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NLRB Imposes “Successor Bar” and Defines a “Reasonable Period” for Bargaining

By Scott Summers and Brian Mosby

Included among the three major decisions issued by the NLRB to mark the end of Chairman Wilma Liebman’s term is one that will significantly affect the continuing majority status of incumbent unions in successorship situations. In *UGL-UNICCO Service Co.*, 357 NLRB No. 76 (Aug. 26, 2011), the Board reinstated the “successor bar” doctrine, a Board-manufactured principle under which a union is conclusively presumed to retain its majority status when the employees whom it represents become employed by a new employer that is a successor.

To reach this result, the Board overturned *MV Transportation*, 337 NLRB 770 (2002), and took steps to minimize the impact of the Supreme Court’s decision in *NLRB v. Burns International Security Services*, 406 U.S. 272 (1972). In *MV Transportation*, the Board declined to impose a successor bar, finding that to do so would promote the stability of a bargaining relationship to the exclusion of an employee’s Section 7 right to free choice of a union representative. The current Board found flaws in the rationale of *MV Transportation*, concluding that an employee’s Section 7 right to free choice is not unduly burdened by the successor bar for two reasons: (1) the important statutory policies served by a successor bar; and (2) the successor bar would continue only for a reasonable period of time, not indefinitely. In short, the Board’s decision in *UGL-UNICCO Service* places a greater value on the protection of an incumbent union than it did on the protection of an employee’s right to free choice under Section 7.

The successor bar doctrine applies (in pending representation cases and in future cases) where the successor employer has recognized an incumbent union, but the “contract bar” doctrine is inapplicable. In these situations, the incumbent union must be afforded a reasonable period of time for bargaining. During this reasonable period of bargaining, an employer, an employee, or a rival union may not challenge the incumbent union’s majority status. Additionally, the employer may not unilaterally withdraw recognition from the union based on a claimed loss of majority support, regardless of whether the incumbent union lost majority support before or after the reasonable period for bargaining began.

The Board also used this case to define the period of time that constitutes a “reasonable period of bargaining.” Where the successor employer “has expressly adopted existing terms and conditions of employment as the starting point for bargaining, without making unilateral changes,” the period is six months. Where the successor employer recognizes the union, but exercises its legal right to unilaterally establish initial terms and conditions of employment, however, the period is

not as easily determined. It could range from six months to up to one year, measured from the date of the first bargaining meeting between the union and the employer. The imposition of a longer period of time would depend on the application of a multifactor analysis.

The lone Republican on the Board, Brian Hayes, dissented. In his dissent, Member Hayes pointed out the fallacy of the Board's decision, arguing that in its effort to insulate union representation from challenge, the Board has developed a scheme that could foreclose an employee's right to raise an issue about the union's continuing representation for as many as four years. For example, if the successor employer exercises its legal right under *Burns* to set initial terms and conditions of employment different from those that existed under the predecessor employer, the reasonable period of bargaining – and thus the irrebuttable presumption of the incumbent union's majority status – could last for as much as one year. If the parties agree to a new collective bargaining agreement with a three-year term, the employees then would be barred from questioning the union's status during the life of the new three-year collective bargaining agreement. Thus, it could conceivably be four years before a question concerning majority status could be raised and employees could participate in an election with respect to the union recognized by the successor employer.

In light of this decision, successor employers have a decision to make. Is it worth a shorter "reasonable period of time for bargaining" to apply the terms and conditions of a collective bargaining agreement of which the employer was not a part as a starting point in negotiations? Or, does the employer implement its own terms and conditions of employment knowing there is the potential that employees will not be able to raise questions about the incumbent union for four years?

An employer that may become a successor employer should consult with experienced labor counsel to discuss how best to answer these questions and to evaluate fully the implications of the successor bar on the employer's transaction and business operations.

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