On April 13, 2022, Jaeson Goodwin (Petitioner) petitioned to decertify a unit of emergency medical technicians (EMT’s), paramedics, and office administrators employed by American Medical Response Ambulance Service, Inc. (the Employer) in Roswell, New Mexico (the Unit). The Unit is represented by the American Federation of State, County, & Municipal Employees, Council 18, Local 360, AFL-CIO (the Union).

A hearing concerning the petition was held before a Hearing Officer of the National Labor Relations Board (the Board) on May 11, 2022. The sole issue in dispute is whether there is a successor bar precluding the Board from conducting an election. The Employer argues that there is no bar, and the Union argues that there is a bar. The Petitioner did not file a brief or state his position on the record.

The parties were given the opportunity to present evidence and to state their respective positions on the record at the hearing. The Employer and the Union filed post-hearing briefs. Having carefully considered all evidence and arguments presented by the parties, I have determined that there is a successor bar, and I am, therefore, dismissing the petition.
I. STATEMENT OF THE FACTS

A. Bargaining History with Predecessor Employer

On August 4, 2014, the Union was certified by the Board as the exclusive collective-bargaining representative of the following employees of Superior Ambulance (Superior): all full-time and regular part-time EMT, EMT-B, EMT-I, EMT-P, and paramedics who are stationed at, or deployed out of Superior's Roswell, New Mexico facility; excluding all other employees, guards, managers, and supervisors as defined by the Act.\(^1\)

Around January 3, 2017, Superior and the Union entered into a Collective Bargaining Agreement (CBA), whereby Superior recognized the Union as the exclusive collective bargaining representative for “the work performed by all full-time and regular part-time Emergency Medical Technicians (EMTs), Paramedics, Office Administrators, performing under [Superior's] 9-1-1 contract with the City of Roswell, at, and out of, its facility located at 108 W. Deming St., Roswell, New Mexico and other related satellite facilities, excluding all other employees, guards, and supervisors as defined in the [Act].”

The CBA expired in January 2019 but was subject to an evergreen clause whereby it automatically renewed year-to-year until replaced. The Union and Superior continued to negotiate for a new CBA until around May 2021. The parties had reached tentative agreement on most articles and had a verbal understanding to maintain the status quo on economic provisions.

B. Successorship Timeline

Around October 2020, the City of Roswell, New Mexico (Roswell) released a “Request for Proposal” in connection with the exclusive rights to provide emergency transportation services to the local community. Both Superior and the Employer submitted bids to Roswell. Around January 14, 2021, Roswell convened a meeting to discuss the bids and contract award. Petitioner, the Union, and the Employer all attended the meeting. Joaquin Graham (Graham), Regional Director for New Mexico Operations for the Employer, who knew Superior’s employees were represented by a union, represented in the meeting that the Employer hoped to hire all of Superior’s employees. Roswell’s City Council approved the recommendation of a subcommittee to award the contract to the Employer.

On April 16, 2021, the Employer sent Superior employees a memorandum stating that it would hold Meet & Greet sessions with them on April 20 and April 21, 2021, so it could answer any questions. Petitioner, who was then local president of the Union, attended these sessions as an employee, but the Employer did not otherwise notify the Union of the sessions. On April 20, 2021, Petitioner emailed a copy of the Employer’s contract with Roswell to the Union. On May 6, 2021, Superior informed the Union that the Employer would take over operations on July 1, 2021. In May 2021, the Employer’s human resources team held meetings with individual

\(^1\) See NLRB Case No. 28-RC-131139.
Superior employees and provided employees with information about the benefits package it would offer employees. The Employer did not notify the Union of these meetings. Around June 20, 2021, the Employer offered employment to nearly all Superior employees. Around June 25, 2021, all offers had been accepted and the employees were officially hired by the Employer (approximately 18 to 21 employees). On July 1, 2021, the Employer commenced operations under its contract with Roswell. The Employer did not notify the Union of offers made to employees, acceptance of such offers, or commencement of operations, though Petitioner, who was then local president of the Union, observed these developments as an employee. The record does not reflect whether or how the Employer changed the terms and conditions of employment of employees in the Unit when it commenced operations.

In July or August 2021, Petitioner informed Union Staff Representative Joel Villarreal (Villarreal) that the Employer had hired a majority of Superior’s employees. Based on his communication with Petitioner, it was Villarreal’s understanding that the Employer was going to acquiesce to most of the Union’s CBA with Superior. Villarreal informed the Union’s Executive Director of the situation and was instructed to obtain documents relating to the Union’s representation of the Unit. Around September 2021, Villarreal realized all files related to his previous CBA negotiations and tentative agreements with Superior had been deleted. The Union maintained the files in a shared drop box within a folder that was deleted somehow. Between September and November 2021, Villarreal searched through old emails with Superior to obtain the deleted tentative agreements. Villarreal had to take time off work in November 2021 due to a death in the family and was off for a couple of weeks in December around the holidays. Villarreal fully restored the deleted data in late January or early February 2022.

C. Bargaining History with Employer

Prior to February 2, 2022, the Union and Employer did not engage in any communications. On February 2, 2022, the Union sent the Employer an email attaching a letter requesting to bargain and a copy of the tentative agreements it had negotiated with Superior. On February 4, 2022, the Employer responded by email, confirming that it had hired a majority of Superior’s employees in the Unit, recognizing the Union as representative of the Union, and acknowledging its obligations under the National Labor Relations Act (the Act) but declining to recognize or assume any obligation to continue the CBA, articles, or provisions the Union had with Superior.

Between February 5 and February 22, 2022, the Union and the Employer did not engage in any communication. On February 23, 2022, the Union sent an email to the Employer and stated that the Union’s local Staff Representative will handle the negotiations and will contact the Employer by the end of the month with proposed dates. Later that day, the Employer responded to the Union and stated it would reach out to its operations team about scheduling dates as soon as it receives the proposed dates from the Union. Around this time, the Union engaged in internal discussions about having its National representatives conduct the negotiations because the National had experience with the Employer. During the 49 days
between February 24, 2022, and when the petition was filed on April 13, 2022, the Union and the Employer did not engage in any communication.

II. ANALYSIS

A. Relevant Legal Precedent

Upon acquiring a business, a new employer is obligated to recognize and bargain with the incumbent union that represented the predecessor’s employees when there is “substantial continuity” between the predecessor and successor enterprises and when a majority of the employees of the new employer in an appropriate unit had been formerly employed by the predecessor. Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 41, 43, 46 n.12 (1987); NLRB v. Burns International Security Services, Inc., 406 U.S. 272, 279-81 (1972). A new employer who satisfies this test but refuses to meet its bargaining obligation violates Section 8(a)(5) of the Act. See Burns, 406 U.S. at 281.

The “substantial continuity” test hinges on the totality of the circumstances, including whether there is continuity of the business operation, products or services provided, plant, workforce, working conditions, supervision, and so forth. See Fall River, 482 U.S. at 43. The test focuses on these factors from the employees’ perspective (i.e., considering whether they would view their job situation as essentially unchanged despite the change in business enterprises). Id. at 43-44.

Once there is a substantial continuity of the employing enterprise, a successor’s bargaining obligation is established when the predecessor employees constitute a majority of the new employer’s workforce in a “substantial and representative complement.” Id. at 47. In determining whether a new employer has hired a substantial and representative complement, the Board and the courts examine whether the employer has substantially filled the unit job classifications designated for the operation, whether the operation was in substantially normal production, the size of the complement on the date of normal production, the time expected to elapse before a substantially larger complement would be at work, and the relative certainty of the expected expansion. Id. at 48-49. However, a successor employer is not required to adopt its predecessor’s collective bargaining agreement with the incumbent union, and, except where it is perfectly clear that the successor intends to retain all unit employees, a successor can set initial terms and conditions of employment unilaterally, without first bargaining with the incumbent union. Burns, 406 U.S. 272 (1972).

Under the successor bar doctrine, when a successor employer acts in accordance with its legal obligation to recognize the incumbent representative of its employees, that representative is entitled to represent the employees in collective bargaining with their new employer for a reasonable period, “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[]” UGL-UNICCO Service Company, 357 NLRB 801, 808 (2011) (returning, with modification, to the successor bar doctrine articulated in St. Elizabeth Manor2).

Whether a reasonable period has passed depends on the circumstances. In situations where the successor employer expressly adopts “existing terms and conditions of employment as the starting point for bargaining,” the period for which no questions concerning representation may arise is six months, “measured from the date of the first bargaining meeting between the union and the successor employer.” Id. at 809. In other situations when a successor employer does not expressly adopt the existing terms and conditions of unit employees’ working conditions the insulated period is a minimum of six months, but no more than one year, which is measured in the same fashion from the date of the first bargaining meeting. Id. The Board has interpreted this standard to mean that the bar may continue for more than one year from the point in time when the bargaining obligation attaches, whether through successorship or in the corollary recognition context, depending on the circumstances as the material marker in time is “the parties’ first bargaining meeting.”3 Americold Logistics, LLC, 362 NLRB 493, 495 n.8 (2015).

Determining whether the period has lapsed after six months in the latter situation, the Board applies the multifactor analysis set forth in Lee Lumber.4 UGL-UNICCO, 357 NLRB at 809. The multifactor analysis considers the following: “(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. (internal quotations omitted, citing Lee Lumber, 334 NLRB at 405). The party asserting that a reasonable period has not lapsed after six months bears the burden of proof. UGL-UNICCO, 357 NLRB at 809; Americold, 362 NLRB at 496 n.17.

However, under circumstances of “significant delay in the commencement of bargaining attributable to inexcusable procrastination or other manifestations of bad faith on the part of the bargaining representative,” 1 I may find it inappropriate to adhere to the usual rule of measuring the insulated period from the date of the first bargaining session. Cf. Dominguez Valley Hosp., 287 NLRB 149, 150 (1987) (adhering to the rule of measuring the insulated period from the time of the parties’ first bargaining session after an employer’s initial refusal to bargain). Further, the insulated period may not extend “in perpetuity.” UGL-UNICCO, 357 NLRB at 804, 808. (citing St. Elizabeth Manor). Rather, I must “balance the goals of bargaining stability and the principle of free choice” when considering whether a reasonable period of bargaining has lapsed to ensure the new bargaining relationship a chance to succeed. Id. at 807-09.

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3 In contrast, “the certification bar guarantees a 1-year insulated period in every instance.” Americold Logistics, LLC, 362 NLRB 493, 495-96 (2015).
B. Application of Relevant Legal Precedent

As discussed below, I find that there is a successor bar precluding an election in this matter because a reasonable period of bargaining between the parties has not elapsed, and I am therefore dismissing the petition.

The parties do not dispute whether the Employer is a successor under Burns, and I so find. The Employer hired Superior employees as a majority of employees in the Unit, as of about July 25, 2021. Further, the record shows a substantial continuity in the enterprises as the business of both entities is essentially the same and employees are performing the same type of work with the same or similar working conditions under contract for the City of Roswell. Accordingly, I find that the Employer is Superior’s successor and obligated to bargain with the Union.

As discussed above, as a successor, the Employer is obligated to bargain with the Union for a reasonable period of time, with the minimum length of bargaining being six months from the date of the first bargaining session. As discussed below, I find that the Union has met its burden in showing that a reasonable period has not lapsed in this matter, despite the Employer’s contention that the reasonable period should not be measured from the first bargaining session because the Union’s delay is inexcusable.

Here, the Union demanded recognition on February 2, 2022, and, in anticipation of the Employer acquiescing to the Union’s recently bargained tentative agreements with Superior, provided copies of the agreements. On February 4, 2022, the Employer expressly rejected the proposed terms or adherence to the expired CBA while recognizing its bargaining obligation. About two months later, the petition was filed before the parties scheduled their first bargaining meeting. Accordingly, I find that the minimum six-month period of bargaining has not lapsed, which bars an election in this matter.

The Employer urges me use discretion to deviate from the Board’s established successor bar doctrine. According to the Employer, the Union’s delayed demand for recognition, which was made approximately six months from when the Employer hired a majority of employees in the Unit, shows that the Union breached its duties and “never demonstrated any bona fide interest in representing the employees.” Er. Br. at 7-8, 12. I disagree. While it is troubling that the parties have not yet conducted a bargaining meeting, as discussed below, the record does not support a finding that the delay was caused by inexcusable procrastination or bad faith such as dilatory tactics.

Here, the Union presented testimony showing that the delay was attributed to a series of unintentional setbacks including the loss and subsequent retrieval of data that would be invaluable to the parties as they engage in first contract bargaining. While the Employer claims that the data was unnecessary to begin negotiating, the data encompassed the Union’s entire bargaining history with the predecessor employer, Superior. This type of information would allow the Union to formulate bargaining proposals consistent with the interests the Union was previously promoting on behalf of the Unit. Without these baselines, the Union would be forced
to formulate its proposals over wages and working conditions from scratch. Therefore, it was not unreasonable for the Union to pursue retrieval of these documents prior to demanding to bargain with the Employer. Once the parties meet to bargain, the prior tentative agreements should streamline the proposals between the parties. As such, the approximate three-month delay associated with the data loss cannot be attributed to bad-faith or inexcusable procrastination.

Further, the Union presented testimony showing that an additional month of the delay was caused by the Union representative and previous negotiator being unavailable due to a death in his family. I cannot find that the Union’s unavailability is inexcusable or attributed to bad faith in any way. I make the same finding regarding the weeks surrounding the holidays in December 2021. On balance, I find that although the parties have had a slow start, the delay is not rooted in bad faith such that I should deviate from the clear standard of measuring the reasonable period from the date of the first bargaining session, which has yet to occur. Shortly after the Union retrieved its data, it demanded recognition and sent the proposed tentative agreements. After that, the Union engaged in internal deliberations to determine who it would delegate to bargain the new contract with the Employer. Adhering to the Board’s standard will further foster stability with this new bargaining relationship that has experienced a rocky start to date. To give this new bargaining relationship a chance, the parties need a reasonable period of bargaining before a question can be raised concerning the Union’s representation of the employees in the Unit.

Moreover, Section 8(d) of the Act provides that the obligation to bargain collectively is “mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment[.]” (emphasis added). Since the Union demanded recognition and engaged in preliminary scheduling discussions internally and with the Employer, neither party followed through with scheduling. There is no evidence showing that the Employer complained about the delay or requested a certain bargaining date. Therefore, any arguments that the delay since the Union demanded to bargain is attributed to the Union on account of procrastination or bad faith are also misplaced. See Virginal Mason Med. Ctr., 350 NLRB 923, 924 (2007).

III. CONCLUSIONS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The rulings at the hearing are free from prejudicial error and are hereby affirmed.

2. The parties stipulated, and I so find, that the Employer is an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act.5

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5 The parties stipulated that the Employer, a Delaware corporation with an office and place of business in Roswell, New Mexico, is engaged in the business of providing emergency transportation and medical care, and, during the 12-month period prior to the filing of the petition, in conducting its business operations,
3. The parties stipulated, and I so find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

4. The parties stipulated, and I so find, the following employees of the Employer constitute a unit (the Unit) appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

Included: All full-time and regular part-time EMT basics, EMT intermediates, paramedic basics and office administrators who are stationed at or deployed out of the Employer's Roswell, New Mexico facility.

Excluded: All other employees, guards, managers and supervisors as defined in the Act.

5. Based on the evidence presented at the hearing, I find that no question concerning representation can be raised because a successor bar was in effect when the petition was filed.

IV. ORDER

IT IS HEREBY ORDERED that the petition in this matter is dismissed.

V. RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board’s Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 10 business days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board’s Rules and Regulations.

A request for review must be E-Filed through the Agency’s website and may not be filed by facsimile. 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, and must be accompanied by a statement explaining the circumstances concerning not having access to the Agency’s E-Filing system or why filing electronically would impose an undue burden. A party filing a request for review purchased and received at its Roswell, New Mexico facilities goods valued in excess of $50,000 directly from points outside the State of New Mexico and derived gross revenues in excess of $500,000.
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 at Phoenix, Arizona this 17th day of June 2022.

/s/ Cornele A. Overstreet
Cornele A. Overstreet
Regional Director