UGL-UNICCO Service Company *and* Area Trades Council a/w International Union of Operating Engineers Local 877, International Brotherhood of Electrical Workers Local 103, New England Joint Council of Carpenters Local 51, Plumbers and Gasfitters Union (UA) Local 12, and the Painters and Allied Trades Council District No. 35 and Firemen and Oilers Chapter 3, Local 615, Service Employees International Union. Case 1–RC–22447

August 26, 2011

DECISION ON REVIEW AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER, PEARCE, AND HAYES

The issue in this case is whether the Board should restore the "successor bar" doctrine, discarded in *MV Transportation*, 337 NLRB 770 (2002). Under that doctrine, when a successor employer acts in accordance with its legal obligation to recognize an incumbent representative of its employees, the previously chosen representative is entitled to represent the employees in collective bargaining with their new employer for a reasonable period of time, without challenge to its representative status. *St. Elizabeth Manor, Inc.*, 329 NLRB 341 (1999).

As we explain in *Lamons Gasket*, 357 NLRB No. 72 (2011), also decided today, analogous "bar" doctrines are well established in labor law, based on 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). These bar doctrines—including the "certification bar,"[1] and the "voluntary recognition bar,"[2]—promote a primary goal of the National Labor Relations Act by stabilizing labor-management relationships and so promoting collective bargaining, without interfering with the freedom of employees to periodically select a new representative or reject representation.[3]

Successorship situations, the by-product of corporate mergers, acquisitions, and other similar transactions, have become increasingly common in the last three decades.[4] And, as the Supreme Court has explained, regulatory agencies like the Board "are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile changing economy." *American Trucking Assns. v. Atchison T. & S.F. Ry. Co.*, 387 U.S. 397, 416 (1967). We are persuaded that restoring the "successor bar" doctrine better achieves the overall policies of the Act, in the context of today's economy, than does the approach of *MV Transportation*, supra, which has its origins in a bygone era and which fails to come to terms with the practical and legal dynamics of labor-law successorship.

However, while we reverse *MV Transportation*, we do not simply return to the rule of *St. Elizabeth Manor*, supra. Instead, we modify the "successor bar" doctrine announced there, to mitigate its potential impact on employees who might wish to change representatives or reject representation altogether. First, we define, for two different situations, the "reasonable period of bargaining" mandated by the "successor bar" doctrine. Second, we modify the "contract bar" doctrine to address a prospect raised in *MV Transportation*: that a challenge to the incumbent union's majority status by employees or by a rival union might be precluded for an unduly long period, should insulated periods based on the successor bar and the contract-bar doctrines run together.

I.

On August 27, 2010, the Board granted the Intervenor's request for review in this case, which asked the Board to reconsider *MV Transportation* and to return to the "successor bar" doctrine set forth in *St. Elizabeth Manor*. 355 NLRB No. 155. The case was consolidated for purposes of decision-making with *Grocery Haulers, Inc.,* Case 3–RC–11944.[5]

A.

On August 31, 2010, the Board issued a notice and invitation to file briefs, inviting the parties and amici to address some or all of the following questions:

> (1) Should the Board reconsider or modify *MV Transportation*?

[1] See *Ray Brooks v. NLRB,* 348 U.S. 96 (1954).

[2] See *Lamons Gasket,* supra.

[3] The Board also precludes any challenge to a representative's status for a reasonable period of time, after the Board has issued a bargaining order against an employer, as a remedy for unfair labor practices. See *Lee Lumber & Building Material Corp.*, 334 NLRB 399 (2001).

[4] See *MV Transportation*, supra, 337 NLRB at 783–784 (Appendices A & B to dissent) (table reflecting number of mergers, divestitures, and disclosed value, 1968–2000; chart reflecting merger and acquisition dollar value as percentage of Gross Domestic Product, 1968–2000).

[5] Although *Grocery Haulers*, supra, was consolidated with this case because it also raises successor-bar issues, we have decided to sever *Grocery Haulers* from this case for separate consideration, given other issues presented there.

(2) How should the Board treat the "perfectly clear" successor situation as defined by *NLRB v. Burns [International] Security Services*, 406 U.S. 272, 294–295 (1972), and subsequent Board precedent?

The parties were invited "to submit empirical and practical descriptions of their experience under *MV Transportation*."

The Council on Labor Law Equality (COLLE) and the National Right to Work Legal Defense and Education Foundation have filed amicus briefs urging the Board to continue to apply *MV Transportation*, as did the National Association of Manufacturers (NAM) and affiliated trade associations.[6]

Professor Kenneth G. Dau-Schmidt, the Service Employees International Union (SEIU), SEIU United Long Term Care Workers, Local 6434, and the American Federation of Labor and Congress of Industrial Organizations (AFL–CIO) have filed amicus briefs urging the Board to overrule *MV Transportation*.

The intervenor in this case, Firemen and Oilers Chapter 3, Local 615, SEIU, as well as the intervenor in *Grocery Haulers*, supra, Bakery, Confectionary, Tobacco Workers and Grain Millers, Local 50, have also argued for overruling *MV Transportation.*

Petitioner Area Trades Council filed a brief arguing that if *MV Transportation* were overruled, the Board's decision should be applied only prospectively.

[6] NAM was joined in its brief by the American Apparel & Footwear Association, the American Composites Manufacturers Association, the American Lighting Association, the Arizona Manufacturers Council, the Associated Industries of Missouri, the Association of Equipment Manufacturers, Capital Associated Industries, Inc., the Colorado Association of Commerce and Industry, the Employers' Coalition of North Carolina, the European-American Business Council, the Forging Industry Association, the Illinois Manufacturers' Association, INDA-Association of the Nonwoven Fabrics Association, the Industrial Fasteners Institute, the Industrial Truck Association, the International Housewares Association, the International Sign Association, the International Sleep Products Association, the Iowa Association of Business and Industry, the Jackson Area Manufacturers Association, the Kentucky Association of Manufacturers, the Metal Service Center Institute, the Michigan Manufacturers Association, the Motor & Equipment Manufacturers Association, the National Council of Textile Associations, the National Marine Manufacturers Association, the National Shooting Sports Foundation, the Nebraska Chamber of Commerce & Industry, the New Jersey Business & Industry Association, the Non-Ferrous Founders' Society, the North American Association of Food Equipment Manufacturers, North Carolina Chamber, the Northeast PA Manufacturers & Employers Association, the Ohio Manufacturers' Association, the Pennsylvania Manufacturers' Association, the Society of Chemical Manufacturers and Affiliates, the Steel Manufacturers Association, the Tennessee Chamber of Commerce & Industry, the Texas Association of Business, the Textile Care Allied Trades Association, and the West Virginia Manufacturers Association.

B.

The only issue presented in this case is whether to adhere to *MV* Transportation. No issues were litigated at the hearing before the Regional Director, who applied *MV Transportation*, and accordingly ordered an election, based on the petition filed by the Area Trades Council.

For purposes of our decision, we accept the facts of this case as stated in the offer of proof made by Intervenor Firemen and Oilers at the hearing. The Employer, UGL-UNICCO Service Company, a successor employer, is a maintenance contractor at various locations throughout Massachusetts, including the State Street Bank facilities in Quincy, Boston, Back Bay, Westborough, and Grafton. The Petitioner, Area Trades Council, seeks to represent 33 employees in the stipulated unit, found appropriate by the Regional Director, of building engineering and maintenance employees employed at the State Street Bank facilities.

For over 20 years, Intervenor Firemen and Oilers had represented employees employed by the Employer's predecessor, Building Technologies, Inc. (BTE) at the locations involved in this case, under successive collective-bargaining agreements. The most recent such agreement was effective from April 23, 2007, to April 19, 2010. The Employer notified the Intervenor on February 27, 2010, that it was assuming BTE's operations and that it intended to offer employment to bargaining unit employees then working. (Ultimately, 32 of BTE's 33 employees were hired.) On March 5, 2010, the Employer and the Intervenor executed an agreement covering initial terms and conditions of employment and adopting (as modified) the remaining 29 days of the agreement between the Intervenor and BTE. The Employer and the Intervenor were in the process of negotiating a new collective-bargaining agreement until the petition in this case was filed on April 23, 2010.

II.

This case is best understood in its larger legal context, which includes both successorship doctrine and bar doctrines, as well as the Board's evolving—and contradictory—jurisprudence with respect to the issue presented here.

A.

The basic rules of labor-law successorship, as developed by the Supreme Court and by the Board, are well established.[7] A new employer is a successor to the old—and thus required to recognize and bargain with the incumbent labor union—when there is "substantial conti-

[7] For an overview of successorship law, see Robert A. Gorman & Matthew W. Finkin, *Basic Text on Labor Law* § 24.1(2d. ed. 2004).

nuity" between the two business operations and when a majority of the new company's employees had been employed by the predecessor. See *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 42–44, 46–47 (1987). The successor is not, however, required to adopt the existing collective-bargaining agreement between the predecessor and the union. *NLRB v. Burns International Security Services,* 406 U.S. 272, 287–291 (1972). Rather, except in situations where it is "perfectly clear that the new employer plans to retain all of the employees in the [bargaining] unit," the successor is free to set initial terms and conditions of employment unilaterally, without first bargaining with the union. *Burns,* supra, 406 U.S. at 294–295.[8]

Under current law, the change in employers does not affect the presumption that the union continues to enjoy majority support, which is rebuttable 1 year after the union has been certified by the Board. *Fall River*, supra, 482 U.S. at 36–41. The *Fall River* Court observed that the presumption is based on the "overriding policy" of the National Labor Relations Act, "industrial peace." Id. at 38. The presumption "further[s] this policy by 'promot[ing] stability in collective bargaining relationships without impairing the free choice of employees.'" Id. As the Court explained, the "rationale behind the presumptions is particularly pertinent in the successorship situation," because "[d]uring a transition between employers, a union is in a peculiarly vulnerable position." Id. at 39. Among other things, "[i]t has no formal and established bargaining relationship with the new employer." Id.

In turn, the "position of the employees" also calls for applying the presumption of majority support. 482 U.S. at 39. The *Fall River* Court observed that:

> [A]fter being hired by a new company following a layoff from the old, employees initially will be concerned primarily with maintaining their new jobs. *In fact, they might be inclined to shun support for their former union, especially if they believe that such support will jeopardize their jobs with the successor or if they are inclined to blame the union for their layoff and problems associated with it.* Without the presumptions of majority support and with the wide variety of corporate transformations possible, an employer could use a successor enterprise as a way of getting rid of a labor contract and of exploiting the employees' hesitant attitude towards the union to eliminate its continuing presence.

Id. at 40 (emphasis added; footnote omitted).

B.

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. As explained, the Board has imposed bars in a variety of contexts, with judicial approval.[9] They are based on the principle that, in the Supreme Court's words, "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*, supra at 702 (upholding Board's issuance of bargaining order to remedy employer's unlawful refusal to bargain with union, despite union's intervening loss of majority support).

In *Keller Plastics*, supra, decided in 1966, the Board applied this principle in the context of voluntary recognition. The "recognition bar" rule of *Keller Plastics* was a fixture of Board law for more than 40 years, until it was substantially modified by the Board in *Dana*, supra, which has now been overruled by the Board. See *Lamons Gasket*, supra.

C.

With little, if anything, in the way of rationale, the Board in *Southern Moldings, Inc.*, 219 NLRB 119 (1975), rejected the application of the "recognition" bar in the successorship context, permitting a decertification petition to proceed. Our case law since then has reflected what a leading scholar of the Board refers to generally as "policy oscillation."[10]

In *Landmark International Trucks*,[11] a unanimous 1981 unfair labor practice decision, the Board cited *Keller Plastics* in finding that a successor employer who had voluntarily recognized the union was prohibited from withdrawing recognition before a reasonable period of bargaining had elapsed.[12]

Landmark was reversed by *Harley-Davidson Co.*, 273 NLRB 1531 (1985). Adopting the view of the Sixth Cir-

[8] See *Spruce Up Corp.*, 209 NLRB 194 (1974) (establishing Board's current "perfectly clear" successorship test).

[9] For an overview of the Board's election, certification, and recognition bar doctrines, see Gorman & Finkin, *Basic Text on Labor Law*, supra, at § 4.8.

[10] Samuel Estreicher, *Policy Oscillation at the Labor Board: A Plea for Rulemaking*, 37 Admin. L. Rev. 163 (1985).

[11] 257 NLRB 1375 (1981), enf. denied in pertinent part 699 F.2d 815 (6th Cir. 1983)

[12] The *Landmark* Board could "discern no principle that would support distinguishing a successor employer's bargaining obligation based on voluntary recognition of a majority union from any other employer's duty to bargain for a reasonable period." 257 NLRB at 1375 fn. 4.

cuit, which had refused to enforce the *Landmark* decision, the unanimous *Harley-Davidson* Board rejected the analogy between the voluntary recognition and successorship situations, citing two differences. First, the bargaining relationship created by successorship is not voluntary, but legally imposed. Second, while successorship involves a new bargaining relationship between the union and the successor employer, the union has a preexisting relationship with at least a majority of the successor's employees. 273 NLRB at 1532. (*Harley-Davidson* was cited by the Supreme Court in *Fall River*, supra, but only in the course of describing existing Board law. 482 U.S. at 41 fn. 8.)

In *St. Elizabeth Manor*, supra, a 1999 decision, the Board reinstated the "successor bar." Rejecting the rationale of *Harley-Davidson* (and the Sixth Circuit in *Landmark*), the Board found crucial similarities between voluntary recognition and successorship, including the creation of a new collective-bargaining relationship between the union and the successor employer. 329 NLRB at 343. Drawing on the analysis of the Supreme Court in *Fall River*, supra, the Board described the "successor bar" as "intended to protect the newly established bargaining relationship and the previously expressed majority choice, taking into account that the stresses of the organizational transition may have shaken some of the support the union previously enjoyed." Id. at 345.

The *St. Elizabeth Manor* Board rejected the view, taken by the dissenting Board members, that the "successor bar" gave too little weight to employee freedom of choice, which it recognized as a "bedrock principle of the statute." 329 NLRB at 344. It cited the Board's contract-bar and certification bar doctrines as examples of similar attempts to strike a balance between the Act's sometimes competing policies of promoting stable collective-bargaining relationships and permitting employees periodically to freely choose or reject continued representation. Id. at 344–345. The crucial aspect of the balance struck by the "successor bar," the Board explained, was that the bar "extends for a 'reasonable period,' not in perpetuity." Id. at 346.

The rule announced in *St. Elizabeth Manor* was short-lived, surviving fewer than 3 years before it was reversed by a divided Board in *MV Transportation*, supra.[13] There, the Board concluded that the "successor bar" "promotes the stability of bargaining relationships to the exclusion of the employees' Section 7 rights to choose their bargaining representative." 337 NLRB at 773. The Board cited the possibility of a long period during which a union would be insulated from challenge, if the "contract bar" period under the predecessor employer was immediately followed by application of the "successor bar" and perhaps then another "contract bar," if the union and the new employer reached a collective-bargaining agreement. Id. Stability of bargaining relationships was sufficiently protected, the Board reasoned, by existing successorship rules requiring the new employer to recognize the incumbent union, absent evidence of a loss of majority support. Id. at 773–774. Embracing *Southern Moldings*, supra, the Board endorsed the distinction made there between the successorship situation and voluntary recognition: that the union has a preexisting relationship with the employees in the case of successorship. Id. at 774. The instability inherent in successorship situations might cause "anxiety" among employees, the Board acknowledged, but the impact on employees' support for the union was uncertain, and, regardless of the impact, the "fundamental statutory policy of employee free choice has paramount value, even in times of economic change." Id. at 775. Finally, the Board reasoned that other bar doctrines were simply not applicable in the successorship context. Id.

III.

As prior Boards have recognized, whether to establish a "successor bar" presents an important policy choice, a choice that cannot be resolved by parsing the words of the National Labor Relations Act, but which instead calls on the Board to consider the larger, sometimes competing, goals of the statute. Although the Board's decisions in *St. Elizabeth Manor* and in *MV Transportation* reached opposite conclusions, they agreed that the Board's proper task was to strike a balance between preserving employee freedom of choice and promoting stable collective-bargaining relationships.[14] That task is not always easy. Indeed, an observer might wonder why the *MV Transportation* Board did not simply leave well enough alone, or why we revisit the issue today, instead

[13] Chairman (then-Member) Liebman dissented. 337 NLRB at 776 (dissent).

[14] See *St. Elizabeth Manor,* supra, 329 NLRB at 344, citing *Stanley Spencer v. NLRB*, 712 F.2d 539, 566 (D.C. Cir. 1983); *MV Transportation*, supra, 337 NLRB at 772, citing same decision.

Amicus National Right to Work Legal Defense and Education Foundation argues that the Act's "paramount policy of promoting the free, uncoerced choice of employees to select or reject union representation" (Br. at 4–5) is analytically prior and superior to any policy of promoting stability in collective-bargaining relationships. Taken to its logical conclusion, as we explain more fully in *Lamons Gasket,* that view actually undermines employees' free choice by denying its effect for even a reasonable period of time. Moreover, that view simply cannot be squared with Supreme Court precedent. E.g., *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 785 (1996) ("The object of the National Labor Relations Act is industrial peace and stability, fostered by collective-bargaining agreements providing for the orderly resolution of labor disputes between workers and employers.").

of adhering to precedent. But reevaluating doctrines, refining legal rules, and sometimes reversing precedent are familiar parts of the Board's work—and rightly so, as the Supreme Court has explained:

> The use by an administrative agency of the evolutional approach is particularly fitting. To hold that the Board's earlier decisions froze the development . . . of the national labor law would misconceive the nature of administrative decisionmaking.
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> . . . .
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> "The constant process of trial and error . . . differentiates perhaps more than anything else the administrative from the judicial process."

NLRB v. J. Weingarten, Inc., 420 U.S. 251, 265 (1975), quoting *NLRB v. Seven-Up Bottling Co. of Miami*, 344 U.S. 344, 349 (1953).[15]

We disagree with the conclusion reached in *MV Transportation*, for reasons that we will explain. But we also disagree with the reflexively negative reaction of the *MV Transportation* Board to the possibility of doctrinal evolution. *MV Transportation* essentially sought to freeze the development of successorship doctrine as of 1975 (the year *Southern Moldings* was decided). The *MV Transportation* Board treated *St. Elizabeth Manor* as an aberration, when in fact our case law to that point had already wandered back-and-forth, in decisions that are notable for their lack of clear and detailed analysis. The better approach would have been to give the "successor bar" a fair trial, instead of declaring it error without analysis of its actual operation.

An "evolutional approach" (in the Supreme Court's phrase) to "successor bar" issues seems particularly prudent because the number and scale of corporate mergers and acquisitions has increased dramatically over the last 35 years. The *St. Elizabeth* Board recognized that fact,[16] as did the Board in *MV Transportation*,[17] where the majority remarked upon its failure "to see how this macroeconomic phenomenon should require, in any given successorship, that a particular unit of employees lose their right to choose to be represented or not."[18] 337 NLRB at 775. The significance of this "macroeconomic phenomenon," of course, is that it means much more is at stake in the Board's approach to successorship issues—and in getting it right. If transactions resulting in successorship are far more common, and if they indeed destabilize collective-bargaining relationships, then the need for the Board to evaluate its doctrines carefully, and to adjust them appropriately, is clear.[19]

IV.

There can be no doubt that, under existing law, 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. The new employer is free to choose (on any nondiscriminatory basis) which of the predecessor's employees it will keep and which it will let go. It is also free to reject any existing collective-bargaining agreement. And it will often be free to establish unilaterally all initial terms and conditions of employment: wages, hours, benefits, job duties, tenure, disciplinary rules, and more. In 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. As the Supreme Court recognized in *Fall River*, supra, successorship places the union "in a peculiarly vulnerable position," just when employees "might be inclined to shun support for their former union." 482 U.S. at 39–40.

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[15] The principle that a regulatory agency "must consider varying [statutory] interpretations and the wisdom of its policy on a continuing basis" is firmly established in modern administrative law. *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 863–864 (1984).

[16] 329 NLRB at 343 ("[M]ergers and acquisitions [are] commonplace, . . . with publicized downsizings, restructurings, and facility closings accompanying them . . .").

[17] 337 NLRB at 775 ("[T]he incidence of successorship in our economy has significantly increased since *Southern Moldings*."). A table and graph appended to the dissent in *MV Transportation* illustrate the phenomenon. Id. at 784–784. In 1975, merger and acquisition announcements numbered 2,297, with transactions valued at $11.8 billion (about 1 percent of Gross Domestic Product). In 2000, announcements numbered 9,566, with transactions valued at $1.3 trillion (about 14 percent of GDP). See Paul A. Pautler, *Evidence on Mergers and Acquisitions*, Federal Trade Commission Working Paper 243 at 58, 50 (Table 1 & Figure 2) (Sept. 25, 2001) (available at www.ftc.gov/be/econwork.htm). Mergers and acquisitions dropped following 2000, only to rise again, peaking in 2007, before another decline, which now seems over. United States merger and acquisition volume in 2010 was $822 billion. See Michael J. De La Merced & Jeffrey Cane, *Confident Deal Makers Pulled Out Checkbooks in 2010*, N.Y. Times (Jan. 3, 2011); Frank Aquila, *Conditions Are Ripe for an M & A Boom in 2011*, Bloomberg Business Week (Dec. 22, 2010). The contrast with the mid-1970s remains stark.

[18] A "successor bar" hardly means that employees "lose their right to choose," any more than do employees represented by a newly-certified union, a union that has been voluntarily recognized, a union that has negotiated a collective-bargaining agreement, or a union that has had its bargaining rights enforced by a Board order remedying an employer's unlawful refusal to bargain. After all, Congress itself created the certification bar in Sec. 9(c)(3).

[19] Indeed, amici on both sides of this case cite these changes in economic activity. For example, Amicus Council on Labor Law Equality, argues that the "expansion of merger and acquisition activity over the past few decades is all the more reason" to adhere to current law. Amicus Br. at 8. We address that argument below.

The question, then, is whether labor law's "overriding policy"—preserving "industrial peace" by "promot[ing] stability in collective bargaining relationships, without impairing the free choice of employees"[20]—is sufficiently promoted by only a *rebuttable* presumption that the union continues to enjoy support, which may be overcome at any time, permitting an employer to withdraw recognition from the union unilaterally, a rival union to file a representation petition, or employees to file a decertification petition. In our view, reinstituting the "successor bar" doctrine, with appropriate modifications, best serves the policies of the National Labor Relations Act. We accordingly reverse *MV Transportation*.

A.

We see no obstacle to our decision in the Supreme Court's rulings. The *MV Transportation* Board asserted that the Court, in *Fall River*, "endorsed the Board's position in *Harley-Davidson*," supra, rejecting the "successor bar." 337 NLRB at 771. That assertion reads far too much into a single footnote of the Court's decision.

The holding of *Fall River* was "that a successor's obligation to bargain is not limited to a situation where the union in question has been recently certified," but rather that "[w]here . . . the union has a rebuttable presumption of majority status, this status continues despite the change in employers." 482 U.S. at 41. In the course of reaching its holding, the Court described existing Board law at the time (1987), noting:

> If, during negotiations, a successor questions a union's continuing majority status, the successor "may lawfully withdraw from negotiation at any time following recognition if it can show that the union had in fact lost its majority status at the time of the refusal to bargain or that the refusal to bargain was grounded on a good-faith doubt based on objective factors that the union continued to command majority support." Quoting *Harley-Davidson, supra,* 273 NLRB 1531 (1985).

Id. at fn. 8.

This was merely a description of the legal landscape at the time,[21] i.e, the legal consequences of the holding in *Burns*, not a part of the Court's holding to extend *Burns* beyond the context of recent certification. At most, the footnote implies that the rule of *Harley-Davidson* was a permissible interpretation of the statute. But it does not suggest that the Board cannot adopt a different view.[22] As the *Fall River* Court went on to explain, the Board "is given considerable authority to interpret the provisions of the [National Labor Relations Act]," and "[i]f the Board adopts a rule that is rational and consistent with the Act, . . . then the rule is entitled to deference from the courts." Id. at 42.[23] That principle remains applicable when the Board changes its rules. See, e.g., *Weingarten*, supra, 420 NLRB at 265. See also *National Cable*, supra, 545 U.S. at 981–982 (explaining that *Chevron* deference applies when administrative agencies adequately explain reasons for reversal of policy).

B.

In line with *St. Elizabeth Manor*, we believe that the new "bargaining relationship . . . rightfully established" through an employer's compliance with successorship requirements "must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed." *Franks Bros.*, supra, 321 U.S. at 705. Under Board law, the same principle applies across a variety of settings, including the setting most like successorship: voluntary recognition of the union by the employer. The Board has now reaffirmed the "recognition bar," restoring a longstanding doctrine, first established in 1966. See *Lamons Gasket*, supra.

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[20] *Fall River*, supra, 482 U.S. at 38.

[21] The Board's rules for how a union's rebuttable presumption of majority support may be overcome have changed since *Harley-Davidson,* supra. Employers may no longer withdraw recognition from a union based simply on a "good-faith doubt" that the union has lost majority support; rather, an actual loss of support must be proven. See *Levitz Furniture Co. of the Pacific,* 333 NLRB 717 (2001).

[22] The Supreme Court has explained that a "court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *National Cable & Telecommunications Assn. v. Brand X Internet Services*, 545 U.S. 967, 982 (2005), citing *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Even if the footnote in *Fall River* describing existing Board doctrine could be understood as a holding, it certainly was not a holding that the then existing doctrine "follows from the unambiguous terms of the statute and thus leaves no room for agency discretion."

[23] For these reasons, we reject the argument of amicus Council on Labor Law Equality, endorsed by our dissenting colleague, that the "application of a 'successor bar' would be contrary to the Supreme Court's expectations when it developed the law of successorship in *Burns* and *Fall River Dyeing*." Amicus Brief at p. 7. Similarly, although our dissenting colleague is correct that the Court in *Burns* noted that holding a successor bound to the terms of its predecessor's contract would prevent withdrawal or recognition based on a good-faith doubt of majority support "during the time that the contract is a bar," 406 U.S. at 290 fn. 12, imposition of a successor bar has no such effect and the successor remains free under our decision today not to adopt the predecessor's contract or agree to a new contract so long as it bargains in good faith for a reasonable period of time. Had the Supreme Court held that, in the successorship context, unions were not entitled to even a *rebuttable* presumption of majority support, then the Board presumably would not be free to adopt a "bar" doctrine. But the Court held otherwise, and nothing in *Fall River* or *Burns* precludes the Board from instituting a "successor bar."

The *MV Transportation* Board distinguished successorship from voluntary recognition on the basis of the union's preexisting relationship with *employees*. 337 NLRB at 774. That distinction, however, does not come to terms with the basic fact of the successorship situation: that the *bargaining relationship* is an entirely new one. Moreover, as the *Fall River* Court recognized, the new relationship will often begin in a context where everything that the union has accomplished in the course of the prior bargaining relationship (including, of course, a contract) is at risk, if not already eliminated. This is, emphatically, a new bargaining relationship that should be given a reasonable chance to succeed. In the face of a clear demonstration of the union's inability to protect the status quo—a task made very difficult by successorship law—its preexisting relationship with employees would seem to be a secondary consideration for employees. Indeed, the *Fall River* Court observed that employees might "be inclined to shun support" for the union, whether from fear of the new employer or anger with the union. 482 U.S. at 40. The *MV Transportation* Board took a different view in arguing that the "environment of uncertainty and anxiety" created by successorship might well make employees *more*, not less, likely to support the union. 337 NLRB at 775. That view, which finds no support elsewhere in current law, seems implausible to us, because it supposes that employees will look for help to a source that has failed to protect them.[24]

Because the destabilizing consequences of a successorship transaction for collective bargaining are themselves, in part, a function of successorship doctrine, it seems reasonable for the law to seek to mitigate those consequences, as a "successor bar" does.

The *MV Transportation* Board also asserted that permitting a challenge to the union's status is *not* destabilizing and, indeed, that an insulated period itself aggravates instability, if most employees no longer support the union. 337 NLRB at 774. We disagree. The stability that the Act seeks to preserve is the stability of the existing collective-bargaining relationship, which an insulated period obviously protects. Employee support for the union may well fluctuate during the period following successorship, as it does during other, similar insulated periods, and a successor bar may, in turn, prevent changes in employee sentiment being given effect through an employee petition to the employer or through a Board election. But such fluctuations in employee sentiment are not inconsistent with stable bargaining so long as employees have a periodic opportunity to change or revisit their representation.

The Board's presumptions regarding union majority support, as the Supreme Court has observed,

> address our fickle nature by "enabl[ing] a union to concentrate on obtaining and fairly administering a collective-bargaining agreement" without worrying about the immediate risk of decertification and by "remov[ing] any temptation on the part of the employer to avoid good-faith bargaining."

Auciello Iron Works, Inc. v. NLRB, 517 U.S. 781, 786 (1996), quoting *Fall River*, supra, 482 U.S. at 38. An insulated period for the union clearly promotes collective bargaining. It enables the union to focus on bargaining, as opposed to shoring up its support among employees, and to bargain without being "under exigent pressure to produce hothouse results or be turned out," pressure that can precipitate a labor dispute and surely does not make reaching agreement easier. *Ray Brooks*, supra, 348 U.S. at 100. An insulated period also increases the incentives for successor employers to bargain toward an agreement. "It is scarcely conducive to bargaining in good faith for an employer to know that, if he dillydallies or subtly undermines, union strength may erode and thereby relieve him of his statutory duties at any time, while if he works conscientiously toward agreement, the rank and file may, at the last moment, repudiate their agent." Id.[25]

Amicus Council on Labor Equality argues that a "successor bar may present an obstacle to mergers or acquisitions of business that are otherwise likely to fail without

[24] Amicus Council on Labor Law Equality urges an additional distinction between voluntary recognition and successorship: "that there typically has not been any recent demonstration of majority support in a successorship situation." Amicus Br. at 6.

The rationale for bar periods, however, like the rationale for the presumptions concerning union majority support in general, does not depend on how recently a majority of employees designated or selected the union to represent them. They turn, rather, on the policy goal of preserving and promoting stable bargaining relationships. See *Fall River*, supra, 482 U.S. at 38 (rejecting argument that presumption of majority support in successorship context should apply only when union was recently certified).

Amicus National Association of Manufacturers makes a similar argument that because employees chose union representation under the predecessor employer, they should be free to reject representation "[w]hen a new and different entity . . . becomes the employer with a different financial situation and management team." Br. at 13. That argument proves too much, for if the union's majority status could be challenged whenever the employer's financial situation or management team changed, bargaining stability would be illusory. In any case, of course, employees will have the opportunity to reject the incumbent union when the temporary "successor bar" expires.

[25] These observations square with the Board's experience, and they are supported by social science theory and experimentation, as Professor Dau-Schmidt argues in his amicus brief here, drawing in part on his own prior work. See Kenneth G. Dau-Schmidt, *A Bargaining Analysis of American Labor Law and the Search for Bargaining Equity and Industrial Peace*, 91 Mich. L. Rev. 419 (1992).

the transaction." Amicus Br. at 10. But given the wide latitude permitted successor employers to reject existing collective-bargaining agreements and to unilaterally establish initial terms and conditions of employment, we fail to see why the successor bar presents a serious obstacle to saving failing businesses. The flexibility sought by amicus Council was given to prospective buyers by the Supreme Court in *Burns*. The Council's argument thus suggests that some purchasers act in reliance on the absence of a successor bar in the expectation that the instability created by the purchase will induce their employees to withdraw support from their existing representative. The argument is in tension with the established law of successorship itself and does not support continued application of *MV Transportation*. Indeed, taken to its logical conclusion, it suggests *Burns* should be overruled.

C.

Perhaps the strongest argument against a "successor bar" is the burden that it places on the Section 7 rights of employees, particularly when the bar prevents employees from filing an election petition with the Board, if less so when it prevents a successor employer from unilaterally withdrawing recognition from the union.[26] We agree with the *St. Elizabeth Manor* Board that "[e]mployee freedom of choice is . . . a bedrock principle of the statute." 329 NLRB at 344. We agree, as well, that a "successor bar," given the important statutory policies it serves, does not unduly burden employee free choice, because it extends (as do other insulated periods) only for a reasonable period of bargaining, which we further define below, "not in perpetuity." Id. at 346. To more appropriately balance the goals of bargaining stability and the principle of free choice, we take this occasion to refine the "successor bar" by defining the "reasonable period of bargaining" mandated by the bar and by modifying application of "contract bar" rules in successorship cases.

1.

We adopt the basic statement of the "successor bar" rule essentially as articulated in *St. Elizabeth Manor*. 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, 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.[27] In such cases, the union is entitled to a reasonable period of bargaining, 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; nor, during this period, may the employer unilaterally withdraw recognition from the union based on a claimed loss of majority support, whether arising before or during the period.

We will apply this new rule retroactively in representation proceedings, consistent with the Board's established approach.[28] The question of retroactivity in the context of an unfair labor practice proceeding is not presented here and may raise distinct issues.

2.

Neither in *St. Elizabeth Manor*, nor in later cases applying the "successor bar," did the Board precisely define a "reasonable period of bargaining."[29] We do so now, addressing two different situations and drawing on *Lee Lumber & Building Material Corp.*, 334 NLRB 399 (2001), a decision that postdates *St. Elizabeth Manor*, in which the Board defined a reasonable period of bargaining in the context of remedying an unlawful refusal to recognize and bargain with an incumbent union.[30]

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[26] As the Supreme Court has observed, the Board is "entitled to suspicion when faced with an employer's benevolence as its workers' champion against their certified union, which is subject to a decertification petition from the workers if they want to file one." *Auciello*, supra, 517 U.S. at 790.

[27] For example, an agreement of less than 90 days will not bar a petition, see *Crompton Co.*, 260 NLRB 417, 418 (1982), nor will an interim agreement that is intended to be superseded by a permanent agreement, see *Bridgeport Brass Co.*, 110 NLRB 997, 998 (1954).

[28] "[I]n representation cases, the Board has recognized a presumption in favor of applying new rules retroactively," which is "overcome . . . where retroactivity will have ill effects that outweigh 'the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles.'" *Crown Bolt, Inc.*, 343 NLRB 776. 779 (2004), quoting *Levitz,* supra*,* 333 NLRB at 729.

Petitioner Area Trades Council argues against retroactivity, citing the Board's decision in *Dana*, supra, which declined to apply a modification to the "recognition bar" retroactively. 351 NLRB at 443–444. *Dana* is easily distinguishable. As the *Dana* Board explained, retroactivity in that case would have destabilized many existing collective-bargaining relationships that were predicated on prior law. Id.

We see no such comparable ill effects here. It is true that some election petitions will be dismissed, and that the petitioners in those cases may have wasted some time and some effort (although those efforts might be recouped when the insulated period ends). Those consequences, however, are outweighed by the policies served by the "successor bar."

[29] In *St. Elizabeth Manor*, the Board explained that

> In determining whether a reasonable period has elapsed prior to the filing of a petition, the Board looks to the length of time as well as what has been accomplished in the bargaining. There is no specific cutoff; each case is determined on its own facts.

329 NLRB at 346.

[30] This analogy is apt because, as we explained above, if a successor refused to recognize the incumbent representative of its predecessor's

Lee Lumber held that the bargaining period in such cases is no less than 6 months, but no more than 1 year. The determination of whether a reasonable period had elapsed after 6 months depends on a "multifactor analysis, which considers '(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." 334 NLRB at 402. The burden is on the General Counsel to prove that a reasonable period of bargaining had not elapsed after 6 months. Id. at 405.

(a)

First, we address the situation where the successor employer has expressly adopted existing terms and conditions of employment as the starting point for bargaining, without making unilateral changes. The "reasonable period of bargaining" in such cases will be 6 months, measured from the date of the first bargaining meeting between the union and the successor employer.

In such cases, successorship remains a destabilizing situation, but the impact on the union and the employees it represents is significantly mitigated, because the new employer has accepted the collectively bargained status quo (if not the predecessor's contract, assuming one was in effect). Accordingly, a relatively shorter insulated period seems appropriate. Cf. *Road & Rail Services,* 348 NLRB 1160, 1162 (2006) (applying "perfectly clear" successor test and describing attendant "stabilizing factors, . . . [which] tend to temper the uncertainty occasioned by a change in ownership").

Fixing that period at 6 months is generally consistent with the Board's analysis in *Lee Lumber*, where the Board drew on its own experience and on data collected by the Federal Mediation and Conciliation Service (FMCS), to conclude that "a period of around 6 months approximates the time typically required for employers and unions to negotiate *renewal* collective-bargaining agreements." 334 NLRB at 402 (emphasis added). Negotiation of a renewal agreement is roughly comparable to the process of negotiating a first contract in a successorship situation where the new employer has expressly agreed to abide by existing terms and conditions of employment.

The 6-month period we establish is intended to fix a bright-line rule for such cases. That is, we will not apply the multifactor analysis of *Lee Lumber* in defining the "reasonable period of bargaining."

(b)

Second, we address the situation where the successor employer recognizes the union, but unilaterally announces and establishes initial terms and conditions of employment before proceeding to bargain. In such cases, the "reasonable period of bargaining" will be a minimum of 6 months and a maximum of 1 year, measured from the date of the first bargaining meeting between the union and the employer. We will apply the multifactor analysis of *Lee Lumber* to make the ultimate determination of whether the period had elapsed. One of those factors is "whether the parties are bargaining for an initial contract," 334 NLRB at 402, which will be the case, of course, in this successorship situation.[31] The burden of proof will be on the party who invokes the "successor bar" to establish that a reasonable period of bargaining has *not* elapsed.

In these cases, because the destabilizing factors associated with successorship are at their height, a longer insulated period is appropriate. The period we have chosen corresponds to the period adopted in *Lee Lumber*, which involved an employer's unlawful refusal to bargain. Six months, as explained, represents the approximate time required to reach a renewal agreement; 1 year is the length of the insulated period for newly-certified unions. *Lee Lumber*, supra, 334 NLRB at 402.

The situation here, of course, is not identical to that in *Lee Lumber*. The successor employer who makes unilateral changes has acted lawfully. But there is no reason to believe that the actual impact of these changes on the bargaining relationship and on employees is somehow lessened because they are legal. In *Lee Lumber*, the Board reiterated the view that

> "when a bargaining relationship . . . has been restored after being broken, it must be given a reasonable time to work and a fair chance to succeed" before the union's representative status can properly be challenged.

334 NLRB at 401 (footnote omitted). The successorship situation, too, represents a break in the prior collective-bargaining relationship between the incumbent union and the predecessor employer, a relationship restored by the

employees and was ordered to do so by the Board, *Lee Lumber* would apply.

[31] The *Lee Lumber* Board explained that "in initial bargaining, unlike in renewal negotiations, the parties have to establish basic bargaining procedures and core terms and conditions of employment, which may make negotiations more protracted than in renewal contract bargaining." 334 NLRB at 403 (footnote omitted).

operation of successorship doctrine, which imposes a bargaining obligation on the new employer.[32]

3.

In addition to defining the "reasonable period of bargaining," we make one further modification to bar doctrines in the successorship context. We hold that where (1) a first contract is reached by the successor employer and the incumbent union within the reasonable period of bargaining during which the successor bar applied, and (2) there was no open period permitting the filing of a petition during the final year of the predecessor employer's bargaining relationship with the union, the contract-bar period applicable to election petitions filed by employees or by rival unions will be a maximum of 2 years, instead of 3.[33]

This modification will mitigate the possibility that consecutive application of the "successor bar" and "contract bar" doctrines will unduly burden employee free choice by leading to prolonged insulated periods. We leave open for decision in future cases whether any further refinements in the contract-bar doctrine are appropriate in particular successorship situations, to ensure that represented employees have adequate periodic access to the Board's election.

V.

Our decision today clearly has failed to persuade our dissenting colleague, who characterizes it as reflecting "ideological discontent with" the Supreme Court's decision in *Burns*, as "protecting labor unions, not labor relations stability or employee free choice," and as lacking "any reasoned explanation" for overruling precedent. Whether these criticisms are fair or not is for others to judge. We have examined the Act and its express policy goals, Board precedent, and the Supreme Court's decisions with care. We have explained our position with care. And, finally, we have read our colleague's dissent with care. It has failed to persuade us.

For all of the reasons offered here, we believe that reestablishing the "successor bar" doctrine, as modified, will further the policies of the Act. As explained, we have determined to apply the rules that we have adopted today retroactively in representation proceedings. Accordingly, we remand this case to the Regional Director for further proceedings consistent with this decision.

ORDER

The case is remanded to the Regional Director for further proceedings consistent with this decision.

Dated, Washington, D.C. August 26, 2011

Wilma B. Liebman, Chairman

Craig Becker, Member

Mark Gaston Pearce, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER HAYES, dissenting.

Like a bad penny, the *Keller Plastics*[1] bar doctrine keeps showing up in Board successorship law. It has no place there, yet my colleagues once again bring it back in order to service the ideological goal of insulating union representation from challenge whenever possible. They pursue the same goal in overruling *MV Transportation*[2] here as they do in *Lamons Gasket*,[3] where they today overrule the modified voluntary recognition election bar policy set forth in *Dana Corporation*.[4] As in *Lamons Gasket*, the majority fails to provide any reasoned explanation why the policy they advocate is preferable to the reasonable policy established in the precedent they now overrule. Indeed, they demonstrate even less reason for overruling precedent here, because their opinion is inconsistent with, and an attack on, Supreme Court precedent. Three times before,[5] the Board has rejected the attempted analogy between voluntary recognition and successorship as the premise for imposing what my col-

[32] The dissent asserts that our decision results in "doubling the potential insulated period" in this second circumstance, but, in fact, in both of the above-described circumstances our decision limits what could otherwise be held to be a "reasonable period of time." That is, in both circumstances, our decision for the first time establishes maximum reasonable periods of time.

[33] To the extent that it is inconsistent with our decision today, *Ideal Chevrolet*, 198 NLRB 280 (1972), is overruled.

In accordance with existing contract-bar principles, the employer will be prohibited from filing an election petition for the duration of the contract, whatever its length. *Montgomery Ward & Co.*, 137 NLRB 346, 348–349 (1962).

[1] *Keller Plastics Eastern, Inc.*, 157 NLRB 583 (1966) (holding that an employer that voluntarily recognizes a union as representative of the employer's employees must bargain for a reasonable period of time before it can challenge the union's continuing majority status).

[2] 337 NLRB 770 (2002).

[3] 357 NLRB 72 (2011).

[4] 351 NLRB 434 (2007).

[5] *Southern Moldings, Inc.*, 219 NLRB 119 (1975); *Harley-Davidson Co.*, 273 NLRB 1531 (1985), overruling *Landmark International Trucks*, 257 NLRB 1375 (1981); *MV Transportation*, supra, overruling *St. Elizabeth Manor, Inc.*, 329 NLRB 341 (1999).

leagues refer to as a successor bar, conferring an irrebuttable presumption of majority status on a union representative at the beginning of its relationship with a *Burns*[6] successor employer. The Sixth Circuit, the only court of appeals to review the aberrant successor bar doctrine during brief intervals of its existence, likewise rejected its imposition, stating that "there is no reason to treat a change in ownership of the employer as the equivalent of a certification or voluntary recognition of a union following an organization drive."[7]

Undeterred by this precedent, my colleagues reimpose their successor bar, giving it the additional twist of defining a reasonable bar period as dependent upon whether a successor has exercised its legal right under *Burns* to set initial terms and conditions of employment different from those that existed under the predecessor employer. If the employer exercises this legal right, the irrebuttable presumption of the incumbent union's majority status could last for as much as a year, thus imposing by decisional fiat a bar of the same length that Congress statutorily provided for only following a free and fair secret ballot Board election. If not, the presumption lasts 6 months. In either event, if a contract is executed within the bar period, employees could have their right to raise a question concerning the union's continuing representative status foreclosed for as much as 4 years.

My colleagues justify their resurrection of a successor bar by characterizing its most recent repudiation in *MV Transportation* as a "reflexively negative reaction . . . to the possibility of doctrinal evolution." They contend that, particularly in light of evidence of an increase in the dollar volume and number of mergers and acquisitions, the successor bar doctrine deserves a fair trial. No, it does not.

It does not because the blanket imposition of an irrebuttable presumption of continuing majority status in *Burns* successorship situations cannot be reconciled with the Supreme Court's rationale in *Burns* and *Fall River Dyeing & Finishing Co. v. NLRB,* 406 U.S. 272 (1987). In *Burns*, the Court affirmed the Board's holding, in accord with well-established precedent, that if a successor employer continues the predecessor's operation substantially unchanged with a workforce including a majority of the predecessor's employees, then the successor must recognize and bargain with the majority-supported union that represented those employees in a collective-bargaining relationship with the predecessor. The Court indicated that the union there, which only a few months earlier had been certified by the Board as representative of the predecessor's employees, should retain the usual presumptions of continuing majority status, i.e., "almost conclusive" during the year after the election, and rebuttable thereafter.[8] However, the Court struck down the Board's attempt to depart from its own precedent and to impose on a successor employer the additional obligation to honor the predecessor's collective-bargaining agreement with the incumbent union. Among the several reasons given for rejection was that "a successor [would] be bound to observe the contract despite good-faith doubts about the union's majority during the time that the contract is a bar to another representation election."[9] Finally, the Court held that a successor employer was in most instances free to set its own initial terms and conditions of employment prior to bargaining with the union.[10]

As mentioned, the incumbent union's presumption of majority status in *Burns* was irrebuttable at the time of transition because it had been certified after a Board election only a few months earlier. *Fall River*, like the present case, involved a longstanding bargaining relationship between the predecessor employer and incumbent union. Thus, the Supreme Court first needed to "decide whether *Burns* is limited to a situation where the union only recently was certified before the transition in employers, or whether that decision also applies where the union is entitled to a presumption of majority support."[11] The Court held that a successor's obligation to bargain extended to situations in which the union retained only a rebuttable presumption of majority status from its bargaining relationship with the predecessor. It observed that "[i]f, during negotiations, a successor questions a union's continuing majority status, the successor 'may lawfully withdraw from negotiation at any time following recognition if it can show that the union had in fact lost its majority status at the time of the refusal to bargain or that the refusal to bargain was grounded on a good-faith doubt based on objective factors that the union continued to command majority support.' *Harley-Davidson Transp. Co.,* 273 NLRB 1531 (1985)."[12]

In the cited *Harley-Davidson* case, decided only 2 years prior to *Fall River*, the Board expressly overruled the first-time attempt to impose a successor bar. As in *St. Elizabeth Manor*, supra, the second failed attempt to impose a successor bar, the majority here describes the *Fall River* Court's reference to *Harley-Davidson* as "merely a description of the legal landscape at the time,"

[6] *NLRB v. Burns International Security Services*, 406 U.S. 272 (1972).

[7] *Landmark International Trucks v. NLRB*, 699 F.2d 815, 818 (1983).

[8] 406 U.S. at 278–279 fn. 3.

[9] Id. at 290 fn. 12.

[10] Id. at 292–296.

[11] 482 U.S. at 29.

[12] Id. at 41 fn. 8.

rather than as an endorsement of the extant law expressly rejecting application of an irrebuttable successor bar regardless of the length of the antecedent bargaining relationship imposed on the successor.

I give the Supreme Court more credit than that. The Court does not rummage through its decisional attic, or ours, and randomly decide which cases to cite, and which to ignore, as mere examples of extant law. After all, *Keller Plastics* was part of the legal landscape when *Fall River* was decided, and the Court saw no need to mention that case, instead citing a case that effectively rejected application of *Keller Plastics* in a successor situation. So, too, was *Franks Bros.* extant law, venerable precedent indeed. Yet the *Fall River* Court failed to cite it for the principle that my colleagues repeat as mantra here and in *Lamons Gasket*, i.e., 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." This is reason enough to infer that the Court believed that the *Keller Plastics* and *Franks Bros.* principles for newly recognized unions were inapplicable to successorship situations, and that the citation to *Harley-Davidson* was an endorsement of Board law holding, consistent with the Supreme Court's rationale, that a union's continuing majority status with a *Burns* successor is entitled to no more protection than it would have had with the predecessor employer in the absence of a contract or certification year bar.

The conflict with controlling Supreme Court precedent is reason enough to preclude the Board from even considering the policy choice of the blanket imposition of a successor bar. Even if it were not, how can one possibly describe the majority's rationale as a reasonable, factually supported justification for overruling precedent?

As I note in my dissent in *Lamons-Gasket*, my colleagues' opinions there and here are rife with rational inconsistencies, both internally and in comparison. For instance, the *Dana* decision was vilified in *Lamons-Gasket* as overruling longstanding precedent. Here, the majority celebrates overruling precedent which has stood as Board law for intervals of 10, 14, and, most recently, 7 years (since *MV Transportation*). My colleagues' definition of when longevity of precedent is entitled to dispositive weight eludes me. If it depends on how many times a partisan shift in Board membership results in a change in the law, thus creating undesirable oscillation, then I would think any such change might give pause, whether it is the first or fifth swing of the pendulum.

Then there is the matter of a factual predicate for reviewing precedent. The majority in *Lamons-Gasket* criticized the lack of an empirical basis for the *Dana* majority's grant of review of the voluntary recognition bar doctrine, even though review was based in part on a change in union organizational practices that undisputedly contributed to a significant reduction in Board elections, the statutorily preferred means of resolving questions concerning representation. Here, the majority relies on evidence of cyclical increases in mergers and acquisitions as the factual basis for reevaluating the need for a successor bar, based on the factually unsubstantiated possibility that an increase in these transactions *might* destabilize collective-bargaining relationships. They make this claim in spite of the fact that Supreme Court successorship law reflects no concern for the numerosity and size of mergers and acquisitions. The Court simply states where the balance of interests must be struck in each and every transaction, and what presumptions of continuing union majority status must apply, in order to stabilize collective-bargaining relationships without detriment to employer enterprise or employee free choice.[13]

Of course, this case and *Lamons-Gasket* are consistent in at least one respect. The majority began in each case with the stated purpose of gaining empirical and experiential evidence under extant policy. When confronted with a record devoid of such evidence, they nevertheless proceed to overrule precedent as a policy choice. At bottom, what is revealed in this case about that policy choice is an ideological discontent with *Burns* itself. It is no secret that unions and their proponents view this decision with great disfavor. The *Burns* Court rejected the Board's attempt to impose on a successor employer the obligation to assume the predecessor's contract, and with it, an irrebuttable presumption of the union's majority status. Then, adding insult to injury, the Court held that a successor could ordinarily set initial terms and conditions of employment different from those of its predecessor.

The imposition of a successor bar is designed to offset *Burns* as much as possible by imposing for a period of time the irrebuttable presumption that would have obtained under the Board's rejected contract assumption and bar theory. If transition to the successor occurs at a time when the incumbent union had no contract with the predecessor, its rebuttable presumption of majority status is transformed into an irrebuttable presumption, giving it greater rights than it had with the predecessor. All of this

[13] The majority cites an increase in mergers and acquisitions as if, under current law, such events pose a risk to the employees' right to union representation. On the contrary, the only "risk" is to the union's incumbency, which is only put at "risk" if a sufficient number of employees raise a legitimate question about the union's continuing majority status. While that may be a risk to the union, it is a risk in furtherance of employee rights of free choice. One would do well to ask what employee rights or interests the majority's decision preserves or protects. Is it a right not to vote?

is for the purpose of preventing any employee challenge to the incumbent union while it works to undo the changes that *Burns* permits.

There is nothing wrong with the union's attempting to do so. There is much wrong with declaring that it must be able to operate free from any electoral challenge by employees, including those who have doubts about their experience when represented by that union with the predecessor and those new employees in the predecessor's workforce who have never had an opportunity to exercise their right of free choice on the question of collective-bargaining representation. The majority views with apparent horror the prospect that the incumbent union's presumption of majority status should be subject to an immediate test by the ballot box. This, they claim, would upset "stability" in the bargaining relationship. However, it is axiomatic that there cannot be a stable relationship where the incumbent no longer represents a majority of the employees in the unit. Thus, an election does nothing to disturb stability since it merely either affirms the majority upon which stability must be based, or reveals that there is no real relationship to be stabilized or maintained.

My colleagues make their purposes patently obvious by doubling the potential insulated period when a successor employer exercised its *Burns* right to make changes. They purport to strike a balance between occasionally competing statutory interests. In reality, they mean to strike a blow against *Burns*, protecting labor unions, not labor relations stability or employee free choice, by substituting an irrebuttable successor bar for the protections that the Supreme Court has denied them.

In sum, the Board, with strong judicial support, has repeatedly held that a union entering into a bargaining relationship with a *Burns* successor should have only a rebuttable presumption of majority status except in circumstances where a certification year begun during the bargaining relationship with the predecessor employer has not expired. I would adhere to that precedent, and I dissent from its overruling on grounds that bear no relation to its rational foundation.

Dated, Washington, D.C. August 26, 2011

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Brian E. Hayes, Member

NATIONAL LABOR RELATIONS BOARD