day after Thanksgiving off! US Brick loves fellowship and to give thanks.

- We want you to stay. Your employment with General Shale/Meridian will end tomorrow and you will immediately be hired by U.S. Brick. (Let somebody know if that doesn’t suit.)
- We will honor your pay. For all hourly workers, you will continue at the same base rate of pay you received from General Shale or Meridian. As part of US Brick, you will receive a direct deposit paycheck on Fridays.
  - If you are hourly, you will be paid every Friday.
  - If you are salaried, you will be paid every other Friday.
  - If you are in the middle of a training period or other transition, we will honor that time, too.
- Your new health insurance will be comparable. (We wanted to say, “just as good or better,” but the lawyers wouldn’t let us.) We will host an open enrollment for new benefits in December. At that time, you will receive information and a presentation to explain your benefits options and you will be entitled to select the health benefits plan that works best for you and your family.
- We are protecting your health insurance in the meantime. When your employment with General Shale/Meridian ends, they will terminate your health insurance, but we will auto enroll you in COBRA so you still have the exact same coverage through the end of the year.
- We don’t want you to pay more. We do not want you to start over with deductibles or pay traditional COBRA rates, so your health benefits will continue, unchanged, until the end of the year, at the same rate you currently pay. We will pay the rest.
- We are going to help you save for the future. We want to help you take care of yourself for a long time. We will match your first $2,000 in contributions dollar for dollar starting January 1. We also want everyone to share when we exceed our goals.
- Life is short. You should enjoy time away from work.
  - If you are new, you are eligible for 5 days of vacation after you have been a part of the group for 60 days.
  - If you have been here for a year, you are eligible to enjoy 10 days of vacation.
  - After giving 10 years to this cause, offering you 15 days a year is the least we can do.
  - And for those of you who know more about making bricks than all the rest of us, if you have supported this place for 20 years, you are eligible for 20 days of vacation.
- Lots of other stuff. We will offer you call-in pay, PPE allowance for shoes and glasses, life insurance, disability, dental, vision, 10% employee discount on products we make, $250 referral bonus for anyone you recruit who stays with us for 60 days, and an opportunity for an attendance bonus.

The Mooresville Plant Manager was to post the letter near the clock, where notices to employees are typically posted, on November 15, 2021. The record does not indicate whether the letter was posted.
On November 15, 2021, Union Business Agent Rick Smith emailed Employer President Templeton “for any updated details that maybe [sic] available on the finalized sale of the business.” The record does not reveal any response.

On November 16, 2021, the Employer closed on its asset acquisition of the Mooresville Plant. Business Agent Smith testified that all 33 of the Unit employees currently employed by the Employer were previously employed by General Shale. The Employer’s six supervisors were previously employed by General Shale, but the General Shale Plant Manager did not continue his employment with the Employer. All the witnesses agree there was no hiatus of operations and the Mooresville Plant continues to operate in basically the same manner as it did under General Shale.

On November 17, 2021, President Templeton and other Employer officials visited the Mooresville Plant, where the Employer held a barbecue for employees and distributed copies of the November 14 letter to employees.

Around 5:31 p.m. on November 22, 2021, Union counsel David Vlink emailed a letter to President Templeton demanding, among other things, the Employer recognize the Union as the representative of Unit employees and immediately meet with the Union to “set dates for bargaining a new collective-bargaining agreement.” Templeton replied the next day, November 23, 2021, requesting the names of Union members and the Union’s dues structure for payroll deductions and noting the Employer did not take ownership until November 16, 2021. She also stated she looked forward to speaking with Business Agent Smith “on all matters after Thanksgiving.”

President Templeton and Business Agent Smith both testified that they had a few conversations on the phone but the majority of their communications were over e-mail. The record does not indicate the dates of any phone calls. Both Templeton and Smith further testified that the Employer recognized the Union as the exclusive representative of the Unit employees.

On the morning of December 6, 2021, Business Agent Smith and President Templeton exchanged e-mails regarding contract negotiations. Specifically, Smith requested “a date and time to discuss the logistics of establishing a new agreement,” noting they had “previously discussed health benefits as priority need for the employees at the Mooresville facility this month,” while Templeton replied that she would “be in touch with some dates.” Smith asked if Templeton would be “available on the 15th for Benefit discussions.” Templeton answered: “We are headed to Mooresville December 15 with a pretty full day already planned, plus I would like to address the entire contract when we meet if you don’t mind?”

5 President Templeton and Plant Manager Alex Walls testified that a majority of the current Unit employees were previously employed by General Shale. Templeton further testified that she could not “say every single solitary [Unit] person” transferred employment from General Shale to the Employer but she did not dispute the possibility that every Unit employee currently employed by the Employer was previously employed by General Shale. Templeton further testified that the Mooresville Plant continued to operate on the same schedule as it had under General Shale until mid-January 2022, the time of the hearing.
On December 9, 2021, President Templeton emailed Business Agent Smith: “I just tried to leave you a message but your mailbox is full. Give me a call so we can get a date on the books before January 1 to bargain.” Smith did not immediately respond.

Business Agent Smith went to the Mooresville Plant on December 15, 2021, and attended a benefits presentation by the Employer. The presentation consisted of two sessions, one for each shift. The Union’s primary steward attended one session and its alternate steward attended the other session. Smith received an 11-page benefits guide, along with a cost comparison of the Employer’s 2022 benefits with predecessor General Shale’s benefits.

Smith testified that he also met with President Templeton on December 15, and the parties agreed to bargaining dates of January 25, 26, and 27, 2022. Templeton testified that she never agreed to bargaining dates, particularly January 25, 26, and 27 because she was already scheduled to bargain with a different union over a different unit of employees at a different plant.

On December 16, 2021, Business Agent Smith emailed President Templeton: “Thanks for the opportunity to meet you and your team prior to scheduling dates for negotiations after the Holidays. The presented 2022 Benefits Plan is better plan for the employees in comparison with the Benefits they did have. We appreciate your efforts on prompt enrollment to get those benefits in place. As we discussed, after the Holidays send the invites with location, dates and times the bargaining unit will be ready.”

The parties have not communicated since December 16, 2021.

On December 22, 2021, Petitioner filed the instant decertification petition.

The hearing officer denied questioning and evidence regarding an alleged disaffection petition received after the filing of the instant decertification petition. The Employer made an offer of proof that Plant Manager Walls would testify that, on January 7, 2022, he received a disaffection petition with signatures from 23 Unit employees, which were verified by the Human Resources Manager against completed I-9 forms. Neither the Employer’s offer of proof nor the record evidence indicates the language used on the alleged disaffection petition.

II. THE SUCCESSOR-BAR DOCTRINE

A. Board Law

An employer is a successor employer, obligated to bargain with its predecessor’s incumbent union, when there is “substantial continuity” of the employers’ business operations and a majority of the successor’s employees were employed by the predecessor. See Fall River Dyeing & Finishing Corp., 482 U.S. 27, 42–44, 46–47 (1987); NLRB v. Burns International Security Services, Inc., 406 U.S. 272, 280 fn. 4 (1972). However, a successor employer is not required to adopt its predecessor’s collective-bargaining agreement with the incumbent union and can set initial terms and conditions of employment unilaterally without first bargaining with the incumbent union, except in “instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit” and does not announce different initial terms at

Under the successor-bar doctrine, the Board will not process a petition for a reasonable period of time “in those situations where [a successor employer] has abided by its legal obligation to recognize an incumbent union, but where the contract-bar doctrine is inapplicable, either because the successor has not adopted the predecessor’s collective-bargaining agreement or because an agreement between the union and the successor does not serve as a bar under existing rules.” UGL-UNICCO Service Co., 357 NLRB 801, 808 (2011) (citing St. Elizabeth Manor, Inc., 329 NLRB 341 (1999); Crompton Co., 260 NLRB 417, 418 (1982); Bridgeport Brass Co., 110 NLRB 997, 998 (1954)). Thus, the Board’s successor 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.” Id. at 803 (italics in original). The reasonable period of time for which a petition is barred ranges from 6 to 12 months, depending on the following circumstances: (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.” Id. at 808–809 (citing Lee Lumber & Building Material Corp., 334 NLRB 399, 402 (2001)).

The successor bar, along with the Board’s other bar policies,7 “promote stability in collective-bargaining relationships, without impairing the free choice of employees” in furtherance of “[t]he overriding policy of the [Act, which] is ‘industrial peace.’” Fall River Dyeing, 482 U.S. 27, 38 (quoting Terrell Machine Co., 173 NLRB 1480 (1969), enfd. 427 F.2d 1088 (4th Cir. 1970), cert. denied, 398 U.S. 929 (1970); Brooks v. NLRB, 348 U.S. 96, 103

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6 A successor employer may also forfeit its ability to set initial terms and conditions of employment if it commits certain unfair labor practices during the transition from the predecessor. See Advanced Stretchforming International, Inc., 323 NLRB 529 (1997), enf’d in relevant part 233 F.3d 1176 (9th Cir. 2000), and its progeny.

7 Other bars include the statutory election bar in Section 9(c)(3) of the Act and the Board’s certification bar, both which prohibit processing a petition within 12 months of a valid Board election or certification, respectively. The Board’s contract bar prevents processing a petition during the term of a valid collective-bargaining agreement, up to a maximum of 3 years, except a petition will be processed if filed during the “open period” from 60 to 90 days before expiration of the agreement. Mountaire Farms, Inc., 370 NLRB No. 110, slip op. at 1 (2021) (citing General Cable Corp., 139 NLRB 1123, 1125 (1962); Leonard Wholesale Meats, Inc., 136 NLRB 1000, 1001 (1962)). For contracts involving healthcare institutions the 30-day window period begins 120 days and ends 90 days prior to contract expiration. See Trinity Lutheran Hospital, 218 NLRB 199 (1975). The recognition bar precludes processing a petition for “a reasonable period of time,” where an employer has voluntarily recognized a union based on a showing of majority support and notified the Board of the recognition, and a rival petition supported by 30 percent or more of the unit employees has not been filed within 45 days of the appropriate notice posting. Lamons Gasket Co., 357 NLRB 739 (2011); Sec. 103.21 of the Board’s Rules and Regulations. This 45-day notice posting requirement also applies to the bar quality of initial contracts between an employer and the union it voluntarily recognized. Sec. 103.21. A bargaining order by the Board or courts or a bargaining provision in a settlement agreement will also bar an election for a reasonable period of time. See, for example, Frank Bros., 321 U.S. at 705; Poole Foundry & Machine Co., 95 NLRB 34, 36 (1951), enf’d. 192 F.2d 740 (4th Cir. 1951), cert. denied 342 U.S. 954 (1952).
These bars to elections operate in furtherance of 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.” Franks Bros. Co. v. NLRB, 321 U.S. 702, 705 (1944).

B. Application of Board Law to This Case

The operative facts of the instant case are not in dispute. The Employer continued General Shale’s business virtually unchanged using a majority, if not all, of General Shale’s former employees. No party argues the Employer is not a successor to General Shale. Accordingly, I find the Employer is a successor to General Shale under Burns.

Prior to the filing of the instant petition, the Union demanded recognition as the Unit’s exclusive collective-bargaining representative, which the Employer granted, and the parties discussed bargaining dates for an initial collective-bargaining agreement. The Union maintains these uncontroverted facts satisfy the successor-bar requirements set forth in UGL-UNICCO, so the instant petition should be dismissed, while the Employer and Petitioner assert that the Board’s successor-bar doctrine should not apply under the circumstances of this case. Specifically, Petitioner argues there is no policy reason the successor bar should apply where, like here, a petition could have been timely filed in the period preceding successorship. The Employer further contends the successor bar arbitrarily places the Union in a more favorable position than if Petitioner had filed the instant petition prior to the Employer’s acquisition.

The Union is correct, and the Employer’s and Petitioner’s arguments are unavailing. Importantly, and contrary to the Employer’s contention, the Supreme Court has long recognized the Board’s authority to bar elections under circumstances other than the 12-month statutory election bar in Section 9(c)(3) of the Act. For example, the Court noted “the Board’s view that the one-year period should run from the date of certification rather than the date of election seems within the allowable area of the Board’s discretion in carrying out congressional policy.” Brooks, 348 U.S. at 104 (citing Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 192–197 (1941); NLRB v. Seven-Up Bottling Co. of Miami, Inc., 344 U.S. 344 (1953)). As discussed above, this acknowledgement by the Court stems from its longstanding recognition 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.” Franks Bros., 321 U.S. at 705.

The instant case falls squarely within the circumstances of the Board’s successor-bar doctrine. The Employer is a Burns successor and the bargaining relationship with the Union was rightfully established when the Employer fulfilled its legal obligation to recognize the Union as the exclusive representative of the Unit. In order for this relationship to be given a fair chance to

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8 To the extent the Employer and Union disagree about the purpose of the meeting on December 15, 2021, and whether the parties set bargaining dates, these facts do not bear on the existence of a successor bar. Rather, they affect the reasonable period of time a petition is barred, which is not at issue in this case since the instant petition was filed before the 6-month minimum elapsed.

9 No party has argued that the Employer did not recognize the Union or that Sec. 103.21 of the Board’s Rules and Regulations apply to this recognition, which, I note, is legally obligated and not voluntary.
succeed, the Board maintains a conclusive presumption of majority support for 6 to 12 months, depending on the particular circumstances. *UGL-UNICCO*, 357 NLRB at 808–809. Thus, even assuming the Employer recognized and commenced bargaining with the Union on its first day in the Mooresville Plant, the Board will not process a petition until May 17, 2022.

The Employer’s and Petitioner’s contentions that the successor bar inappropriately favors incumbent unions fail to acknowledge the bargaining relationship between a successor and labor organization, in this case the Employer and Union, is a new and different one from the relationship between the predecessor, in this case General Shale, and union. The *UGL-UNICCO* Board recognized this difference, noting “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.” Id. at 805. It explained that, “[i]n 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 … plac[ing] the union ‘in a peculiarly vulnerable position,’ just when employees ‘might be inclined to shun support for their former union.’” Ibid. (quoting *Fall River Dyeing*, 482 U.S. at 39–40).

Petitioner’s citation to *Fall River Dyeing* for the premise that a “union has a rebuttable presumption of majority status, [and] this status continues despite the change in employers” is misplaced. 482 U.S. at 41 (italics added). The Court in that case approved of the Board’s presumptions that were in place in 1987, more than a decade before the Board initially established the successor-bar doctrine in *St Elizabeth*10 (and which was reestablished by *UGL-UNICCO* in 2011), but did not hold that the presumption must be rebuttable. In fact, the First Circuit has held that the Board adequately justified its change from a rebuttable to an irrebuttable presumption under the successor-bar doctrine, and that the change does not categorically violate employees’ rights to choose or reject union representation. *NLRB v. Lily Transportation Corp.*, 853 F.3d 31 (1st Cir. 2017).

The Employer’s and Petitioner’s argument is that the Employer risks violating Section 8(a)(2) of the Act by continuing to recognize the Union because objective evidence shows it has lost majority support; however, this speculation fails for the same reason as the parties’ other contentions. As explained above, the Board has well-established conclusive presumptions of majority support, during which the Union’s status as exclusive representative cannot be challenged. In the instant case, the irrebuttable presumption under the successor-bar doctrine ranges from 6 to 12 months while this petition was filed less than 6 weeks from the Employer becoming a successor. *UGL-UNICCO*, 357 NLRB at 808–809.

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10 Its citation to *Randall Division of Textron, Inc. v. NLRB*, 965 F.2d 141, 148 (7th Cir. 1992), also predates the Board’s successor-bar doctrine. Further, the Board follows a “nonacquiescence policy” with respect to appellate court decisions that conflict with Board law, unless the Board precedent is reversed by the Supreme Court. See, for example, *D.L. Baker, Inc.*, 351 NLRB 515, 529 fn. 42 (2007); *Northcrest Nursing Home*, 313 NLRB 491, 496, fn. 24 (1993).
Despite the Employer’s and Petitioner’s policy arguments that the successor bar is unlawful or otherwise invalid and impinges on employee free choice, the undersigned has no authority to overrule or ignore what is clear Board precedent and policy.

Accordingly, I find an election in the Unit is barred under the successor-bar doctrine.

III. CONCLUSIONS

Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the Board. Based on 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 Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.\(^{11}\)

3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.

4. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

   **Included:** All production and maintenance employees, including all shale haul truck drivers and sample employees, employed by the Employer at its Mooresville, Indiana, plant and pit operations.

   **Excluded:** All office clerical employees, maintenance engineers, technicians, professional employees, delivery truck drivers, and guards and supervisors as defined in the Act.

5. No question concerning commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

\(^{11}\) The parties stipulated to the following commerce facts:

The Employer, US Brick Holdings, LLC, is a South Carolina limited liability company with a place of business located in Mooresville, Indiana, where it is engaged in the manufacture and sale of bricks. Since starting operations at its Mooresville, Indiana, facility, the Employer purchased and received at its Mooresville, Indiana, facility goods and materials valued in excess of $50,000 directly from points located outside the State of Indiana. During the last twelve months, a representative period, the Employer derived gross revenues in excess of $500,000.
IV. ORDER

Based on the Board’s successor-bar doctrine, an election in the Unit is barred. Thus, it is hereby ordered that the petition in this matter is dismissed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67(c) of the Board’s Rules and Regulations, you may obtain a request for review of this Decision by filing a request with Executive Secretary of the National Labor Relations Board. The request for review must conform to the requirements of Sections 102.67(d) and (e) of the Board’s Rules and Regulations and must be filed by February 24, 2022.

Pursuant to Section 102.5(c) of the Board’s Rules and Regulations, a request for review must be filed by electronically submitting (E-Filing) it through the Agency’s web site (www.nlrb.gov), unless the party filing the request for review does not have access to the means for filing electronically or filing electronically would impose an undue burden. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. 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: 2/9/2022

Patricia K. Nachand, Regional Director
National Labor Relations Board, Region 25
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