

**Bendix Transportation Management Corporation
and Teamsters Local Union No. 429, a/w Inter-
national Brotherhood of Teamsters, Chauff-
eurs, Warehousemen and Helpers of America.**
Case 4-CA-18075

December 31, 1990

DECISION AND ORDER

BY MEMBERS CRACRAFT, DEVANEY, AND
RAUDABAUGH

On March 12, 1990, Administrative Law Judge Bernard Ries issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed a brief in response to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions² and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and

¹The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's finding that the Respondent is a successor employer, we find it unnecessary to rely on his comments, drawn from his reading of *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27 (1987), that the Supreme Court there (1) "made obvious [its] inclination to encourage the finding of successorships"; (2) "leaned so decisively in favor of the applicability of the [successorship] doctrine"; (3) made "a similar display of liberality" in applying the Board's continuing demand doctrine; and (4) exhibited a "positive attitude towards successorships." We also find it unnecessary, in assessing whether there is a "substantial continuity" between the employing entities at issue in this case, to rely on the judge's observation that the Respondent's "regressive innovations" would tend to reinforce the employees' attitudes in favor of continued representation. For the other reasons set forth fully in the judge's decision, however, we agree that the General Counsel has established a "substantial continuity" between the predecessor and the Respondent.

²We agree with the judge that the Union made a viable demand to bargain. In so doing, we find no merit in the Respondent's argument in its exceptions, citing *Fremont Ford*, 289 NLRB 1290 (1988), that a demand for recognition is not viable unless it is made after the purported successor hires bargaining unit employees and has commenced operations with them. In *Fremont*, the Board found that the union's first demand for recognition was premature because the successor at that time had not entered into a franchise agreement to operate the car dealership nor had it taken any other steps to divest the predecessor's control of the employer entity. The union's second demand for recognition, however, which the Board found to constitute a viable demand, occurred before the purported successor had hired any bargaining unit employees, but after the actual takeover of the predecessor had begun; thus, the facts in *Fremont* do not support the Respondent's argument. *Id.* at 1293. Where, as here, the successor is already in existence, has effectively concluded the transaction leading to its takeover of the predecessor's business, and has distributed employment applications to unit employees, a union can make a viable demand to bargain which continues in effect even though the successor, at the time of the demand, has not actually commenced operations or hired a substantial and representative complement of the predecessor's unit employees.

orders that the Respondent, Bendix Transportation Management Corporation, Shoemakersville, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

William Slack Jr., Esq. and *Peter Verrochi, Esq.*, for the General Counsel.

Patrick W. McGovern, Esq. and *Yolanda Troublefield, Esq.*, of Morristown, New Jersey, for the Respondent.

DECISION

STATEMENT OF THE CASE

BERNARD RIES, Administrative Law Judge. This matter was tried in Reading, Pennsylvania, on October 12, 1989.¹ Presented for resolution are the usual cluster of questions engendered by a case charging that, under Section 8(a)(5) of the Act, an employer is a successor employer obligated to bargain with the union which represented the employees of its predecessor.

Briefs were received from General Counsel and Respondent on or about November 29, 1989. Having reviewed the briefs and the facts as reflected in the transcript and exhibits, I make the following findings of fact, conclusions of law, and recommendations.²

I. THE FACTS

Respondent, a wholly owned subsidiary of Allied-Signal Inc., is engaged throughout a substantial portion of the country in both the private carriage by truck of products and materials to and from the various Allied locations and, as well, carriage for other businesses. It operates a fleet of more than 300 tractors and 1000 trailers from 21 terminals and domiciles in about 12 States. Respondent's headquarters are permanently located in South Bend, Indiana. In the present case, we are interested in a terminal which was located, for a while, in Allentown, Pennsylvania.

Without getting into all the historical details, it is sufficient to say that at one time, the Union represented the drivers and other related personnel of an employer named Eltra which, at least by 1980, terminated its drivers and began to lease them (and a warehouseman and a mechanic) instead from a firm called Pacemaker Driver Service, Inc. Pacemaker operated a business of employing, for the purpose of leasing out, primarily transportation-related personnel.³ At that time, Pacemaker agreed to extend recognition to the Union as representative of the employees then rented by Pacemaker to Eltra.

Eltra was, apparently, eventually absorbed into Respondent Bendix around 1984; at the time, Eltra was operating a terminal in Reading, Pennsylvania. After the takeover, Bendix continued to rent drivers from Pacemaker, and Pacemaker continued to recognize the Union as the bargaining representative of those rented employees at the Reading terminal. When Bendix moved to a terminal in Allentown, in April 1986, Pacemaker also recognized the Union there, and the

¹The underlying charge was filed on May 15, 1989, and the complaint was issued on June 29.

²Errors in the transcript are noted and corrected.

³In its present form (to be discussed infra), the firm services more than 30 clients with 200-250 drivers.

last collective-bargaining agreement executed by Pacemaker and the Union covered the period May 5, 1986–May 4, 1989.

Thus, we encounter in this case a rather unusual collective-bargaining unit, composed of those employees of an employee leasing company who are leased out to perform work at a particular terminal of a national firm engaged in the business of private and common carriage.⁴

While Pacemaker was, nominally and legally, the “employer” of the leased personnel at the Allentown terminal, the employees generally had very little contact with their Pacemaker supervisor, Ben LaGarde (located in Exton, Pennsylvania), in comparison to their much more frequent contacts with Respondent’s terminal manager Herbert Deibert and his dispatcher, Randy Christman. As might be expected, Deibert and Christman oversaw the day-to-day activities of the drivers and gave them instructions about how to perform their duties, and Deibert played a role in both personally resolving grievances and assisting in grievance investigations and discipline imposed by Pacemaker pursuant to the bargaining agreement between Pacemaker and the Union.⁵

On March 27, 1989,⁶ Timothy A. Drost, the Respondent’s vice president of operations and resources, located in South Bend, wrote a letter to a representative of Pacemaker confirming that, effective April 30, Bendix would discontinue use of Pacemaker drivers. At the hearing, Drost testified to various reasons for the decision to change to direct-hire drivers, including the desire to get more mileage from the drivers than Respondent was capable of doing under the lease arrangement and to more fully integrate the drivers into the Bendix national network.

The Union, while preparing for negotiations to supplant the bargaining contract expiring in early May, was informed of the planned operational change in late March and took some action in response thereto, to be described below.

In April, applications to be hired as permanent Bendix employees were passed out to all 28 drivers and the mechanic working at the Allentown terminal by Deibert and Christman; advertisements were placed in the newspapers; and as of May 1, Respondent had hired a work force of 22 employees, 19 of whom (including the mechanic) had been in the employ of Pacemaker at the Bendix terminal.⁷

⁴The record shows that all of Bendix’s tractors and trailers involved in the operation considered here are also leased from other companies.

⁵Deibert began work as terminal manager for Bendix’s predecessor in 1981 or 1982. G.C. Exh. 21 shows that as of April 30, 1989, of the 29 Pacemaker employees assigned to the terminal, 17 had been employed there for more than 4 years.

⁶All date references hereafter are to 1989, unless otherwise indicated.

⁷Actually, by that time, Pacemaker was known as “Vanguard of Pennsylvania, Inc.” (See G.C. Exh. 25.) One of the four “points” made in Respondent’s brief is that the complaint should fail because it alleges that Respondent is a successor to “Pacemaker,” whereas in fact, Pacemaker had been replaced by Vanguard, allegedly a different corporation, in January 1989.

The claim that Vanguard is a new and substantially different corporation is one that I very much doubt. When Respondent’s LaGarde was called as an adverse witness by General Counsel, he agreed that “the name of the company was changed” in January from Pacemaker to Vanguard. When counsel for Respondent asked LaGarde if “that was anything more than a simple name change,” suggesting the possibility of a “new corporation” or a “drop-down agreement” or a “corporate merger,” LaGarde said that a new corporation had been formed. But Respondent Vice President Drost, testifying for Respondent, stated that he was “informed by Pacemaker that it was changing its name to Vanguard.”

Correspondence in evidence shows that Vanguard now occupies the same suite of offices at the same address in Indianapolis at which Pacemaker had been located. (G.C. Exhs. 2, 25.) Although counsel for Respondent went to

The Allentown terminal, at which the leased trailers were stored when not in use, contained a terminal building, some 10,000 square feet of storage area, and 6 loading docks; there, the drivers picked up the loaded trailers. On May 15, however, with the Allentown lease about to expire, Bendix leased a new location at Shoemakersville, Pennsylvania, about 31 miles from Allentown, and moved its operation there effective June 5. The Shoemakersville location consists of offices and some storage space for office supplies, and has no docks.⁸ It was not, however, until the middle of August that Respondent stopped storing trailers in Allentown and instead parked them at three proximate rented locations. Although apparently all Allentown drivers (and the one mechanic) continued to work for Respondent after the move to the Shoemakersville facility, and the drivers were still categorized, as they had previously been, as over-the-road, local, and “dedicated” drivers,⁹ they no longer had as such contact with Deibert and Christman as they had had at Allentown; some of them (starting around September) began driving to more distant States and customers which the Allentown terminal had never serviced; and various operational changes were effected, such as forbidding the drivers to use toll roads and restricting their choice of gasoline stations to one source.¹⁰

II. DISCUSSION

The question of whether a new employing entity is bound to recognize a union previously recognized by an employer which is no longer in the picture has become, over the years,

the trouble of introducing into evidence Respondent’s operating permits, they offered no documentation of the circumstances surrounding the creation or function of Vanguard as distinguished from Pacemaker. We do know that, as Respondent’s brief notes, Vanguard “assumed Pacemaker’s labor agreement.” We also know that on March 27, Drost wrote a letter to Dave Constantino in care of “Pacemaker” at the Indianapolis address, and that even in a May 3 letter from Respondent’s counsel to the Union, the leasing outfit was referred to as “Pacemaker” (G.C. Exhs. 2, 4). Advertisements from 1989 trade journals introduced by Respondent state that Vanguard was “formerly Pacemaker Employee Leasing, Inc.” With reference to General Counsel’s Exhibit 8, Respondent stipulated that this list represented, *inter alia*, employees who were “employed by the Pacemaker Driver Service” at the Bendix Allentown terminal as of April 30. It is, in short, difficult to take this contention seriously.

⁸Deibert explained the move as motivated by “[e]conomics and we didn’t need the dock space any longer” because of the fact that Respondent had no longer been doing “LTL” work, as will be noted, since January.

⁹A “dedicated” driver serves only the location at which Respondent’s parent, Allied Signal, produces an apparently sensitive chemical called borontrifluoride.

¹⁰Respondent contends at sole length that a major change in operations after May 1 was the cessation of “less-than-truckload” (LTL) work, which had accounted for 40–60 percent of all the business. This ignores, however, the testimony of Respondent’s supervisor Deibert on adverse-witness examination by General Counsel. He said there that virtually all the LTL work had been phased out at Allentown by the latter part of January. When called as a witness for Respondent, however, Deibert seemed to change his tune, indicating that perhaps 20–25 percent of the LTL work was not eliminated until June. I see no reason to believe his second version.

The same sort of inconsistency attended Deibert’s testimony regarding the expansion of the road drivers’ work into western and southern States to which they had only rarely driven before. At first, he testified quite certainly that this expansion, into Indiana, Illinois, Michigan, South Carolina, Georgia, Louisiana, and Tennessee, had “just started in the last three weeks” (he gave his testimony on October 12). Subsequently, after road driver Dennis Weitzel, testifying for General Counsel, said that he had been getting into some of these States in June or “maybe the beginning of July,” Deibert came back to testify for Respondent that it had begun “running [the drivers] further away” “[a]pproximately between June and July.” I would credit Deibert’s positive first version in these circumstances, given Weitzel’s uncertainty.

a rather involved inquiry. Not only does each case present potentially an almost unlimited fact array, in order to compare the old operation, duties, functions, personnel, etc., with the new, but the possible permutations of the manner in which the later business was formed from the old also offer choice opportunities for nearly endless factual analysis (assets transfer, auction purchase, lease, sale, substitution of contractors, etc.).

The two most familiar general types of successorship cases, perhaps, are exemplified by *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), and *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27 (1987). In *Burns*, the Supreme Court held that a security guard service which won a contract bid and succeeded to the work performed by the preceding security company also had to recognize the existing union as bargaining agent when it hired the old employees. There was no transfer of assets or other privity between the two independent contractors, but there was also no meaningful change between the two groups of employees and the work they performed under the old and new regimes.

Both before and after *Burns*, the Board had been evolving successorship principles in various situations, and the *Fall River* case represents the more traditional kind of claimed successorship. A classical "successorship" for present purposes would be the purchase of a plant from the present owner by a new firm, with operations, customers, etc., continuing unchanged. *Fall River* did not quite fit that classic mold.

The company involved ceased production in February 1982 and finally went out of business in late summer of that year, making an assignment of its property for the benefit of its principal creditors and disposing of its remaining assets at auction. During this period, a former employee and officer and the president of one of the erstwhile major customers formed a new company to engage in only one type of business, accounting for 30–40 percent of that conducted by the old company. They acquired from the creditors the plant, real property, and equipment, and obtained some of the remaining inventory at the auction (they did not, however, purchase one of the three buildings formerly used by the previous employer, and they closed one of the two which they did acquire). They began hiring employees in September 1982 after advertising for workers and supervisors in a newspaper (and contacting several prospective supervisors). Although they engaged in only one of the two former lines of business, working conditions did not vary from before, the supervisors were virtually the same, and "[o]ver half" of the new business came from former customers, in particular one of the new owners.

Despite the indirect and piecemeal acquisition of the assets, the change in the business purposes of the new company, and the 7-month hiatus before the new owners began seeking out employees, the Court held that when, in mid-January 1983, the new operation had reached a "substantial and representative" complement of employees by attaining its "initial goal" of one full shift, on which the 55 workers included 36 former employees of the old employer, the new employer was obligated to bargain with the former union as a successor.

Respondent argues here that because there was no transfer of assets between Vanguard and Bendix, no successorship resulted, citing the reference in *Fall River* (482 U.S. at 43) to

the requirement expressed in *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 184 (1973), that the Board focus on whether the new company "has acquired substantial assets of its predecessor." Since there was no such acquisition in *Burns*, however, and since in *Fall River* the Court not only relied on *Burns*, but specifically extended its reach, I cannot conceive that the Court was, in *Fall River*, silently overruling *Burns* on this point.

The case is somewhat unusual, however, in that the Respondent here is assertedly a successor to its own former independent contractor, and the argument can be made that, under the precedents, the "employing industry" has changed: the "employer" of the present group of employees was Vanguard, a labor contractor, and the new employer is Bendix, a carrier. However, similar circumstances were present in *Saks Fifth Avenue*, 247 NLRB 1047 (1980), enf. in pertinent part 634 F.2d 681 (2d Cir. 1987), where Saks leased space from Gimbels in Pittsburgh and also leased Gimbels' employees to perform Saks' alteration work; Gimbels employed alteration employees to work solely on clothes sold by Saks. When Saks moved its business to a separate location and hired most of its former Gimbels alteration employees, the Board found a successorship, holding, "Continuity of the employing industry requires consideration of *the work done*, which in this case continues to be alterations on clothing sold by Saks, as well as consideration of the work force." (Emphasis added.)¹¹

Thus, the fact that after May 1, Bendix performed the work through employees directly hired by it does not appear to be a material factor. The "work done" was essentially the same as before, and it is hard to perceive a difference between Bendix doing the work through its own employees and what would have been an unarguable situation, as General Counsel asserts on brief, had Bendix simply continued having the driving done by hiring another independent contractor to furnish employees in place of Vanguard.¹²

Respondent further contends, however, that the asserted successorship here fails to satisfy the indicia of "substantial continuity" cited by the *Fall River* decision as factors to which the Board looks (482 U.S. at 43):

[W]hether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products, and basically has the same body of customers.

The Board has never held that all of these conditions have to obtain in order to establish a "substantial continuity"; the Board's approach, as the Court said in *Fall River*, is "primarily factual in nature and is based upon the totality of the circumstances of a given situation." *Ibid.*

¹¹ Although both Gimbels and Saks were in the same basic retail clothing industry, Gimbels, in furnishing alteration employees to Saks for compensation when they shared the same store, was acting as a labor contractor.

¹² *Pinter Bros.*, 263 NLRB 723 (1982), and *Co-Op Trucking Co.*, 209 NLRB 829 (1974), relied on by Respondent, seem to be inconsistent with *Fall River*, *Burns*, *Saks*, and other cases insofar as the former cases emphasize the alleged importance of the sale of a going business.

I do not, similarly, find helpful here the case of *American Stevedoring Co.*, 280 NLRB 756 (1986), relied on by General Counsel. That case is such like *Burns*, in which one independent contractor took over the function previously performed for a third party by another independent contractor.

There is no doubt that the drivers now directly employed by Bendix do not work under the identical conditions that the leased Vanguard employees did. The significance of those changes which occurred subsequent to the relevant date upon which recognition should have been accorded seems debatable. Thus, the fact that beginning only a few weeks prior to the hearing, some drivers were assigned occasionally to drive to States further west and south than had been their previous experience, has been held the sort of change which is not legally material. *Great Lakes Chemical Corp.*, 280 NLRB 1131, 1133 (1986).¹³

In addition, a number of the changes cited by Respondent, when viewed in the perspective which seems to be the controlling one, arguably cut in favor of the General Counsel's position. The perspective referred to is one which was not emphasized in *Burns*, but has been stressed in *Fall River* (482 U.S. at 43) and in cases preceding and following that case: e.g., *Ranch-Way, Inc.*, 183 NLRB 1168, 1169 (1970); *Great Lakes*, supra, 280 NLRB at 1133; *NLRB v. Albert Armato*, 199 F.2d 800, 803 (7th Cir. 1950); *NLRB v. Jeffries Lithograph Co.*, 752 F.2d 459, 464 (9th Cir. 1985); *Sheffield Industries v. NLRB* (D.C. Cir. Mar. 2, 1989; unpublished per curiam order). As summed up by the Board in *Derby Refining Co.*, 292 NLRB 1015 (1989), "In the successorship situation, the events must be viewed from the employees' perspective, i.e., whether their job situation has so changed that they would change their attitude about being represented."

Assessed from this viewpoint, it is not easy to believe that employees who were presumed to favor union representation would have made a complete volte face once Bendix started paying them directly. Indeed, a number of the changes noted by Respondent, such as the lack of access to shower or lunchroom facilities after moving to Shoemakersville (if that were relevant); a lower hourly wage for the road drivers; the increase in their daily driving mileage from perhaps 350–400 miles to 400–500 miles; the denial to such drivers of the right to use toll roads (which Respondent's brief concedes makes their work "more difficult"); requiring them to purchase fuel from a single source as opposed to the prior two alternatives—all such regressive innovations argue for the likelihood that the new employment relationship would not "change their attitude about being represented," but would rather tend to reinforce that attitude.

At the same time, it may fairly be said that the essential nature of the work functions did not change. There were still three categories of drivers. There were still six local drivers, six dedicated drivers, and (despite Deibert's contrary testi-

mony) apparently the same number of road drivers as before. The local drivers, who used to work in a 50-mile radius, expanded their horizons to 100 miles. The road drivers began, not long before the hearing, to drive further in some cases and serve new customers, but it has always been common to pick up new customers and lose other ones. When Respondent operated the Allentown terminal, the drivers left their trailers there; now they leave them at three nearby locations (one of which was sometimes used while the operation was still at Allentown). They used to store their leased tractors at a Hertz Penske facility in Allentown; now they leave them at a Hertz Penske location in Leesport.

I do not view the various changes as tending to suggest an affirmative answer to the question of whether it is likely that the drivers no longer desire union representation. Truckdrivers, long-range and short, are truckdrivers—basically solitary workmen, whether they occasionally and briefly see one another at a terminal or not. In the present case, they continued, after the Bendix takeover, to receive supervision from the same principal authority figure—Deibert—with whom they were used to dealing on a regular basis even when Vanguard was the "employer." Deibert testified that the method of assigning the drivers is the same now as it was prior to May 1. He also testified that Respondent has "some" new customers, but it would appear that there has not been a substantial change in that area of questionable importance.

The language used and the conclusions reached in *Fall River* made obvious the Court's inclination to encourage the finding of successorship. Speaking of the reference in *Burns* to the presumptions of majority representation which the Board has applied in order to promote industrial peace, the Court noted at 39–40.

The rationale behind the presumptions is particularly pertinent in the successorship situations and so it is understandable that the Court in *Burns* referred to them. 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. Accordingly, during this unsettling transition period, the union needs the presumptions of majority status to which it is entitled to safeguard its members' rights and to develop a relationship with the successor.

The position of the employees also supports the application of the presumptions in the successorship situation. 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

¹³There was no specific evidence presented as to the proper date, if any, for recognition of the Union by Respondent. The record shows that on May 1, the date urged by General Counsel on brief, Respondent started on its own in Allentown with 22 employees working in all the preexisting classifications, 19 of whom had been employed at the same location for Vanguard; the work complement thereafter hovered around the 22–23 mark, with a majority of former Vanguard employees, until June 27–28, when 8 employees were hired and the proportion of former Vanguard/Bendix employees dropped to 15/30; and thereafter, until October 7, just prior to the hearing, the total employees ranged mostly in the high 20s, with the former Vanguard employees again representing a bare majority from July 18 through October 7.

My impression of the record is that a "substantial and representative" complement was in place on the very first day, and that Respondent was then engaged in normal operations, which would seem to mean, according to *Great Lakes*, supra, as well as *Fall River*, that no changes which occurred thereafter are relevant (including the move to Shoemakersville in June and the different arrangements resulting therefrom).

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.

Starting with this attitude toward the usefulness of successorship obligations, it is not surprising that the resolution of the specific questions addressed by the Court in *Fall River* leaned so decisively in favor of the applicability of the doctrine. The Board, for example, was deemed justified in formulating a "substantial and representative complement" rule in successorship situations. In *Fall River*, that meant that the successor employer became liable to recognize the old union not when it commenced operations in September 1982, but rather in mid-January 1983, by which time it had hired 55 workers, 36 of whom had been employed by the predecessor employer—even though by mid-April 1983 the successor had hired a "full" complement of 107 employees, less than half of whom had been employed by the predecessor; even though it was not until October 1984 (272 NLRB 839) that the Board decided that the phenomenon of a "substantial and representative complement," and thus a bargaining obligation, had arisen in mid-January 1983 rather than later; even though there was no evidence that the 36 predecessor's employees hired by the successor as of the January date actually favored the Union as their representative; and even though the putative successor employer could only guess at the date which the Board might later decide was the occasion upon which a "substantial and representative complement" was reached and the obligation to bargain consequently arose.¹⁴

In a similar display of liberality, the Court agreed that a union demand made in October 1982 could be deemed to be "continuing" until mid-January 1983, the time the Board held to represent the advent of the "substantial and representative complement" and a time which necessarily postdated the issuance of the unfair labor practice complaint in December 1982. Likewise, it perceived the 7-month hiatus to be no obstacle to a finding of successorship.

Following what I consider to be the Supreme Court's positive attitude toward successorship, together with the emphasis placed by the Court, the courts of appeals, and the Board on "the employees' perspective," 482 U.S. at 43 as earlier discussed, it is my belief that on the present record, Respondent would qualify as a successor employer of the Vanguard bargaining unit.

In *Fall River*, the Court made it abundantly clear that the duty of a successor employer to recognize and bargain with a union can "only" come into being when the union has ad-

ressed such a request to the successor. In the words of the Court (Id. at 52):

We also hold that the Board's "continuing demand" rule is reasonable in the successorship situation. The successor's duty to bargain at the "substantial and representative complement" date is triggered only when the union has made a bargaining demand. Under the "continuing demand" rule, when a union has made a premature demand that has been rejected by the employer, this demand remains in force until the moment when the employer attains the "substantial and representative complement." See, e.g., *Aircraft Magnesium*, 265 N.L.R.B., at 1345, n. 9; *Spruce Up Corp.*, 209 N.L.R.B. at 197.

The record reveals the following evidence relevant to the Union's efforts here to deal directly with Bendix. John T. Ignatosky, the Union's secretary-treasurer, testified that after he heard from Vanguard Vice President James Malarney in late March that Respondent was canceling its contract with Vanguard, Ignatosky asked Deibert for the name of a Bendix official to "deal with to talk to about negotiating a contract." Deibert gave him the name and telephone number of one Tim Eideljorge in South Bend. When Ignatosky finally was able to contact Eideljorge (who is referred to in Respondent's brief, although not in the record, as "Bendix manager of labor relations"), Ignatosky asked "whether there was a possibility of getting together and discussing a contract."¹⁵ Eideljorge replied that he "handle[s] labor" but did not have the "authority to tell you yes or no, anything like that"; such authority resided in "higher people," naming specifically Vice President Drost. Ignatosky, however, who had been required to make a second call in order to get hold of Eideljorge, asked the latter to have Drost call him, which he thought would be easier. Apparently Eideljorge agreed to relay the message, but Drost never called.

Ignatosky then turned the matter over to the Union's counsel, who sent the following letter to Drost on April 17:

This office is legal counsel to Teamsters Local Union No. 429. In that capacity, I am writing to you with respect to the change from Vanguard Leasing Company to the intention of Bendix Transportation Management Corp. to direct hire drivers. In that Bendix has controlled the daily terms and conditions under which the 30 or so drivers have worked at the Allentown terminal, it is the position of Local 429 that Bendix is a co-employer of those employees and, accordingly, is obligated to negotiate with that Local Union upon demand with respect to the decision to change from a leasing company to direct hire, together with the effects of that change. In addition, if the decision to direct hire is irrevocable, it is incumbent upon Bendix to negotiate the terms and conditions of employment of the drivers with Local 429.

Please have the appropriate Company official or legal counsel contact the undersigned or John Ignatosky to schedule such negotiations.

¹⁴As to situations in which successors recognized unions prematurely, i.e., prior to the date later to be ascertained by the Board, thus violating Sec. 8(a)(2), or in good faith refused to extend recognition on the erroneous ground that a "substantial and representative" complement had not been reached, thereby violating Sec. 8(a)(5), the Court shrugged off these violations as merely entailing "a remedial order." 482 U.S. at fn. 18.

¹⁵Ignatosky had already been preparing for negotiations with Vanguard to replace the contract due to expire on May 4.

On May 3, counsel for Bendix replied:

Your April 17, 1989 letter to Timothy Drost has been referred to me for review and reply.

Bendix Transportation Management Corporation denies that it is a joint employer, or to use your phrase a co-employer, of Local 429 members.

There is no substance to your claim that Bendix has "controlled the daily terms and conditions under which the 30 or so drivers have worked at the Allentown terminal." To the contrary, Pacemaker has exercised control over the drivers' terms and conditions of employment such that any involvement by Bendix was purely incidental to the normal contractor-customer relationship that existed between Pacemaker and Bendix.

For these reasons, Bendix' position is that it has no duty to bargain with IBT Local 429 absent certification of Local 429 as the exclusive bargaining representative of Bendix' employees.

On May 15, 2 weeks after Respondent had begun its "direct-hire" operation of the Allentown terminal, union counsel filed a charge which read:

Since on or about April 17, 1989, the Employer has failed and refused to recognize Teamsters Local Union No. 429 or to bargain with it with respect to its decision to change from leasing drivers to direct hire of those drivers, as well as the affects [sic] of that change.

By the above and other acts, the above-named Employer has interfered with, restrained and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act.

It can be seen from the foregoing that, until the Region issued its complaint on June 29, there was no specific reference by the parties to a bargaining relationship founded on a "successorship" obligation. However, it appears that no other theory could account for union counsel's statement in its letter that "if the decision to direct hire is irrevocable, it is incumbent upon Bendix to negotiate the terms and conditions of employment of the drivers with Local 429." This declaration, it seems to me, could only be based on a contemplation that as the direct-hire employer of the drivers, Respondent would be obligated to bargain thereafter, not as joint employer, but because it would be the sole employer of the same bargaining unit.

While Respondent's reply focused on the "joint employer" claim, as did the Union's subsequent charge, the latter may be read, as well, to encompass Respondent's refusal to acknowledge a present duty to bargain, in its reference to "failed and refused to recognize Teamsters Local Union No. 429 or to bargain with it with respect to its decision."

Whether a demand for successor bargaining has been made should be subject to liberal construction. See *T. F. Frick & Co.*, 270 NLRB 459 fn. 1 (1984). I believe that even an ambiguous demand should put an employer on notice that it must examine every possibility on which the demand might be legally premised. That is the case here.

CONCLUSIONS OF LAW

1. Respondent, Bendix Transportation Management Corporation, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Teamsters Local Union No. 429, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has violated the Act as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I make the following recommended¹⁶

ORDER

The Respondent, Bendix Transportation Management Corporation, Shoemakersville, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain with Teamsters Local Union No. 429, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive collective-bargaining representative of the employees in the following appropriate bargaining unit with regard to their wages, hours, working conditions, and other terms and conditions of employment:

All truckdrivers, mechanics, helpers and warehousemen assigned to Respondent's Shoemakersville, Pennsylvania, location.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and, on request, bargain collectively with Teamsters Local Union No. 429, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive bargaining representative of the unit employees with regard to wages, hours, working conditions and other terms and conditions of employment of the unit employees, and if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its business facility located at Shoemakersville, Pennsylvania, copies of the attached notice marked "Appendix."¹⁷ Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that

¹⁶If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

¹⁷If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail or refuse to recognize and bargain with Teamsters Local Union No. 429, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive bargaining representative of the employees in the following appropriate unit with regard to

wages, hours, working conditions, and other terms and conditions of employment:

All truckdrivers, mechanics, helpers, and warehousemen assigned to Respondent's Shoemakersville, Pennsylvania, location.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, recognize and bargain collectively with Teamsters Local Union No. 429, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive bargaining representative of the employees in the appropriate unit described above, with regard to their wages, hours, working conditions, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

BENDIX TRANSPORTATION MANAGEMENT
CORPORATION