MV Transportation *and* Gerald King, Petitioner and Amalgamated Transit Union, Local 416, Case 33–RD–788

July 17, 2002

DECISION ON REVIEW AND ORDER

BY CHAIRMAN HURTGEN, AND MEMBERS LIEBMAN, COWEN, AND BARTLETT

Cases arising under the National Labor Relations Act often require the Board to engage in sometimes delicate but almost always difficult balancing of competing statutory policies. This case presents another such example. The case involves an employee petition to decertify an incumbent union following the acquisition of the company by a successor employer. The issue is whether the employees of the acquired company should be allowed the option to exercise their statutory rights and vote out the incumbent union, or whether they should be barred from doing so for some period of time until the incumbent union has had an opportunity to negotiate a collective-bargaining agreement with the new employer. The competing statutory policies involved in addressing this issue are protecting employee freedom of choice on the one hand, and promoting stability of bargaining relationships on the other.

The issue is not a new one. For decades, with one brief and unsuccessful deviation, the Board, with court approval, balanced the competing interests involved in favor of protecting employee freedom of choice and held that employees retained their statutory right to vote following a change of employers. In 1999, however, in *St. Elizabeth Manor*,[1] a divided Board abruptly—without prompting by any amendment to the statute or adverse court decision, and without inviting the views of the labor-management community—reversed course and upset this balance in favor of maintaining stability of bargaining relationships at the expense of employee freedom of choice. The Board majority justified this reversal on the ground that the Board's existing policy had not been applied in certain other circumstances, which the majority viewed as analogous.

As fully explained in our opinion today, based on our consideration of the record, including the briefs of the Union and amici curiae, we find that the majority's reasoning in *St. Elizabeth Manor* was faulty and, in any event, plainly insufficient to warrant such an abrupt departure from longstanding Board and court precedent. Accordingly, we overrule *St. Elizabeth Manor* and return to the previously well-established doctrine that an incumbent union in a successorship situation is entitled to—and only to—a *rebuttable* presumption of continuing majority status, which will not serve as a bar to an otherwise valid decertification, rival union, or employer petition, or other valid challenge to the union's majority status.

[1] 329 NLRB 341.

I. FACTS

The Employer assumed the operations of Door to Door, Inc. on July 1, 2001.[2] Prior to that date, however, the Employer[3] recognized the Union, which was the bargaining representative of the Door to Door employees, as the representative of its employees. Accordingly, following the Employer's assumption of operations, the parties met for bargaining on August 29 and 30. On October 10, before the parties had held any additional negotiation sessions, the Petitioner filed the decertification petition.

On October 26, 2001, the Regional Director for Region 14 administratively dismissed the decertification petition pursuant to the successor bar doctrine enunciated in *St. Elizabeth Manor, Inc.*, 329 NLRB 341 (1999). The Petitioner subsequently filed a timely request for review of the Regional Director's action. On February 8, 2002, the Board granted the request for review to consider the propriety of the application of the successor bar rule, and the principles underlying its creation. Thereafter, the Union filed a timely brief on review. In addition, amicus curiae briefs were submitted by the AFL–CIO and Outrigger Hotels and Resorts.

II. ANALYSIS

A discussion of the evolution of Board precedent in the successor employer context necessarily begins with the Supreme Court's decision in *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972). In that case, the Supreme Court approved the Board's determination that a "successor employer"—an employer that 1) assumes the operations of another employer, maintaining substantial continuity with the predecessor's operations, and 2) hires a majority of its employee complement from among the predecessor's employees—has an obligation to recognize and bargain with the union that was recently certified as the bargaining representative of the predecessor's employees.[4] At the same time, however, the Court rejected the Board's conclusion that

[2] All dates are in 2001, unless otherwise indicated.

[3] No party challenged the Regional Director's implicit finding that the Employer is a successor employer within the meaning of *NLRB v. Burns Security Services*, 406 U.S. 272 (1972).

[4] In *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987), the Supreme Court reaffirmed its holding in *Burns* and specifically indicated that its principles were not limited to situations in which the incumbent union was *recently certified* as the employees' bargaining representative.

the successor employer is obligated to adopt the terms of the collective-bargaining agreement between the predecessor and the Union. Id. at 291.

The Board subsequently delineated the effects of the *Burns* decision on the rights and obligations of the successor employer, its employees, and the union representing the predecessor's/successor's employees. In *Southern Moldings*, 219 NLRB 119 (1975), the Board considered the effect of a successorship on the processing of a decertification petition. Noting that a successor employer "in effect stands in the shoes of the predecessor vis-à-vis the [u]nion," the Board found that the Union in a successorship situation is not entitled to greater rights with the successor than it had with the predecessor. Accordingly, the Board reasoned that since a union in a bargaining relationship with a predecessor employer—assuming the expiration of any certification year and the absence of a collective-bargaining agreement—is entitled only to a rebuttable presumption of majority status, a union in a successor employer situation similarly will be entitled only to a rebuttable presumption of majority support. Id. at 119–120. Applying that principle to the facts of the case, the Board concluded that the union's rebuttable presumption of majority status would not operate as a bar to a timely filed petition raising a question concerning representation.[5]

The Board in *Southern Moldings* additionally rejected the union's contention that the successor employer's voluntary recognition of the union gave rise to a recognition bar[6] that precluded the processing of the decertification petition. In that regard, the Board held that the recognition bar rule is applicable only in an initial organizing situation, and does not extend to the successor employer context. Id. at 120.

The Board thereafter adhered to and expounded upon the principles set forth in *Southern Moldings* for nearly a quarter of a century, with a single exception. In *Landmark International Trucks, Inc.*, 257 NLRB 1375 (1981), an unfair labor practice case, the Board inexplicably retreated from its holding in *Southern Moldings*. There, the Board determined that, following the successor employer's voluntary recognition of the incumbent union, the employer could not lawfully withdraw recognition without first affording the Union a reasonable period of time for bargaining. As support for its application of voluntary recognition principles in the successor context, the Board simply remarked that it 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." Id. at 1375 fn. 4.

On review, the Sixth Circuit vacated the decision of the Board, 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." *Landmark International Trucks, v. NLRB*, 699 F.2d 815, 818 (6th Cir. 1983).[7] The court reasoned that whereas the employees in a situation involving voluntary recognition or certification need an opportunity to assess the union's effectiveness in an environment free from any attempts to replace, decertify, or otherwise alter the employer-union relationship, the employees in a successor situation have already had the opportunity to gauge the union's effectiveness as a result of their long-standing relationship. Id.

Responding to the criticisms of the Sixth Circuit, the Board in a subsequent unfair labor practice case overruled its earlier decision in *Landmark*, and reiterated and specifically adopted the reasoning of the Sixth Circuit in that case. See *Harley-Davidson Transportation Co.*, 273 NLRB 1531 (1985). Accordingly, reaffirming the premise that a union that has been certified for a year or more enjoys only a rebuttable presumption of majority status, the Board in *Harley-Davidson* found that a successor employer lawfully withdrew recognition from the recognized incumbent union based upon evidence that the employees no longer supported the union. Id. at 1531–1532.

The Supreme Court has endorsed the Board's position in *Harley-Davidson*. In *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987), the Court was called upon to clarify and define the successorship principles under the Act. In discussing the union's presumption of majority status and the employer's countervailing right to

[5] The Board's decision in *Southern Moldings* was by no means the first time the Board had held that there is only a rebuttable presumption of continued majority status in a successorship situation. The Board had so held in several cases preceding the Supreme Court's decision in *Burns*. See, e.g., *Downtown Bakery Corp.*, 139 NLRB 1352, 1355 (1962), enfd. in part 330 F.2d 921 (6th Cir. 1964).

[6] In *Keller Plastics Eastern, Inc.*, 157 NLRB 583 (1966), an unfair labor practice case, the Board held that an employer's lawful voluntary recognition of a union based on a showing of majority support entitles the union to a reasonable period of time for bargaining without challenge to its continued majority status. Thereafter, in *Sound Contractors*, 162 NLRB 364 (1966), the Board extended its holding in *Keller* to representation cases, such that an employer's lawful voluntary recognition of a majority union will serve as a bar to petitions challenging the union's representational status for a reasonable period of time following the recognition.

[7] The court referenced the absence of precedent supporting the Board's decision, deeming inapposite the cases on which the Board relied. The court found that such cases involved instances of "truly voluntary recognition during an organizing campaign," as contrasted with recognition required by law in successor employer situations.

arrange its business, the Court, citing *Harley-Davidson*, said that a successor employer could challenge the union's majority status "at any time." 482 U.S. at 41 fn. 8.

Following *Harley-Davidson*, the principle that the incumbent union in a successor employer situation is entitled to no greater rights than it otherwise would have with respect to the predecessor, i.e., that the union merely is entitled to a rebuttable presumption of continuing majority status following the expiration of its certification year, remained undisturbed for more than 14 additional years. In *St. Elizabeth Manor, Inc.*, 329 NLRB 341 (1999), however, the Board reversed course and changed decades of precedent.

In *St. Elizabeth Manor*, the Board majority overruled *Southern Moldings* and announced the creation of a "successor bar," pursuant to which a successor employer, by operation of law, incurs an obligation to bargain with the incumbent union for a reasonable period of time, during which the union's majority status is immune to challenge through a decertification effort, an employer petition, or a rival union petition.[8] The Board majority, ostensibly drawing from recognition bar principles, asserted that there were similarities between successor and initial recognition situations: In both situations, the employer and union are "embarking on a new relationship," which generally poses greater challenges than bargaining between parties to an established relationship;[9] the parties in both situations additionally are undergoing a "stressful transitional period," during which the employees may fear that their support for (and employer opposition to) the union could jeopardize their job security or result in less favorable working conditions, leading ultimately to employee disaffection for the union. Id. at 343. The Board majority thus concluded that the union in a successor situation should be afforded the same irrebuttable presumption of majority status for a reasonable period of time as that provided to a union following voluntary recognition by an employer.

Then-Member Hurtgen and former Member Brame dissented. Emphasizing the freedom of choice granted employees by Section 7 of the Act, they rejected the adoption of a successor bar as an improper incursion on the employees' freedom to select or reject a bargaining representative. Contending that the majority opinion served to "protect the incumbent [union] from the desires of those individuals who have firsthand knowledge of, and experience with, the union's ability, attentiveness, and performance," the dissenters maintained that "[c]ollective bargaining. . . should flow from employee choice and not drive it." *St. Elizabeth Manor*, 329 NLRB at 349 (dissenting opinion). The dissenters additionally drew upon the prior decisions of the Board in *Southern Moldings* and *Harley-Davidson* and the opinion of the Sixth Circuit in *Landmark*, noting that the courts had not challenged the soundness of the principles articulated in those cases. Instead, the dissenters observed, the Supreme Court and various courts of appeal had cited with approval the Board's decision in *Harley-Davidson*.[10] See id. at 348.

After careful consideration, we now conclude, in accord with the dissenting opinion in *St. Elizabeth Manor*, that *St. Elizabeth Manor* represented an unwarranted departure from well-established Board precedent. Accordingly, we overrule *St. Elizabeth Manor* and return to the sound principles articulated in *Southern Moldings*, which, we conclude, more appropriately and effectively serve the purposes of the Act.

It is well established that two of the fundamental purposes of the Act are (1) the protection and promotion of employee freedom of choice—choice with respect to the initial decision to engage in or refrain from collective bargaining, and choice regarding the selection of a bargaining representative; and (2) the preservation of the stability of bargaining relationships. See *Stanley Spencer v. NLRB*, 712 F.2d 539, 566 (D.C. Cir. 1983). The first of these is explicitly set forth in Section 7 of the Act. The second is a matter of policy and operates with respect to those situations where employees have chosen a bargaining relationship. When these two objectives conflict, it is the Board's obligation to strike an appropriate balance between them. *NLRB v. Circle A & W Products Co.*, 647 F.2d 924 (9th Cir. 1981). See, e.g., *General Cable Corp.*, 139 NLRB 1123 (1962)(determining that a 3-year contract bar rule represented the appropriate balance between the competing concerns); *Deluxe Metal Furniture Co.*, 121 NLRB 995 (1958)(modifying contract-bar policies to "achiev[e] a finer balance between" the objectives of fostering stability of labor relations and ensuring employee freedom of choice).

[8] The Board in *St. Elizabeth Manor* indicated that the successor employer's obligation to recognize the union, and the concomitant bar to any challenge to the union's majority status, commences upon the "occurrence of two events: (1) a demand for recognition or bargaining by the union; and (2) the employment by the successor employer of a 'substantial and representative complement' of employees, a majority of whom were employed by the predecessor." Id. at 344 fn. 8.

[9] The Board majority acknowledged that the relationship between the union and *the employees* was a continuing one—such that the employees would have had the opportunity to assess the union's effectiveness in representing them—but stressed that the employees would not have had the opportunity to assess the union's effectiveness with regard to the new employer.

[10] See, e.g., *Fall River Dyeing Corp. v. NLRB*, 482 U.S 27, 41 fn. 8 (1987); *NLRB v. Williams Enterprises*, 50 F.3d 1280, 1288 (4th Cir. 1995); *Briggs Plumbingware, Inc. v. NLRB*, 877 F.2d 1282, 1288 (6th Cir. 1989); *Textron, Inc. v. NLRB*, 965 F.2d 141, 148 (7th Cir. 1992).

We conclude that in a successor employer context, the position articulated by the Board in *Southern Moldings* represents the appropriate balance between employee freedom of choice and the maintenance of stability in bargaining relationships. Although the Board majority in *St. Elizabeth Manor* purported to strike a balance between these two objectives, we find that the successor bar rule, by providing the union with an irrebuttable presumption of majority status and denying the employees the opportunity to change or reject their bargaining representative for a "reasonable period of time," promotes the stability of bargaining relationships to the exclusion of the employees' Section 7 rights to choose their bargaining representative. *Hill Park Health Care Center*, 334 NLRB 328, 331 at fn. 7 (dissenting opinion of Chairman Hurtgen). At a minimum, the successor bar prohibits the employees' exercise of their right to select a bargaining representative for a "reasonable period of time" as defined by the Board in a particular case. It is possible, however, that the successor bar could preclude the employees' exercise of their Section 7 rights for as long as several years. For example, a successor employer could engage in bargaining with the incumbent union and, prior to the expiration of a "reasonable period of time," reach agreement with the union on a new collective-bargaining agreement, which then would serve as a bar to a representation petition for the duration of the contract, up to a period of 3 years. Moreover, the incursion on the employees' freedom of choice could be even more severe (up to 6 years) if the Union and the predecessor employer were parties to a collective-bargaining agreement that served to bar any employee efforts to remove or replace the Union prior to the successor's assumption of operations.[11]

In contrast, the rule developed in *Southern Moldings* gives proper effect to employee freedom of choice guaranteed by Section 7 of the Act. Pursuant to *Southern Moldings*, an incumbent union in a successor employer situation is entitled only to a rebuttable presumption of continuing majority status, which will not operate to bar an otherwise valid decertification, rival union, or employer petition. Accordingly, the employees, "who have firsthand knowledge of, and experience with, the union's ability, attentiveness and performance," properly can determine whether the incumbent union is adequately representing their interests during the period of transition, or whether another representative or the employees themselves might be more effective in dealing with their prospective employer.[12] See *St. Elizabeth Manor*, 329 NLRB at 349 (dissenting opinion). If the employees determine that the union is not serving their needs, they can file a decertification petition or attempt to secure representation by another union. Alternatively, if the employees feel that they have had an insufficient period of time to assess the effectiveness of the Union with respect to the new successor employer, they can simply refrain from filing a decertification petition or supporting a rival union. In either case, it is significant that, in contrast to a situation in which the successor bar rule is applied, the decision is left to the employees.

At the same time that the *Southern Moldings* rule preserves employee freedom to select a bargaining representative, it additionally promotes the objective of maintaining stability in bargaining relationships, contrary to our dissenting colleague's assertions. Although our return to the principles set forth in *Southern Moldings* has the effect of removing the irrebuttable presumption of majority status provided to the union under the successor bar rule, it does not eliminate the bargaining obligation of the successor employer. As articulated by the Supreme Court in *Burns*, supra, a successor employer becomes obligated to bargain with the bargaining representative of its predecessor's employees if (1) there is substantial continuity

[11] Thus, we reject as a significant understatement our dissenting colleague's assertion that the successor bar merely places a temporary restraint on the employees' exercise of their Sec. 7 rights.

[12] Rather than relying on the employees' own judgments, the Board majority in *St. Elizabeth Manor* appeared to rely on a paternalistic assumption that the employees in a successor employer situation need the protection of an insulated period—free from the potential ill effects associated with the alleged "stressful transition" to a new employer—to make an informed decision regarding the effectiveness of their bargaining representative. See *St. Elizabeth Manor*, 329 NLRB at 343 (suggesting that, in the absence of an insulated period, employee anxiety over job security and work conditions as a result of a change of employers could alter the employees' otherwise favorable attitudes toward their bargaining representative). We believe such protectionism is unwarranted. Employees are presumably mature individuals who are capable of making rational decisions. See *Midland National Life Insurance Co.*, 263 NLRB 127, 132 (1982) (stating, in the context of an election campaign, that employees are "mature individuals who are capable of recognizing campaign propaganda for what it is," such that the Board need not regulate the veracity of the parties' campaign statements).

Additionally, apart from its questionable factual validity, that assumption fails to account for the possibility that the employees could have made a decision to replace or remove their bargaining representative *prior to* the change in employers. For example, it is entirely possible that the employees could reach a decision to remove the union while still employed by the predecessor employer, yet be prevented from effectuating that decision as a result of an existing collective-bargaining agreement between the predecessor employer and the union. Further, even after the change in employers, there may be other reasons why employees would no longer want union representation, none of which has to do with "stress," "anxiety," "uncertainty," "dislocation," or "turmoil". For example, employees may simply feel that they no longer need a union in light of the change in the identity of their employer, a change that employees may perceive as improving their overall employment circumstances.

between the predecessor employer's and the successor employer's operations; and (2) the successor employer hires a majority of its employees from among the predecessor's employee complement. Furthermore, pursuant to *Southern Moldings*, the successor employer's obligation to bargain with the incumbent union continues indefinitely, unless and until the employees exercise their right to remove or replace the union by filing a decertification petition or supporting a rival union petition or, alternatively, the employer rebuts the presumption of the union's continuing majority status.[13] Accordingly, the existing bargaining relationship is permitted to continue, absent some evidence that the employees no longer support that relationship.[14]

Although the *Southern Moldings* policy to which we return today does not completely immunize or protect the bargaining relationship from disruption or uncertainty, we conclude that it nevertheless serves to promote labor stability, and that it does so without abrogating the Section 7 rights of the employees. Moreover, we believe that the *Southern Moldings* standard properly recognizes and accounts for an important distinction between the successor employer situation and other situations in which the employer embarks on a new bargaining relationship with a union. Contrary to the *St. Elizabeth Manor* majority's suggestion that the successor employer situation is analogous to the voluntary recognition situation, we find, in accordance with the well-reasoned decision of the Sixth Circuit in *Landmark*, supra, that the two situations are not equivalent.

> In [the case of a voluntary recognition following an organizing drive] the employees must be given an opportunity to determine the effectiveness of the union's representation free of any attempts to decertify or otherwise change the relationship. However, where the union has represented the employees for a year or more a change in ownership of the employer does not disturb the relationship between employees and the union. While the relationship between employees and employer is a new one, the relationship between employees and union is one of long standing.

Landmark, 699 F.2d at 818. Therefore, although the incumbent union "may not necessarily be familiar with the new employer, its overall knowledge of the operations and the specific facility may exceed that of the new owners. Thus, it can build rapidly on its past experience in handling workplace issues that particularly concern these unit employees." *St. Elizabeth Manor*, 329 NLRB at 349 (dissenting opinion). In light of these distinctions, it is reasonable to maintain different standards that appropriately harmonize the purposes and policies of the Act.

Our dissenting colleague agrees that protecting employee free choice is a fundamental statutory policy and therefore properly a Board concern. She also agrees that a merger or acquisition may cause changes in employee attitudes about continued representation by the incumbent union. Finally, our dissenting colleague also agrees that whether employees should be allowed the opportunity to rid themselves of an unwanted union following a merger or acquisition requires balancing the policy of protecting employee free choice against the competing policy of maintaining stability of bargaining relationships. Unlike us, however, our colleague strikes the balance against employee free choice in favor of stability of bargaining relationships.

Our dissenting colleague premises her conclusion on two essential propositions. First, she notes correctly that the transition to a successor employer is potentially destabilizing.[15] Second, and incorrectly, she posits that permitting a challenge to the union's continued majority status adds to the instability. In reality, if a large percentage (or majority) of the employees support a petition to decertify or change the bargaining representative, the situation has reached maximum instability, and to fail to resolve the issue with a Board-conducted election simply aggravates the instability further. Instability is, in fact, preserved and increased rather than relieved. The dissent seems to recognize this reality by the statement in footnote 16 that "[a]s a practical matter, however, it seems unlikely that a successor employer would reach an agreement with a union that lacked majority support: there would rarely be an incentive to do so." To what purpose, then, do we require bargaining during the insulated period?[16]

[13] A successor employer can rebut the presumption if it can demonstrate that (1) the union has in fact lost its majority status or (2) that the employer possesses a good faith uncertainty as to the union's continued majority support. The employer may unilaterally withdraw recognition from the union in the former situation, and may file an RM petition in the latter situation. See *Levitz*, 333 NLRB 717 (2001). Members Cowen and Bartlett were not on *Levitz*, and find it unnecessary in this case to express an opinion regarding the analysis set forth in the Board's *Levitz* decision.

[14] If a successor employer were to refuse to bargain with the union in the absence of evidence that the union had lost its majority status, or bargain in bad faith, the union could seek recourse with the Board through the filing of an unfair labor practice charge.

[15] While it is frequently disconcerting to employees, successorships also save failing businesses and jobs and are then a cause for celebration, not despair.

[16] Contrary to our dissenting colleague, we are *not* suggesting that collective bargaining "guarantees" that a contract will be reached. We recognize that collective bargaining may, or may not, result in a contract. We simply observe that it is unlikely that a successor employer

Our dissenting colleague also correctly observes that the incidence of successorship in our economy has significantly increased since *Southern Moldings*. We fail 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. The same economic forces that precipitate successorship require employers to be more efficient, adaptable, and expedient. Employees should not lose their right to representation by reason of these dynamics; neither, however, should they lose their right to change or eliminate a bargaining representative.

Contrary to the suggestion of the dissent, we do not link "efficiency, adaptability and experience" with the elimination of the union as representative. We simply say that employees should not lose their freedom of choice by reason of these qualities.

We acknowledge the possibility that a change in corporate ownership or other restructuring might engender anxiety or stress among those affected by the change. Our difficulty lies not with the recognition of that possibility but, rather, with the unsupported leap to the assumption that such anxiety would render the employees incapable of making an informed decision regarding union representation, or that it would cause them to "shun" the union. Indeed, it is equally possible, if not more plausible, that the employees—faced with an environment of uncertainty and anxiety—would turn to, and place a greater value on representation by, their bargaining representative.

As noted above, we recognize that a change of employers can cause instability, and this in turn may cause stress for the employees. However, the impact of such instability on employees is uncertain. The impact may be that the employees become stronger adherents of the union; they may become weaker adherents or nonadherents of the union; or there may be no effect at all on their union views. What is certain, however, is that, under the Act, these matters are to be decided by the employees. Our colleague would take away that choice for an undefined period of time. By contrast, in other contexts where economic changes cause stress (e.g., recessions or layoffs), no one suggests that the economic changes and stress are reasons to postpone the exercise of employee free choice. Contrary to the suggestion of our colleague, we are not saying that "broader economic developments should have no bearing" on Board rules. We simply observe that the fundamental statutory policy of employee free choice has paramount value, even in times of economic change.

By creating a bar to employees' exercise of their freedom of choice and awarding the union an irrebuttable presumption of majority status, our dissenting colleague's position additionally results in an unwarranted extension of the Supreme Court's holdings in *Burns* and *Fall River*, supra.[17] The *Burns* principle, affirmed in *Fall River*, affords stability in the context of a change of employers. It does so by continuing the union's representative status and by the presumption that the union retains majority support. However, the price of stability becomes too high if we say that the presumption cannot be rebutted, i.e., that the employees cannot reject the union if they so choose. Indeed, although the Supreme Court in *Burns* and *Fall River* discussed the propriety of a continuing presumption of majority status in light of the potential negative effects of a change in corporate ownership, the Court also specifically emphasized "the rightful prerogative of owners independently to rearrange their businesses," as well as the successor's right to withdraw recognition from the Union at any time if it loses its majority status. *Fall River*, supra at 40–41 (citations omitted).

Our dissenting colleague's attempt to justify the existence of an insulated period in a successorship situation through reliance on other contexts in which the Board has deemed appropriate the creation of an insulated period (during which the union's majority status cannot be challenged) is unavailing. None of those contexts is applicable here. In an initial certification case, the employees have recently exercised their Section 7 right to choose a union. As the newly-elected representative, the union needs time to learn the ropes and prove its worthiness. The same is true of a voluntary extension of lawful recognition. In a case involving an unlawful withdrawal of recognition, the insulated period is necessary to remedy unlawful employer conduct and to allow the union time to get back on its feet. In a Section 8(a)(5) settlement case, the employer has promised to bargain in order to remedy an alleged violation. It would be contrary to the remedial aspect of the settlement to allow a hasty withdrawal of recognition. By contrast, the union in the instant situation has been the representative of employees for a long time. The employer has committed no unfair labor practices, and has not agreed to any remedial settlements.

Finally, we have emphasized throughout the principles of industrial democracy and employee free choice. Our

would reach agreement with a non-majority union, and there would be no incentive to do so.

[17] By contrast, the *Southern Moldings* policy to which we return properly adheres to and reflects the Supreme Court's mandate in those cases.

colleague speaks of the "destabilizing effects of an election." In response, we believe that a democracy, by its nature, undergoes the turmoil of frequent elections. But that is a price that we gratefully pay for a free society. Incumbent public officials are subject to elections at periodic intervals. Incumbent unions are not. Thus, to allow for free choice, we subject unions to challenge at certain times when employees objectively indicate that they no longer desire representation by the union.[18] Our colleague would take away that choice for an undefined period of time.

For all the foregoing reasons, we reject our dissenting colleague's criticisms of the well-reasoned principles of *Southern Moldings*.

Application of *Southern Moldings* principles

Having determined that the principles set forth in *Southern Moldings* best effectuate the purposes and policies of the Act, we turn now to the application of those principles to the facts of the instant case. Several months after the Employer's assumption of the predecessor's operations, the Petitioner filed a decertification petition. Relying on the successor bar doctrine established in *St. Elizabeth Manor*, the Regional Director administratively dismissed the petition, finding that the Employer and the Union had not had a reasonable period of time to bargain before the petition was filed. Since the Regional Director's dismissal of the petition was based on the Board's decision in *St. Elizabeth Manor*, which we have overruled today, we will reverse the Regional Director's action and remand the proceeding to him for processing of the petition. In so doing, we note that the facts of this case clearly illustrate the wisdom of the *Southern Moldings* principles. As the Petitioner contends in his request for review, the employees felt that the incumbent union was not effectively representing their interests with respect to their employment with the Employer.[19] Whereas the successor-bar rule would have negated the employees' ability to reject their bargaining representative, the *Southern Moldings* policy permits the employees to exercise their freedom of choice.

ORDER

The Regional Director's administrative dismissal of the decertification petition is reversed, and the case is remanded to the Regional Director for further appropriate action consistent with this decision.

[18] Contrary to the dissent, this objective indication is more than a drop in poll numbers.

[19] Indeed, the Petitioner's request for review recites a multitude of complaints concerning the Union's representation, including allegations of preferential treatment of certain employees, inadequate communication, and retaliation against employees who were opposed to the Union.

MEMBER LIEBMAN, dissenting.

Corporate mergers and acquisitions have proliferated during the past quarter century. These transactions have consequences for employees in the workplace. Under current labor law successorship principles, employers enjoy substantial flexibility to restructure their businesses and transfer capital, unhampered by the rights and benefits union members may have won through collective bargaining. Unions, in turn, must struggle to safeguard employees' gains, including their jobs, all of which may be jeopardized. This case poses the question whether during the throes of the corporate transition—with its attendant uncertainties and dislocations—the union's representational status should be subject to challenge.

Resolving this question requires the Board to decide an important question of labor policy: how best to balance the National Labor Relations Act's goals of workplace stability and employee free choice, in the context of successor bargaining relationships. My colleagues today resurrect the old doctrine of *Southern Moldings, Inc.*, 219 NLRB 119 (1975), and overrule *St. Elizabeth Manor, Inc.*, 329 NLRB 341 (1999), a case in which the Board, only 3 years ago, took an initial step in striking a balance that fits today's economy. By providing a limited period of repose during which a question of representation may not be raised, *St. Elizabeth Manor* preserves stability and promotes collective bargaining, without sacrificing employee free choice. I dissent from the Board's abandonment of a framework that best accommodates the economic realities of the 21st Century.

I. THE CURRENT ECONOMIC CONTEXT OF SUCCESSORSHIP LAW

"Regulatory agencies do not establish rules of conduct to last forever; they 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. They are neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday." *American Trucking Assns. v. Atchison T. & S.F. Ry. Co.*, 387 U.S. 397, 416 (1967).

The economy, and the workplace with it, have changed radically in the past 25 years. Under *Southern Moldings*, decided in 1975, a challenge to the incumbent union's majority status may be raised at any time, even immediately upon the start of the successor business. But in 1975, mergers and acquisitions—business events that typically create successorships—were, in a relative sense, blips on the radar screen of economic activity. Since then, our economy has experienced a many-fold increase in merger and acquisition activity. The numbers

are illuminating.[1] In 1975, merger and acquisition announcements numbered 2,297. In the year 2000, there were 9,566. The dollar value of this activity is even more pronounced. In 1975, the total dollar value paid in these transactions was $11.8 billion. In 2000, it was $1.3 trillion. In terms of dollar value as a percentage of gross domestic product (GDP), mergers and acquisition activity has gone from about 1% of GDP to a striking, nearly 14% level in 2000.

With the efficiencies that most consolidations are expected to achieve, layoffs are a routine fact of merger activity.[2] Even for employees who survive the transaction, fear, anger, and insecurity will almost inevitably arise. Whether employees are uncertain about their continued prospects for employment or disturbed by the clash of corporate cultures, their loyalties certainly are strained. One pair of commentators has described the effect of mergers on employees this way:

> Mergers affect cultural patterns. . . . First, there is the look-over-your-shoulder effect. Personnel try to figure out where cuts will be made. Second, there is the winners-and-losers effect. One party to the deal almost always wins, and the other, usually the acquired, almost always loses as jobs in the new entity are allocated. Third, and most important, there is the cultural isolation effect. It occurs when survivors discover that the company that they now work for is significantly different from the one they worked for before.
>
> Terrence E. Deal & Allan A. Kennedy, *The New Corporate Cultures* 121–122 (1999).

All of these effects are likely to destabilize relations not only between both labor and management, but between a union and the workers it represents. The union, after all, will have failed in sparing workers from dislocation. Successorship law, as I will explain, directly contributes to the union's precarious position, a fact the Supreme Court implicitly recognized in *Fall River Dyeing & Finishing v. NLRB*, 482 U.S. 27 (1987).

Meanwhile, the merger craze shows little or no sign of abating.[3] Thus, "[a]t the end of the 1980s, corporations were selling off divisions and companies and buying new ones at a rapid rate" and "[w]hile the pace of mergers and acquisitions slowed somewhat during the early 1990s, it has accelerated since then."[4] These transactions may benefit corporate executives handsomely, but for the rank and file, they seriously upset settled expectations and surely complicate, even frustrate, collective bargaining.[5]

One implication of these dramatic economic changes is that old regulatory doctrines may no longer be appropriate. In contrast to the old *Southern Moldings* rule, the contemporary *St. Elizabeth Manor* framework fits the demands of changed circumstances. In an economy in which rapid corporate transformation regularly brings uncertainty, even turmoil, to the workplace, the rule of *St. Elizabeth Manor* affords some measure of stability.

St. Elizabeth Manor strikes the right balance in newly-created successor relationships, by creating an insulated period during which a union's majority support may not be challenged. The decision calls for the parties to bargain for a reasonable period of time, free of the kind of challenges that would undermine the bargaining relationship before it had any real chance to flourish. The majority's approach, in contrast, unnecessarily intrudes on collective bargaining and destabilizes an already uncertain situation for employees, labor unions, and employers. The timing is unfortunate. In a volatile economy marked by mergers, acquisitions, and takeovers, the interest of stability should be given greater—not less—weight in shaping national labor policy. I take issue, then, with my colleagues' apparent suggestion that broader economic developments should have no bearing on the rules the Board necessarily applies in individual workplaces.

II. THE LEGAL CONTEXT OF THE *ST. ELIZABETH MANOR* INSULATED PERIOD

St. Elizabeth Manor was a sound, logical outgrowth of current successorship law, which seeks to reconcile the sometimes competing interests of employers and employees in the context of changes in corporate ownership. As the Supreme Court observed in its first labor-law successorship decision, the "objectives of national labor policy . . . require that the rightful prerogative of owners independently to rearrange their businesses . . . be balanced by some protection to the employees from a sudden change in the employment relationship." *John Wiley & Sons v. Livingston*, 376 U.S. 543, 549 (1964).

[1] See Paul A. Pautler, *Evidence on Mergers and Acquisitions*, Federal Trade Commission Bureau of Economics Working Paper 243, at 58, 60 (Table 1 & Figure 2) (Sept. 25, 2001) (available at www.ftc.gov/be/econwork.htm). See Appendix A and Appendix B.

[2] See, e.g., Peter Cappelli, *The New Deal at Work* 79–80 (1999).

[3] See, e.g., Deal & Kennedy, supra, at 111; William C. Symonds & Peter Coy, *Corporate America Braces for the Shakeout*, Business Week (Oct. 15, 2001).

[4] Cappelli, supra, at 79–80.

[5] Compare Andrew Ross Sorkin, *Those Sweet Trips to the Merger Mall*, New York Times (April 7, 2002), with N. R. Kleinfeld, *The Downsizing of America: In the Workplace, Musical Chairs; The Company as Family, No More*, New York Times (March 4, 1996). Although the question is debatable, some economists have argued that "an important source of … gains [from corporate acquisitions] comes simply from breaking long-term employment relationships, particularly those which implicitly deferred compensation." Cappelli, supra, at 79. See Pautler, supra, at 7–8 (surveying economic literature).

See also *Howard Johnson Co., v. Detroit Local Joint Executive Board*, 417 U.S. 249, 264 (1974) (discussing balancing of interests in *John Wiley*). The Supreme Court has recognized that a successorship case "requires analysis of the interests of the new employer and the employees and of the policies of the labor laws in light of the facts of each case and the particular legal obligation which is at issue. . . ." *Howard Johnson Co., Inc.*, supra, 417 U.S. at 262 fn. 9. Within the broader framework established by the Court, the Board must in turn develop subsidiary rules that further the goals of the Act—and that necessarily seek to reconcile competing interests.

NLRB v. Burns Services, 406 U.S. 272 (1972), sets out the basic rules of successorship.[6] Under *Burns*, the incumbent union that represented the predecessor's employees is the presumptive bargaining representative of the successor's employees, when the latter's work force comprises a majority of the predecessor's former employees and when there is substantial continuity between the enterprises in the employing industry. If these criteria are satisfied, the incumbent union follows the employees, as their bargaining representative, in the successor workplace.

As a practical matter, however, *Burns* sharply limits the authority and status of the employees' bargaining representative in crucial respects. The *Burns* Court stressed that employers enjoy substantial flexibility to restructure their businesses and that successor employers are free to make substantial changes in their operation of the enterprise. It decided that holding a new employer bound to the substantive terms of the preexisting labor contract might inhibit the free transfer of capital. Thus, if there was formerly a governing bargaining agreement with the predecessor, that contract no longer governs the workplace in the future. It is abrogated, unless the successor chooses to assume its obligations.

Further, the incumbent union typically has no bargaining authority with respect to the initial terms and conditions of employment preferred by the successor employer for its new workforce. Those working conditions may be unilaterally implemented by the successor.[7] Perhaps most significantly, the incumbent union's authority to represent employees, as a threshold matter, is essentially determined by the successor employer. Thus, the union's representative status depends virtually entirely on the vagaries of the successor's hiring process and decision-making. It is no wonder, then, that employees may ask whether union representation is worthwhile.[8]

In *Fall River Dyeing & Finishing*, supra, its most recent successorship decision, the Court focused on the impact that corporate transactions have on employees and their unions. While *Fall River* reaffirmed the proposition that employers are free to restructure their businesses and hire a workforce unhampered by the predecessor's collective bargaining agreement, the Court also held that a successor's obligation to bargain is not limited to situations where the union has been recently certified. In observations that bear directly on the issue posed today, the Court underscored the difficult circumstances facing the employees' incumbent union:

> During a transition between employers, a union is in a peculiarly vulnerable position. It has no formal and established bargaining relationship with the new employer, is uncertain about the new employer's plans, and cannot be sure if or when the new employer must bargain with it. While being concerned with the future of its members with the new employer, the union also must protect whatever rights still exist for its members under the collective-bargaining agreement with the predecessor employer.

482 U.S. at 39 (footnote omitted).

At the same time, the *Fall River* Court observed, successorship also affects the way in which employees perceive their union and their rights under Section 7 of the Act:

> If the employees find themselves in a new enterprise that substantially resembles the old, but without their chosen bargaining representative, they may well feel that their choice of a union is subject to the vagaries of an enterprise's transformation. This feeling is not conducive to industrial peace. In addition, after 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.*

482 U.S. at 39–40 (emphasis added; footnote omitted).

With these considerations in mind, the Court in *Fall River* emphasized, as it had in *Burns*, the "interest of the

[6] Rules for changes in ownership resulting from the mere transfer of stock shares do not raise successorship issues. See *TKB International Corp.*, 240 NLRB 1082, 1083, fn. 4 (1979).

[7] Under *Burns*, the successor must consult with the incumbent union about initial terms of employment only when it is "perfectly clear" that it intends to retain the predecessor's work force. E.g., *Spruce Up Corp.*, 209 NLRB 194 (1974).

[8] For an argument that successorship law itself makes unions less attractive to workers, see Wilson McLeod, *Rekindling Labor Law Successorship in an Era of Decline*, 11 Hofstra Labor L. J. 271, 276–286 (1994).

employees in continued representation by the union" and reiterated that the "new employer has an obligation to bargain with that union so long as the new employer is in fact a successor of the old employer and the majority of its employees were employed by its predecessor." 482 U.S. at 41.[9]

III. THE RATIONALE OF *ST. ELIZABETH MANOR*

St. Elizabeth Manor created a framework for successorship bargaining that gives substance to the notion of continuity underlying both *Burns* and *Fall River*. When an employer, exercising its freedom to select employees of its lawful choosing, hires its workforce and becomes a *Burns* successor, it must honor an incumbent union's request to bargain, and it must bargain in good faith for a reasonable period of time.

This rule avoids the scenario posed, for example, in *Hampton Lumber Mills-Washington*, 334 NLRB 195 (2001), enfd. No. 01-1276 (D.C. Cir. May 17, 2002) (unpublished judgment order), where a successor employer began operations on November 4, received a petition from employees repudiating the incumbent union on December 8, declined to recognize the union that same day, and filed a petition with the Board on December 9. The number of bargaining sessions before the challenge to the union's incumbency was exactly zero. In a case like that, the presumption of majority status flowing from *Burns* is rendered entirely illusory, as is the notion, endorsed by *Fall River*, that the presumption should facilitate the incumbent union's development of a relationship with the successor. Yet that is what the majority's approach allows.

In contrast, *St. Elizabeth Manor* puts first things first. The issue of successorship has been settled and meaningful bargaining should proceed. It leaves for another day a re-testing of the incumbent union's majority status, while delaying that inquiry for only a "reasonable" time. This frees the union from what the Supreme Court has called "exigent pressure to produce hot-house results or be turned out." *Brooks v. NLRB*, 348 U.S. 96, 100 (1954) (approving bar to election for one year after certification of union). At the same time, the employer —who must bargain in good faith for a reasonable time—is freed of the temptation to avoid good faith bargaining in the hope that, by delay, it can undermine the union's support among employees. Id. See, e.g., *Chelsea Industries v. NLRB*, 285 F.3d 1073, 1076 (D.C. Cir. 2002) (citing *Brooks* in upholding Board's certification-year bar). Finally, as do other insulated periods adopted, the rule of *St. Elizabeth Manor* allows the employer and the incumbent union to bargain without the uncertainty and disruption that might be caused by organizing campaigns, including the effort of a rival union, a potential destabilizing factor. See, e.g., *Deluxe Metal Furniture*, 121 NLRB 995, 998–1001 (1958) (discussing contract-bar rule). As the *St. Elizabeth Manor* Board explained, the rationale for a successor bar—that employees should have a reasonable opportunity to determine the effectiveness of the union's representation—parallels the rationale for the well-established insulated period following an employer's voluntary recognition of a union. 329 NLRB at 342–343. See also *Keller Plastics Eastern, Inc.*, 157 NLRB 583 (1966) (establishing recognition bar doctrine).

Of course, preserving industrial stability and promoting collective bargaining are not the Board's only concerns; so is protecting employee free choice. But *St. Elizabeth Manor* does this, too. As to employees who do not desire union representation—notwithstanding the *Burns* presumption that the bargaining unit as a whole supports the Union—they must wait temporarily before they can invoke the Board's election processes. Their right of free choice is not denied, but merely delayed pending a reasonable period for bargaining.[10] This delay may occur in every situation where the Board has, for decades, created insulated periods. As the *Fall River* Court observed, those rules are not based on judgments about employees' likely sentiments or their fitness to act on them, but rather on a compelling policy interest, the need to promote industrial peace, that comes into play. 482 U.S. at 38–39.

Fall River explains why, during a corporate transition, unions are particularly vulnerable to employee dissatis-

[9] The majority contends that the *Fall River* Court "endorsed" the rebuttable nature of the *Burns* presumption by its citation to *Harley-Davidson Co.*, 273 NLRB 1531 (1985), in which the Board found that a successor employer lawfully withdrew from bargaining based on a good faith doubt of the union's majority status. But, as the *St. Elizabeth* Board explained (329 NLRB at 344, fn. 7), the Court's reference to the *Harley-Davidson* rebuttable presumption was simply a reflection of Board law at the time of the Court's decision.

[10] That employees who oppose union representation may be required to wait to express their views, as a means of furthering the Act's other policies, is neither unreasonable, nor unfair. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 613 (1969) (upholding bargaining order based on employer's unfair labor practices). In the words of the *Gissel* Court:

> There is . . . nothing permanent in a bargaining order. . . . [A]s we pointed out long ago, in finding that a bargaining order involved no "injustice to employees who may wish to substitute for the particular union some other . . . arrangement," 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," after which the "Board may . . . upon a proper showing, take steps in recognition of changed situations which might make appropriate changed bargaining relationships."

395 U.S. at 613, quoting *Frank Bros. Co. v. NLRB*, 321 U.S. 702, 705–706 (1944).

faction and why employees simultaneously may feel particular pressure to shun the Union. These effects, as we have seen, are in significant part a result of successorship law itself, which gives employers great flexibility and which gives employees and unions comparatively little security. The volatile nature of this transitional period makes it appropriate, as a matter of policy, to establish a period of repose with respect to changes in union representation. To say that employees must have free choice in the selection of their representatives (or in their decision to forgo representation) is not to say that an incumbent union must be prepared to survive a confidence-vote at all times—even when employees, for no fault of the union's, "might be inclined to shun support" in the words of the *Fall River* Court.

An insulated period ensures that employees will be free to decide on representation after the union has a fair chance to prove itself in its dealings with a new employer. It ensures, as well, that the union will not be required to expend resources to defend its representational status, as opposed to protecting the interests of employees during the transition to a new employer. Obviously, important employee interests are at stake, and the union's role—following, not before, successorship—may be crucial. As the *John Wiley* Court observed:

> Employees, and the union which represents them, ordinarily do not take part in negotiations leading to a change in corporate ownership. The negotiations will ordinarily not concern the wellbeing of the employees, whose advantage or disadvantage, potentially great, will inevitably be incidental to the main considerations.

376 U.S. at 549.

In turn, no one familiar with union-representation campaigns—which employers often contest vigorously (and sometimes unlawfully)— can doubt that they consume the resources of unions and employers, while disrupting ordinary workplace activities.[11] As vital as elections are to the Act, permitting challenges to a union's status even during the transition from one employer to another, elevates employee free choice to the exclusion of other statutory goals.

Finally, while this case involves a petition seeking a decertification election, under the majority's approach—which extols the virtues of *employee* free choice—successor employers would be permitted to unilaterally withdraw recognition from unions even *without* an election.[12] Even if defended in terms of employee free choice, the majority's approach certainly coincides with the interests of those employers who wish to rid themselves of unions unilaterally. Indeed, the majority's perspective is telling in linking the asserted need of successor employers to be "more efficient, adaptable, and expedient"—goals that are not, in fact, incompatible with union representation—to the elimination of bargaining representatives. While the rule of *St. Elizabeth Manor* forecloses an election, it also prevents employers from withdrawing recognition unilaterally, a not uncommon event that often leads to litigation before the Board.

IV. THE MAJORITY'S APPROACH IN AN ERA OF RAPID CORPORATE TRANSFORMATION

In short, *St. Elizabeth Manor* was sound policy, consistent with the Act**,** and fairly adapted to "needs in a volatile, changing economy." *American Trucking Assns.*, supra, at 416. It reflected an attempt by the Board to carry out its responsibility "to adapt the Act to changing patterns of industrial life." *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975). The Board may, of course, change its policies, but it must justify the change with a "reasoned explanation." *Micro Pacific Dev., Inc. v. NLRB*, 178 F.3d 1325, 1336 (D.C. Cir. 1999). Here, in one of its first undertakings (review was granted on February 8, 2002), the Board's newly-constituted majority reverses course needlessly and without institutional experience under the previous rule.[13] In less than 3 years—

[11] See, e.g., Commission on the Future of Labor-Management Relations (Dunlop Commission), *Final Report* 40 (1994) (www.ilr.cornell.edu/library/e_archive/gov_reports/dunlop). My colleagues do not give sufficient weight to the destabilizing effects of an election, in which employers may use entirely lawful means to undermine a union's support—and thus generate instability in the workplace.

[12] Of course, the withdrawal of recognition would have to be consistent with the Board's recent decision in *Levitz*, 333 NLRB 717 (2001), requiring proof that the union has in fact lost majority status. I note, however, that Chairman Hurtgen dissented in *Levitz* and that Members Cowen and Bartlett expressly state no view on the merits of that decision.

[13] The majority asserts that the *Southern Moldings* principles actually precede the issuance of that case in 1975. But in *D & F Super Market*, 208 NLRB 891, 892 (1974), which issued a year prior to *Southern Moldings*, the Board stated that, under then-prevailing Board law, a successor must bargain for a reasonable period of time free from challenges to its majority under the doctrine of *Keller Plastics Eastern, Inc.*, 157 NLRB 583 (1966), citing *Fed-Mart*, 165 NLRB 202 (1967). As the majority points out, however, other cases preceding *Southern Moldings* permitted successors to show a good-faith doubt of the union's majority status, and seem to treat the presumption as rebuttable, at least in an unfair labor practice context. See *Southerland's Tennessee Co.*, 102 NLRB 1178 (1953). The uncertain status of the Board's law is illustrated by the classic treatise on the National Labor Relations Act, *The Developing Labor Law*. It notes that until the issuance of *Harley-Davidson*, 273 NLRB 1531 (1985), which returned to the rule of *Southern Moldings*, the Board had "applied the contract-bar principle of *Keller Plastics Eastern*, that following lawful recognition the parties may be given a 'reasonable' time in which to conclude an agreement undisturbed by challenges to the incumbent's bargaining status," citing *D & F Super Market* and *Fed-Mart*, supra, cases from the 1960s and early 1970s. American Bar Association, Section of Labor & Employment Law, *The Developing Labor Law* 1144 (Patrick Hardin & John E.

and with no empirical evidence whatsoever that the decision failed to further statutory policy interests—the majority casts *St. Elizabeth Manor* aside for an older and, to my eyes, far less appealing alternative. After all, administrative agencies are not "supposed to regulate the present and the future within the inflexible limits of yesterday." *American Trucking Assns.*, supra, at 416.

One might ask in what respect *St. Elizabeth Manor* has failed in practice. My colleagues supply no answer. Rather, they assert simply that the decision is "paternalistic." They focus on whether employees are "capable" of making informed decisions about union representation. Obviously, employees are. But that is not the issue here. The question, rather, is whether it is sound policy to reinstate a rule that permits representation questions to be raised during corporate transitions, and so places further strains on unsettled workplaces.

That rule had its origin in a very different time, before the phenomenal growth of corporate takeovers beginning in the 1980s.[14] In today's era of accelerating corporate transformation, encouraging continuity in the workplace serves important policy objectives. By providing a period of repose, *St. Elizabeth* shielded unions from premature and perhaps unreliable confidence votes, prevented unwarranted intrusions on collective bargaining, afforded some protection for retained employees from sudden changes in their employment relationship, and thereby eased the transition from one corporate organization to another. The majority, however, consistently ignores business realities and the dislocations that they cause.

The majority also mistakenly subordinates the need for stability to the goal of employee free choice, a step that has no statutory justification, despite the majority's implication to the contrary.[15] While the majority purports to take into account the need for stability, it is difficult to see how stability is furthered by permitting a challenge to the union's majority status shortly after the creation of the new relationship—indeed, before bargaining has even begun.

The majority contends that the rapid rise in mergers and acquisitions, and the uncertainties created by such activity, may cause changes in employee attitudes about existing unionization sufficient to warrant quick elections upon successorship. As I have pointed out, however, changes in employee sentiment are very likely bound up with the legal rules that make it difficult for unions to protect employee interests in the context of successorship. Moreover, the Board's law on representation questions, which incorporates several insulated periods, is not based on the premise that an election is warranted whenever it might reasonably be expected to produce a change in representation. Indeed, in the successorship context, it is precisely the vulnerability of employees and unions that makes a period of repose appropriate.

The majority claims that an insulated period actually contributes to workplace instability, at least where employees wish to end union representation, but are prevented from achieving that goal. In principle, that criticism would apply to any of the long-established insulated periods, but it lacks force especially in the successorship context. As explained, there is good reason to suspect that in such situations, the decline in support for the union may be a function of the successorship itself.

Instability, then, is likely to diminish over time, as the union continues to represent employees and to make progress in good-faith collective bargaining, and as employees continue to shape their representative's policies in light of new realities in the changed workplace. The majority asks what purpose an insulated period serves, if there is no guarantee that a collective-bargaining agreement will be reached. The answer is that, in the interest of employees, unions should be given an opportunity to demonstrate their effectiveness before being put to the test. An insulated period thus is akin to a term of office for a public official, who is not required to run for reelection whenever his poll numbers drop. In or out of the workplace, democracy does not demand a perpetual campaign.

In any case, the majority's approach turns *Burns* on its head. If *Burns* stood for the proposition that protecting employee free choice was of overriding concern during corporate transitions, then the Supreme Court would not have conferred on incumbent unions a presumption of majority status of *any* kind. On the contrary, *Burns* is predicated on the notion that, once continuity is established, it is presumed that employees still desire union representation—and not that a question concerning rep-

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Higgins eds., 4th ed. 2001). Cf. *Paramount Paper Products Co.*, 154 NLRB 1064 (1965).

[14] As one student of merger and acquisition activity has written recently:

> [M]arkets for corporate assets were remarkably active over the last twenty years, with major merger waves occurring in the 1980s and 1990s . . . . This new 1990s wave took asset transfer activity to levels not seen before.

Pautler, supra, at 55 (footnote omitted).

[15] The majority acknowledges, but then seems to ignore, the admonition of the Supreme Court in *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 784 (1996), that 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." Our task is to strike an appropriate balance between stable labor management relations, the encouragement of the practice of collective bargaining (Sec. 1 of our Act), and employees' freedom of choice in deciding whether they want to engage in collective-bargaining and whom they wish to represent them. See *Stanley Spencer v. NLRB*, 712 F.2d 539, 566 (D.C. Cir. 1984).

resentation, for election purposes, is created by the inevitable uncertainties and anxieties endemic to most successorship situations.

Underlying my colleagues' position is the idea that the insulated period established by *St. Elizabeth Manor* is unnecessary, because *Burns* recognizes the concept of successorship and provides for continuity of representation across changes in corporate ownership, at least in some circumstances and at least so long as the union can survive a challenge to its status. They suggest that in the successorship context, the insulated period of *St. Elizabeth Manor* somehow gives the incumbent union "greater rights than it otherwise would have with respect to the predecessor." But this is clearly not the case. As explained, a union that survives a corporate transaction often will lose important rights that it had with respect to the predecessor: the ability to require the employer to honor any preexisting collective-bargaining agreement, as well as an irrebuttable presumption of majority support for the duration of that contract, up to 3 years.

In today's economy, corporate transitions are an increasingly common feature of the workplace. *Burns* certainly did not foreclose the Board from developing rules, consistent with the Act and with the Supreme Court's decisions, which address the destabilizing effects of successorship. *St. Elizabeth Manor* addresses those effects while representing a genuine balancing of statutory interests, unlike the majority's approach. The majority here sees no need to adopt a rule that furthers stability when it is clearly jeopardized.

In contrast, the *St. Elizabeth Manor* Board recognized the need to protect employee free choice and gave it proper weight. Thus, the insulated period that the decision created was necessarily temporary. As the Board emphasized:

> The rule extends for a "reasonable period," not in perpetuity. It is intended neither to give the incumbent union an unfair advantage nor to fix a permanent bargaining relationship requiring the employer to bargain with a designated union forever, without regard to new situations that may develop. After a reasonable period has elapsed, the Board may, in a proper proceeding and upon a proper showing, take steps in recognition of changed situations that might make appropriate changed bargaining relationships.

329 NLRB at 346.

For employees, their statutory right to choose a bargaining representative, or not, is fulfilled. The bar to an election is temporary. If no bargaining agreement is reached after a reasonable period of time for bargaining has elapsed, employees may petition for an election.

In some instances, certainly, the parties will reach a bargaining agreement. My colleagues worry that in such a case, an opportunity for the expression of free choice could effectively be blocked for a long period, based on the adding together of different insulated periods, immediately before and after the successorship.[16] The Board never had occasion to consider that case. And had my colleagues in the majority truly been interested in striking an appropriate balance of policy interests, they could have proposed a refinement to *St. Elizabeth Manor* to address that scenario. For example, we could have considered whether the application of the customary 3-year contract bar rule would have been appropriate in that case, or whether some other framework for achieving reasonable and periodic access to the election process would better serve statutory interests.[17]

Instead, my colleagues jettison *St. Elizabeth Manor* before it has had a chance to succeed. The decision was a first step toward addressing a recurring workplace issue. Rather than move forward and refine our law to better confront the changing demands that our economy makes on employers, employees, and unions in this era of unprecedented merger, acquisition, and takeover activity, the majority moves backwards.

Conclusion

The issue that we consider today requires a sensitive balance of competing policy interests. Instead, the majority's approach champions one interest at the complete expense of the other. Our responsibility is to make decisions that promote longstanding statutory aims in the context of current economic realities. Abandoning the rule of *St. Elizabeth Manor*, which endorses a reasonable period for bargaining, does not advance this mandate. I fail to see how that rule is contrary to the statute, inconsistent with federal labor policy, or unreasonable in any respect. Accordingly, I dissent.

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[16] For example, a contract bar might have been in place for nearly 3 years before the successorship, the successorship would then lead to an insulated period under *St. Elizabeth Manor*, and finally, the successor employer and the union might reach an agreement, resulting in a second contract bar. As a practical matter, however, it seems unlikely that a successor employer would reach an agreement with a union that lacked majority support: there rarely would be an incentive to do so.

[17] Had the majority not decided to abandon *St. Elizabeth Manor* in its entirety, a number of issues ultimately might have been decided under its rubric, such as: (1) whether a 3-year contract bar, or something less, is appropriate if a bargaining agreement is reached during a "reasonable period of bargaining;" (2) whether recent "open periods" during the predecessor employer's reign are sufficient to satisfy the need for periodic access by represented employees to the Board's election processes; and (3) whether the duration of the predecessor's vitiated contract should be a factor in determining the timing of future access to the Board's election processes.

Appendix A

Table 1
Number of Mergers, Divestitures and Disclosed Value (1968-2000)

Year	Net merger and acquisitions announcements	Number of transactions with purchase price disclosed	Total Divestitures	Divestitures as % of Total	Total dollar value paid ($ billions)	Constant dollar value * ($ billions)
1968	4462	1514	557	12.5	43.60	119.1
1969	6107	2300	801	13.1	23.70	62.4
1970	5152	1671	1401	27.2	16.40	41.7
1971	4608	1707	1920	41.7	12.60	31.1
1972	4801	1930	1770	36.9	16.70	40.0
1973	4040	1574	1557	38.5	16.70	36.6
1974	2861	995	1331	46.5	12.50	23.8
1975	2297	848	1236	53.8	11.80	20.3
1976	2276	998	1204	52.9	20.00	32.9
1977	2224	1032	1002	45.1	21.90	33.8
1978	2106	1071	820	38.9	34.20	49.0
1979	2128	1047	752	35.3	43.50	56.1
1980	1889	890	666	35.3	44.30	50.3
1981	2395	1126	830	34.7	82.60	86.0
1982	2346	930	875	37.3	53.80	53.8
1983	2533	1077	932	36.8	73.10	71.9
1984	2543	1084	900	35.4	122.20	117.8
1985	3001	1320	1218	40.6	179.80	171.7
1986	3336	1468	1259	37.7	173.10	167.7
1987	2032	972	807	39.7	163.70	155.3
1988	2258	1149	894	39.6	246.90	228.6
1989	2366	1092	1055	44.6	221.10	194.6
1990	2074	856	940	45.3	108.20	90.8
1991	1877	722	849	45.2	71.20	58.5
1992	2574	950	1026	39.9	96.70	78.5
1993	2663	1081	1134	42.6	176.40	141.5
1994	2997	1348	1134	37.8	226.70	180.6
1995	3510	1735	1199	34.2	356.00	278.3
1996	5848	2658	1702	29.1	495.00	377.0
1997	7800	3013	2108	27.0	657.10	498.6
1998	7809	3091	1987	25.4	1191.90	911.9
1999	9278	3384	2353	25.4	1425.90	1072.1
2000	9566	3757	2501	26.1	1325.70	960.7

*Constant dollar value is the annual dollar value divided by the seasonally adjusted Producer Price Index, by Stage of Processing. Total Finished Goods (1982=100), Table B-65, p. 349, Economic Report of the President, January 2001.

SOURCE: Mergerstat® Review, 2001, pp. 2 and 9. The Mergerstat® Review Research Department tracks publicly announced formal transfers of ownership of at least 10 percent of a company's equity where the purchase price is at least $1,000,000, and where at least one of the parties is a U.S. entity. These transactions are recorded as they are announced, not as they are completed. Open market stock purchases are not recorded. For sellers in the database with competing bids, only the highest offer is included in the calculation. Cancelled transactions are deducted from total announcements in the period in which the cancellation occurred, resulting in net merger-acquisition announcements for that period. The statistics reflect completed or pending transactions as of the end of the applicable period.

Appendix B

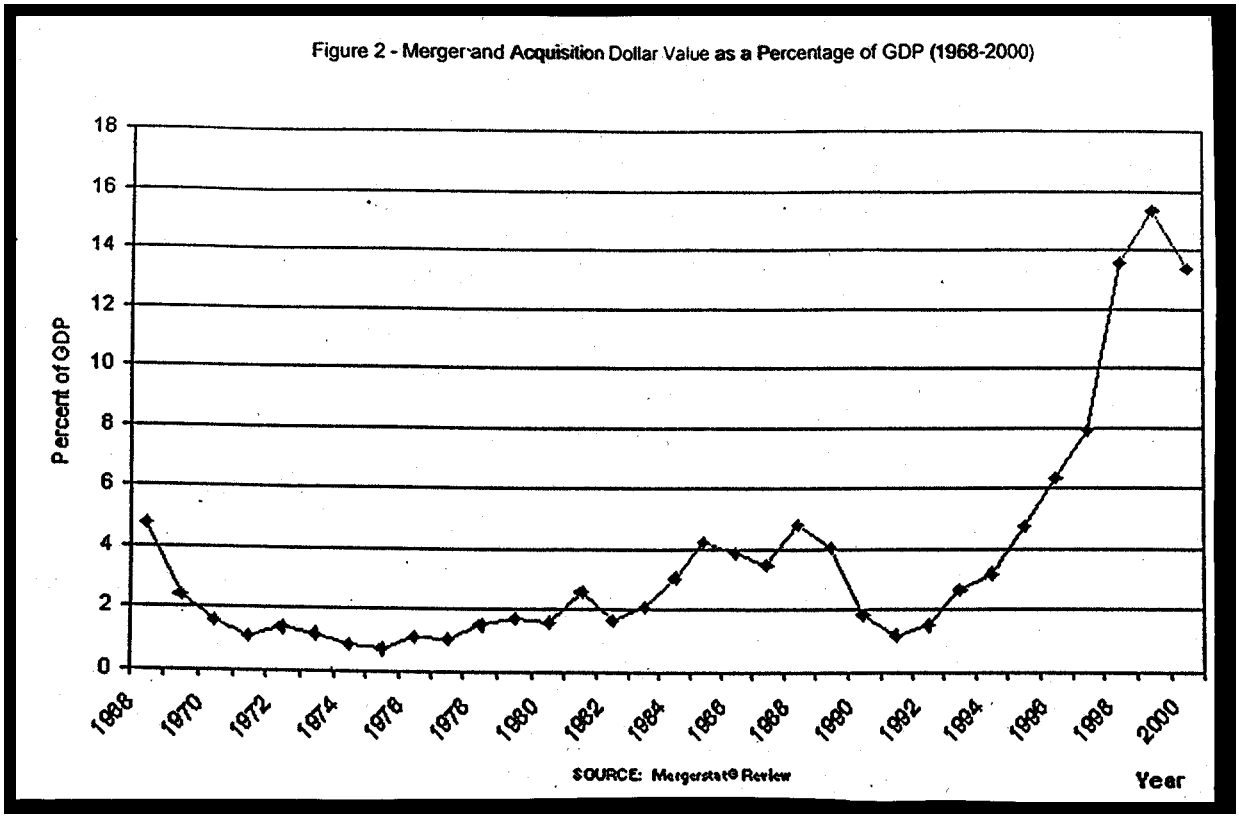
Figure 2 - Merger and Acquisition Dollar Value as a Percentage of GDP (1968-2000)
Percent of GDP
18
16
14
12
10
8
6
4
2
0
1968
1970
1972
1974
1976
1978
1980
1982
1984
1986
1988
1990
1992
1994
1996
1998
2000
Year
SOURCE: Mergerstat® Review